Protected A
File: 2016-335193 (C-058)

IN THE MATTER OF
an appeal of an Adjudication Board Decision
Pursuant to section 45.11(1) of the
***Royal Canadian Mounted Police Act*, RSC 1985, c R-10, as amended**

BETWEEN:

Constable Daniel Marshall
Regimental Number 57827

Appellant

and

Commanding Officer, "E" Division
Royal Canadian Mounted Police

Respondent

(Parties)

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Decision of the Commissioner
Royal Canadian Mounted Police

==========

2022

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INTRODUCTION

[1] Following a conduct hearing in Vancouver, British Columbia, from December 14 to 18, 2015, an RCMP conduct board (Board) determined that six allegations of discreditable conduct (section 7.1 the *RCMP Code of Conduct* (*Royal Canadian Mounted Police Regulations 2014*, SOR/2014-281)) had been established against Constable Daniel Marshall, Regimental Number 57827 (Appellant), all of which involved female members of the public.

[2] Two contraventions pertained to inappropriate and unauthorized use of police database systems and the subsequent disclosure of information to unauthorized persons; one pertained to an inappropriate comment, and one pertained to having spent an inappropriately disproportionate amount of time (two hours) on a relatively minor complaint, engaging in personal conversation and flirtatious behaviour which led to an invitation to return, off duty, resulting in a consensual sexual encounter.

[3] The remaining two contraventions consisted of a breach of fiduciary duty and the other a failure to provide proper care for a seriously intoxicated woman who complained of having been sexually assaulted two hours prior to the reporting.

[4] The Board rendered the decision on March 14, 2016, ordering the Appellant to resign within 14 days, or be dismissed.

[5] The allegations related to the Appellant's interactions with four different women between September 25, and October 10, 2014, and based on the circumstances of those interactions and subsequent events, he originally faced nine allegations (as outlined in the Notice of Conduct Hearing and particulars, issued on June 9, 2015, served on the Appellant on July 16, 2015) (Additional Material 2016-11-08, pp 56-61).

[6] As required by subsection 45.15(1) of the *RCMP Act*, the appeal was referred to the Royal Canadian Mounted Police External Review Committee (ERC) for review on July 19, 2018. In a report containing findings and recommendations issued on March 9, 2022 (ERC file no. C-2018-007 (C-058)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be dismissed.

[7] Subsection 45.16(8) of the *RCMP Act* states that I am not bound to act on ERC findings or recommendations, but if I disagree, I must "include in the decision on the appeal the reasons for not so acting".

[8] In rendering this decision, I have considered the record consisting of the material before the Board (Material) and the appeal record (Record) prepared by the Office for the Coordination of Grievances and Appeals (OCGA), as well as the ERC Report (Report). The Board's decision is referred to as the "Decision", the Appellant's appeal submissions as the "Appeal", and the response by the Respondent as the "Response". References to legislative provisions reflect those in effect at the time of these events.

[9] The following list of materials will also be referenced:

- Additional Material 2016-11-08
- Additional Material 2016-12-13
- Additional Material
- Disclosure Documents - Conduct Board (Transcript references)
- Pre-Hearing Correspondence (Marshall)

[10] I sincerely apologize to the Parties for any delays attributable to the RCMP in advancing the adjudication of this appeal.

[11] For the reasons that follow, I agree with the ERC recommendation, and dismiss the appeal.

BACKGROUND

[12] The Appellant's introduction and subsequent contact with the female victims in this matter stemmed directly from his duties as a member of the RCMP in Chilliwack, British Columbia.

[13] The first incident involved Witness A and transpired on September 25, 2014. The Appellant attended Witness A's residence after a call for service at which point she advised the Appellant that she had been sexually assaulted. In order to show her injuries to the Appellant, Witness A exposed her vagina to him unsolicited. The Appellant reported the incident to his supervisor and completed the appropriate documentation in relation to Witness A's exposure. However, the Appellant failed to follow up on the sexual assault complaint despite being told by his supervisor (Cpl. R) to do so.

[14] The second incident involved Witness B and took place over September and October 2014. On September 26, 2014, the Appellant responded to a mental health call involving Witness B at her residence. Later that day, the Appellant returned to her residence to follow up and found Witness B unresponsive in her bedroom due to overconsumption of alcohol and medication. Witness B was hospitalized and released after which between September 26, 2014, and October 6, 2014, the Appellant returned several times to her home, while on and off duty, and engaged in consensual sexual intercourse.

[15] The third event involved Witness C and transpired on October 5, 2014. While on duty and in a marked police vehicle, the Appellant approached Witness C and asked her to identify herself for a non-police-related purpose. While validating her identity, the Appellant not only determined that she was a 16-year-old female with the cognitive ability of a child aged 8-10, but also proceeded to question her on a prior sexual complaint she had been involved in. The Appellant retrieved this information from the computer in his vehicle. Witness C advised the Appellant that the nature of the discussion made her feel uncomfortable and requested that he stop. Witness C asked the Appellant if she could ride in the police vehicle with the Appellant to which the Appellant responded with words to the effect that, he only permits individuals who are naked to ride in his police vehicle.

[16] The fourth event took place on October 6, 2014, and involved Witness D reporting a stolen bicycle to the Appellant. The Appellant was present for over two hours during which discussions of a personal nature took place between the two. Witness D asked the Appellant to query her on his police car computer. The Appellant complied. Witness D alleged that the Appellant later returned to her home that evening while off duty at which point they engaged in sexual intercourse.

[17] On June 4, 2015, the Respondent initiated a conduct hearing pursuant to subsection 41(1) of the *RCMP Act* (Additional Material 2016-11-08, pp 5-6).

[18] A Notice of Conduct Hearing dated June 9, 2015, and related investigative materials, were served on the Appellant (Additional Material 2016-11-08, pp 56-61).

[19] The Notice of Conduct Hearing enumerated nine allegations. Allegations 7 through 9 were withdrawn during a preliminary motion because Witness E, the principal witness to those allegations, had passed away (Disclosure Documents - Conduct Board, p 11).

[20] The remaining six allegations put forward by the Respondent at the conduct hearing involved the complainant witnesses as follows:

- Allegation 1 related to events involving Witness A;
- Allegation 2 related to events involving Witness B;
- Allegations 3 and 4 related to events involving Witness C; and
- Allegations 5 and 6 related to events involving Witness D.

[21] All six allegations were related to discreditable conduct as outlined in the Notice of Conduct Hearing (Additional Material 2016-11-08, pp 56-61) (*sic* throughout):

> **Allegation 1**
>
> On or about the 25th day of September, 2014, at or near Chilliwack, Constable Daniel Marshall engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.
>
> *Particulars of the contravention:*
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.
>
> 2. On September 25th, 2014, while on duty, you attended W.C.'s [Witness A] residence in response to a complaint.
>
> 3. You transported W.C. [Witness A] from her residence to a parking lot near the [place name].
>
> 4. W.C. [Witness A] disclosed to you she had been sexually assaulted recently by her boyfriend. You asked W.C. [Witness A] few questions about the sexual assault. W.C. [Witness A] showed you her injuries and exposed her vaginal area to you.
>
> 5. W.C. [Witness A] left your police vehicle. You then left the parking lot in your police vehicle.
>
> 6. Once back at the detachment you advised Cpl. Chris Robinson of W.C.'s [Witness. A] sexual assault allegation.

7. Cpl. Chris Robinson advised you that a follow-up was required with W.C. [Witness. A]. You did not conduct or cause to be conducted a follow-up with W.C. [Witness A].

8. You authored a police report about your interaction with W.C. [Witness A].

9. You failed to properly document and investigate W.C. [Witness A]'s complaint of sexual assault.

Allegation 2

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

Particulars of the contravention:

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

2. On September 26th, 2014, while on duty, you attended P.B.'s [Witness B] residence in response to a call for service related to P.B.'s [Witness B] mental health. During your intervention P.B. [Witness B] talked with you about her mental health and her substance abuse issues.

3. You returned to P.B. [Witness B]'s residence later that same day to conduct a follow-up. You found P.B. [Witness B] unresponsive in her bedroom. Once P.B. [Witness B] became responsive she advised you she had taken alcohol and medication. P.B. [Witness B] was transported to the hospital by Emergency Health Services.

4. Between September 26th, 2014, and October 6th, 2014, you returned several times to P.B. [Witness B]'s residence, while off duty and while on duty, and engaged in sexual and romantic conduct with P.B. [Witness B] including, but not limited to sexual intercourse and kissing.

5. You engaged in romantic and sexual conduct with P.B. [Witness B] that originated from your professional relationship with her.

Allegation 3

On or about October 5th, 2014, at or near Chilliwack, in the province of British Columbia, [the Appellant] engaged in discreditable conduct in a manner that is

likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars of the contravention:

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

2. On October 5th, 2014, S.C. [Witness C] was sixteen years old and was residing in a group home. S.C. [Witness C] operated cognitively as a child aged between 8 - 10 years old.

3. On October 5th 2014, while on duty and in a marked police vehicle, you drove up to S.C. [Witness C] and asked her for her name. S.C. [Witness C] identified herself to you.

4. You then queried S.C. [Witness C] on [Computer Aided Dispatch] CAD [Canadian Police Information Centre] CPIC and [Police Records Information Management Environment] PRIME.

5. You discussed information retrieved from an RCMP electronic information system with an unauthorized individual, namely, S.C. [Witness C], for a non-duty-related purpose.

6. By discussing the information you made S.C. [Witness C] feel uncomfortable. S.C. [Witness C] requested that you stop talking about the information with her.

Allegation 4

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

Particulars of the contravention:

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

2. On October 5th, 2014, S.C. [Witness C] was sixteen years old and was residing in a group home. S.C. [Witness C] operated cognitively as a child aged between 8 - 10 years old.

3. On October 5th, 2014, while on duty and in a marked police vehicle, you drove up to S.C. [Witness C] and engaged in a conversation with her.

4. During the conversation, S.C. [Witness C] asked you if she could ride in your police vehicle.

5. You answered that you only let people ride in the police car if they are naked, or something to that effect.

6. S.C. [Witness C] responded that she would "pass". You laughed and drove away.

Allegation 5

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

Particulars of the contravention:

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

2. On October 6th, 2014, M.H. [Witness D] reported a stolen bicycle. While on duty, you attended M.H.'s [Witness D] residence in response to her complaint.

3. While at M.H.'s [Witness D] residence you discussed matters unrelated to your duties.

4. Later that day, while off duty, you returned to M.H.'s [Witness D] residence uninvited, and engaged in sexual activities with M.H. [Witness D], notably unprotected sexual intercourse.

5. You engaged in sexual conduct with M.H. [Witness D] that originated from your professional relationship with M.H. [Witness D].

Allegation 6

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

Particulars of the contravention:

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

2. On October 6th, 2014, M.H. [Witness D] reported a stolen bicycle. While on duty, you attended M.H.'s [Witness D] residence in response to her complaint.

3. You conducted queries regarding M.H. [Witness D] on RCMP electronic information systems available from your police vehicle.

4. You discussed information retrieved from RCMP electronic information systems with an unauthorized individual, namely M.H. [Witness D], for a non-duty related purpose.

CONDUCT HEARING PROCEEDINGS

[22] The ERC summarized the conduct hearing proceedings (Report, paras 15-47):

3. Conduct Hearing

[15] The Board held a five-day hearing from December 14 to 18, 2015. The Respondent was represented by the CAR and the Appellant was represented by counsel, whom I will refer to as the Member Representative (MR). Over the course of this five-day period, the Board heard witness evidence and submissions from the parties in relation to the allegations. It then rendered an oral decision finding each allegation established. The Board later heard submissions from the parties as to the proper conduct measure to impose, after which it ordered the Appellant to resign in default of which he would be dismissed. In the following section, I summarize what took place at the hearing.

A. Hearing on the Allegations

[16] The Appellant denied all of the allegations (Transcript, pages 9, 22).

[17] I will preface my summary of what took place during the hearing on the allegations by briefly highlighting certain comments made by the Board during the hearing. These comments related to the way the investigation into the Appellant's actions was conducted. They provide contextual information in light of specific grounds of appeal that I address later in this Report.

[18] At the opening of day 2 of the hearing, the Board heard arguments from the parties as to whether evidence provided to investigators by Witness E, prior to her passing, could be relied upon by the Board, even though allegations involving Witness E had been withdrawn. The CAR wished to use certain elements of the evidence provided by Witness E to show a pattern of misconduct by the Appellant. The Board indicated to the parties, at that point, that it had reviewed witness statements obtained during the investigation, including that of Witness E. The Board expressed a concern that the way an investigator, Sergeant (Sgt.) G had made certain comments during witness interviews was highly inappropriate and

risked tainting the witnesses' recollection of events. The Board noted, however, that it could consider the extent to which witnesses who testified at the hearing had been able to "counter the tainting effect of Sgt. G's commentary". This was not the case with Witness E, who had passed away, as a result of which the Board had reservations about relying on her evidence. The Board invited the parties to address the issue in closing arguments (Transcript, pages 307-318). The CAR then suggested that "if the Board was inclined to make findings on Sgt. G's behaviour […]", then Sgt. G should have an opportunity to testify (Transcript, page 320). The Board indicated this was not necessary, observing that the hearing was not about Sgt. G's behaviour. The Board clarified that the issue was really about why it was not comfortable relying on Witness E's evidence as advocated by the CAR, and it reiterated that "[w]e're not going to get a chance to hear from Witness E" with respect to whether she had been able to counter "the tainting effect of what [Sgt. G] has said" (Transcript, pages 320-324).

