Protected A

File 2019335365

2022 CAD 17

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF
an appeal of a conduct board decision pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 (as amended) and the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289

BETWEEN:

Level III Conduct Authority, "E" Division
Royal Canadian Mounted Police

(Appellant)

and

Constable Konstantinos Xanthopoulos
Regimental Number 60852

(Respondent)

(the Parties)

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CONDUCT APPEAL

ADJUDICATOR: Steven Dunn

DATE: November 9, 2022

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SYNOPSIS

The Level III conduct authority appealed a preliminary motion decision of a conduct board (Board). The Respondent faced three allegations of contravening the RCMP *Code of Conduct*. Allegations 1 and 2 pertained to violations of section 7.1 (discreditable conduct) and Allegation 3 concerned a violation of section 8.1 (failing to provide complete and accurate accounts).

Following the preliminary motion on the first day of the hearing, the Board dismissed Allegation 1 finding that it was initiated outside the limitation period set out in subsection 41(2) of the *Royal Canadian Mounted Police Act*. Allegations 2 and 3 were found to be established and the Board directed the Respondent to resign within 14 days or be dismissed.

On appeal, the Appellant argued that the Board made an error of law by finding that the Professional Standards Unit (PRU) investigator's knowledge was sufficient to trigger the limitation period to initiate a hearing pertaining to Allegation 1. The Appellant did not seek to interfere with the Board's ultimate decision to dismiss the allegation, but sought a finding that the Board made an error of law given the impact its decision would have on the RCMP conduct process.

The adjudicator determined that the Board made an error of law and allowed the appeal for the limited purpose of overturning the Board's problematic analysis and conclusion related to the PRU.

INTRODUCTION

[1] The designated Level III Conduct Authority, "E" Division (Appellant), challenges the decision of an RCMP conduct board (Board) with respect to one finding concerning the application of subsection 41(2) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 (*RCMP Act*) in the conduct proceedings involving former member Constable Konstantinos Xanthopoulos, Regimental Number 60852 (Respondent).

[2] The Board found two contraventions of the RCMP *Code of Conduct* (Code) (set out in the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281 (*RCMP Regulations*)) established. Specifically, the Board found that the Respondent engaged in discreditable conduct contrary to section 7.1 of the Code by interfering with a conduct investigation in which he was the

subject member (Allegation 2), and provided false and misleading statements and submissions contrary to section 8.1 in a previous conduct matter (Allegation 3). As a result, the Board ordered the Respondent to resign within 14 days or be dismissed.

[3] The subject of the appeal pertains to the Board’s findings related to Allegation 1, a contravention of section 7.1 of the Code. The Board dismissed the allegation finding that it was initiated after the expiration of the one-year limitation period prescribed by subsection 41(2) of the *RCMP Act*. The Appellant argues that the Board made an error of law by finding that the knowledge of the Professional Standards Unit (PSU) investigator was deemed to be the knowledge of the conduct authority for purposes of triggering the limitation period.

[4] The appeal process for this type of decision is governed by subsection 45.11(1) of the *RCMP Act* which allows for the appeal of a decision by a conduct board to the Commissioner. Under subsection 45.16(11), the Commissioner has the authority to delegate her power to decide all matters related to conduct appeals. I have received such a delegation.

[5] In rendering this decision, I have considered the entire record consisting of the material before the Board (Material) and the appeal materials (Appeal) prepared by the Office for the Coordination of Grievances and Appeals (OCGA). References to the Material and the Appeal relate to the electronic page numbers of the corresponding document and references to the Board’s written decision (Decision) are indicated by paragraph number.

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

[7] For the reasons that follow, I allow the appeal.

BACKGROUND

[8] The Respondent was a member posted to “E” Division. Following a Code investigation, a *Notice to the Designated Officer* was issued by the Commanding Officer, “E” Division on September 20, 2017, containing the following allegations (Material, pp 1449-1450):

> **Allegation 1**
>
> On or between July 23, 2016, and September 23, 2016, at or near Surrey, in the province of British Columbia, [the Respondent] engaged in discreditable conduct contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.
>
> **Allegation 2**
>
> On or between September 20, 2016, and April 5, 2017, at or near Surrey, in the province of British Columbia, [the Respondent] engaged in discreditable conduct contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.
>
> **Allegation 3**
>
> On or between July 21, 2016, and December 21, 2016, at or near Surrey, in the province of British Columbia, [the Respondent] did not provide complete and accurate accounts pertaining to the carrying out of his responsibilities and the performance of his duties and the operation and administration of the Force, contrary to section 8.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

[9] On September 22, 2017, the Board was appointed to determine whether the Respondent contravened the provisions of the Code (Material, p 1451). On December 7, 2017, a *Notice of Conduct Hearing* containing the following particulars was issued (Material, pp 1453-1458):

> *Particulars of [Allegation 1]:*
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.
>
> 2. On July 22, 2016, [S] RCMP received a report from Ms. [MM] that her ex-boyfriend, Mr. [GB], had possibly abducted their 19 month old son. [S] File 2016-104985 was created and members were dispatched. You were not involved in this incident, which resulted in the arrest of Mr. [GB].
>
> 3. On July 23, 2016, Mr. [GB] contacted the [S] RCMP and requested assistance in retrieving his personal belongings from [Ms. MM]'s residence. [S] File 2016-105620 was created and you were the assigned lead investigator. Ms. [MM] who was not present at her residence, had left Mr. [GB]'s belongings outside, but had forgot to include Mr. [GB]'s welder log, which he needed for work. You attempted to contact Ms. [MM] but were unable to reach her.
>
> 4. Later on that night, you attended Ms. [MM]'s residence to follow up on [S] File 2016-105620. You stayed at her residence for approximately 20 minutes and gave her an RCMP business card with your personal cell phone number handwritten on it. The written number was [number redacted].

5. Over the next two weeks, while on duty, you attended or drove by Ms. [MM]'s residence in a marked RCMP vehicle, on several occasions. Specifically, you attended or drove past the residence at:

a. 12:00 on July 28, 2016;

b. 17:34 on July 30, 2016;

c. 21:11 on July 30, 2016;

d. 19:02 on July 31, 2016;

e. 21:39 on August 8, 2016.

There was no operational reason for you to attend Ms. [MM]'s residence on these occasions.

6. During one of your visits, you asked Ms. [MM] the reason why she had not called you. You also advised her that the number on the RCMP business card you provided her was your personal number.

7. You began to exchange personal text messages with Ms. [MM]. While off duty, you met with her, returned to her residence and engaged in consensual sexual activities with her.

8. You knew or ought to have known that Ms. [MM] was the victim of domestic abuse and that she called the RCMP, the day before you met her, reporting her son was being abducted by her ex-boyfriend, Mr. [GB].

9. While you were in a position of trust and authority you met Ms. [MM], a vulnerable person and complainant in [S] File 2016-104985, and you engaged in a sexual relationship with her.

Particulars of [Allegation 2]:

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

2. On August 12, 2016, Ms. [MM] attended the [F] detachment to make a complaint of breach of recognizance against her ex-boyfriend Mr. [GB], [F] File 2016-1856. During the interview, Ms. [MM] revealed to the investigator that she had been in a relationship with a [S] RCMP officer who responded to a call for service at her residence. She did not disclose the name of the officer.

3. On August 23, 2016, [S] Professional Standards Unit was made aware of Ms. [MM]'s disclosure and conducted some inquiries in an attempt to identify the member referred to by Ms. [MM].

4. On September 22, 2016, you were advised that you were being investigated for a contravention of the RCMP Code of Conduct, you contacted Ms. [MM] and asked if she had talked to anyone about your relationship.

5. You further questioned Ms. [MM] about the information she provided because you wanted to ensure both stories would match. Your actions caused Ms. [MM] to feel that you didn't want her to talk to the investigator about your relationship.

6. You therefore tried to interfere with a Code of Conduct investigation.

Particulars of [Allegation 3]:

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

2. On December 13, 2016, you were served with a copy of a “Notice of Conduct Meeting” to be convened on December 20, 2016, with your line officer Supt. [ML]. ACMT file 2016-336373. The Notice included two allegations, s. 3.2, and s. 7.1, both for conducting a traffic stop of a female without cause, to provide her with your personal cell phone number.

3. The conduct meeting was being held with respect to allegations that occurred on January 16, 2016. The Record of Decision (ROD) noted the s. 3.2 allegation was established, and it was noted the conduct alleged in the s. 7.1 allegation was already dealt with by the first allegation, therefore it was not established.

