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**ROYAL CANADIAN MOUNTED POLICE**

in the matter of a conduct hearing pursuant to the  
*Royal Canadian Mounted Police Act*, RSC, 1985, c R-10

Between:

**Commanding Officer, "J" Division**

(Conduct Authority)

and

**Constable Graham Bourque**  
Regimental Number 57118

(Subject Member)

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**Conduct Board Decision**

Louise Morel

February 16, 2023

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Ms. Sabine Georges, Conduct Authority Representative

Mr. David Bright, K.C., Subject Member Representative

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## **SUMMARY**

The *Notice of Conduct Hearing* contains two alleged contraventions of the RCMP Code of Conduct. Allegation 1 involves Constable Bourque deleting a video clip taken of a target during a surveillance and making an agreement with the surveillance team not to disclose the video despite the fact that it was evidence in a criminal investigation. Allegation 2 involves Constable Bourque failing to ensure that all of the evidence he obtained was completely and accurately included in the surveillance report and falsely attesting to the truthfulness of this report.

The Conduct Board found both Allegations 1 and 2 established and imposed a conduct measure of a forfeiture of 25 days' pay.

## **INTRODUCTION**

[1] On March 11, 2020, the “J” Division Criminal Operations – Core Policing Officer received an email from the Deputy Chief Federal Prosecutor for Public Prosecution Service of Canada (PPSC), in which they indicated having uncovered the apparent misconduct of four RCMP officers involved in a surveillance operation that may, if established, compromise a criminal prosecution and the administration of justice. The following day, the Commanding Officer became aware of the incident and ordered a Code of Conduct investigation into the matter.

[2] The allegations are set out in the *Notice of Conduct Hearing*, dated June 30, 2021. On November 11, 2021, Constable Bourque filed his response to the allegations, pursuant to subsection 15(3) of the *Commissioner’s Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*]. He denied both allegations.

[3] On March 12, 2021, Mr. Gerry Annetts was appointed as the Conduct Board, pursuant to subsection 43(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*].

[4] On May 11, 2022, I was appointed as the new Conduct Board. In accordance with section 45 of the *RCMP Act*, I must decide whether each allegation is established on a balance of probabilities. In other words, I must determine for each allegation whether it is more likely than not that Constable Bourque has contravened the RCMP Code of Conduct. If I find one or more of the allegations to be established, then I must impose conduct measures.

[5] The Conduct Hearing was held virtually the week of September 20, 2022. I delivered my oral decision on the allegations on September 22, 2022, in which I found both allegations established. Following submissions from the parties on conduct measures, I rendered my oral decision on conduct measures on September 23, 2022, and imposed a 25-day forfeiture of pay. This written decision incorporates and expands upon that oral decision.

### **Publication ban**

[6] On September 22, 2022, at the request of the Conduct Authority Representative and with the consent of the Subject Member Representative, I imposed a publication ban prohibiting any further publication, broadcast or transmission of any information disclosed during the Conduct

Hearing that deals with ongoing criminal or homicide investigations and that does not form part of the allegations before the Conduct Board.

## ALLEGATIONS

[7] In accordance with the *Notice of Conduct Hearing*, the allegations read as follows:

### **Allegation 1**

On or about, May 15, 2019, at or near Moncton, in the Province of New Brunswick, Constable Graham Bourque engaged in conduct contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

### **Particulars**

1. At all material times you were a member of the Royal Canadian Mounted Police (“RCMP”) posted to Codiak Detachment in “J” Division, in the Province of New Brunswick.
2. On May 15, 2019, you were conducting surveillance with [Corporal (Cpl.)] Mathieu Potvin, [Constable (Cst.)] Eric Pichette and Cst. Melissa Cormier in relation to file [file name redacted].
3. At approximately [8:18 p.m.], you started to video record an individual leaving the residence that was under surveillance. Approximately 25 minutes later, you realized that the recording was still running.
4. At approximately [8:43 p.m.], you were involved in the following radio communications with the surveillance team:

BOURQUE: Okay, question for you guys. Say, the video camera, where I took a brief video, didn't stop recording and it video recorded for twenty-five minutes. Can we edit that to just ten seconds?

PICHETTE: I don't think you can because, uh, Max was trying to do vetting on the videos for Jamie, and, uh, they ended up not s-, not sending anything; it was sensitive, so he was just scrapping the video, so not sending it.