[19] I now turn to the evidence heard in relation to each allegation.

Allegation 1: Discreditable Conduct in Relation to Witness A

[20] The evidence revealed that the Appellant had attended the residence of Witness A in response to a call. Witness A was intoxicated. Following some discussions on site, and at Witness A's request, the Appellant then drove Witness A in his police car to another location, at which time she disclosed to him that she had recently been sexually assaulted by her boyfriend. The Appellant testified that at that location, he asked Witness A if she had any injuries as a result of that assault and offered Victim Services to her; however, Witness A did not want medical services. Witness A then exposed her vagina to the Appellant indicating that she may be bleeding. According to the Appellant, he told Witness A at that point to pull up her pants and indicated to her that he had not observed anything. At Witness A's request, the Appellant agreed to leave her at that location and he departed. The Appellant reported the entire incident to his supervisor, Corporal (Cpl.) CR. Although Cpl. CR testified that he told the Appellant to ensure that Witness A was contacted for a follow-up on her allegation of sexual assault, the Appellant testified that no follow-up had been required of him (Transcript, pages 45-48, 62-63, 656-689, 697-705, 776-807).

Allegation 2: Discreditable Conduct in Relation to Witness B

[21] The Appellant and Cst. JS had responded to a call at Witness B's residence. The call originated from concerns about Witness B's mental health. The Appellant and Cst. JS discussed Witness B's mental health and substance abuse issues with her, and left the scene after deciding their presence was no longer required. Later that same day, they returned to Witness B's residence to check on her and found her unresponsive from consuming alcohol and taking medication. Witness B was hospitalized as a result.

[22] Witness B testified that after her hospitalization, the Appellant stopped by her residence at night, on one occasion, to check on her, and that on that occasion she and the Appellant spent time talking about personal issues. Witness B also testified that either on that occasion or "a few days after", she and the Appellant had sex in a bedroom at her residence. She further testified that on another occasion, the Appellant had stopped by her residence in uniform, and she had asked the Appellant if she could kiss him. He said yes and she gave him a kiss, on her front porch (Transcript, pages 543-605).

[23] The Appellant denied having sex with Witness B. He acknowledged having attended Witness B's residence at night while on duty, but testified that the purpose was to obtain information for her file. He indicated that on that occasion, they had interacted in her foyer and on the front porch. Witness B was grateful to see him, asked to hug and kiss him, and he lightheartedly accepted, resulting in Witness B briefly hugging him and kissing him on "the cheek or the lips or kind of in-between" (Transcript, pages 721-736, 750-766).

[24] MB was called as a witness by the CAR in relation to the Appellant's interactions with Witness B. However, MB refused to answer the CAR's questions at the hearing. The CAR obtained permission from the Board to cross-examine MB as a hostile witness about a prior statement he had given to investigators. Questions posed by the CAR referred to MB having asserted, in his statement, that he had seen Witness B kissing a police officer in uniform on her porch (Transcript, pages 378-400).

Allegations 3 and 4: Discreditable Conduct in Relation to Witness C

[25] The particulars of Allegations 3 and 4 indicated that Witness C was 16 years old and the resident of a group home at the time of the incident giving rise to those allegations, and this was not contested before the Board. According to the testimony of JM, a youth worker, Witness C had cognitive challenges and as a result sometimes presented as a much younger person (Transcript, pages 327, 334).

[26] Witness C testified that on the day of the incident, she was waiting for a friend in a parking lot. She explained that the Appellant, in a marked police car, had driven up to her and asked that she identify herself. The Appellant was using his police car computer while asking Witness C questions. It appeared to Witness C that these were questions from her "profile". The Appellant mentioned information which related to a prior sexual assault complaint involving Witness C as the alleged victim when she was younger. This made her uncomfortable and scared her. Witness C also told the Board that during their conversation, she asked the Appellant if she could ride in his police car, to which the Appellant responded with words to the effect that "I don't like girls riding in […] my cop car unless they're completely naked". On cross-examination, Witness C maintained that the

Appellant had stated words to the effect of "I don't let […] nobody ride in the […] back of the cop car unless they're naked" (Transcript, pages 94-117, 119-156).

[27] The Appellant testified that as he was passing by the parking lot, he noticed Witness C. When Witness C observed his police car, she appeared to turn away to avoid him. The Appellant approached Witness C who appeared nervous. As Witness C could not produce any identification, the Appellant verified her name and date of birth on his police car computer to confirm her identity. In so doing, the Appellant came across a sexual assault file with Witness C's name, and the Appellant asked her if she knew a name associated with that file. Witness C became upset. The Appellant did not recall Witness C asking him for a ride, nor did he recall making a comment about naked people to her. However, he acknowledged during cross-examination that it was possible that he had made such a comment. He sometimes told people, in a lighthearted manner, that only drunks and naked people ride in his car, and Witness C might have misinterpreted what he said (Transcript, pages 711-717, 740-749).

Allegations 5 and 6: Discreditable Conduct in Relation to Witness D

[28] The Appellant attended a call regarding a stolen bicycle at the residence of Witness D. The Appellant remained there for two hours, and he and Witness D discussed personal issues. Witness D then accompanied the Appellant back to his police car, and asked the Appellant to conduct database queries regarding her on his police car's computer, which he did. The Appellant gave Witness D his card and left. Witness D testified that later that day, she invited the Appellant to return by texting him. She further testified that later that night, the Appellant returned to her residence while off duty and that following more personal discussion, they had sex (Transcript, pages 169-194).

[29] Witness D testified that during the initial attendance at her residence, the Appellant told her she was beautiful. Her discussion with the Appellant about personal issues made her feel "like a closeness to him, like trust". Witness D added that she later struggled with what had taken place, in that she felt the amount of attention she had received from the Appellant was disproportionate to the issue of her stolen bicycle. She stated that some weeks after the incident she phoned the police as she felt she had been manipulated (Transcript, pages 194-203).

[30] On cross-examination, Witness D was questioned about the way the Appellant had, in her presence, conducted a database search regarding her history. She indicated that the Appellant had read out the names of individuals appearing on his screen, including her sister's name, as he attempted to locate her information. She also acknowledged that she had later invited the Appellant to her residence that night through a text message, describing it as a flirtation (Transcript, pages 216-217, 251-252).

[31] The Appellant testified that during his initial attendance at Witness D's residence, he discussed personal matters with her at length. This included discussions about Witness D's children and the Appellant's military experience. The Appellant's recollection was that Witness D "just wanted to keep me there and keep talking to me". He described how prior to leaving Witness D's residence and at her request, he conducted a database query of Witness D's history on his police car computer (Transcript, pages 706-710).

[32] On cross-examination, the Appellant explained that he viewed his discussion of personal matters with Witness D as part of his obligation to "develop a rapport" with clients. He also acknowledged that he had read other names appearing on his screen as he searched Witness D's history on his police car computer. In response to a question from the Board, the Appellant did not recall telling Witness D that she was beautiful when he initially attended her residence (Transcript, pages 766-774, 807). The Appellant was not asked, either on direct or cross-examination, about having sex with Witness D that night.

B. Submissions and Board Findings on the Allegations

Submissions

[33] On the final hearing day, the MR began by bringing a Non-Suit Motion with respect to Allegation 5 involving Witness D. In the MR's view, an allegation that a member had consensual sex with a civilian while off duty, at the civilian's invitation, could not constitute a Code of Conduct breach. After hearing the CAR's response to the motion and a reply from the MR, the Board denied the motion, finding that Allegation 5 sufficiently articulated professional misconduct (Transcript, pages 851-888).

[34] The Board then heard closing arguments. The CAR made submissions regarding the Appellant's and other witnesses' credibility, and explained how in her view, the evidence supported the allegations (Transcript, pages 892-942). The CAR also expanded on why she was of the view that Witness E's evidence was relevant, despite the fact that allegations involving events related to Witness E had been withdrawn. As I understand the CAR's argument on this point, evidence contained in the material before the Board revealed that the Appellant's interactions with Witness E possessed similar characteristics to his interactions with Witnesses A, B, C and D. For this reason, Witness E's evidence could be used to support the credibility of each of the complainants (Transcript, pages 945-947). The CAR also provided the Board a written submission setting out principles in relation to similar fact evidence (Additional Material, pages 298-302), in support of an argument that incidents involving Witness B and Witness D contained very specific similarities that were beyond coincidence. The CAR urged the Board to rely on Witness B's evidence to support the allegations involving Witness D, and vice versa, if necessary (Transcript, pages 947-952).

[35] The MR's closing submissions began by focusing on the manner that the investigation had been conducted. The MR argued that the Appellant's right to a fair hearing had been breached because investigators had influenced witnesses' perception when conducting interviews. As I will discuss in more detail later in this Report, the MR submitted a four-page submission to the Board with attached jurisprudence and an Appendix which contained excerpts from the interviews of Witness B and of SB, a person who did not testify at the hearing (Additional Material, pages 249-252, 526-671, 681-687). The MR principally expressed a concern with the effect of this tainted evidence on Allegation 2, involving Witness B, although he also argued that investigators had supplied questionable information to Witness C affecting her credibility as well (Transcript, pages 955-961). The MR, with a written submission and jurisprudence in support (Additional Material, pages 289-297, 689-956), also disputed the CAR's argument that Witness B and Witness D's evidence in relation to Allegations 2 and 5 could mutually support each other based on similar fact evidence (Transcript, pages 963-970).

[36] The MR then provided arguments regarding the allegations and witness credibility, in support of his position that the allegations had not been established (Transcript, pages 970-1002).

[37] Following a brief reply argument by the CAR, the Board indicated that it would deliberate in order to render a decision on the allegations (Transcript, pages 1003-1016).

Board Findings on the Allegations

[38] The Board resumed the hearing two hours later and read an oral decision, finding that each allegation had been established. The Board also briefly explained that it would not consider Witness E's evidence in making its findings. Further, the Board explained that it was cognizant of the MR's concern that witness interviews had been problematic, and that this was a key reason why the Board had ordered that viva voce evidence be obtained from witnesses. In the end, the Board felt it had been able to assess firsthand the degree to which the witnesses were able to overcome the influence of investigators. The Board indicated that its eventual written decision would provide "a much more fulsome analysis" (Transcript, pages 1016-1028).

C. Submissions and Board Findings Regarding the Conduct Measure

[39] After a very brief conduct measures hearing, during which the MR only argued that the conduct measure imposed should be an order to resign rather than a dismissal, the Board rendered an oral decision ordering the Appellant to resign in default of which he would be dismissed (Transcript, pages 1029-1037).

D. Board's Written Decision

[40] In its final written Decision dated March 14, 2016, the Board provided detailed reasons for its findings on each allegation. The Board also explained why it had imposed an Order to Resign.

Allegations

[41] The Board first observed that it was in "partial agreement" with the MR that the way the witnesses had been approached and interviewed was problematic. The Board specifically noted instances where witnesses had been provided information obtained from other witnesses, and where investigators had used terminology, such as the word "predator", during interviews. This may have influenced the witnesses' perception of the Appellant. However, the Board indicated that its ability to observe the witnesses when they testified had provided an opportunity for it to "evaluate the extent to which the witnesses were able to overcome whatever negative effect the internal investigators might have had". Ultimately, the Board found that the way the interviews had been conducted had not adversely affected the witnesses' credibility or reliability (Decision, pages 19-20).

[42] With respect to Allegation 1, the Board indicated that it was highly inappropriate for the Appellant to examine Witness A for injuries in the manner that he did, and that he should have taken her to obtain medical attention. Further, the Board accepted that Cpl. CR had likely instructed the Appellant to follow up with Witness A in regard to her sexual assault complaint, and that the Appellant had taken no further action (Decision, pages 20-21).

[43] As for Allegation 2, the Board accepted Witness B's evidence that she and the Appellant had sex, and that on one other occasion they had kissed and hugged on her porch. The Board observed that independent evidence confirmed that the Appellant had attended Witness B's residence at night. The Board viewed the Appellant's behaviour as a romantic pursuit involving a vulnerable member of the public where the Appellant was in a position of trust as a result of his duties (Decision, pages 21-22).

[44] Turning to Allegations 3 and 4, the Board found that even if the Appellant was legitimately trying to ascertain Witness C's identity by asking her questions about a police record, raising the matter of a sexual assault was unprofessional and inappropriate. The Board further found that the Appellant's reference to drunks and naked people as humour had a proper time and place which required the proper audience. Witness C's limited cognitive capacity was apparent to any observer, and his choice of words with her was inappropriate (Decision, pages 22-23).

[45] Finally, the Board addressed Allegations 5 and 6. It found that Witness D's status as a complainant in a property theft placed her "in a somewhat vulnerable situation". The Board concluded that during the Appellant's initial attendance at Witness D's residence, he had been "grooming [Witness D] for a romantic tryst". He was "certainly not investigating a bicycle theft, at least not after the first five or ten minutes". The Board clarified that the Appellant's effort to develop a personal relationship with Witness D while on duty and initially responding to the call, formed the crux of the discreditable conduct, rather than the later sexual encounter itself. That being said, the sexual encounter was proof that the Appellant's "efforts were rewarded". Finally, there was no operational reason for the Appellant to perform database queries on Witness D and share with her information from that search including her sister's name. The Board viewed this as an unnecessary violation of privacy (Decision, pages 23-24).