4. On January 3, 2017, you filed a Statement of Appeal of this ROD to the Office of Coordination of Grievances and Appeals (OCGA). Your submission included a document you prepared for the conduct meeting, which was also submitted to your line officer for his consideration during the conduct meeting. The document was titled “Written Submission in Response to Final Report - File No. 2016-336373”.

5. As a result of the investigation in relation to your claims made in your appeal of this matter it was discovered information included in your Conduct Meeting written submission was false and/or misleading. Specifically the following two statements:

> a. “As set out in my written statement [dated July 21, 2016], the reason that the card had my personal cell phone number was that I did not have a phone issued by the RCMP at the time.”
>
> b. “As set out in my written statement [dated July 21, 2016], in October I submitted the appropriate form (ED12) for phone replacement, which was signed by Inspector [M] and forwarded to Central Helpdesk Service. I was informed by [GT] sometime in February or March that my replacement phone had arrived, so I went to [GT] and picked it up. During the interim period I mostly used my personal cell phone while on duty, as have many officer at various times.”

6. Your RCMP cell phone records for phone number [number redacted], indicate that during December 2015 and January 2016, you were issued an

> RCMP BlackBerry, it was functional, and you used it to make and receive calls.
>
> 7. Central Helpdesk records indicate that you were provided a new BlackBerry device and you activated it on October 22, 2015.
>
> 8. Your PRIME sign-on comments data from October 2015 to February 2016, which you manually entered, listed your RCMP issued phone number [number redacted]. When you did not enter your work Blackberry phone number, the space was either left blank, or you were listed as the second officer signed in to the vehicle. Your personal cell phone [redacted] was not listed in your PRIME sign-on comments data during this time.
>
> 9. You therefore provided misleading information in your July 21, 2016 written statement to the Conduct Investigator, and you lied to Supt. [ML], your line officer, during a Code of Conduct process in your written submission.

CONDUCT PROCEEDINGS

[10] On July 20, 2018, the Respondent raised a preliminary objection to the allegations seeking that they be struck or dismissed (Material, pp 3308-3317). On October 23, 2018, the Board issued a written decision dismissing the Respondent's preliminary objection (Material, pp 3482-3487).

[11] As a result of additional disclosure received by the Respondent, a second preliminary motion was made seeking the dismissal of Allegation 1 on the basis that the limitation period to initiate it had already expired. The Board heard evidence and submissions on the preliminary motion at the conduct hearing on March 19, 2019 (Material, pp 4080-4182). After ruling on the preliminary motion, the Board heard arguments and evidence on Allegations 2 and 3, on March 20, 2019 (Material, pp 4184-4404).

[12] On March 21, 2019, the Board delivered its oral decision (Material, pp 4404-4438). The written decision was issued on April 25, 2019 (Appeal, pp 8-31).

A. Board's Findings on the Preliminary Motion – Allegation 1

[13] The Board dismissed Allegation 1 finding that it was initiated outside of the limitation period. The Board provided the following rationale (Decision, paras 4-24):

> [4] The Subject Member brought a preliminary motion seeking a dismissal of Allegation 1 on the basis that when it was initiated on September 20, 2017, the

limitation period had already expired. In order to determine if that was the case, I will first review the statutory provisions dealing with the responsibility to deal with conduct matters. That review must start with section 40 of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*], which states:

> **40 (1)** If it appears to a conduct authority in respect of a member that the member has contravened a provision of the Code of Conduct, the conduct authority shall make or cause to be made any investigation that the conduct authority considers necessary to enable the conduct authority to determine whether the member has contravened or is contravening the provision.

[5] Therefore, it is the responsibility of a conduct authority to cause to be made any investigation that he or she considers necessary to enable him or her to determine whether a member has contravened or is contravening a provision of the Code of Conduct.

[6] Under the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], the Commissioner has designated the following positions as conduct authorities:

> **2 (1)** The following persons, subject to any requirements that may be established by the Commissioner under subsection (2), are designated as conduct authorities in respect of the members who are under their command:
>
> > **(a)** members who are in command of a detachment and persons who report directly to an officer or to a person who holds an equivalent managerial position;
> >
> > **(b)** officers, or persons who hold equivalent managerial positions; and
> >
> > **(c)** officers who are in command of a Division.

[7] There are no provisions within the *RCMP Act*, the *Royal Canadian Mounted Police Regulations*, *2014*, SOR/2014-281, or the *Commissioner's Standing Orders* that allow for any further delegation of those designations to other members of the RCMP. Nor can any such delegation be done in policy (national, divisional or detachment) to override the provisions of the statutory instruments. The power to delegate has been recognized by the courts since the beginning of confederation, *Hodge v The Queen (1883-84)*, *9 AC 117*, but it may only be delegated by enabling statutes. Therefore, it is the responsibility of the various conduct authorities to investigate allegations against members of the RCMP in order to determine whether the member subject to an allegation has contravened the Code of Conduct.

[8] In reality, this investigative function is carried out by the Professional Standards Units (PSUs) across the RCMP on behalf of the conduct authorities,

for the simple reason that the conduct authorities do not have the capacity to do so themselves. Normally, PSU commences such an investigation upon receipt of a mandate letter from a conduct authority, providing them with the necessary direction. The ability to direct someone else to carry out the actual investigation comes from subsection 31(2) of the *Interpretation Act*, RSC, 1985, c 1-21 [*Interpretation Act*]*:*

> 31(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

[9] However, that doesn't change the fact that legally, it is the conduct authority who holds the responsibility and the authority. "E" Division PSU has no authority on its own to conduct a Code of Conduct investigation under the *RCMP Act.* Their authority is that of the various conduct authorities in the Division. In my view, they act as the agent of the Conduct Authority; and in that respect, every action undertaken by the PSU in respect to an allegation that a member has contravened the Code of Conduct is undertaken on behalf of a conduct authority.

[10] What is the effect then when:

> a) the PSU receives a complaint and conducts a "preliminary investigation" in order to determine if there is a basis upon which to warrant an actual Code of Conduct investigation directed by a conduct authority? and
>
> b) the PSU delays the notification to the conduct authority until such time as the PSU is satisfied that the grounds exist to warrant the Code of Conduct investigation?

[11] Under the law of agency in those circumstances, the knowledge of the PSU investigator/manager is deemed to be the knowledge of the Conduct Authority. The limitation period must then be triggered the moment that information known to the PSU is sufficient to reasonably believe that a member has contravened the Code of Conduct for the purpose of initiating an investigation (paragraphs 204 and 208 of RCMP Conduct Board decision 2018 RCAD 20183382 [*Phillips*]). The level of knowledge required is the information necessary to initiate an investigation, not all the verified details of the alleged misconduct. It is during the one-year limitation period that the necessary investigation is conducted to learn or confirm those details and to determine whether the imposition of conduct measures is appropriate or to initiate a Conduct Hearing (*Thériault v The Appropriate Officer of C Division of the Royal Canadian Mounted Police*, 2006 FCA 61 (CanLii) [*Thériault*]).

[12] I am mindful of the conduct board's comments at paragraph 190 of *Phillips* with respect to it being the knowledge of the applicable conduct authority that causes the limitation period to begin to run, not that of third

parties within the RCMP or subordinates. However, I don’t consider PSU investigators to be “third parties” to the conduct authorities when they have been entrusted and mandated by the conduct authorities to investigate and manage conduct matters on their behalf. What they learn in the course of managing and investigating conduct matters is therefore deemed to be known by the conduct authority on whose behalf they are acting. It is that knowledge that will trigger the start of the limitation period for the purposes of subsection 41(2) of the *RCMP Act*.

[13] This is also implied in policy at section 4.1.1 of the *Administration Manual*, Chapter XII.1 “Conduct”:

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

[14] A conduct authority cannot perform those functions until he or she has been notified that the information has been received that a member has allegedly contravened a provision of the Code of Conduct. The policy does not require that information be received by the conduct authority, it simply says where information has been received, implying that regardless of who receives the information (the PSU), it must either be immediately passed along to the conduct authority or it will be deemed that it has been received by the conduct authority.