POTVIN: Graham, I didn't write that, I didn't yet that you'd, you, uh, you took a video, so we can act as if it never happened.

BOURQUE: Yeah, just leave it out. I mean, I've had two other videos of [the target] leaving that place. PICHETTE had it yesterday. It's just him leaving apartment and going in, but I guess, I literally just looked down and it said twenty-five minutes and the read button was on. Um...

POTVIN: Is the [other target] video the same, or...?

BOURQUE: No, that's a different one. And I'll see. Like there's, there's gotta be a way of doing that. But, uh, just don't write anything down for now.

POTVIN: Yeah, well technically if you're (\_\_\_\_) with full disclosure, it has to be disclosed, right? But if it never happened, it never happened. You can't, you can't try to cut pieces of, uh, of video off. It'll just create an issue for no reason.

BOURQUE: Yeah, and the only other thing it just would've had us losing him on video, looking for him, and talking on the radio, so I would just say that it never happened.

POTVIN: Copy.

PICHETTE: Yeah, but wait, maybe you just restart a new one for five minutes.

BOURQUE: Yeah, that's true. I'll just – we'll talk later. I'll, I'll go through it there and we'll figure it out.

5. You made an agreement with the surveillance team not to disclose the video you took at [8:18 p.m.] (the "Video") although it was evidence in a criminal investigation. You also made an agreement to create and submit documentation that would be consistent with this action.
6. The Video was not mentioned in the May 15, 2019, surveillance report (the "Surveillance Report") and was not submitted for disclosure. You deleted the Video and it cannot be recovered.
7. On May 16, 2019, you reviewed and signed the Surveillance Report although it included false and misleading information. You therefore attested to the truthfulness of this report with disregard for the accuracy and completeness of the information it contained.
8. As a surveillance team member, you failed to ensure that all your observations and any evidence you obtained were completely and accurately included in the Surveillance Report. Your failure resulted in the destruction of evidence and the submission of a false and misleading police report in a criminal investigation.
9. Your actions in relation to this incident are discreditable.

## **Allegation 2**

On or about, May 16, 2019, at or near Moncton, in the Province of New Brunswick, Corporal Mathieu Potvin engaged in conduct contrary to section 8.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

### **Particulars**

1. At all material times you were a member of the Royal Canadian Mounted Police (“RCMP”) posted to Codiac Detachment in “J” Division, in the Province of New Brunswick.
2. On May 15, 2019, you were conducting surveillance with Cpl. Mathieu Potvin, Cst. Eric Pichette and Cst. Melissa Cormier in relation to file [file name redacted].
3. At approximately [8:18 p.m.], you started to video record an individual leaving the residence that was under surveillance. Approximately 25 minutes later, you realized that the recording was still running.
4. At approximately [8:43 p.m.], you asked the surveillance team if it was possible to edit video and a discussion took place over the radio.
5. You made an agreement with the surveillance team not to disclose the video you took at [8:18 p.m.] (the “Video”) although it was evidence in a criminal investigation. You also made an agreement to create and submit documentation that would be consistent with this action.
6. The Video was not mentioned in the May 15, 2019, surveillance report (the “Surveillance Report”) and was not submitted for disclosure. You deleted the Video and it cannot be recovered
7. On May 16, 2019, you reviewed and signed the Surveillance Report although it included false and misleading information. You therefore attested to the truthfulness of this report with disregard for the accuracy and completeness of the information it contained.
8. As a surveillance team member, you failed to ensure that all your observations and any evidence you obtained were included in the Surveillance Report. Your failure resulted in the destruction of evidence and the submission of a false and misleading police report in a criminal investigation.

[*Sic throughout*]

### **CREDIBILITY OF WITNESSES**

[8] The Record before me includes statements from Corporal Potvin and Constables Bourque, Pichette and Cormier, all of whom were present during the May 15, 2019, surveillance and either participated or were privy to the 8:43 p.m. recorded radio communication. At the Conduct Hearing, all four members testified.

### **Applicable legal principles to determine credibility and reliability of evidence**

[9] In assessing the credibility of the four witnesses, I must consider whether they are being truthful as well as whether their evidence is reliable (i.e., whether the witness is in a position to accurately perceive and recollect what they observed). I may find a witness's evidence to be truthful, but unreliable. It is also open to me to accept some, none or all of a witness's evidence on a given point.<sup>1</sup>

[10] I must consider the impact of the inconsistencies in that evidence and whether, when taken as a whole in the context of the totality of the evidence, they impact the witness's credibility.<sup>2</sup>

[11] In *Faryna*,<sup>3</sup> the Court notes that a witness's evidence cannot be assessed solely on their demeanour, i.e., that they appear to be telling the truth. Rather, a trier of fact must determine whether the witness's story is consistent with the most probable interpretation of the surrounding facts.