Conduct Measures

[46] The Board then set out the reasons underlying its decision to order the Appellant to resign. It found that the Appellant's actions towards Witness A and Witness B revealed a fundamental character flaw. In the Board's view, the contraventions of Allegations 1 and 2 on their own demonstrated that the Appellant was no longer fit to be employed by the RCMP. The Board noted that no mitigating factors had been argued in favour of the Appellant. However, the Appellant's prior discipline record was an important aggravating factor. This prior discipline consisted of a reprimand for two incidents of misconduct which had taken place in August 2009. The Board described the prior discipline as follows (Decision, pages 26-27):

> [123] According to the written record of appeal of the informal discipline which was imposed, the Subject Member first of all "harassed [Ms. H] by, among other things, stopping her while driving and suggesting they meet at a hotel room after he completed his shift, as well as making phone calls". The second incident consisted of attending this same female client's residence for a "non-duty related purpose".
>
> [124] In dismissing the Subject Member's appeal, the adjudicator noted, in paragraph 9:
>
> > There is no issue with the facts that the Appellant called [Ms. H] on two occasions utilizing a RCMP telecommunications device signed out to him for duty related purposes. The Appellant failed to explain how he knew [Ms. H]'s cellular phone number and why he would make two phone calls to [Ms. H]. Although [Ms. H] did not speak with [the Subject Member] the contact was made to her personal property for no duty related

> purpose while he was on shift. Two calls are repetitive in nature and constitute harassing behaviour from an unwanted telephone caller. Further, additional contact was made after an original traffic stop for no police-related reason. Further, following a citizen home, when unrequested and without justification other than some vague claim of being a danger to herself or from some other unknown person, is not a normal police duty nor appropriate.
>
> [*sic* throughout]

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

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

[*sic* throughout]

[47] The Board noted that these incidents involved similar inappropriate behaviour which was relatively recent. In the Board's view, the Appellant's disciplinary record was a serious aggravating factor, and in his brief seven year career, the Appellant had "put together a distressing disciplinary track record of inappropriate conduct involving female clients". Retaining the Appellant would place the public at risk, and an Order to Resign was the appropriate conduct measure to impose (Decision, page 27).

THE APPEAL

1. Statement of Appeal and Submissions

[23] The Appellant submitted a Statement of Appeal to the Office for the Coordination of Grievances and Appeals (OCGA) on March 23, 2016.

[24] The Appellant indicated that his grounds for appeal, as outlined in the Statement of Appeal, are based on his position that the Board's decision was clearly unreasonable, based on an error of law, and reached in a manner that contravened the principles of procedural fairness.

[25] Affixed to the Statement of Appeal was an Appendix seeking an order for the disclosure of potentially relevant records during the appeal process (Record, pp 8-9). The OCGA managed the disclosure request as a collateral issue. On June 24, 2016, and July 12, 2016, the Appellant provided his submissions on disclosure (Record, pp 127-134; 1245-1252). On April 13, 2017, the Respondent submitted a response to the disclosure issue (Record, pp 4120-4130), and on May 12, 2017, the Appellant submitted a reply (Record, pp 4193-4205).

[26] The Parties also made submissions on the merits of the appeal. On February 10, 2017, the Appellant provided submissions on the merits (Record, pp 4029-4049). On June 22, 2017, the OCGA received the Respondent's response following a time extension request (Record, pp 4219-4235) which was (likely erroneously) dated May 22, 2017 (Record, pp 4221). On July 31, 2017, the Appellant submitted a reply (Record, pp 4287-4293).

[27] On July 19, 2018, the appeal was referred to the ERC. An amended copy of the appeal volume was submitted to the ERC on July 30, 2020.

2. Issues on Appeal

[28] The Appellant takes the position that the Board's decision should be set aside on the following grounds:

1. The Board failed to ensure adequate disclosure prior to the hearing;

2. The Board improperly refused to require an investigator, Sgt. G, to testify during the hearing;

3. The Board failed to consider a written submission provided by the Appellant during closing arguments, and prejudged the case prior to rendering its Decision;

4. The Board erred by eliciting witness testimony to compensate for tainted evidence;

5. The Board improperly relied on Witness E's evidence and Sgt. P's Task Action Report;

6. The Board referred to corroborating evidence regarding Allegation 2 with insufficient specificity; and

7. The Board made certain findings, which brought information that had not been disclosed to the Appellant into consideration.

PRELIMINARY MATTERS

[29] The Respondent initiated the conduct hearing by notifying the Designated Officer pursuant to subsection 41(1) of the *RCMP Act* on June 4, 2015 (Additional Material 2016-11-08, pp 5-7). Accordingly, the matter was initiated less than one year after the dates of the events underlying the six allegations heard by the Board, meeting the requirement of subsection 41(2) of the *RCMP Act*.

[30] Pursuant to section 22 of the *Commissioner's Standing Orders (Grievances and Appeals)* (*CSO (Grievances and Appeals)*), the Appellant was required to file the appeal with the OCGA within 14 days of service of the Record of Decision (ROD).

[31] The ROD was issued by the Board on March 14, 2016 (Record, pp 10-39). The Appellant's Statement of Appeal was submitted to the OCGA on March 23, 2016 (Record, pp 6-7), within the requisite 14 days.

APPLICABLE STANDARD OF REVIEW

[32] In order to properly address the grounds of appeal raised by the Appellant, it is first necessary to identify the standards against which they must be assessed. The Appellant argues procedural fairness and insists that the Board's decision is clearly unreasonable.

[33] As I will explain, in light of subsection 33(1) of the *CSO* (*Grievances and Appeals*) and common law principles, a question of procedural fairness is considered on the basis of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, para 43). Meanwhile, for questions of fact or mixed law and fact, the standard of review is "clearly unreasonable":

> 33(1) The Commissioner, when rendering a decision as to the disposition of the appeal, must consider whether the decision that is the subject of the appeal

> contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

Procedural Fairness

[34] Breaches of procedural fairness will normally render a decision invalid; the usual remedy is to order a new hearing, with the exception where the circumstances will inevitably lead to the same outcome (*Mobil Oil Canada Ltd v Canada - Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, paras 51-54; *Renaud v Canada (Attorney General)*, 2013 FCA 266, para 5).

[35] Procedural fairness is made up of two broad rights, as explained by the ERC in G-568, which the former Commissioner endorsed on January 20, 2015:

> Procedural fairness is a common law principle that has come to be seen as the "bedrock of administrative law". It comprises two broad rights: the right to be heard and the right to an impartial decision-maker [see David J. Mullan. *Essentials of Canadian Law: Administrative Law* (Toronto: Irwin Law, 2001) 4, 232]. Where procedural fairness is found to have been denied, a decision will be deemed invalid unless the substance of a claim "would otherwise be hopeless" [see *Cardinal v. Director of Kent Institution* [1985] 2 S.C.R. 643; *Kinsey v. Canada (Attorney General)*, 2007 FC 543; *Mobil Oil Canada v. Canada Newfoundland Offshore Petroleum Board* [1994] 1 S.C.R. 202; and *Stenhouse v. Canada (Attorney General)* [2004] FC 375].

[36] The right to be heard generally comprises of individuals knowing the case against them and having the ability to present their case to the agency (Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2004) (loose-leaf updated 2017, release 8), ch 17-14 [*Practice and Procedure*]).

[37] Administrative bodies have a duty to act fairly according to the rules of natural justice or procedural fairness, and with a concern for the underlying purposes of the rules of evidence (*Practice and Procedure*, ch 17-14).

[38] In *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 [*Mooring*], the Supreme Court of Canada (SCC) determined that the National Parole Board was subject to the duty to act fairly as its decisions impacted the rights, privileges or interests of individuals, based on its legislative scheme (*Mooring*, paras 34-35). The Supreme Court of Canada held that the duty to act

fairly varies according to the structure and the function of the board or tribunal in question (*Mooring*, para 36).

[39] Conduct boards are required to act fairly in making decisions on whether a member has contravened the *Code of Conduct*. A finding of misconduct can affect a member's career and conduct measures can include financial or other sanctions, including termination of employment.

[40] In making these decisions, as held in *Mooring*, a conduct board's duty to act fairly is guided by the principle of maintaining the public trust while also reinforcing the high standard of conduct expected of members.

Clearly unreasonable

[41] The SCC has emphasized that statutory standards of review must be respected (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 34). There is no presumption that an administrative appeal should be subject to the ordinary common law standards of judicial review or appellate review (*Smith v Canada (Attorney General)*, 2021 FCA 73, at para 50).

[42] Subsection 33(1) of *CSO* (*Grievances and Appeals*) requires questions of fact or mixed fact and law to be assessed on the "clearly unreasonable" standard. The term "clearly unreasonable" is equivalent to the common law standard of patent unreasonableness (*Smith v Canada (Attorney General)*, 2021 FCA 73, at para 56; *Kalkat v Canada (Attorney General)*, 2017 FC 794, at para 62).

[43] The SCC addressed the degree of deference for the patent unreasonableness standard in *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.*, [1997] 1 SCR 748, at para 57:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. […] As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, 1993 CanLII 125 (SCC), [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision

> under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. […] But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

[44] As outlined in *Law Society of New Brunswick v Ryan*, [2003] 1 SCR 247, at para 52 [*Ryan*], "[…] a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective". Further explained in *Canada (Attorney General) v Public Service Alliance of Canada*, [1993] 1 SCR 941, at pp 963-64, a patently unreasonable decision is one that must be, "[…] described as 'clearly irrational' or 'evidently not in accordance with reason'". The SCC in *Ryan* adds, "[a] decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand" (para 52).

[45] The ERC noted that the relevant question is whether there is any rational or tenable line of analysis supporting the decision and demonstrating that the decision is not clearly irrational which was succinctly explained in *Victoria Times Colonist v Communications, Energy and Paperworkers*, 2008 BCSC 109, at para 65:

> When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

[46] The standard of patent unreasonableness precludes re-weighing of evidence, or rejecting the inferences drawn by the decision maker from that evidence. A finding of fact is only patently unreasonable where the evidence is incapable of supporting it (*British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25, at para 30).

[47] A finding of fact based on merely insufficient evidence is not patently unreasonable (*Toronto Board of Education v OSSTF*, [1997] 1 SCR 487, at para 44; *Speckling v British Columbia (WCB)*, [2005] BCJ No 270 (CA), at para 37).

GROUNDS OF APPEAL

1. Did the Board fail to ensure adequate disclosure prior to the conduct hearing?

A. Appellant's Submission

[48] In an Appendix to the Statement of Appeal filed on March 23, 2016, the Appellant sought an order for "production of all potentially relevant records" (Record, p 8). The scope of this request was detailed in a submission dated June 24, 2016, in which the Appellant requested 28 specific items (Record, pp 127-134). The list of requested items includes:

> • any material not disclosed to the Appellant that was before the Board; and
>
> • digital records given by the CAR to the Board during the hearing which were not disclosed to the Appellant (#23).

[49] With regard to the first item, the ERC noted that the Board indicated on June 28, 2016, in response to a query from the OCGA, that the material sought by the Appellant was "either already in the Investigation Report (already disclosed) or consists of information I have never seen before and to which I do not have access" (Record, p 1231).

[50] As for the second item, on April 13, 2017, the CAR indicated that the digital records provided by the CAR to the Board had been disclosed to the MR during the Board proceedings, and that "all documents provided to the Board were disclosed to [the MR]" (Record, p 4128).

[51] The remaining items requested by the Appellant on appeal, listed in the June 24, 2016, submission, include records gathered or generated for the purpose of the investigation (Record, pp 129-134) such as production orders, authorizations, search warrants (including supporting affidavits), cellphone records for the Appellant's personal phone and the RCMP Blackberry issued to him, any recordings and transcripts of intercepted conversations, and multiple other sources of information. The reasons supporting this request are set out in submissions provided by the Appellant during the appeal process, which the ERC summarized (Report, para 77):

- Further submission dated July 12, 2016 (Record, pp 1248-1252): The Appellant refers to jurisprudence, which sets out a broad threshold for disclosure in civil proceedings. He argues that while the Board may not have seen the documents that the Appellant is seeking, disclosure of information upon which the Investigation Report was based may lead to a train of inquiry on appeal, which could disprove the Board's findings of fact and/or inferences drawn from the Investigation Report (Record, pp 1250-1251).

- Written Submission on the Merits dated February 10, 2017 (Record, pp 4031-4042): The Appellant asserts that the MR took issue with lack of disclosure prior to the hearing and attaches excerpts of correspondence between the parties and the Board (summarized above) (Record, pp 4068-4072). The Appellant claims that despite the MR expressing concerns about disclosure, relevant documents are in existence and have not been disclosed, casting doubt on whether he received a fair hearing (Record, pp 4033-4034).