[15] In response to the second question, it makes little difference if the PSU delays the notification to the conduct authority until such time as the PSU is satisfied that the grounds exist to warrant the Code of Conduct investigation. If the knowledge of the PSU is deemed to be the knowledge of the Conduct Authority, then when the PSU gains sufficient knowledge to trigger the limitation period (under the test in *Thériault*), then the limitation period begins to run. It therefore makes little difference when or even if they pass it along to a conduct authority.

[16] The relevant section of the *RCMP Act* is subsection 41(2), which states:

> **41 (2)** A hearing shall not be initiated by a conduct authority in respect of an alleged contravention of a provision of the Code of Conduct by a member after the expiry of one year from the time the contravention and the identity of that member as the one who is alleged to have committed the contravention became known to the conduct authority that investigated the contravention or caused it to be investigated.

[17] From the affidavit evidence tendered prior to the hearing and the *viva voce* evidence heard on this issue, I make the following findings of fact. On August 5, 2016, an email was received by the S. PSU from a member of S. Detachment alleging that a member of S. Detachment had inappropriately made some advances towards a complainant on a file. By August 9, 2016, (then) Corporal P. and Corporal G. of the S. PSU had conducted sufficient investigation to determine that the allegation was serious in that it involved a member taking advantage of a potentially vulnerable indigenous victim of reported domestic violence. The likely member involved had also been identified at that time as the Subject Member, because a review of his PRIME CAD log showed that he had attended Ms. M. M.'s residence at least five times in the days following the original call for service.

[18] What wasn't known at that time was the alleged nature of the contact between the Subject Member and Ms. M. M. However, that changed on August 23, 2016, when the Officer in Charge of the S. PSU, Inspector L., heard from Constable S. of F. N. Detachment. He was told on that day that Ms. M. M. had lodged a complaint at F. N. Detachment in relation to her ex-boyfriend. At that time, she also told Constable S. the following:

- a member did standby and keep the peace at her residence in S.;
- the member later left a card with his name on it, but she did not call him;
- the member came back another day, knocked on the door and asked her why she did not call him, and asked her on a date;
- they went on a date in W.R.; and
- they are no longer together.

[19] When that information is combined with what was already known on August 9, 2019, there was, according to any objective standard, enough information to trigger the start of the limitation period under subsection 41(2) of the *RCMP Act.* I find further support for this conclusion in the fact that there was no additional evidence obtained between August 23, 2016, and September 22, 2016, when Supt. M. L. was "officially" briefed and the Code of Conduct mandate letter issued. My conclusion then is that the limitation period was triggered on August 23, 2016, and that the initiation of a Conduct Hearing on September 20, 2017, was out of time.

[20] If I am wrong in my interpretation and application of the law of agency under these circumstances, then I also find that two different properly designated conduct authorities had sufficient knowledge on September 7, 2016, to trigger the limitation period. Inspector T. testified that, as a result of a conversation he had with Supt. M. L. on that day, he was aware that the Subject Member was going to be the subject of another Code of Conduct investigation, which was related to an ongoing one, in that it involved him inappropriately pursuing a female he met in the course of his duties for the

> purpose of pursuing a personal relationship. In his mind, it was serious enough that he was concerned that the Subject Member would be removed from duty.
>
> [21] I find some support for that finding in Supt. M. L.' s testimony that he met on a biweekly basis with the management of the S. PSU for a briefing/update of ongoing Code of Conduct matters. Whether or not the specific details of the file were discussed, there is little doubt in my mind that Supt. M. L. was advised of the identity of the Subject Member and of sufficient information to reasonably believe that he had contravened the Code of Conduct. There would be little reason for such meetings if that were not the case.
>
> [22] One other issue requires comment in terms of the application of the limitation period. I received both affidavit and *viva voce* evidence to the effect that there was a policy in place in S. Detachment that limited the "management" of conduct matters to the Officer in Charge of the Detachment and the Superintendent level. However, Detachment Management should be aware that, no matter their intent, such policies cannot override the relevant legislation. Subsection 40(1) of the *RCMP Act* requires a conduct authority to act on information received of a potential Code of Conduct contravention. That provision is imperative and not permissive. In addition, subsection 31(3) of the *Interpretation Act* states:
>
>> 31(3) Where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.
>
> [23] When subsection 40(1) of the *RCMP Act* and subsection 31(3) of the *Interpretation Act* are combined, it is clear that a conduct authority who becomes aware of such information must act. Deferring to a higher rank conduct authority in compliance with Detachment policy does not absolve him or her from the responsibility of a properly designated conduct authority and does not delay triggering the limitation period.
>
> [24] I find that Allegation 1 was initiated out of time and I have no jurisdiction to hear it. Therefore, Allegation 1 against the Subject Member is dismissed.

B. Board's Findings on Allegation 2 and Allegation 3

Findings - Allegation 2

[14] The Board determined that the Respondent met Ms. MM when he responded to a call for service to be present when her ex-boyfriend retrieved some personal belongings from her residence. Before leaving her residence, the Respondent provided Ms. MM with an RCMP business card on which he wrote his nickname and personal cellphone number. Over the next two

weeks, a personal relationship between the two developed and the Respondent attended Ms. MM's residence while on duty on at least five occasions (Decision, paras 27-29).

[15] After returning to work from a holiday on September 22, 2016, the Respondent was made aware of an impending Code investigation (this was in addition to an already ongoing Code investigation). The same day he contacted Ms. MM and had a 22-minute telephone conversation with her. The Respondent admitted that he contacted her knowing that when the Notice of Code Investigation was served on him, he would be ordered not to speak to her or any other witnesses. He testified that he contacted Ms. MM to ask her if she knew anything about the Code investigation as he was under the impression that it pertained to him harassing her.

[16] The Board determined that the Respondent discussed with Ms. MM, someone who he knew to be a witness in a pending Code investigation against him, whether she had gone to the RCMP to complain, how the complaint originated, the fact that she had spoken to the RCMP, and that the RCMP were being persistent in an attempt to obtain a statement from her. The Board also noted that the Respondent likely contacted Ms. MM because he knew he had engaged in inappropriate sexual relationship with her (Decision, paras 35-38, 42).

[17] In applying those findings of fact to the particulars of Allegation 2, the Board found that particulars 1, 2, 4, 5, and 6 were established on a balance of probabilities. The Board concluded that the Respondent wanted to know what Ms. MM shared with other members in order to shape his version of events and likely made her feel that he did not want her to talk to the investigator about their relationship. In the Board's view, a reasonable person would determine that this behaviour was discreditable as it could be seen as attempting to interfere with a Code investigation. Accordingly, the Board was satisfied that Allegation 2 was established (Decision, paras 43-45).

Findings - Allegation 3

[18] The Respondent admitted to particulars 1, 2, 3, 4, 7, and 8 of this Allegation, and partially admitted to particular 6. With regard to particular 5, based on the phone records provided in the Material, the Board determined that the Respondent was in possession of a fully functional RCMP issued telephone at the time he provided his personal cell phone number to Ms. F. Accordingly, the

Board was not convinced that the Respondent provided his personal cell phone number because he did not have an RCMP issued phone. The Board also took issue with the Respondent's explanation that he trusted strangers like Ms. F and Ms. MM with his personal cellphone number, but not the members he worked with.

[19] Similarly, with regard to particular 6, the Board determined that the phone records showed that the Respondent was in possession of an RCMP issued phone that was fully functional for the period between December 2015 and January 2016. As both these particulars were found established, the Board was satisfied that the Respondent provided misleading information in his written submission to Supt. ML during a Code process thereby also establishing particular 9. The Board noted that the Respondent was under no obligation to provide a statement, but when he made the decision to do so, he was obliged to ensure any statements he made were accurate (Decision, paras 47-52).

[20] In ultimately finding that Allegation 3 was established, the Board also confirmed that the allegation had not been previously dealt with by Supt. ML, or anyone else, and was rightfully before it in the conduct proceedings (Decision, pp 53-55).

C. Conduct Measures

[21] When contemplating appropriate conduct measures, the Board considered aggravating and mitigating factors and noted that dismissal should only be considered in the most extreme cases (Decision, paras 60-67).

[22] The Board found that in misconducting himself, the Respondent repudiated several essential elements of his employment with the RCMP, including the core values of honesty, integrity and accountability. The Board noted that an officer "who lies in a statement to an investigator and attempts to interfere in an investigation undermines the discipline process and thwarts the check and balance, which is integral to the public's trust". Therefore, to maintain the public's confidence, an officer who does not treat the police disciplinary process "with utmost integrity should absolutely face a sanction in the most serious range" (Decision, para 68).