[12] The determination of whether the witness's account has an "air of reality" is subjective, but it must be grounded in the totality of the evidence.<sup>4</sup>

### **Constable Cormier**

[13] Constable Cormier was a member of the surveillance team on May 15, 2019, having been seconded to assist on the file in February 2019. Her responsibility that day was to both participate in the active surveillance and monitor an iPad, which livestreamed video of one of two targeted locations.

[14] Constable Cormier testified that she had no previous experience on surveillance prior to this file. Her evidence was consistent with her statement and I found Constable Cormier's evidence to be credible and reliable.

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<sup>1</sup> *R. v R.E.M.*, 2008 SCC 51, at paragraph 65.

<sup>2</sup> *F.H. v McDougall*, 2008 SCC 53 [*McDougall*], at paragraph 80.

<sup>3</sup> *Faryna v Chorney*, 1951 CanLII 252 (BC CA), [1952] 2 DLR 354 [*Faryna*], at page 357.

<sup>4</sup> *McDougall*, at paragraph 58.



### **Constable Pichette**

[15] Constable Pichette was the designated team leader of the surveillance team on May 15, 2019, responsible for ensuring the team fulfilled the objectives of the “Triangle Command” responsible for this surveillance file.

[16] I found Constable Pichette’s evidence to be highly credible and reliable. His oral evidence was also consistent with his statement. He answered questions clearly and in a forthright manner.

### **Corporal Potvin**

[17] Overall, I found Corporal Potvin’s evidence to be credible and reliable. He provided his evidence in a direct and forthright manner. His oral evidence was consistent with his previous statements; sworn testimony of June 2, 2020, at the Preliminary Inquiry of the target in the deleted video clip; and, in his subsection 15(3) *CSO (Conduct)* response to the Code of Conduct allegations in a concurrent conduct proceeding.

### **Constable Bourque**

[18] On the whole, I found Constable Bourque’s evidence to be credible and reliable. His oral evidence, for the most part, was consistent with his statements.

[19] He was a member of the surveillance team on May 15, 2019, responsible for active surveillance as well as documenting the target’s presence by video at two specified locations.

[20] When first confronted in March 2020, Constable Bourque readily admitted that, after asking his team members if a video could be vetted and being told that it could not, he had decided to delete it.

[21] I did note a few inconsistencies in Constable Bourque’s evidence. For example, during his oral testimony, he stated that after his radio communication with Corporal Potvin and Constable Pichette, he consulted an Information Technologist (IT) to ascertain whether the personal portion of the recording could be vetted, but he was told that it could not. This alleged consultation with IT is information not contained in any of his previous statements; sworn testimony of June 2, 2020,

at the target's Preliminary Inquiry; or his subsection 15(3) *CSO (Conduct)* response to the Code of Conduct allegations against him.

[22] Overall, this minor and uncorroborated inconsistency did not significantly impugn the credibility or reliability of Constable Bourque's evidence.

### **Summary of established facts by the Conduct Board**

[23] On June 3, 2022, I provided a *Determination of Established Facts*, which sets out the following undisputed facts.

[24] At all material times, Constable Bourque was a member of the RCMP, posted to Codiac Detachment, in "J" Division, in the province of New Brunswick.

[25] On May 15, 2019, he was conducting surveillance with Corporal Potvin and Constables Pichette and Cormier.

[26] At approximately 8:18 p.m., Constable Bourque started to video record an individual leaving the residence that was under surveillance. Approximately 25 minutes later, he realized that the recording was still running.

[27] At approximately 8:43 p.m., Constable Bourque was involved in a radio communication with the surveillance team, which was recorded live and the transcript of that communication is set out in the *Notice of Conduct Hearing*.

[28] The video clip was not mentioned in the May 15, 2019, surveillance report and it was not submitted for disclosure. Constable Bourque deleted the video and it cannot be recovered.

[29] On May 16, 2019, Constable Bourque reviewed and signed the surveillance report even though it failed to mention the 25-minute recording that included 10 seconds of the target. Constable Bourque attested to the truthfulness of the surveillance report with disregard for its accuracy and completeness.