- Reply to the Respondent's Submission on the Issue of Disclosure dated May 12, 2017 (Record, pp 4196-4205): The Appellant addresses the applicability of section 25 of the *CSO (Grievances and Appeals)*, which prevents an appellant from including any new information on appeal that could have been known at the time of the hearing. He claims that the requested documents were not available to the Appellant when the Board rendered its Decision, nor could they reasonably have been known at that time. He reiterates that in his view, the MR sought disclosure of all potentially relevant documents prior to the hearing, and refers again to email correspondence between the parties and Board (summarized above) including that which led to the Board ruling in favour of disclosing the unredacted RTCC (Record, pp 4137, 4141). The Appellant argues that disclosure is required at the appeal stage to establish that he was denied the opportunity to formulate a full answer and defence.

- Reply Submission on the Merits dated July 31, 2017 (Record, pp 4288-4293): The Appellant argues that the MR cannot be faulted for not having insisted on specific items of disclosure at the time of the hearing. While the CAR demanded that the MR define the specific material being requested, the Appellant is of the view that the CAR had the legal obligation to ensure that all potentially relevant materials were disclosed, keeping in mind broad principles relating to disclosure in criminal matters, which have been extended to administrative tribunals.

B. Respondent's Submission

[52] The ERC summarized the Respondent's arguments on the issue of disclosure in two submissions (Report, para 78):

- Response on the Issue of Disclosure dated April 13, 2017 (Record, pp 4124-4130): The Respondent argues that pursuant to section 25 of the *CSO (Grievances and Appeals)*, the Appellant cannot request new information if it was known or could reasonably have been known by the Appellant at the time the Board's decision was rendered, i.e. if the request for disclosure could have been made in the first instance. All of the items that the Appellant is requesting on appeal could have been requested at the hearing, and allowing disclosure at this stage would be contrary to section 25 of the *CSO (Grievances and Appeals)*.

- The Respondent urges that the Board addressed the matters relating to disclosure raised by the MR (Record, pp 4131-4169). The Respondent asserts that the MR was satisfied that disclosure was complete before the hearing, and that the MR had ample opportunity to raise outstanding disclosure issues during the hearing.

- Response on the Merits dated May 22, 2017 (Record, pp 4221-4231): The Respondent takes issue with the Appellant's position that the MR, prior to the hearing, had made a broad disclosure request. The Respondent points to the context of emails referred to by the Appellant, which in fact were part of the MR's specific request for a copy of the unredacted RTCC and with respect to which the Board ultimately ruled in the Appellant's favour.

C. Adjudicator's collateral ruling on the issue of disclosure

[53] The Appellant believed that disclosure which was not provided to him prior to the hearing should be provided to him on appeal. The OCGA referred the collateral issue of disclosure to a conduct appeal adjudicator for a ruling.

[54] The adjudicator denied the Appellant's request for disclosure on January 9, 2018, and also made the following findings as summarized by the ERC (Record, pp 4361-4391) (Report, para 79):

- The appeal process is an opportunity to challenge a decision, which has already been made. If the original decision maker denied access to specific disclosure, the remedy is to challenge this decision as a ground of appeal;

- As is described in subsection 25(2) of the *CSO (Grievances and Appeals)*, additional disclosure during the appeal stage is not justified if it relates to information which was available, or for which disclosure requests could have been made, during the original decision-making process;

- The onus is on an appellant to demonstrate why the information was not sought during the conduct process; and

- In the present case, while the MR initially indicated prior to the hearing that he wished to "have all relevant documents disclosed", the record contains no indication that this request was maintained or raised again prior to or during the hearing. Further, the Appellant has provided no explanation as to why the request he is making now for certain specific items was not made during the conduct hearing process.

[55] The Parties were afforded the opportunity to make additional submissions on the issue of disclosure after the adjudicator's ruling on the collateral issue. However, neither Party made submissions, yet the Appellant did mention that he was, "satisfied with relying on his previous submission with respect to the merits" (Record, pp 4407, 4479).

[56] The ERC noted that in responding to the OCGA, the Appellant attached copies of his submissions on the merits dated February 10, 2017, which addresses disclosure and he also attached copies of his submissions on the collateral issue of disclosure (Record, pp 4422-4434) (Report, para 80).

[57] The Appellant further attached a copy of his reply submission on the merits (Record, pp 4469-4474), which addresses the disclosure issue.

D. ERC Analysis

[58] The ERC concluded that this ground of appeal should be dismissed (Report, para 81).

[59] The ERC identified paragraph 25(2)(b) of the *CSO (Grievances and Appeals)* as the governing provision relating to this ground which states an appellant in a conduct appeal cannot include new information in written submissions that was known or could have been known when the original decision was rendered (Report, para 82):

(1) The OCGA must provide the appellant with an opportunity to file written submissions and other documents in support of their appeal.

(2) The appellant is not entitled to

> (a) file any document that was not provided to the person who rendered the decision that is the subject of the appeal if it was available to the appellant when the decision was rendered; or
>
> (b) include in their written submissions any new information that was known or could reasonably have been known by the appellant when the decision was rendered.

[60] The ERC highlights ERC C-2015-015 (C-025) where reference was made to paragraph 40(2)(b) of the *CSO (Grievances and Appeals)*, which for present purposes is the same as paragraph 25(2)(b). That report explained why the terminology used in those provisions prohibits arguments on appeal which were not made before the initial decision maker (C-025, at para 103) (Report, para 83):

> In my view, the term "any new information" includes new arguments that could have been made before the original decision maker. The use of that broad term in paragraph 40(2)(b) reflects an intent that new arguments that could have been made before the original decision maker be prohibited from an appeal. This interpretation of paragraph 40(2)(b) is consistent with the general principle that appeal bodies should not entertain new arguments. To do so would prejudice the opposing side by depriving it of the opportunity to respond to the new argument at the first level of decision (e.g. see *R. v Warsing*, [1998] 3 SCR 579). Additionally, it would deprive the initial decision maker of a complete set of contending arguments to test at the outset and to consider. In addition to significant supporting jurisprudence in the criminal context, the general principle that new arguments should not be entertained on appeal has been stated in various civil contexts as well (see *Kaiman v. Graham* [2009] O.J. No. 324 (C.A.) (Kaiman) at para. 18, as well as *Catholic Children's Aid Society of Hamilton v. C.R.* [2009] O.J. No. 2778 (Div. Ct.) (C.R.) at paras.19-21, where the Divisional Court refused to consider a constitutional argument raised for the first time on appeal).

[61] While the Appellant alleges that the MR sought disclosure of "all potentially relevant documents" prior to the hearing, this assertion is not supported by the Record (Record, p 4198).

[62] The ERC recognized that the MR initially advised the Board on September 17, 2015, that he potentially wished to make an application for "a list of documents that were collected as part of the investigation but have not been disclosed" (Record, p 4141), there is no indication that such a broad application was ultimately presented (Report, para 84).

[63] The CAR had responded on September 18, 2015, that she would wait for the MR to make his application for a list of outstanding documents before taking a position on the issue. The Board never ruled on any such issue because no application ensued (Report, para 84).

[64] According to the ERC, what is clear is that the MR requested an unredacted copy of the RTCC, a request which was opposed by the CAR, and which resulted in the Board ruling in the Appellant's favour during the November 9, 2015, Pre-Hearing Conference (Report, para 85).

[65] The Board had indicated in advance of the Pre-Hearing Conference that "[a]s for outstanding motions, I believe we have only this one, on disclosure" and had confirmed that the disclosure issue being raised by the MR related to the redacted RTCC (Record, p 4163):

> I want to decide the disclosure issue then and there. Would you be able to supply me with the RTCC in question, [CAR]? It would help to know the extent of the redaction so I can better understand [the MR]'s concerns.

[66] The Board noted that it had directed disclosure of the unredacted RTCC in its summary of what had taken place at the November 9, 2015, Pre-Hearing Conference (Record, p 4167). However, the ERC highlights that the Board did not indicate that other disclosure issues had been raised or addressed (Report, para 86).

[67] The ERC found that the email exchanges between the CAR and the MR relating to the accuracy of the Board's Pre-Hearing Conference summary make no mention of any further disclosure issues having been discussed or still needing to be addressed at that stage (Pre-Hearing Correspondence, pp 1954-1957).

[68] The ERC saw no indication that any further request for potentially relevant documents was put to the Board for a ruling. Accordingly, the ERC held, as did the Conduct Appeal Adjudicator, that the Appellant is precluded from raising this issue on appeal, and as a result, this ground of appeal should be dismissed (Report, para 87).

E. Commissioner's Analysis

[69] I agree with the reasoning of both the ERC and the Conduct Appeal Adjudicator. In short, the Appellant is precluded from raising the issue of disclosure before me on appeal.

[70] Even so, I intend to elaborate on a few points mentioned by the ERC. First, I emphasize that I am aware that the courts have clarified on various occasions that it is perfectly proper to raise a supplementary argument on appeal that was not raised at trial, if the supplementary argument goes to an issue or ground that was itself raised at trial (*R v Vidulich*, 1989 CarswellBC 110, para 24 [*Vidulich*]). However, the matter before me does not present itself as one of those situations.

[71] Second, permitting a party to advance additional argument not previously raised, remains a discretionary authority conferred on the appeal authority. In this case the Conduct Appeal Adjudicator already pronounced on this issue and I am not prepared to overturn that decision as I remain guided by balancing the interests of justice as they affect the Parties.

[72] Third, the Appellant should have put forward his defence when he found himself before the Board. If he decided at that time, as a matter of tactics, strategy, by error or omission, or even for some other reason, not to put forward a defence that is available, he must abide by that decision. The Appellant simply cannot expect that if he loses on the defence that he has put forward, that he can then raise another defence on appeal and seek a new hearing to lead the evidence on that defence.

[73] There are very few exceptional circumstances where balancing the interests of justice leads to the conclusion that an injustice has been done. In such circumstances, a new ground may be permitted where it raises an issue of law alone as opposed to the leading of evidence either in the appeal court or at a new trial (*Vidulich*, para 27).

[74] In this instance, I recognise paragraph 25(2)(b) of the *CSO (Grievances and Appeals)*:

> Restriction
>
> (2) The appellant is not entitled to
>
> […]
>
> (b) include in their written submissions any new information that was known or could reasonably have been known by the appellant when the decision was rendered.

[75] By way of clarification, I turn to the Nova Scotia Court of Appeal's test concerning receiving argument for the first time on appeal as set out in *Ross v Ross* (1999), 181 NSR (2d) 22

(NS CA). The court outlined that such an argument, "should only be entertained if the court of appeal is persuaded that all of the facts necessary to address the point are before the court as fully as if the issue had been raised at trial" (para 34). The rationale for the principle is that it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised (*"Tasmania" (The) v Smith* (1890), 15 App Cas 223 (UK HL) at 225; *Homburg v S-Marque Inc.* (1999), 176 NSR (2d) 218 (NS CA); *O'Bryan v O'Bryan* (1997), 97 BCAC 62 (BC CA).).

[76] In the result, I reject this ground of appeal.

2. Did the Board improperly refuse to require an investigator, Sgt. G, to testify during the hearing?

A. Appellant's Submission

[77] The ERC summarized the Appellant's submissions (Record, pp 4034-4035) noting that the Appellant alleges the following (Report, para 91):

- The Board expressed serious concerns about Sgt. G's investigative methods, and, according to the Appellant, refused to allow him to testify.
- In the Appellant's view, Sgt. G's decisions and actions as the lead investigator "lay the evidentiary foundations" for the investigation. Without his testimony, tested through cross-examination, the credibility of the investigation and conduct hearing were irreparably harmed, and the Appellant's right to a fair hearing was "attenuated".
- The Board's decision to "effectively shield Sgt. G from […] a very unpleasant cross-examination" raises a reasonable apprehension of bias in respect to the Board (Record, p 4036).

[78] The ERC summarized the Appellant's July 31, 2017, Reply submission (Record, p 4291) where the Appellant maintains (Report, para 92):

- The Board's decision not to require Sgt. G to testify breached the Appellant's right to a fair hearing and is fatal to the Board's decision. The purpose of calling Sgt. G was to expose the full extent of improper investigative techniques that tainted, cross-pollinated and reshaped the alleged events' witnesses' accounts. The Board's refusal to permit Sgt. G to testify amounted to suppression of evidence.

B. Respondent's Submission

[79] The ERC summarized the Respondent's Response (Record, pp 4227-4228) (Report, para 93):

> - The MR did not raise an issue regarding his right to examine witnesses at the hearing. Neither Sgt. G nor Sgt. P (another investigator) were on the CAR's or the MR's witness lists. The Record shows that no issue was raised by the MR regarding his right to examine either investigator at the hearing.

C. ERC Analysis

[80] The ERC determined that this ground of appeal should be dismissed (Report, para 94).

[81] The ERC disagreed with the Appellant's assertion that the manner by which the Board addressed Sgt. G's potential testimony breached the Appellant's right to a fair hearing. The ERC highlights that the Board stated on the second day of the hearing that it was not inclined to require Sgt. G to testify, and further that the Board indicated this in the very specific context of a request by the CAR (Report, para 95).

[82] The ERC focussed specifically on the fact that the CAR suggested that Sgt. G should testify on his alleged behaviour during witness interviews if, as the CAR put it, "the Board [was] inclined to make findings on [Sgt. G]'s behaviour" (Disclosure Documents - Conduct Board, p 320) (Report, para 95).

[83] The ERC then notes that the MR had an opportunity to take a position on the necessity of calling Sgt. G, yet did not do so under direct examination nor under cross-examination (Report, para 96).