[23] The Board was not convinced that the Respondent learned anything from his mistakes and noted that there was no medical explanation for his actions, which is typically present in cases where similar behaviour has not resulted in dismissal. Given the position of responsibility and trust held by a police officer sworn to enforce the law, the Board determined that retaining the Respondent as a member would not be in the best interests of the public or the Force. Accordingly, the Respondent was directed to resign from the Force within 14 days, or be dismissed (Decision, paras 70-72).

APPEAL PROCEEDINGS

Statement of Appeal

[24] On May 9, 2019, the Appellant filed a Statement of Appeal. The Appellant challenged the Board's finding that Allegation 1 was initiated out of time and should be dismissed. The Appellant claimed that the Board made an error of law by finding that the limitation period pursuant to subsection 41(2) of the *RCMP Act* was triggered when the PSU investigator had sufficient information to reasonably believe that a member has contravened the Code. As redress, the Appellant seeks a ruling that the Board erred in law by relying on subsection 31(2) of the *Interpretation Act*, RSC, 1985, c 1-21 (*Interpretation Act*) to determine that under the law of agency, the knowledge of the PSU is deemed to be the knowledge of the conduct authority.

[25] The Appellant noted that the appeal was not referable to the RCMP External Review Committee (ERC) given that the ground for appeal was a question of law regarding the *RCMP Act* and did not seek to interfere with the findings of Allegations 2 or 3 or the resulting conduct measures (Appeal, pp 6-7).

Initial Collateral Issues and Directions

[26] Prior to the submissions stage of the appeals process, a number of collateral issues were raised. I summarize these below.

Collateral Issue 1 – Correct Respondent

[27] On July 18, 2019, the Respondent informed the OCGA that he was not the proper respondent in the matter as he did not render the decision giving rise to the appeal. The Respondent also indicated that he could not be compelled to participate in the process as he was no longer a member and was therefore no longer bound by the *RCMP Act*.

[28] Although the OCGA explained that the *National Guidebook – Appeals* indicates that the respondent "is the member who is the subject of the conduct board's decision, if the appellant is the conduct authority who initiated the hearing by the conduct board", the Respondent maintained that he was not the correct respondent. He also identified another member of the RCMP to be his representative and informed the OCGA that he would not have any further personal involvement in the appeal (Appeal, pp 85, 97).

[29] On July 30, 2019, the OCGA sought direction from an adjudicator to confirm the correct respondent in the matter. On August 13, 2019, I issued a direction confirming that the Respondent was correctly identified by both the Appellant and the OCGA as the respondent in this appeal. I also confirmed that the Respondent could not be compelled to participate and that the outcome of this appeal would have no effect on his dismissal (Appeal, pp 107, 161).

Collateral Issue 2 – Referral to the ERC

[30] After receiving the Statement of Appeal, the OCGA requested justification from the Appellant to support why the appeal should not be referred to the ERC. On August 7, 2019, the Appellant explained that because the finding being appealed did not result in the imposition of conduct measures, it did not fall within the parameters of subsection 45.15(1) of the *RCMP Act* (Appeal, pp 65, 109-116).

[31] On August 29, 2019, I issued a direction concurring with the Appellant that the nature of the appeal involves a question of law and does not relate to the enumerated list of conduct measures set out in subsection 45.15(1) of the *RCMP Act*. Accordingly, I confirmed that this appeal was not referable to the ERC (Appeal, p 173).

Collateral Issue 3 – Standing

[32] On October 16, 2019, the Respondent raised the preliminary issue of standing with the OCGA. The Respondent challenged the standing of the Commissioner designated Level III Conduct Authority, "E" Division, to act as the Appellant given that the conduct hearing had been initiated by the former Commanding Officer (CO), "E" Division (Appeal, pp 182, 231-238).

[33] On December 29, 2020, I issued a direction confirming that the Level III Conduct Authority had the authority to act as the Appellant in this case by virtue of the *Letter of Designation* issued by the Commissioner on February 26, 2019. I also confirmed that the Appellant filed the appeal within the 14-day period set out in subsection 45.11(1) of the *RCMP Act* and section 22 of the *Commissioner's Standing Orders (Grievances and Appeals),* SOR/2014-289 (*CSO (Grievances and Appeals)*) (Appeal, p 323).

Appellant's Appeal Submission

[34] On February 11, 2021, the Appellant filed their appeal submission reiterating the Board's two reasons for finding that Allegation 1 was initiated outside the one-year limitation period and therefore statute-barred:

i. the first reason was that the limitation period was triggered on August 23, 2016, when the PSU gained sufficient knowledge to support a Code claim. The Board relied on the "law of agency" and explained that the knowledge of the PSU investigator was deemed to be the knowledge of the Conduct Authority; and

ii. the second reason was that the Board found that two properly designated conduct authorities had sufficient knowledge on September 7, 2016, to trigger the limitation period.

The Appellant is not contesting the Board's findings pertaining to the second reason, nor seeking to interfere with the Board's decision to dismiss Allegation 1 for lack of jurisdiction. Rather, the sole contention is that the Board erred in its interpretation of subsections 40(1) and 41(2) of the *RCMP Act* by failing to follow existing case law established by higher courts and finding that the

knowledge of the PSU is deemed to be the knowledge of the conduct authority (Appeal, pp 333-336).

[35] The Appellant explains that the Board erred by resorting to the *Interpretation Act* and the law of agency rather than undertaking a plain meaning interpretation of subsections 40(1) and 41(2) of the *RCMP Act*, and insists that a plain interpretation of these provisions unambiguously limits the initiation of a Code investigation or hearing to a designated conduct authority. The Appellant further contends that there is "no purview in the Conduct Authority provisions of the *RCMP Act*, for the unauthorized delegation of the powers, duties or functions of Conduct Authorities". Specifically, subsection 2(1) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 (*CSO (Conduct)*) and subsections 2(1) and 2(3) of the *RCMP Act* provide precise definitions of who a Commissioner may designate as conduct authorities (Appeal, pp 339-340).

[36] The Appellant claims that the amended *RCMP Act* was structured to reinforce the broad powers and responsibilities assigned to the Commissioner related to all matters connected to the Force as outlined in subsection 5(1). Had Parliament intended for PSU knowledge to trigger the subsection 41(2) limitation period, it would "have been explicit in legislation". In the Appellant's view, the Board engaged in a "line of analysis […] to justify imputing a legislated obligation upon the PSU" and erred by "reading in a deemed knowledge framework to a clear and unambiguous legislative scheme" (Appeal, p 341).

[37] Additionally, the Appellant maintains that the Board failed to adhere to the "fundamental doctrine of *stare decisis*" by not following the findings of the Federal Court of Appeal (FCA) and the Federal Court (FC) in *Thériault v RCMP*, 2006 FCA 61 (*Thériault*) and *Smart v Canada (Attorney General)*, 2008 FC 936 (*Smart*), respectively. In *Thériault*, the FCA held that it is the knowledge of appropriate officer, not of persons responsible for investigations and reporting on allegations of misconduct, that cause the limitation period to begin to run. In *Smart*, the FC found that the board erred in law by finding that knowledge imputed to the appropriate officer was sufficient to start the clock running with respect to the limitation period (Appeal, pp 341-342).

[38] Lastly, the Appellant points out that there was no finding of "shielding" in the Board's decision, yet the Board's "novel deemed knowledge framework resulted in a sharp reproach to the actions of PSU outlined in this case". Accordingly, the Appellant requests a finding pursuant to paragraph 45.16(1)(b) that the Board erred in its interpretation of subsection 40(1) and 41(2) of the *RCMP Act* "pertaining to 'the knowledge of the PSU' and deeming knowledge on the part of Conduct Authorities". The Appellant maintains that this determination "will have no practical impact on the ultimate decision of the Board to dismiss Allegation 1" or the decision regarding Allegations 2 and 3 (Appeal, p 343).

Respondent's Appeal Submission

[39] On March 9, 2021, the Respondent filed his written submission (Appeal, pp 1079-1090). He referred to a definition of agency cited in the Government of Canada's publication, *GST/HST Policy Statement P-182R*:

> In a sense, **an agent is an extension of a principal**, so the actions of the agent are those of the principle. […]
>
> **Agency exists where one person** (the principal) **authorizes another person** (the agent) **to represent it and take certain actions on its behalf**. The authority granted by the principal may be express or implied. In other words, an agency relationship may be created where one person explicitly consents to having another act on its behalf **or behaves in such a way that consent is implied**.
>
> [Emphasis in Respondent's submission].