## **EVIDENCE**

[30] As stated by the Supreme Court of Canada in *McDougall*,<sup>5</sup> “[...] evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test [...]”; however, the Supreme Court recognizes that there is “no objective standard to measure sufficiency”.

### **Constable Cormier’s testimony**

[31] Constable Cormier testified that she heard the radio communication between Corporal Potvin and Constables Bourque and Pichette, but that she did not participate as she had nothing to contribute.

[32] Constable Cormier understood the conversation to be with respect to the proper way to address an error in the use of video equipment. At no time did she understand the members to be discussing the destruction of a video or evidence.

[33] Constable Cormier testified that she became aware of a deleted video clip in March 2020 when Corporal De Botton advised her that the Crown had sent an email concerning the radio communication he had transcribed.

[34] Constable Cormier testified that she does not have an independent memory of the May 15, 2019, discussion, and that her recollection is based upon reviewing the transcript of the conversation in March of 2020.

[35] Constable Cormier confirmed that, in the 10 months between May 2019 and March 2020, she did not have any communications with the other members of the surveillance team about this video clip.

### **Constable Pichette’s testimony**

[36] Constable Pichette testified that he understood Constable Bourque to be describing a “video malfunction” during the impugned radio communication. He testified that, on May 15 and 16, 2019, he did not believe or understand that Constable Bourque had, in fact, taken a video of

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<sup>5</sup> *McDougall*, at paragraph 46.

the target. As in the case of Corporal Potvin, it was not until 10 months later, after a complaint from the PPSC, that he became aware of Constable Bourque having taken a 25-minute video that included 10 seconds of the target and then deleting it.

[37] Constable Pichette recalled that, shortly after being advised of the PPSC complaint in March 2020, Constable Bourque apologized to him for having deleted the video clip. He could not recall the exact conversation or where it took place.

[38] Constable Pichette testified that Constable Bourque was asking if one could “vet” a video and that he advised that, from experience, he did not think one could edit a surveillance video.

[39] Constable Pichette stated that there was no communication between the team members with respect to the destruction of a portion of a tape or the tape completely. Nor did he have any conversation with any of the team members between the time of the radio conversation on May 15, 2019, and 10 months later when he found out from Corporal De Botton that the video had been deleted.

[40] Finally, Constable Pichette explained that, when preparing disclosure to be forwarded to the Crown, the usual practice is that a radio dispatcher downloads the original radio communication and forwards it to a surveillance team member to review and suggest vetting to the Crown. Once an original is obtained, a second CD is produced, which includes proposed vetting to the Crown and the rationale to support such vetting. Thereafter, both the original and the copy with the proposed vetting is forwarded to the Crown for a decision with respect to the proposed vetting.

[41] In this case, as a result of a shortage of staff, the surveillance team members, as opposed to a radio dispatcher, were authorized to go on the radio system and extract the original of the radio communications for disclosure.

[42] Constable Pichette testified that he was responsible for downloading the original radio communications for the month of May 2019 and for producing the second CD with the proposed vetting. He noted that he “flagged” the May 15, 2019, 8:43 p.m. radio communication for the Crown to review, and he had suggested that it be vetted as he thought it was irrelevant. It was because of this flagging that the discussion came to the attention of the Deputy Chief Federal

Prosecutor at PPSC, who formed the opinion that the surveillance team intentionally suppressed evidence that ought to have been disclosed.

[43] In response to a direct question from me, Constable Pichette testified that, in downloading the original radio communication of May 15, 2019, he could have deleted the communication had he decided to do so.

### **Corporal Potvin's testimony**

[44] During his testimony, Corporal Potvin acknowledged that when one reviews the transcript of the radio communication of May 15, 2019, it is clear that Constable Bourque verbalized that he took a 25-minute video that included 10 seconds of the target. However, that is not what Corporal Potvin understood on May 15, 2019.

[45] Corporal Potvin understood that Constable Bourque attempted to take a video of the target leaving the residence but that his camera malfunctioned. It was not until March 13, 2020, when he was informed by Corporal De Botton of the Crown's allegation that the surveillance team destroyed evidence that he became aware of the 25-minute video that included 10 seconds of the target captured by Constable Bourque and subsequently deleted.

[46] Corporal Potvin denies that there was any "agreement" by the surveillance team not to disclose the video taken or an "agreement" to create and submit the surveillance report consistent with this. He did not know there was a video; consequently, how could there be an "agreement" not to disclose it or to create and submit a surveillance report omitting the video.