[84] Furthermore, at no point in time did the MR demonstrate a desire to examine or cross-examine Sgt. G. The ERC recognized that the MR's list of witnesses, submitted to the Board prior to the hearing on September 4, 2015, did not identify Sgt. G as a potential witness (Record, pp 4139-4140). In addition, the Board's summary of a Pre-Hearing Conference that took place on November 9, 2015, identified no outstanding issues regarding potential witnesses (Record, p 4167). The ERC explains that this was despite the fact that on November 6, 2015, the Board had

indicated to the Parties that witness lists should be finalized at the Pre-Hearing Conference (Record, p 4163).

[85] Lastly, the ERC determined that when the Board asked the MR who he intended to call as witnesses on behalf of the Appellant, he responded that he intended to call only witness TA and the Appellant (Disclosure Documents - Conduct Board, p 401) therefore leaving no indication in the record that the MR sought to have Sgt. G called as a witness, or that he raised a need to cross-examine him to present the Appellant's case (Report, p 97).

[86] The ERC reiterated its position from the first ground of appeal above, notably that a party to a conduct appeal cannot include new information in written submissions that was known or could have been known when the original decision was rendered, including new arguments that could have been made before the original decision maker (Report, para 98).

[87] The ERC stated that the Appellant is precluded from now raising on appeal the argument that the Board should have allowed him the opportunity to examine Sgt. G., particularly because this was not raised by the MR before the Board (Report, para 98).

D. Commissioner's Analysis

[88] I agree with the ERC analysis.

[89] The MR had the opportunity to request and explain to the Board why the testimony of Sgt. G was required at the conduct hearing.

[90] In his submissions, the Appellant states that of the three investigators, only one testified, "Of the three lead investigators, only Sergeant [B] testified in person. Neither Sergeant [G] nor Sergeant [P] testified during the conduct hearing, notwithstanding that all three were lead investigators" (Record, p 4034).

[91] In my view, the Appellant's suggestion that the Board refused to permit Sgt. G to testify or that it purposely intended to suppress evidence is a mischaracterization of the events that transpired.

[92] On the other hand, the CAR highlighted to the Board that "If the Board is inclined to make findings on Con -- or Sergeant [G]'s behaviour that was not disclosed in the evidence, or the documentary evidence, I would suggest that Sergeant [G] should have an opportunity to respond or to be -- to testify on what is alleged he's -- or his alleged behaviour" (Record, p 460).

[93] The Board did not discount or ignore the CAR's suggestion but instead addressed it directly,

> "I'm going to leave it to argument. I anticipate some very vigorous argument on that particular point. But I -- now, I don't see the need to call Sergeant [G] […] Sergeant [G]'s not the one who's -- this is not a hearing about his behaviour. […] my primary concern, really my only concern is with the witnesses who've been brought here. I mean, this -- this issue, this entire hearing is about credibility of the witnesses. And where we're going to need to hear from them. And we can draw our own conclusions about their credibility on the basis of everything we see and hear (Record, p 461-462).

[94] The Board went on to explain that although Allegations 7-9 were withdrawn due to the passing of Witness E, it was still willing to consider that witness's statement at the CAR's suggestion that it evidences a pattern of behaviour on the part of Appellant; this, irrespective of Sgt. G's "tainting effect" (Record, p 463).

[95] The Board was clear that it would leave the assessment of the witness credibility to argument, as opposed to shifting the focus of the hearing from witness credibility to a critical assessment of Sgt. G's investigative methods (Record, p 463).

[96] The CAR did not push any further against the Board with respect to this point, and the transcripts clearly demonstrate a protracted silence from the MR during these discussions (Record, pp 460-464).

[97] While I recognize the impact Sgt. G's investigative methods may have had on the witnesses, I am inclined to agree with the Board's reasoning. The method by which the witness evidence was collected by Sgt. G, tainted or not, is not on trial, but rather the credibility of those witnesses and the evidence they provided.

[98] I conclude that the Appellant cannot now on appeal suggest that he was irreparably harmed and that his right to a fair hearing was somehow breached when he did not make any submissions at the time the CAR addressed the issue with the Board, or include Sgt. G in his witness list.

[99] Lastly, the Appellant could have exercised his right under subsection 18(1) of the *CSO (Conduct)* and added Sgt. G to the witness list he presented to the Board on September 4, 2015, should he have truly felt aggrieved by Sgt. G's investigation and wished to examine him (Record, pp 4139-4140):

> Witnesses to appear
>
> 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.
>
> Information on witnesses
>
> (2) The list of witnesses must include
> (a) the name and address of each witness;
> (b) the reasons for requesting the appearance of each witness;
> (c) a summary of the anticipated evidence of each witness; and
> (d) the appropriate means that will allow each witness to testify.
>
> List of witnesses
>
> (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.
>
> Providing reasons
>
> (4) The board must provide the parties with the list of witnesses that it will hear and its reasons for accepting or refusing any witness on the list submitted by the parties.

3. Did the Board fail to consider the Appellant's written submission provided during closing arguments, and did it improperly prejudge the case prior to rendering a decision?

A. Appellant's Submission

[100] The ERC summarized the Appellant's two concerns pursuant to this ground (Report, para 108):

> 1) That the Board failed to consider the Outline of Arguments and its attachments; and
>
> 2) That there is a reasonable apprehension of bias as the Board had prejudged the matter before hearing submissions.

[101] The ERC summarized the Appellant's submissions (Report, para 108):

- Appellant's Submission on the Merits dated February 10, 2017 (Record, pp 4036-4038): The Appellant argues that the Board failed to consider the Outline of Arguments and its attachments. The Appellant believes this to be the case on the basis of the limited two-hour period during which the Board deliberated after hearing oral submissions and receiving those documents. He notes that the Board made no mention of this material in its oral decision.

- The Appellant also claims that the Record reveals a reasonable apprehension of bias, in that the Board had either rendered a Decision or began articulating its Decision before hearing closing arguments. In support of this, the Appellant refers to the above-noted comments made by the Board that it had been working and paying passionate attention to the matter throughout the week of the hearing, and, when reading its oral Decision, the Board commented that the parties "will see in the written decision that I engage in a much more fulsome analysis than I'm going to provide you now". In his view, this shows that the Board had been "drafting or formulating" its Decision before the final day of hearing and that a written Decision had been prepared prior to the close of arguments. The Appellant believes that the Board's comments and actions, demonstrate "an effort to push to conclude the hearing on that day", at the expense of his right to a fair hearing.

- In a Reply Submission on the Merits dated July 31, 2017 (Record, p 4292), the Appellant maintains that there was insufficient time between the close of final arguments and the time the Board delivered its oral reasons, for the Board to properly consider the evidence and legal arguments. In the Appellant's view, the Board's own words reveal that it had reached a conclusion before hearing final arguments.

B. Respondent's Submission

[102] In his submissions, the Respondent maintains that the Appellant's suggestion that the Outline of Arguments was not considered by the Board is speculative at best (Record, p 4230) (Report, para 109).

[103] The Respondent notes that the Board accepted the four-page document as part of the hearing record and that the Board allowed the CAR a brief recess to review the document, after which the CAR continued oral argument and replied to specific points outlined in the document (Report, para 109).

C. ERC Analysis

[104] The ERC recommends that this ground of appeal be dismissed.

[105] The ERC separated its reasons into two sections based on the Appellant's alleged breaches of his right to a fair hearing (Report, p 110):

1) Decision makers be free of any real or perceived bias and keep an open mind; and

2) Parties must be allowed to present their cases, provide evidence, make submissions and have their views heard and considered by a decision maker (see Guy Régimbald, *Canadian Administrative Law*, Second Edition (Markham: LexisNexis Canada Inc., 2015), at pages 297, 381; Sarah Blake, *Administrative Law in Canada*, Fourth Edition (Toronto: LexisNexis Canada Inc., 2017), at p 12).

[106] The ERC did not find that the Board failed to consider the Outline of Arguments and its attachments before rendering its oral Decision on the allegations, as suggested by the Appellant (Report, para 112).

[107] The ERC emphasized the manner in which the material was presented to the Board during oral submissions. The reason being is that according to the ERC, it shows that the crux of the concerns contained in the written material was discussed by the Parties orally and thus brought to the Board's attention (Report, para 113).

[108] The ERC noted that the MR took the Board through the examples found in the Appendix to the Outline of Arguments, and explained in detail his concerns with the effect of tainted evidence on Allegation 2, which involved Witness B (Report, para 113).

[109] The ERC added that the MR indicated he would not refer to the jurisprudence attachment containing the four cases identified in the Outline of Arguments (Report, para 113). The Board subsequently agreed to the CAR's request to take a 10-minute pause to read the MR's Outline of Arguments, describing this as "a good plan". The Board then heard the CAR address the points raised by the MR.

[110] The ERC explained that while the Board addressed the overall concerns raised through the Outline of Arguments, its Appendix and the attached jurisprudence in its oral reasons, it did not explicitly refer to them (Report, para 114). However, the ERC recognized the Board's acknowledgement of the MR's concern regarding the way certain witnesses were interviewed as expressed in the Outline of Arguments (Report, para 114).

[111] The Board explained that this was a key reason why it had ordered that *viva voce* evidence be obtained from witnesses. Furthermore, the Board explained that it did not determine that the investigation was biased to the point where the evidence pertaining to Witness B could not be accepted, thereby addressing the focal point of the Outline of Arguments (Report, para 114).

[112] In support of his position, the Appellant refers to *Edmonton Police Association v. Edmonton (City of)*, 2007 ABCA 184 (CanLII) [*Edmonton Police*], an Alberta Court of Appeal judgment. The ERC determined that this situation differs from *Edmonton Police* where a medical review panel had failed to consider a letter and accompanying documents, submitted by the police officer whose case it was reviewing, because that material had not been forwarded to the panel (*Edmonton Police*, paras 12-13) (Report, para 115).

[113] The ERC noted that there is no question that the Outline of Arguments and its attachments were submitted to the Board and that the Board was aware of these documents (Report, para 115). In addition to this, the Board heard thorough oral arguments from the MR and CAR that addressed the issues raised in the Outline of Arguments, and it was guided by the MR through the examples of allegedly improper questioning contained in the Appendix.

[114] The ERC also recognized that the Board had a further opportunity to review this material and the four cases submitted by the MR during the 10-minute break taken by the CAR to review the same, and would have had a further opportunity to review this material during its two-hour adjournment to deliberate (Report, para 115).

[115] The ERC found that the Appellant has not established that the Board failed to consider the Outline of Arguments and related attachments and depriving him of a fair hearing (Report, para 116).

[116] With respect to the Appellant's assertion that there was a reasonable apprehension of bias as a result of the Board supposedly prejudging the matter, the ERC disagreed (Report, para 117).

[117] The ERC rejected the Appellant's position that the Board's conduct during the hearing raised a reasonable apprehension of bias (Report, para 117)

[118] The ERC highlighted that starting point for the analysis of reasonable apprehension of bias is the principle that, absent evidence to the contrary, an administrative decision maker is presumed to act impartially (Report, para 117).

[119] In ERC 2900-08-006 (D-123), the ERC previously examined concerns of prejudgment arising from a relatively short deliberation period (Report, para 120).

[120] In D-123, the adjudication board rendered an oral decision on the last day of the hearing after an almost 3-hour adjournment.

[121] The subject member in that matter alleged that the limited amount of time the adjudication board spent deliberating raised a concern that it had prejudged the issues, essentially arriving at a decision before the end of the hearing.

[122] The ERC acknowledged that preparatory work, including summarizing evidence and typing notes, can be completed as a hearing progresses, provided that a conduct board maintains an open mind. The ERC determined that it was "quite possible" for the Board to have weighed evidence, considered submissions, reached conclusions and formulated oral reasons during its deliberations, however, the oral reasons conveyed an appreciation of the evidence and submissions that were made before the Board (D-123, paras 68-70; Commissioner, paras 23-29).

[123] The ERC acknowledged the Board's deliberations (Report, para 122), but did not sway in supporting the Board's actions with the presumption that it remained open-minded and was not predisposed to any particular result until final submissions had been delivered and considered (Report, para 122).

[124] The ERC referred to the following examples to support the presumption that the Board remained open-minded throughout the hearing (Report, para 122):

- On day two of the hearing, the Board indicated that it anticipated "very vigorous discussion" about the extent to which witnesses had been able to counter the problematic interview techniques used by investigators (Record, p 451).
- After denying the MR's Non-Suit Motion regarding Allegation 5 on the morning of the last day of hearing, the Board indicated that it nevertheless anticipated "a much more fulsome argument on the […] allegation itself in your submissions, both of you" (Record, p 1028).
- The Board prefaced its announcement that it would render an oral decision on the last day of the hearing by stating that "with submissions in place, your work is done and mine begins" (Record, p 1155).

[125] The ERC considered the Appellant's concern based on a statement made by the Board in its oral decision, which in his view pointed to the existence of a decision prepared before the close of arguments (Record, p 1159) (Report, para 123):

> I do not find the investigation to have been biased to the point where I cannot accept the evidence pertaining to Witness B. Rather, I've incorporated whatever investigational bias may have been present during the state -- taking of statements into my analysis of her credibility on the witness stand. <u>And you will see in the written decision that I engage in a much more fulsome analysis than I'm going to provide you now.</u>
>
> [ERC emphasis.]