The Respondent also referenced the FC's finding in *Frankowski v Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1253, at para 7, that each provision in a body of legislation enacted by a legislature is presumed to be capable of operating without coming into conflict with any other and that the presumption of coherence is "virtually irrebuttable".

[40] In the Respondent's view, the Appellant's argument "directly contradicts the virtually irrebuttable *presumption of coherence*" as it solely relies on the premise that PSU investigators are third parties to conduct authorities but fails to take into account the "law of agency" which does not view principles and agents as third parties in their relationship. The Respondent states that whether implicit or explicit, "an agency relationship exists where the agent becomes an extension of the

principle", and that the Board correctly determined such relationship existed between the PSU investigator and the conduct authority. The Respondent also notes that the Appellant's requested remedy is a "technical impossibility" as the Commissioner cannot "render a decision that an agency relationship did not exist but then choose to dismiss Allegation One" (Appeal, pp 1086-1087, 1089).

[41] In his response, the Respondent also introduces an unrelated abuse of process claim. The Respondent contends that the Appellant knew, or reasonably ought to have known, that the limitation period for Allegation 1 had lapsed and would be called into question, but nonetheless placed the particulars before the Board. In doing so, the Respondent claims that it increased the likelihood that the Board could not disregard the particulars of the allegation if/when imposing conduct measures on Allegations 2 and 3. The Respondent explains that this is evident in the commentary pertaining to Allegation 2 in which the Board stated that the most likely reason he contacted Ms. MM was because he knew he had engaged in an appropriate sexual relationship with her.

[42] The Respondent also suggests that Allegation 1 was the "operative allegation" triggering the *Notice to the Designated Officer* and, on their own, it is likely that Allegations 2 and 3 would have remained under the jurisdiction of Supt. ML. The Respondent states that the Appellant's conduct to this effect was "egregious", compromised the fairness of the proceedings and manifested in an abuse of process (Appeal, pp 1087-1088).

[43] Additionally, the Respondent states that the initial disclosure package provided by the Appellant was "bereft of any information" pre-dating the impugned date of Allegation 1. The Respondent alleges that the Appellant deliberately withheld probative disclosure records which the Board failed to correct. In order to "maintain the integrity of the RCMP Conduct Process" the Respondent requests an acknowledgement of the violations of procedural fairness and abuse of process, and seeks that the disclosure process continue to completion to determine whether the Appellant has a viable case and if so, that it be remitted to a newly constituted conduct board (Appeal, pp 1089-1090).

Appellant's Rebuttal Submission

[44] On April 8, 2021, the Appellant provided a rebuttal (Appeal, pp 1146-1153). The Appellant insists that there was no abuse of process or corresponding contravention of procedural fairness that warrants the Respondent's requested remedy. The Appellant is not seeking a confirmation of whether an agency relationship between a conduct authority and the PSU exists, but rather that the Board erred in law by unnecessarily reading in a novel legal analysis on the law of agency when the treatment of investigations within the statutory time limitation framework has been judicially considered by the FC and FCA (Appeal, pp 1149-1150).

[45] With regard to the abuse of process and fairness arguments, the Appellant argues that they could have been reasonably submitted before the Board as the Respondent was aware of them before the conduct hearing. As a result, pursuant to paragraph 25(2)(b) of the *CSO (Grievances and Appeals)*, the Respondent is not entitled to include any new information that was known, or could reasonably have been known, when the decision was rendered (Appeal, pp 1150-1151).

[46] As it pertains to the disclosure, the Appellant acknowledges that additional disclosure was provided during the proceeding resulting in Allegation 1 being statute-barred, but explains that in the initial disclosure, the Respondent was provided with sufficient information to inform him of the case he had to meet, as required by the principles of procedural fairness. The Appellant adds that it was open to the Respondent to inquire into the existence of additional disclosure at any time in the 11- month period between being served with disclosure on December 17, 2017, and prior to the additional disclosure request on November 21, 2018.

[47] Moreover, the Appellant explains that *Notice to the Designated Officer* has no evidential value, other than establishing the date on which the conduct authority initiated the conduct hearing process, and its omission from the initial disclosure did not establish a denial of procedural fairness. The Appellant also points out that the Record demonstrates that the Conduct Authority Representative reasonably responded to disclosure requests as they were raised (Appeal, pp 1151-1152).

[48] The Appellant also highlights that in imposing conduct measures for Allegations 2 and 3, the Board did not consider the inappropriate relationship the Respondent had with Ms. MM that was the subject of Allegation 1, nor did it consider Ms. MM's vulnerability status as an aggravating factor. Further, the Appellant indicates that the Board took into consideration any issues of unfairness towards the Respondent, but concluded that there was no evidence to support a finding that he was mistreated. This finding was made after the "ultimate remedy" of dismissing Allegation 1 was afforded to the Respondent (Appeal, p 1153).

[49] The Appellant insists that the Respondent's arguments are without merit and should be dismissed (Appeal, p 1153).

Subsequent Collateral Issues and Directions

[50] Following the submissions stage, two more collateral issues were raised by the Respondent. I summarize these below.

Collateral Issue 4 – Supplemental Submissions

[51] On April 14, 2021, the Respondent informed the OCGA that he wished to request leave to the adjudicator to make supplemental submissions to clarify "inaccurate and/or misleading statements" made in the Appellant's rebuttal, citing section 6.1.7 of the *National Guidebook – Appeals*, as the governing authority (Appeal, p 1170).

[52] On July 27, 2021, I issued a direction explaining that the impugned statements the Respondent was referring to were neither new nor additional as required by section 6.1.7 of the *National Guidebook – Appeals*. On the contrary, the Appellant's statements were made in reply to the Respondent's statements, which were improperly introduced in his March 9, 2021, response. The issues raised in the Respondent's response (abuse of process and disclosure) were not introduced in the Appellant's written submissions dated February 11, 2021, and were therefore beyond the scope of this appeal. The Respondent's permissible response is limited to the Appellant's initial position.

[53] Additionally, I explained that the Respondent should have made his disclosure based abuse of process claim before the Board as his assertions were well known to him at the time of those proceedings. As the disclosure being raised had no bearing on the issue challenged by the Appellant and relied on by the Board to dismiss Allegation 1, the Respondent's request to make supplemental submissions was denied (Appeal, p 1174).

Collateral Issue 5 – Reasonable Apprehension of Bias

[54] On July 29, 2021, the Respondent informed the OCGA that he wished to raise a collateral issue of a reasonable apprehension of bias. On September 7, 2021, the Respondent provided his submission requesting that I recuse myself from this appeal on the basis he was allegedly denied his procedural fairness right to be heard because I issued a direction rejecting his request to address the Appellant's rebuttal. The Respondent stated that in a different case with near identical circumstances, I afforded a commanding officer the opportunity to provide submissions. The Respondent also alleged that the previous directions issued in this appeal were all adverse to him and that my comments in these directions indicated a predisposition towards a certain result on the merits of the appeal (Appeal, pp 1178, 1185-1191).

[55] On April 13, 2022, I issued a direction on this issue. I explained that the none of the previous directions negatively affected the legitimate rights of the Respondent in this appeal, or the outcome on the merits. Further, I confirmed that throughout this appeal, the relevant procedures were followed and the Respondent was afforded the opportunity to be heard by way of his ability to make submissions on the merits, raise collateral issues, and provide submissions. I also clarified that in the other case that the Respondent referred to, the respondent had no right to make any submissions in response to the Appellant without a grant to do so by an adjudicator because the case did not arise from a decision of a conduct board. In this appeal, the Respondent already had the opportunity to make submissions in response to the Appellant's appeal submissions. Accordingly, I remained seized of the matter as the Respondent failed to demonstrate a reasonable apprehension of bias warranting my recusal (Appeal, pp 1219-1226).

ADJUDICATOR'S DECISION

Timeliness

[56] Pursuant to section 22 of the *CSO (Grievances and Appeals)*, an appeal to the Commissioner "must be made by filing a statement of appeal with the OCGA within 14 days after the day on which copy of the decision giving rise to the appeal is served on the member who is the subject of the decision". In my direction issued December 29, 2020, I confirmed that the Appellant's appeal was timely.

Admissibility of the Respondent's Supplemental Arguments on Appeal

[57] In his response to the Appellant's submissions, the Respondent introduced abuse of process arguments that went beyond the scope of the Appellant's appeal. Specifically, the Respondent alleges that the Appellant withheld probative disclosure records, including the *Notice to the Designated Officer*. The Respondent also claims that despite Allegation 1 being dismissed, the Board was still live to its particulars and referred to them when imposing conduct measures. In the Respondent's view, although the Board was "duly informed" of the Appellant's "disclosure obfuscation efforts, [and] the violations of procedural fairness", it took no action to correct the unfair outcome these efforts created (Appeal, p 1089).

[58] Although I already indicated in my direction dated July 27, 2021, that the arguments raised by the Respondent in his March 9, 2021, were improperly introduced and went beyond the scope of this appeal, I would like to make some comments for completeness. Before I do so, it is instructive to consider the Respondent's actions in a related matter, File 2020335274.

Respondent's Separate Appeal Filing and Federal Court Decisions

[59] On March 26, 2020, the Respondent filed his own Statement of Appeal with the OCGA, contending that the Board's decision was reached in a manner that contravened the applicable principles of procedural fairness, was based on an error of law, and was clearly unreasonable. The Respondent indicated that he was served with the Board's decision on May 1, 2019.

[60] Despite being reminded of the provisions in the *RCMP Act* and the *CSO (Grievances and Appeals)* governing his right to appeal in paragraph 73 of the Decision, the Respondent waited until March 26, 2020, to file his appeal which, at that point, was well outside the 14-day prescription period referred to in subsection 45.11(1) of the *RCMP Act* and set out in section 22 of the *CSO (Grievances and Appeals)* (File 2020335274, pp 4-6). Instead, the Respondent made a deliberate decision to file an application for judicial review in FC (T-522-19) on March 25, 2019, a few days after the conclusion of the conduct hearing. The application resulted in three decisions, 2019 FC 1609, 2020 FC 297, and 2020 FC 401, and was eventually dismissed for being brought prematurely. The Respondent appealed this decision to the FCA.

[61] On October 15, 2020, I declined the OCGA's request to amalgamate the Respondent's appeal with the Appellant's appeal, and instead directed the OCGA to obtain submissions from the Parties on the issue of timeliness and whether the Respondent should be granted a retroactive extension (File 2020335274, pp 85, 99-100).

[62] On July 12, 2021, I issued a decision dismissing the appeal and finding that the Respondent's circumstances did not warrant a retroactive extension. Specifically, I explained that the Respondent had not displayed a continued intention to exercise his statutory right of appeal, nor had he provided a reasonable explanation for the delay. I also noted that condoning the Respondent's forum shopping, as he tactically decided to ignore the governing statutory conduct appeal process by filing for judicial review, would prejudice the RCMP conduct appeal process.

[63] On May 11, 2022, the FCA in *Xanthopoulos v Canada (Attorney General)*, 2022 FCA 79, dismissed the Respondent's appeal finding that the FC did not make a palpable and overriding error in determining that there were no exceptional circumstances that would preclude the well-established principle that a party must exhaust all adequate remedial administrative processes before resorting to a judicial remedy.

Adjudicator's Comments

[64] It is clear from his actions in this appeal, File 2020335274, and the applications for judicial review, that the Respondent has acted in a deliberate manner as it pertains to his position on appeal.

After receiving the Board's written decision on May 1, 2019, the Respondent was aware of his statutory right to appeal the decision pursuant to section 45.11 of the *RCMP Act*, but he opted to file an application for judicial review instead, alleging "procedural unfairness in the RCMP's investigation and decision-making, erroneous fact-finding, and inadequacy of the appeal through the RCMP's internal administrative process" for failing to follow the appropriate process (*Xanthopoulos v Canada (Attorney General),* 2020 FC 401, at para 9).

[65] Only after the FC dismissed the application on March 23, 2020, for being brought prematurely, did the Respondent file an appeal with the OCGA on March 26, 2020. As this was over 10 months past the prescription period, I directed the Respondent to provide written submissions explaining why a retroactive extension of this period was warranted. The Respondent provided his submission on November 11, 2020, while also presenting arguments on the merits of his position in his response to the Appellant's submission in the current appeal on March 9, 2021, likely in the event that his retroactive extension request was denied. In the File 2020335274 decision issued on July 12, 2021, I explained that condoning the Respondent's deliberate forum shopping would prejudice the RCMP conduct appeal process, especially when his actions were not a good faith mistake.

[66] In this appeal, the determination of whether the Board made an error of law with respect to its findings on Allegation 1 will have no impact on the Board's decision to dismiss that allegation, nor will it impact the Board's decision regarding Allegations 2 and 3. As I previously explained to the Respondent, the outcome of this appeal will have no practical effect on the Respondent or the Board's decision to direct him to resign. It is likely that this is why the Respondent did not initially wish to participate in the appeal process as he indicated that he was "now out of the RCMP, not bound by the RCMP Act, [and] working in another country" (Appeal, pp 85, 97). For this reason, I find that the Respondent's disclosure and abuse of process submissions were improperly introduced and exceeded the scope of this appeal.

[67] Even if I were to consider the Respondent's arguments, I find that they are without merit.

[68] In the July 27, 2021, direction, I explained that the Respondent was aware of his disclosure based abuse of process assertions at the time of the hearing, and should have made those arguments at the time of the conduct proceedings. I also indicated in the File 2020335274 decision that disclosure was dealt with prior to the hearing and focussed on the timeliness of Allegation 1, which the Board ultimately dismissed. Further, the disclosure provided to the Respondent pertaining to Allegations 2 and 3 addressed their respective particulars. Allegation 2 fell to an assessment of the credibility of the context of the telephone conversation the Respondent had with Ms. MM on September 22, 2016, and Allegation 3 considered statements the Appellant made in addition to relevant RCMP cellphone records. These were adequately dealt with through the Board's credibility analysis and the disclosure provided, none of which were challenged by the Respondent (Decision, paras 25-45; Material, pp 82-89, 2542-2561).

[69] With regard to the absence of the *Notice to the Designated Officer* from the initial disclosure package, I accept, with some reservation, the assertion by the Appellant that this is a procedural document that "does not assist a subject member in knowing the case to meet" and therefore its omission, presumably an administrative oversight, from the initial disclosure did not, in the end, deny the Respondent procedural fairness (Appeal, p 1152). That said, I agree with the Respondent that in the normal course, the *Notice to the Designated Officer* should have been disclosed in the first instance.

[70] I do not accept the Respondent's argument that the Board could not "disabuse himself from Allegation One if/when imposing conduct measures on Allegations Two and Three" resulting in an abuse of process (Appeal, p 1088). When imposing conduct measures for Allegations 2 and 3, the Board confirmed that it would not consider the Respondent's relationship with Ms. MM, or her state of vulnerability as an aggravating factor since Allegation 1 was dismissed (Decision, para 66):

> The Conduct Authority asked me to consider as an aggravating factor the fact that Ms. M.M. was a young, vulnerable, indigenous victim of domestic violence. However, **I'm not imposing conduct measures for the inappropriate relationship that was the subject of Allegation 1. That Allegation was dismissed and is no longer before me.** Ms. M.M's state of vulnerability is substantially less relevant in terms of Allegation 2 and **I decline to consider it as an aggravating factor.**

> [Emphasis added.]

[71] Lastly, I disagree with the Respondent that the Board failed to turn its mind to any purported violations of procedural fairness. As it pertains to Allegation 1, the Board agreed with the Respondent that the one-year time limitation to initiate the hearing had expired and ensured fairness by dismissing the allegation. In this appeal, the Appellant is not seeking to interfere with the Board's decision to dismiss the allegation. Further, in rendering its final decision, the Board considered the material before it and explained that there was "nothing in the evidence before [him] that would indicate [the Respondent] was mistreated in any fashion during the course of this investigation or in these proceedings" (Decision, paras 24, 70).

[72] In sum, I find that the Respondent's abuse of process claims raised in his response to the Appellant's submission are without merit.

Legislative Framework and Standard of Review

[73] This appeal is governed by Part IV of the *RCMP Act*. Subsection 45.11(1) states:

> A member who is the subject of a conduct board's decision or the conduct authority who initiated the hearing by the conduct board that made the decision may, within the time provided for in the rules, appeal the decision to the Commissioner in respect of
>
> (a) any finding that an allegation of a contravention of a provision of the Code of Conduct by the member is established or not established; or
>
> (b) any conduct measure imposed in consequence of a finding referred to in paragraph (a).