[126] The ERC held that the statement must be considered in light of its explanation, at the outset of the oral decision, that its reasons would be amplified in an ensuing written decision (Record, p 1156):

> I will preface my oral rendering of my decision on the six (6) allegations with my usual caveat that, although my decision is final and takes immediate effect as of its pronouncement today, I reserve the right to expand upon my reasoning in the written decision which will issue in due course.

[127] Examining from a contextual standpoint, the ERC did not find the Board's reference to engaging in a more extensive analysis in "the written decision" would evidence the existence of a final decision that predated the close of the hearing. The ERC concluded that the Board's statement can as easily be read to mean that the eventual written decision would contain a more extensive analysis of the relevant issue (Report, para 125).

[128] The ERC concluded that an informed, reasonable person would not find that the Board's comments, and the amount of time it spent deliberating, were enough to rebut the presumption that the Board had acted fairly (Report, para 126).

D. Commissioner's Analysis

[129] I agree with the ERC.

[130] I find that the Appellant is speculating that the Board failed to consider the Outline of Arguments and related attachments. He bases this speculation on the Board's two-hour deliberation after closing arguments, and that the Board made no mention of these materials during the oral decision.

[131] To be clear, the Board is not precluded from documenting and preparing reference notes prior to the culmination of the hearing. Doing so does not impact or evidence a breach of the Appellant's right to a fair hearing.

[132] The Appellant speculates that there was an insufficient amount of time between the close of arguments and the Board reconvening to render the oral decision.

[133] Had the Appellant felt that his right to a fair hearing had been compromised by the short duration of the deliberation, the Appellant could have brought the issue forward when the Board reconvened.

[134] In the result, I accept that the Appellant is hard pressed on appeal to raise a new argument in light of subsection 25(2) of the *CSO* (*Grievances and Appeals*):

> Restriction
> 25(2) The appellant is not entitled to
> (a) file any document that was not provided to the person who rendered the decision that is the subject of the appeal if it was available to the appellant when the decision was rendered; or
> (b) include in their written submissions any new information that was known or could reasonably have been known by the appellant when the decision was rendered.

[135] According to the transcripts, the Outline was accepted as part of the record by the Board and consisted of four pages (Record, pp 1100-1101). Upon receipt of the Outline, the CAR requested a 5 to 10-minute break to review, to which the Board agreed and recessed (Record, p 1142). After the recess, the CAR replied to each of the 15 paragraphs of the Outline with detail (Record, pp 1143-1154).

[136] It is clear then that the additional material, notably the Outline and attachments, were indeed reviewed during the hearing.

[137] I am of the view that the Board was in the best position to make the determination of whether two hours taken was sufficient to formulate and finalize its decision. Barring any evidence to the contrary, a review of the materials has led me to conclude that the Board kept an open mind, supported its decision, and remained entirely reasonable throughout the process.

[138] I would add that in previous matters with similar facts, notably, ERC 2900-08-006 (D-123), the ERC highlighted that the presumption of bias is difficult to negate, and that the burden of establishing a perception of bias lies with the party alleging it (para 59) (Report, para 117):

> Absent evidence to the contrary, it is presumed that administrative tribunal members act fairly and impartially. The threshold for finding real or perceived bias is high. Specifically, a real likelihood of probability of bias must be demonstrated. The onus of demonstrating bias lies with the party alleging it (see *Zundel v Citron*, [2000] 4 FC 225 (CA)).

[139] In *Yukon Francophone School Board v Yukon (Attorney General)*, 2015 SCC 25, at para 20, the test for reasonable apprehension of bias has been confirmed by the SCC to be one which is assessed through the eyes of a reasonable observer as follows:

> 20. The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:
>
> > ... what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted; *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, at p 394, per de Grandpré J. (dissenting)].

[140] The ERC confirmed and identified the test as being an objective one to determine whether an informed person viewing the matter realistically and practically, and having thought the matter through, would conclude there is a likelihood of bias (Report, para 119).

[141] I agree with the ERC and would add that in *R v S (RD)*, [1997] 3 SCR 484, the SCC reiterated that the test to be applied when it is alleged that a judge was not impartial is "whether the particular conduct gives rise to a reasonable apprehension of bias." (pp 389-390):

> […] the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information [...] The test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude".

[142] I do not view the Board's indication before deliberating that it had been working and paying "passionate attention to this case throughout the week" (Record, p 1155) as problematic.

[143] Lastly, I note that the Board did not render a fulsome written decision but rather a shorter oral decision while explaining that further expansion and detail would follow, "And you will see in the written decision that I engage in a much more fulsome analysis than I'm going to provide you now" (Record, p 1159).

[144] I do not accept the Appellant's interpretation that the Board's reference to, "'you will see' is a reference to a decision prepared by the Conduct Board prior to the close of arguments and

prior to the MR's Improper Investigations submissions being considered" (Record, p 4037). I view this as the Board explaining to the Parties that the oral decision is a summary of thorough deliberations and in-depth analysis that would be expressed in greater detail in the written decision.

[145] This reasoning is consistent with the preparatory work recognized in D-123, as long as the Board kept an open mind of which I have no doubt.

[146] In sum, I agree with the ERC. The Appellant has not convinced me that a reasonable person faced with these facts would conclude that the deliberation time, or the Board's comments, created a reasonable apprehension of bias.

4. Did the Board err by eliciting witness testimony to compensate for tainted evidence?

A. Appellant's Submission

[147] The ERC summarized the Appellant's position (Report, para 135):

- In his Submission on the Merits dated February 10, 2017, the Appellant refers to the Board's expressed concern regarding the way the witness interviews were conducted. In the Appellant's view, the Board erred by attempting to "cleanse irreparably tainted evidence" by eliciting fresh evidence from witnesses. Their recollections were irreparably damaged by the way the investigation took place (Record, pp 4035-4036).

- The Appellant argues that the evidence tainting has fatal consequences for the hearing. It is difficult for a witness to avoid this contamination. Such evidence should have been excluded at the outset of the hearing. The Board had read witness statements in advance, and should have recognized that allowing the witnesses to testify would irreparably damage the Appellant's right to a fair hearing. The Appellant suggests that it would be "difficult for anyone other than an experienced trial judge to read those statements and then to disabuse his mind of the poisoning effect of the taint".

- In a Reply Submission on the Merits dated July 31, 2017 (Record, pp 4289-4291), the Appellant maintains that the Board erred by presuming it could purge the effect of tainted evidence by hearing *viva voce* evidence.

B. Respondent's Submissions

[148] In response, the Respondent (Record, pp 4221-4235), notes that the Board expressly turned its mind to how witness credibility needed to be assessed in light of "troubling" components of the internal investigation and that the MR had the opportunity to cross-examine each witness.

[149] The Appellant further argues on appeal that evidence affected by tainting should be excluded from consideration by virtue of the application of subsections 24(1) and (2) of the *Canadian Charter of Rights and Freedoms*, 1982, c. 11 (Record, pp 4038-4041).

[150] However, this argument was not put to the Board. In keeping with its earlier discussion regarding paragraph 25(2)(b) of the *CSO (Grievances and Appeals)*, the ERC did not consider this component of the Appellant's arguments on appeal (Report, para 137).

C. ERC Analysis

[151] The ERC concluded that this ground of appeal should be dismissed (Report, para 138).

[152] From its understanding of the Appellant's position on appeal, the ERC determined that the Appellant takes issue with the manner by which the Board opted to handle the MR's witness interviews concerns (Report, para 139).

[153] The ERC reiterated that the Appellant challenged the Board's reliance on oral testimony to evaluate each witness's ability to, as the Board put it, "overcome whatever negative effect the internal investigators might have had" (Record, p 4468) (Report, para 139).

[154] The ERC noted that some concerns raised by the Appellant on appeal have to do with a witness whose evidence was not considered by the Board and with respect to whom allegations were withdrawn (Report, para 140).

[155] In essence, the Appellant refers to the Board's concern expressed during day two of the hearing regarding something that may have been said to Witness E. The Board acknowledged at that time, that according to a "Task Action Report" authored by Sgt. P, Witness E had alleged that an investigator, Sgt. G, had told her that the Appellant had "raped six women" (Record, pp 452-454; 4036) (Report, para 140).

[156] The ERC explained that the Board referenced a comment by Sgt. G to communicate, in part, why it was not inclined to consider Witness E's prior statements, given that she had passed away. The Board specifically said (Record, p 454) (Report, para 140):

> [Sgt. G]'s act of filling her in - or I don't know what he said to her. But whatever it was she interpreted has, I would suggest, in the absence of any ability to talk to her about what actually happened, irreparably tainted her testimony.

[157] The ERC accepted that, the Board referred to Witness E's evidence as having been "irreparably tainted" in this very specific context (Record, p 454), an assertion on which the Appellant has placed significant weight in his appeal submissions (Record, pp 4035-4036). However, the ERC recognized that the record indicates that the Board did not consider Witness E's prior statements when deciding the allegations.

[158] At the hearing, the Board heard that the MR's concerns revolved mostly around Witnesses B and C. The ERC disagreed with the assertion that the Board's reliance on oral testimony to evaluate the credibility of these witnesses in light of the things investigators had told them, was flawed. Furthermore, the ERC rejected the notion that the Appellant was deprived of a fair hearing through the way the Board handled the MR's concerns (Report, para 142).

[159] A detailed explanation of witness tainting is addressed in *JH v Windsor Police Services Board et al.*, 2017 ONSC 6507 (para 41), where the court determined that the issue remains a question of weight.

[160] The ERC reiterated that the MR had a full opportunity to cross-examine witnesses regarding their evidence at the hearing and that the MR thoroughly cross-examined Sgt. B, who was the investigator who interviewed both Witness B and SB, and whose interviews were at the heart of the MR's concerns at the hearing (Report, para 142).

[161] With respect to addressing the impact of any tainting within its credibility analysis, the ERC determined that the Board's approach in doing so was proper (Report, para 143).

[162] The questions posed by the MR to Witness B and Witness C, which probed some of the tainted evidence concern's central elements, provided relevant credibility assessment information to the Board.

[163] For instance, the ERC noted that the MR questioned Witness B about whether she had discussed the Appellant's reputation with Sgt. B (Disclosure Documents - Conduct Board, pp 589-590). The MR also asked Witness C about her testimony of being told by a police officer that the Appellant had "pulled over and profiled" four other women (Record, p 1433). Further, the Board observed the cross-examination by the MR, and redirect examination by the CAR, of Sgt. B regarding his interviews of Witness B and SB with respect to Allegation 2 (Disclosure Documents - Conduct Board, pp 486-538). The way that Sgt. B had interviewed both witnesses, including specific lines of questioning which were of concern to the MR, was thoroughly examined in this testimony (Report, para 146).

[164] The ERC was satisfied that the Board's written reasons demonstrate an awareness to the concerns raised by the MR with respect to evidence tainting, and summarized the principal elements of the MR's submissions on tainted evidence (Record, p 27) (Report, para 147):

> The MR submitted that the biased, unfair and incompetent manner in which the Subject Member's investigation was conducted prevented him from getting a fair hearing. The investigation report cannot be relied upon because of the inappropriate manner in which witness interviews were conducted. The investigators from the Professional Standards Unit, in questioning witnesses, discussed bad character and spread rumours and innuendos about the Subject Member. The word "predator" was used. In some cases, not only were the interviewers leading the witnesses, they were actually putting words in their mouths. They were telling the witnesses, essentially, "everyone believes this has happened". This was a witch hunt, not an investigation. Witnesses were being "cross-pollinated" with information from other witnesses. For example, [Witness C], in her testimony, recalled being told that the Subject Member's investigation included complaints from five other women.[…]

[165] The ERC noted that the Board was cognizant of the MR's concerns. The Board was aware of the MR's apprehension as it pertained specifically to Allegation 2, which involved Witness B. Those concerns were summarized by the Board (Record, p 28):

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

> time [Witness B] is interviewed, [Witness B] is talking the same way as the investigators, saying the Subject Member is a "predator".

[166] The ERC emphasized that the Board explained in its written reasons how it had addressed the issue of evidence tainting. While acknowledging some of the MR's concerns with the way that the interviews had been conducted, the Board nevertheless explained that its ability to watch each witness testify had allowed it to assess any negative effect investigators may have had (Record, p 31) (Report, para 149):

> With respect to the manner in which the internal investigation was conducted and the manner in which witnesses were approached and interviewed, I am in partial agreement with the MR. It is unacceptable to "cross-pollinate" certain witnesses by feeding them information obtained from other witnesses.
>
> The MR quite rightly pointed out several instances of inappropriate conduct by the interviewer in the transcripts of the statements. Use of the word "predator", for example, creates an impression in the mind of the witness and may colour their perception of events. This is a dangerous practice.
>
> My main concern, which I articulated in the course of the hearing, was the tendency for the internal investigators to tell witnesses about the existence of other complaints against the Subject Member. [Witness E], who unfortunately passed away only weeks before this hearing began, apparently said she was "told by the officer who interviewed her that [the Subject Member] had raped six women". In her testimony, [Witness C] made reference to having been told by the female police officer who interviewed her that she was not the only girl the Subject Member "had pulled over and profiled: in fact she was the fifth".
>
> One of the reasons I summoned the witnesses to attend and provide oral testimony before me was to allow me the opportunity to evaluate the extent to which the witnesses were able to overcome whatever negative effect the internal investigators might have had.[…].

[167] The ERC found that the Board's reasons demonstrate that it contended with credibility issues in light of the evidence and submissions (Report, para 151).

[168] The ERC highlighted certain witness testimonies as addressed by the Board in the Decision. For example, with respect to Allegation 2, the Board examined the contradictory versions of events offered by Witness B, who testified that she and the Appellant had sex, and the Appellant, who denied it. The Board explained that it had preferred the evidence of Witness B

over that of the Appellant, not only because of the "steadfast manner in which she delivered her testimony" (Record, p 33), but also because her story "had the ring of truth to it" (Record, p 33). On this latter point, the Board highlighted Witness B's recall of intimate details of the sexual encounter. The Board also explained why Witness B's lack of recall regarding certain details of the encounter, or discrepancies in her evidence, had not convinced it that her story was fabricated (Report, 151).

[169] Lastly, the Board added that Witness B had been candid in explaining her medical and psychological condition, both at the time of the encounter and at the time of appearing before the Board (Record, p 33) (Report, para 151).

[170] With respect to Allegations 3 and 4, the ERC noted that the Board explained in detail why it had found Witness C credible. The Board referred to the consistency between her testimony and the accounts she had given to other individuals. Furthermore, the Board directly addressed Witness C's cognitive challenges by noting the forthright manner in which she gave her testimony. The Board stated that Witness C had been "guileless and quite expansive on cross-examination about the various aspects of the encounter […] and the things said to her by internal investigators" (Record, p 34). The Board acknowledged that it was "somewhat odd" that Witness C, who testified that she was "terrified of cops" (Record, p 34), had still asked the Appellant if she could ride in his car. However, because of the Appellant's admission that he may have made a comment "of at least passing similarity" (Record, p 34) to what Witness C had alleged regarding "naked people" (Record, pp 34-35), the Board was convinced of Witness C's truthfulness regarding what she thought she had heard the Appellant say (Record, p 34) (Report, para 152).

[171] In conclusion, the ERC held that the Board's reasons show that it was very much alive to the MR's concerns about "tainting" and to the overall issue of credibility regarding Witness B and Witness C (Report, para 153).

[172] Furthermore, the ERC emphasized that the process through which the Board assessed these concerns was fair, particularly given the Appellant's opportunity for cross-examination (Report, para 153).

[173] The ERC states that it is not my role on appeal to query whether the Board erred merely by performing the function with which it was tasked (ERC 2500-05-005 (D-103), para 42) (Report, para 153).

[174] The ERC found that there is no reason to interfere in this ground particularly given the deference owed to credibility findings in conjunction with the Board's rational and tenable line of analysis, all of which demonstrated unequivocally that the Board did in fact grapple with relevant issues surrounding credibility (Report, para 153).

D. Commissioner's Analysis

[175] I agree with the ERC analysis.

[176] In his closing argument, the MR maintained that the perception of witnesses had been tainted by the manner the investigation had been conducted. He submitted the Outline of Arguments and an Appendix, referencing passages of the interviews of Witness B and SB, in relation to Allegation 2.

[177] The MR claimed that these passages revealed problematic questioning by Sgt. B, as a result of his use of leading questions, and thereby "cross-pollinated" information from one witness to the other (Disclosure Documents - Conduct Board, pp 955-960, 997; Additional Material, pp 249-252, 681-687).

[178] The MR took the Board through some of the examples of challenging witness questioning contained in the Appendix (Disclosure Documents - Conduct Board, pp 955-959).

[179] He added that the other witness statements obtained in relation to Allegation 2, such as that of SB, should also not be considered by the Board, and that "to rely on the product of the investigation in any way in this proceeding would amount to a flagrant breach of natural justice and procedural fairness" (Additional Material, pp 250-251; Disclosure Documents - Conduct Board, pp 955, 959).

[180] The MR also suggested that the "glaring flaws" in the investigation affected the reliability and credibility of any witness testimony supporting Allegation 2, to such an extent that the ability

to cross-examine those witnesses would be insufficient to "untangle rumour and suggestion from fact" (Additional Material, p 250).

[181] In his view, these flaws were sufficient to justify dismissing Allegation 2 in its entirety, or to significantly affect Witness B's credibility (Disclosure Documents - Conduct Board, pp 996-998). He expressed a similar concern in relation to Allegations 3 and 4, as an investigator had told Witness C that the Appellant had conducted himself similarly with several other women. This raised a concern that Witness C's evidence had been tainted, thereby affecting her credibility (Disclosure Documents - Conduct Board, pp 959, 988).

[182] In the oral decision on the allegations, the Board indicated that it was alive to the MR's concern that witness interviews had been problematic, and shared that concern in certain areas.

[183] This was a key reason why the Board had ordered that *viva voce* evidence be obtained from witnesses. The Board also stated that it did "not find the investigation to have been biassed to the point where I cannot accept" Witness B's evidence (Record, p 1159).

[184] The Board explained that "whatever investigational bias may have been present during the taking of statements", would be considered in the Board's, "analysis of her credibility on the witness stand" (Disclosure Documents - Conduct Board, pp 1018-1019).

[185] In the written Decision, the Board confirmed and expanded on its reasoning on this point and also explained in further detail, when addressing each allegation, why it had found the evidence of each witness who testified to be credible.

[186] The court in *X v British Columbia College of Teachers*, [2004] BCSC 1593, at paras 50-59 [*British Columbia College of Teachers*], addressed the issue of tainted evidence in detail. The court determined that within the context of professional discipline proceedings, addressing the impact of concerns that evidence is tainted because, for example, witnesses have read the statements of other witnesses before testifying, remains for the trier of fact to consider in a credibility assessment.

[187] The court in *British Columbia College of Teachers* cited the Ontario Court of Appeal decision of *College of Physicians and Surgeons (Ontario) v K* (1987), 36 DLR (4th) 707, 59 OR (2d) 1 (Ont CA), at pp 720-21, to further explain credibility assessments:

> If there is a possibility of collusion, the trier of fact must give anxious consideration as to whether the testimony of the witnesses was concocted. However, it is only if either the trier of fact is satisfied that there was a real chance that there was such concoction, or the facts are such that it could reasonably be inferred that there may have been concoction, that the evidence of one witness, if otherwise admissible, cannot be used to support or confirm the testimony of another witness.

[188] Pursuant to subsection 33(1) of the *CSO* (*Grievances and Appeals*), I must determine whether the Board's decision is clearly unreasonable. In doing so, deference is owed to the Board's findings on credibility, as the Board was best placed to conduct this assessment (ERC C-2020-021 (C-055), para 119).

[189] In *Elhatton v Canada (Attorney General)*, 2013 FC 71, at para 47, the Federal Court emphasized, in the context of my role in considering a disciplinary appeal, the considerable deference to be given to credibility findings.

[190] The Board identified what it described as a "useful framework" for the analysis of credibility issues, as found in excerpts of judicial precedents in *Wallace v Davis*, [1926] 31 OWN 202 (Ont HC); *MacDermid v Rice*, (1939) 45 R de Jur 208; and *Faryna v Chorney*, [1952] 2 DLR 354 (BCCA). These excerpts highlighted various elements to be considered in assessing witness credibility. This included assessing the "ability to resist influence, frequently unconscious, of interest to modify his recollection", as well as subjecting their recollection "to an examination of its consistency with the probabilities that surround the currently existing conditions" (Record, pp 30-31).

[191] The Board considered the test in each case (Record, pp 30-31):

> The test in *Wallace v. Davis* is found at page 203:
>
> […] the credibility of a witness in the proper sense does not depend sole upon his honesty in expressing his views. It depends also upon his opportunity for exact observation, his capacity to observe accurately, the firmness of his memory to

> carry in his mind the facts observed, his ability to resist influence, frequently unconscious, of interest to modify his recollection, his ability to reproduce in the witness-box the facts observed, the capacity to express clearly what is in his mind—all these are to be considered in determining what effect to give to the evidence of any witness.
>
> In *MacDermid v. Rice*, Archambault, J. said at page 210:
>
> […] when the evidence of an important fact is contradictory....the Court must weigh the motives of the witnesses, their relationship or friendship with the parties, their attitude and demeanour in the witness box, the way in which they gave evidence, the probability of the facts sworn to, and come to a conclusion regarding the version which should be taken as the true one.
>
> In *Faryna v. Chorney* the following test was set out by the court at page 357:
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[192] The Board also highlighted the SCC's examination of witness credibility and reliability in *FH v McDougall*, [2008] 3 SCR 41, at para 86, and their relevance to the proceedings before it (Record, p 31):

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

[193] To conclude, the Board was satisfied that comments by investigators had not adversely affected the credibility or reliability of witnesses who had testified (Record, p 32) (Report, para 150):

> […] I am satisfied that each provided a frank and honest account of their respective interactions with the Subject Member. The things internal investigators

> may have told them about the Subject Member, including the fact that their complaints were not unique, did not adversely affect their credibility or reliability.

[194] I agree with the Board and do not find any evidence that would indicate that the witnesses had been adversely impacted by the investigator comments.

5. Did the Board improperly rely on Witness E's evidence and Sgt. P's Task Action Report?

[195] The ERC reiterated that the three allegations of misconduct by the Appellant towards Witness E were withdrawn by the CAR at the start of the hearing due to Witness E's passing (Disclosure Documents - Conduct Board, pp 10-11).

[196] However, the CAR argued that documentary evidence contained in the Record, describing Witness E's interactions with the Appellant, could be considered to infer that the Appellant had engaged in a pattern of behaviour with multiple individuals (Disclosure Documents - Conduct Board, pp 945-947) (Report, para 156).

[197] The MR objected to this viewpoint and instead argued that Witness E had been interviewed in a problematic fashion and as a result, it would be unfair to the Appellant that the Board consider Witness E's untested evidence because of her inability to testify (Disclosure Documents - Conduct Board, pp 969-970).

[198] The Appellant expressed on appeal a concern that the Board never explicitly stated that it was ignoring the similar fact evidence of Witness E. To the Appellant, this implies that the Board may have considered Witness E's evidence of her interactions with the Appellant in deciding that the other allegations had been established (Record, p 4290):

> […] the CB permitted the CAR to make these submissions and the CB presumably considered them in rendering his decision. The CB does not expressly state anywhere in his decision that he was not considering the similar fact evidence relied upon by the CAR during her final argument.

[199] The ERC explained that the Board's explanations regarding its handling of the evidence are to be considered in the context of the record, evidence and submissions in the case (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*,

2011 SCC 62, paras 15, 18; *Construction Labour Relations v Driver Iron Inc*., 2012 SCC 65, para 3; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, para 103) (Report, para 159).

[200] When the Record is reviewed in its entirety, there is no indication that the Board considered evidence relating to Witness E when deciding the allegations. In fact, the Record points to the opposite conclusion. The Board expressly indicated during the hearing that it had been unable to assess firsthand, the extent to which Witness E could counter the "tainting effect" of her interview (Disclosure Documents - Conduct Board, pp 311-312; 322-323).

[201] Although the Board indicated it would still hear the parties on the point in closing argument, the Board's oral decision on the allegations removes any doubt as to whether evidence relating to Witness E was used (Disclosure Documents - Conduct Board, p 1019):

> I was able to assess firsthand the degree to which the witnesses were able to overcome the perception that internal investigators may have tainted their testimony. I was able to do this for every key witness save for [Witness E]. And for that reason, I will not incorporate the information she provided to investigators into my findings of fact in the allegations.

[202] The ERC suggested that the oral explanations provided by the Board be read in conjunction with the absence of any reference in its written reasons to reliance on Witness E's evidence in support of the allegations (Report, para 160). The ERC went on to explain that the record, read as a whole alongside the Board's written Decision, supports a conclusion that the Board did not consider Witness E's evidence in deciding the allegations (Report, para 160).

[203] A second concern brought forth by the Appellant under this ground was the Board's use of Sgt. P's Task Action Report.

[204] On the second day of the hearing, the Board referred to a Task Action Report prepared by Sgt. P dated September 14, 2015. The Board noted that according to the Task Action Report, Witness E had alleged that an investigator, Sgt. G, had told her that the Appellant had "raped six women" (Disclosure Documents - Conduct Board, pp 312-314).

[205] The Board linked this reference to an alleged comment by Sgt. G to explain, in part, why it was not inclined to consider Witness E's prior statements. Essentially, the Board explained that given Witness E's passing, it would be unable to assess the extent to which Witness E could counter the tainting effect of the manner in which she had been interviewed.

[206] The Task Action Report was missing from the Record. The ERC proceeded to obtain a copy through the OCGA, however, the Appellant objected to the admissibility of this document on appeal.

[207] In his June 16, 2021, objection, the Appellant advised that this document had not been disclosed to him during conduct proceedings. However, despite not being admitted into evidence, it had been considered by the Board. Consequently, the Appellant believed his right to a fair hearing had been compromised (Report, para 162).

[208] In subsequent submissions, the Appellant set out detailed grounds for his concerns, yet did not suggest that the Task Action Report was not disclosed. Instead, his submissions were summarized as follows (Report, para 163):

- In the Appellant's view, the CAR had purported to use the Task Action Report to prove a pattern of misconduct by the Appellant, and the MR objected to the admissibility of the Task Action Report as a "back door attempt to introduce similar fact evidence".