[74] The *CSO (Grievances and Appeals)* sets out the obligatory considerations when rendering a decision:

> 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.

[75] The crux of this appeal is whether the Board made an error of law in its findings for Allegation 1.

[76] An error of law is generally described as the application of an incorrect legal requirement or a failure to consider a requisite element of a legal test, subject to the correctness standard (see, for example, *Housen v Nikolaisen*, 2002 SCC 33, at para 36 (*Housen*)). Stated another way, "[a] question which seeks to determine the proper interpretation of a legal requirement [or statutory provision] rather than the manner in which the requirement is applied to the particular facts is a question of law" (Robert Macaulay & James Sprague, Practice and Procedure before Administrative Tribunals, looseleaf (Toronto: Thompson Reuters, 2017), vol 3, at 28-336, n 236).

[77] Questions of mixed law and fact were distinguished from pure errors of law by the Supreme Court of Canada (SCC) in *Housen*, at paras 33 and 36:

> 33 Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. […]
>
> […]
>
> 36 […] Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[78] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*), the SCC held that in terms of reviewing administrative decisions for questions of law, in the absence of limited exceptions where the correctness standard would apply (i.e., "constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies" (para 53)), the applicable standard of review is reasonableness.

[79] In *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, the SCC explained that a reasonable decision is one that is justifiable, transparent, and intelligible and falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law". In *Vavilov*,

the SCC added that a reasonable decision is one that is based on reasoning that is “both rational and logical”. Making this determination does not require a “line-by-line treasure hunt for error” in a decision maker’s reasoning but rather, the reviewing body must be able to “trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived” (internal quotations removed) (paragraph 102).

[80] The SCC went on to explain that a decision will be unreasonable if the reasons for it read holistically (paragraph 103):

- fail to reveal a rational chain of analysis;
- reveal that the decision was based on an irrational chain of analysis;
- reach a conclusion that cannot follow from the analysis undertaken; or
- if read in conjunction with the record, do not make it possible to understand the decision maker’s reasoning on a critical point.

A decision may also be called into question if the reasons “exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise”. The SCC clarified that this does not mean that decisions should be held to “formalistic constraints and standards of academic logicians” but a reviewing body “must ultimately be satisfied that the decision maker’s reasoning ‘adds up’” (paragraph 104).

Merits

Did the Board make an error of law in interpreting that the relevant knowledge of the PSU is sufficient to trigger the limitation period set out in subsection 41(2) of the RCMP Act?

[81] The Appellant maintains that subsections 40(1) and 41(2) of the *RCMP Act* unambiguously imposes an obligation on conduct authorities to initiate a hearing within one year after it appears to

them that a member may have contravened the Code. In the Appellant's view, the Board erred by failing to consider existing precedent on the issue and resorting to the *Interpretation Act* and the law of agency to base its finding that knowledge of the PSU investigator is deemed to be the knowledge of the conduct authority.

[82] The Respondent supports the Board's finding that an agency relationship exists between conduct authorities and PSU investigators and by virtue of this relationship, the agent becomes an extension of the principal. In his view, the Appellant's argument directly contradicts the "virtually irrebuttable" presumption of coherence of bodies of legislation.

[83] As I will explain, I find that the Board erred in its interpretation of subsections 40(1) and 41(2) of the *RCMP Act*.

[84] To begin, I outline the relevant statutory provisions pertaining to conduct matters:

> ***RCMP Act***
>
> **Definitions**
>
> **2(1)** In this Act, […] ***conduct authority***, in respect of a member, means a person designated under subsection (3) in respect of the member; […].
>
> **Designation**
>
> **2(3)** The Commissioner may designate any person to be a conduct authority in respect of a member either for the purposes of this Act generally or the purposes of any particular provision of this Act.
>
> **Delegation**
>
> **5(2)** The Commissioner may delegate to any member, subject to any terms and conditions that the Commissioner directs, any of the Commissioner's powers, duties or functions under this Act, except the power to delegate under this subsection, the power to make rules under this Act and the powers, duties or functions under subsections 45.4(5) and 45.41(10).
>
> **Investigation**
>
> **40(1)** If it appears to a conduct authority in respect of a member that the member has contravened a provision of the Code of Conduct, the conduct authority shall make or cause to be made any investigation that the conduct authority considers necessary to enable the conduct authority to determine whether the member has contravened or is contravening the provision.

Limitation or prescription period

41(2) A hearing shall not be initiated by a conduct authority in respect of an alleged contravention of a provision of the Code of Conduct by a member after the expiry of one year from the time the contravention and the identity of that member as the one who is alleged to have committed the contravention became known to the conduct authority that investigated the contravention or caused it to be investigated.

CSO (Conduct)

Designation as conduct authorities

2(1) The following persons, subject to any requirements that may be established by the Commissioner under subsection (2), are designated as conduct authorities in respect of the members who are under their command:

(a) members who are in command of a detachment and persons who report directly to an officer or to a person who holds an equivalent managerial position;

(b) officers, or persons who hold equivalent managerial positions; and

(c) officers who are in command of a Division.

Requirements

2(2) The Commissioner may establish the requirements that a person must meet before acting as a conduct authority.

Revocation

2(3) The Commissioner may revoke the designation of a person as a conduct authority by written notice. The revocation takes effect as soon as the notice is served on the person.

Suspension of conduct process

2(4) At the time of the revocation, any conduct process that is the responsibility of the conduct authority is suspended until another conduct authority takes responsibility for the conduct process.

[85] I find that the Board correctly determined that it is the responsibility of a conduct authority, pursuant to subsection 40(1) of the *RCMP Act*, to cause to be made any investigation that they deem necessary to enable them to determine whether a member has contravened a provision of the Code. The Board also specified who is designated as a conduct authority under subsection 2(1) of *CSO (Conduct)* (Decision, paras 4-7). Subsection 5(2) of the *RCMP Act* indicates that the Commissioner may delegate her powers, duties, or functions except for the power to delegate itself.

[86] The Board then explained that in reality, the investigation function is typically carried out by PSUs on behalf of conduct authorities, by way of a mandate letter providing them with the necessary direction. Legally, however, the Board recognized that this does not change the fact that a PSU has no authority *on its own* to initiate a Code investigation, as it is the responsibility of the conduct authority to do so (Decision, paras 8-9).

[87] While the Board correctly described the role of conduct authorities in the conduct process, the Board erred in its subsequent determination of the role and authority of the PSU. In the Board's view, PSU investigators act as an agent of the conduct authority and therefore "the knowledge of the PSU investigator/manager is deemed to be the knowledge of the Conduct Authority". The Board explained that "every action undertaken by the PSU in respect to an allegation that a member has contravened the Code of Conduct is undertaken on behalf of a conduct authority" and in effect, what they learn "in the course of managing and investigating conduct matters is therefore deemed to be known by the conduct authority on whose behalf they are acting". Accordingly, the Board determined that the limitation period for purposes of subsection 41(2) of the *RCMP Act* must be "triggered the moment that information known to the PSU is sufficient to reasonably believe that a member has contravened the Code of Conduct" (Decision, paras 10-12).

[88] The Board came to this position by relying on subsection 31(2) of the *Interpretation Act*:

> Where power is given to a person, officer, or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

The Board also referred to paragraph 190 of the RCMP conduct board decision in *Phillips*, 2018 RCAD 20183382, and acknowledged that conduct board's reference to *Thériault* confirming that it is the knowledge of "the applicable conduct authority that causes the limitation period to begin to run, not that of third parties within the RCMP and/or subordinates of the conduct authority […] provided there is not some form of inappropriate attempt to shield the conduct authority from acquiring knowledge of an alleged contravention or the identify of the subject member". Nevertheless, the Board declined to "consider PSU investigators to be 'third parties' to the conduct

authorities when they have been entrusted and mandated by conduct authorities to investigate and manage conduct matters on their behalf" (Decision, para 12).