- According to the Appellant, the Task Action Report, which amounted to inadmissible hearsay, was in any event irrelevant to facts in dispute, since the allegations involving Witness E had been withdrawn by the CAR.

- Notwithstanding the Board's reasons to the contrary, it could not "sufficiently disabuse" itself of the information contained in the Task Action Report. The Board did in fact rely on the Task Action Report when rendering its decision. This resulted in a breach of the Appellant's right to a fair hearing.

[209] In response to the Appellant's objection, the Respondent states (Report, para 164):

- The Respondent takes the view that the MR, during the hearing, never objected to the admissibility of the Task Action Report.

- The Respondent underscores that the Task Action Report "was only used by the [Board] as an example of dangerous investigation practices", and that it was not considered by the Board in rendering its findings on the allegations.

> The Board expressly excluded all evidence regarding Witness E. Accordingly, the Respondent contests the Appellant's suggestion that his right to a fair hearing was compromised.

ERC Analysis

[210] The ERC concluded that the manner in which the Board relied on the Task Action Report did not deprive the Appellant of his right to a fair hearing (Report, para 165).

[211] The ERC noted that during the hearing, the CAR argued that documentary evidence describing Witness E's interactions with the Appellant should be considered to infer that the Appellant had engaged in a pattern of behaviour with multiple individuals. This was despite the fact that Witness E had passed away and that the allegations involving her had been withdrawn (Report, para 166).

[212] The ERC found that the Board indicated that it would not consider any information provided by Witness E to investigators in deciding the allegations because, unlike other witnesses, the Board was unable to assess firsthand the degree to which Witness E had been able to overcome the influence of investigators (Report, para 166).

[213] The ERC was satisfied that the Board referred to the Task Action Report within this context and that the Board read portions of the report verbatim, noting the reference to Sgt. G having allegedly told Witness E that the Appellant "had raped six (6) women" (Disclosure Documents - Conduct Board, pp 312-313) (Report, para 167).

[214] The ERC further recognized that the Board expressly indicated its concern that given the inability to see Witness E testify, it would be unable "to assess the degree of success or not that she has in countering what I see to be the tainting effect of what [Sgt. G] has said" (Disclosure Documents - Conduct Board, p 323) (Report, para 167).

[215] The ERC explained that should the MR have had any basis for objecting to the Board's reliance on the Task Action Report, for instance by reason of a perception that the Board was relying on information that had not been disclosed, the MR would have had to raise the point at the first opportunity (Report, para 168).

[216] The ERC acknowledged the Board's awareness and sympathetic view of the MR's position. For example, the Board's indicated in its oral reasons that because it had been unable to assess the degree to which Witness E was able to overcome troubling elements of the internal investigation, it would not incorporate the information she had provided to investigators into its findings of fact on the allegations (Disclosure Documents - Conduct Board, p 1019).

[217] The ERC concluded that the Board's reference in the written Decision to Witness E allegedly having been told that the Appellant had "raped six women", as indicated in the Task Action Report, was meant to highlight its concern with certain aspects of the investigation (Report, para 170).

[218] In that context, the ERC found that this passage does not, as the Appellant suggests, raise a concern that the Board had been improperly influenced by the Task Action Report in assessing allegations against the Appellant. Rather, when read holistically, the Board's reasons demonstrate the Board understood the concern raised by the MR at the hearing (Report, para 170).

[219] It was clear to the ERC that the Board viewed Witness E's evidence as unreliable because it could not be tested and that the Board did not consider it in reaching its findings on the allegations (Report, para 170).

COMMISSIONER'S ANALYSIS

[220] I agree with the ERC analysis and will keep my analysis short.

[221] It is evident to me that the Board acknowledged its inability to assess Witness E due to her unforeseen passing along with the degree to which she may, or may not, have been influenced by the investigation. I am satisfied that the Board did not rely on Witness E's statement to investigators in arriving at findings of fact on the allegations.

[222] In *Muskego v Norway House Cree Nation*, 2011 FC 732, at para 42, the Federal Court stated that a party must raise an issue of procedural fairness at the first opportunity. Taking this into consideration, the MR raised no concern regarding the Board's reference to the Task Action Report during the conduct hearing. Instead, in his closing submissions the MR relied on the content of the Task Action Report to support his argument that the untested evidence of Witness E's

interactions with the Appellant should not be relied upon to corroborate the other allegations due to tainting (Disclosure Documents - Conduct Board, pp 969-970):

> Again, and on the last point about [Witness E], we don't think that the -- I mean, especially her saying that she was fed information by an investigator, [Sgt. G], that [the Appellant] was raping women is -- again, I mean, I certainly think that that would be a denial of a fair hearing to rely on -- on untested evidence with that kind of tainting.

[223] In its written Decision, the Board specifically referred to the content of the Task Action Report and addressed concerns over the manner in which the investigation had been conducted (Record, p 32):

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

[224] The Board explained that one of the reasons for summoning the witnesses to attend and provide oral testimony was to "evaluate the extent to which the witnesses were able to overcome whatever negative effect the internal investigators might have had" (Record, p 32).

[225] The Board then concluded (Record, p 32):

> In every case, I [Board] am satisfied that each [Witness] provided a frank and honest account of their respective interactions with the Subject Member. The things internal investigators may have told them about the Subject Member, including the fact that their complaints were not unique, did not adversely affect their credibility or reliability.

[226] Like the ERC, I reject this ground because in my view the Board came to a reasonable conclusion based on the evidence and made an effort to clearly explain how it assessed each witness and the issues related to credibility or reliability. Consequently, I am satisfied that the

Board did not improperly rely on Witness E's evidence nor do I question the use of Sgt. P's Task Action Report.

6. Did the Board's vague reference to independent evidence corroborate Allegation 2?

ERC ANALYSIS

[227] In finding Allegation 2 established, the Board accepted Witness B's evidence that she and the Appellant had sex and that on one other occasion they had kissed and hugged on her porch. The Board noted that the Appellant's attendance, on the night of the kissing and hugging occurrence, was confirmed by what was suggested to be independent evidence (Record, p 33).

[228] The Appellant questioned what evidence the Board was referring to when it wrote in its Decision that independent evidence confirmed that the Appellant had attended Witness B's residence on the night of the alleged hugging and kissing incident (Record, p 1251).

[229] The ERC suggested that the Board may have been referring to the evidence of MB, who had provided a statement to investigators indicating he saw Witness B kissing a uniformed police officer on her porch. The ERC acknowledges that this evidence was problematic (Report, para 172).

[230] Furthermore, MB was called to testify as a witness but he refused to answer the CAR's questions at the hearing, it appeared to the ERC that he refused to either swear an oath or solemnly affirm that his testimony would be truthful (Disclosure Documents - Conduct Board, pp 378-388) (Report, para 172).

[231] The CAR obtained permission from the Board to treat MB as a hostile witness and to cross-examine him on his prior statement (Disclosure Documents - Conduct Board, pp 395-400) (Report, para 172).

[232] The Appellant admitted in his testimony that he recalled attending Witness B's residence in uniform in the evening to obtain information from her; that this took place in the foyer of her residence and the front porch; that she asked to hug and kiss him; that he lightheartedly accepted; and that the kiss was on "the cheek or the lips or kind of in-between" (Disclosure Documents - Conduct Board, pp 732, 764-766).

[233] Consequently, the ERC concluded that in its view, nothing turns on the issue of independent evidence (Report, para 173).

COMMISSIONER'S ANALYSIS

[234] I agree with the ERC analysis.

[235] I recognize that the issue of independent evidence was first brought about in the Appellant's appeal submissions contending he does not know the source of such evidence (Record, p 4048)

[236] To my understanding, however, the issue of independent evidence corroborating the Appellant's attendance at Witness B's home was brought up and discussed considerably at the hearing (Record, pp 1021, 1062, 1065, 1071). The Board confirmed this as well in its decisions (oral and written) (Record, pp 72-73).

[237] Much like the ERC, I do not see what turns on this independent evidence given that the Appellant himself admitted in his testimony to being present at Witness B's home on the night in question, standing in her foyer, hugging her, and allegedly turning his face away as she tried kissing him (Record, pp 2604-2606).

7. Did the Board's findings bring into consideration information not disclosed to the Appellant?

ERC ANALYSIS

[238] With respect to Allegation 1, the Appellant expressed some concern with the Board's finding in relation to the Appellant's examination of Witness A's injuries following her disclosure of a possible sexual assault.

[239] Furthermore, the Board did not find any reason to doubt the high likelihood that the Appellant's supervisor, Cpl. R, had instructed the Appellant to follow up with Witness A on the sexual assault complaint, and that the Appellant had taken no further action (Record, pp 32-33). Cross-examination of Cpl. R had probed the extent to which he had provided guidance to the Appellant.

[240] On appeal, the Appellant specifically highlights the following findings by the Board (Record, p 1251):

- While it may be true that the degree of documented supervision provided by Cpl. R may not have been what one might have expected, major crimes such as sexual assaults need no explicit written instruction for a follow-up; and
- The Appellant was aware of what had to be done.

[241] The Appellant contends that these findings place squarely in issue the training the RCMP provided him, in addition to the RCMP's policies and procedures on investigations, and the degree of supervision provided to him during his career. The Appellant appears to claim that these findings were unfair due to an absence of complete disclosure (Record, p 1251):

> […] the presence or absence of any such policies and the extent of the supervision and coaching provided to [the Appellant] during his career is relevant and material to the Conduct Board's conclusions, nevertheless, this information is not included in the disclosure provided for the purposes of the appeal.

[242] The ERC did not find any lack of fairness arising from this ground. Specifically, the Appellant claims that he should have been made aware of certain requirements surrounding the sexual assault investigation. The ERC disagreed (Report, para 177).

[243] The ERC addressed this in two points. First, policies governing sexual assault investigations in "E" Division were contained in the record which was before the Board (Material, pp 2493-2529; Additional Material, pp 1013-1044) (Report, para 177).

[244] In closing arguments, the CAR referred to certain provisions in these policies demonstrating that the Appellant had failed to properly document and investigate Witness A's sexual assault complaint (Disclosure Documents – Conduct Board, pp 908-914). Moreover, the MR's closing arguments specifically referred to and addressed the "policy instruments for investigating" allegations of sexual assault (Disclosure Documents – Conduct Board, pp 990, 995).

[245] Secondly, the ERC disagreed with the Appellant's assertion that the Board's findings somehow raise a fairness issue because of the absence of evidence of the Appellant's training over the course of his career. The ERC determined that this sort of evidence had no correlation and was

not required in order to demonstrate that the Appellant should have been aware of the policies governing sexual assault investigations (Report, para 178).

[246] The ERC and Commissioners have long held that members must familiarize themselves with policy authorities applicable in their circumstances (ERC 3300-15-008 (G-645), para 32; Commissioner, para 32). According to the ERC, it is in this context that the Board's findings must be examined and understood (Report, para 178).

COMMISSIONER'S ANALYSIS

[247] I find that this ground of appeal should be dismissed.

[248] The ERC has previously applied this principle to a policy underlying conduct allegations (C-2016-009 (C-029), paras 125-128). Although traditionally arising in the grievance context, I accept that it should equally apply in the conduct appeal context.

[249] Members are expected to be "[…] diligent in the performance of their duties and the carrying out of their responsibilities, including taking appropriate action to aid any person who is exposed to potential, imminent or actual danger (*Code of Conduct*, s 4.2).

[250] Members of the RCMP are extensively trained on policies, procedures, and investigations early on in their careers and are expected to maintain regular familiarization. It is therefore incumbent on every member to maintain their continuing professional development through ongoing training and seeking advice and guidance from superiors when necessary.

[251] I reject the Appellant's assertion regarding the RCMP's responsibility in the Appellant's mishandling of the sexual assault investigation (Record, p 1251):

> These findings by the Conduct Board place squarely in issue the training the RCMP had provided to Cst. Marshall with respect to investigation of such matters, the RCMP's policies and procedures with respect to such investigations, and the degree of supervision provided to Cst. Marshall by the RCMP.

[252] The Appellant failed to conduct a proper investigation into a sexual assault complaint. He was directed to follow up with the complainant, and did not do so. Had the Appellant felt that he was not familiar with the policies, procedures, or appropriate method of conducting such an

investigation, he should have sought further assistance from his supervisor, coworkers, or through other resources readily available to him.

[253] The Appellant instead disregarded the direction entirely. The Appellant cannot now after the fact blame the RCMP for not providing him with the appropriate training.

[254] While I acknowledge the importance a supervisor plays in the development of competencies, it is also incumbent on members, to recognize any deficiencies or lack of knowledge they may have and seek assistance when needed. I have no evidence before me that the Appellant attempted to seek help, instead, he completely disregarded the investigational direction.

ERC RECOMMENDATION

[255] The ERC recommends that I dismiss the appeal.

DISPOSITION

[256] The Appellant has not demonstrated that the Board made any reviewable errors.

[257] Pursuant to paragraph 45.16(1)(a) of the *RCMP Act*, I dismiss the appeal and confirm the conduct measure imposed by the Board: an order to resign from the Force within fourteen days in default of which the Appellant was to be dismissed.

[258] Should the Appellant disagree with my decision, he may seek recourse with the Federal Court pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

_____ _____

Brenda Lucki
Commissioner

Date