[89] In doing so, I find the Board's analysis diverges from the FCA finding in *Thériault* at paragraph 1:

> Were the disciplinary proceedings brought against the appellant as a member of the Royal Canadian Mounted Police (RCMP) subject to a limitation period pursuant to subsection 43(8) [as am. by R.S.C., 1985 (2nd Supp.), c. 8, s. 16] of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 (the Act)? That subsection states: "No hearing may be initiated by an appropriate officer under this section in respect of an alleged contravention of the Code of Conduct by a member after the expiration of one year from the time the contravention and the identity of that member became known to the appropriate officer" [underlining added]. **It should be noted that the knowledge in question here is that of the appropriate officer, not of persons responsible for investigating and reporting on allegations of misconduct. In other words, knowledge by third parties, even if they are subordinates of the appropriate officer, will not cause the limitation period to begin to run.**
>
> [Emphasis added].

While the FCA referred to a version of the *RCMP Act* that was in effect at the time, the now repealed subsection 43(8) is similar in wording and purpose of the current subsection 41(2), both of which prescribe the limitation period of when and who may initiate a hearing. Despite clearly indicating that knowledge of "persons responsible for investigating and reporting on allegations of misconduct" will not cause the limitation period to begin to run, the Board made its own finding otherwise, noting that because PSU investigators have been entrusted with investigating and managing conduct matters, what they learn in the course of such investigation is deemed to be the knowledge of the conduct authority (Decision, para 12).

[90] The FC in *Smart* referred to the FCA decision in *Thériault* and explained that it is "only the appropriate officer [themselves] who has the power to initiate formal disciplinary proceedings", a power that cannot be delegated and cannot even be exercised by the appropriate officer's representative. As it is only the appropriate officer who has the statutory power to initiate formal disciplinary proceedings, "it follows that the appropriate officer **must personally have the**

requisite knowledge in order to be able to do so. **Constructive knowledge, even on the part of appropriate officer's representative, will not suffice**" (emphasis added). As a result, the FC found that the adjudication board "**erred in law in finding that knowledge imputed to the appropriate officer** […] **was sufficient to start the clock running with respect to the limitation period for commencing disciplinary proceedings** […]" (emphasis added) (*Smart*, at paras 55-59).

[91] More recently, the FC in *Lewis v Canada (Attorney General)*, 2021 FC 1385, examined a similar issue as it pertained to the limitation period set out in subsection 42(2) of the *RCMP Act*. Like subsection 41(2), subsection 42(2) also prescribes a one-year limitation period, but on the imposition of conduct measures from the time the contravention and the identity of the member became known to the conduct authority that investigated the contravention or caused it to be investigated.

[92] The findings in these cases make it clear that it is the conduct authority who requires the requisite knowledge to initiate a hearing, and that imputing knowledge to the conduct authority, such as that of the PSU investigator, is inappropriate. It is not enough for the PSU investigator to simply be aware of the information, but rather, the PSU must provide this information to the designated conduct authority for it to trigger the time limit set out in subsection 41(2).

[93] In short, the Board failed, without a persuasive explanation, to follow the FCA in *Thériault* and the FC in *Smart*. In *Sanchez Herrera v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 401, at paras 72-73, the FC explained that *stare decisis* is a binding precedent by which "courts render decisions consistent with those they have already rendered or those that higher courts have already rendered" to ensure "certainty in the law" (internal quotations removed). The FCA in *Bank of Montreal v Li*, 2020 FCA 22, at para 37, explained that "an administrative decision-maker is bound to follow applicable precedents **from any court, let alone a court of appeal**; the doctrine of *stare decisis* calls for no less" (emphasis added).

[94] The SCC in *Carter v Canada (Attorney General)*, 2015 SCC 5, at para 44, described two situations where settled rulings of higher courts may be reconsidered: "(1) where a new legal issue

is raised; and (2) where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (internal quotations removed).

[95] Here, neither situation is present that would justify the Board's deviation from existing case law. The Board's only justification for its position is that it relied on the *Interpretation Act* and the law of agency to support its conclusion that because PSU investigators have been mandated by the conduct authority to "investigate and manage conduct matters on their behalf", knowledge of the PSU investigator is automatically deemed to be the knowledge of the conduct authority. The Board also defended its interpretation noting that it was "implied in policy" at section 4.1.1 of the RCMP *Administration Manual*, Chapter XII.1 "Conduct" (AM XII.1):

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

In the Board's view, the policy "does not require that information be received by the conduct authority" but simply that information is received, implying "regardless of who receives the information (the PSU), it must either be immediately passed along to the conduct authority or it will be deemed that it has been received by the conduct authority". If the knowledge of the PSU is deemed to be the knowledge of the conduct authority, then the Board surmised that the limitation is triggered as soon as the PSU gains sufficient knowledge and it "makes little difference when or even if they pass it along to a conduct authority" (Decision, paras 13-15). I am not convinced.

[96] In *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22, at para 6, the SCC confirmed that the "modern approach to statutory interpretation" requires that "words of a statute be read **in their entire text context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament**" (internal quotations removed) (emphasis added). The SCC also explained that the preferred method of statutory interpretation takes a "contextual and purposive interpretive approach" (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42).

[97] With this in mind, even without the guidance form the FCA and FC in *Thériault* and *Smart*, a review of the relevant provisions in the *RCMP Act* and *CSO (Conduct)* "read in their entire text context" supports a finding that it is the knowledge of the designated conduct authority that triggers the time limitation in subsection 41(2). Subsections 2(1) and 2(3) of the *RCMP Act* set out that a conduct authority is an individual specifically designated by the Commissioner and subsection 2(1) of the *CSO (Conduct)* lists the requirements an individual must possess to be designated a conduct authority. Subsections 2(3) and 2(4) of the *CSO (Conduct)* caution that should the Commissioner revoke the designation of the conduct authority; the conduct process is suspended until another conduct authority takes responsibility for it. I note that there is no provision in either the *RCMP Act* or the *CSO (Conduct)* that permits a PSU investigator, or any other individual except for a designated conduct authority, to initiate the conduct process.

[98] Reviewing these provisions in harmony with subsections 40(1) and 41(2) of the *RCMP Act*, the designated conduct authority is the only individual authorized to make or caused to be made any investigation deemed necessary to determine whether a member has contravened the Code. Additionally, it is only a conduct authority that may initiate a hearing within the prescribed time limit. Even section 4.1.1 of AM XII.1 explains that it is "**the conduct authority at the level that is the most appropriate to the subject member** [that] must […] determine the best means of addressing the situation" (emphasis added).

[99] While a conduct authority may give the PSU direction to undertake an investigation, as the Board pointed out, the PSU has no authority on its own to initiate an investigation or a hearing. Simply put, I find the Board erred in interpreting the relevant legislative and policy provisions to support a conclusion that the knowledge of the PSU is automatically deemed to be that of the conduct authority, even if that information is not specifically passed along to the conduct authority.

[100] I agree with the Appellant that "it is inconsistent with the legislative scheme to impose an obligation on an employee or unit, such as the PSU, after the fact" as the Board did in this case. What's more, I also accept the Respondent's position that there is a "presumption of coherence" in a body of legislation, but for the reasons previously explained, I do not agree that an inherent agency relationship exists such that a PSU investigator is an extension of the conduct authority.

[101] Lastly, I note that the Board was live to the issue of shielding since it was raised prior to and at the hearing with both Parties providing their respective position on the issue (Material, pp 3943- 3947, 4151-4179). In the end, the Board did not make a finding of shielding. As a result, I am satisfied that this was not an issue that affected the Board's determination that the PSU investigator's knowledge triggered the limitation period under subsection 41(2) of the *RCMP Act*.

Conclusion

[102] I find the Board erred by failing to follow existing case law established by the FCA and FC, by misinterpreting subsections 40(1) and 41(2) of the *RCMP Act*, and by incorrectly applying the *Interpretation Act* and the law of agency to support its position that the knowledge of the PSU investigator in these circumstances was sufficient to trigger the limitation period to initiate a conduct hearing.

DISPOSITION

[103] Pursuant to paragraph 45.16(1)(b) of the *RCMP Act*, I allow the appeal. In my view, the Board erred by deeming the knowledge of the PSU investigator in the circumstances of this case to be sufficient to trigger the subsection 41(2) limitation period.

[104] Even so, the Board actually provided two reasons for finding that Allegation 1 was initiated outside the one-year limitation period. The Board also found two properly designated conduct authorities had sufficient knowledge on September 7, 2016, to trigger the prescription period and this conclusion is not contested. Therefore, my finding does not impact the Board's ultimate decision to dismiss Allegation 1, or its determination of Allegations 2 and 3 that resulted in the Respondent being directed to resign from the Force or be dismissed.

Date

Steven Dunn, Adjudicator