[47] Corporal Potvin testified that, shortly after March 13, 2020, after his discussion with Corporal De Botton, Constable Bourque apologized via text for deleting the 25-minute video that included 10 seconds of the target.

[48] During his cross-examination by the Subject Member Representative, Corporal Potvin testified that the deletion of the video clip did not jeopardize the project as it came to a successful conclusion. The target was arrested, charged with drug trafficking and convicted.

### **Constable Bourque's testimony**

[49] Constable Bourque testified that, on May 15, 2019, he was observing one of the targeted locations and was equipped with a camera. He took a 25-minute video that included 10 seconds of the target exiting a location under surveillance, coming down a set of stairs and getting into his vehicle. Constable Bourque stated that he then dropped the camera to undertake active surveillance with the team.

[50] Constable Bourque advised that he believed that he had turned off the camera but, approximately 25 minutes later, he realized that the camera had inadvertently continued to record radio communications of the surveillance team as well as a personal telephone conversation he had either with his wife or with regard to her with another family member.

[51] Constable Bourque stated that he asked his team members if it was possible to vet the video clip and, after being told that the video could not be vetted, he deleted it as he believed there was no evidentiary value to the 25-minute video that included 10 seconds of the target exiting the location.

[52] Constable Bourque testified that his observation with respect to the target exiting the location, walking down the stairs and getting into his motor vehicle was noted on the surveillance report and he initialled his observation.

[53] When asked if he made an agreement with Corporal Potvin to destroy the video and modify the surveillance report, Constable Bourque testified that he did not. He believed the 10-second clip was irrelevant as there was nothing new in the video that the team did not already have on film and he "thought" the others were on the same page.

[54] In cross-examination by the Conduct Authority Representative, Constable Bourque testified that Corporal Potvin did not coach him to destroy the video. Constable Bourque stated that he believed that, on May 15, 2019, Corporal Potvin understood that he had a video clip, but he now understands that was not the case.

## Documentary evidence

[55] Corporal Potvin was also subject of a conduct hearing because of the May 15, 2019, surveillance and the fact that he was the scribe responsible for producing the surveillance report for that date. As part of his subsection 15(3) *CSO (Conduct)* response to the Code of Conduct, he provided the Conduct Board a text message dated March 18, 2020, authored by Constable Bourque and sent to both he and Constable Pichette.<sup>6</sup> It reads as follows:

Boys, I feel awful its come to this. Sorry we're all involved in this due to me forgetting to turn off a video clip & then deleting it. I literally didn't think it was anything but I assume I'll take the brunt of this. [...]

[*Sic throughout*]

## ANALYSIS

### Allegation 1 – Discreditable conduct

[56] In the conduct process, the onus is on the conduct authority to demonstrate that the allegations are established on a balance of probabilities. The conduct board is then responsible for determining whether this burden has been met.

[57] Section 7.1 of the RCMP Code of Conduct states: “Members behave in a manner that is not likely to discredit the Force.” The test for “discreditable conduct” was developed by the RCMP External Review Committee and consists of four steps.

[58] In order to establish an allegation under section 7.1 of the Code of Conduct, the Conduct Authority must establish each of the following on a balance of probabilities:

- a) the acts that constitute the alleged behaviour;
- b) the identity of the member;
- c) whether the member’s behaviour is likely to discredit the Force;
- d) whether the member’s behaviour is sufficiently related to their duties and functions so as to provide the Force with a legitimate interest in disciplining the member.

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<sup>6</sup> Annex A, *Corporal Mathieu Potvin’s Section 15(3) CSO (Conduct) Response to a Code of Conduct*, dated April 22, 2022.

[59] There is no dispute surrounding step 2 concerning the identity of Constable Bourque, nor is there any dispute with respect to step 4 as the allegations occurred while Constable Bourque was on-duty and conducting surveillance. The other two steps require further analysis.

*What are the acts that constitute the alleged behaviour?*

[60] The acts that constitute the alleged behaviour in this allegation is the destruction of a 25-minute video that included 10 seconds of the target and making an agreement with the surveillance team not to disclose the video despite the fact that it was evidence in a criminal investigation.

***Destruction of the video clip***

[61] Constable Bourque testified that he took a 10-second video clip of the target exiting a location under surveillance and getting into his car. He believed he had turned off the camera when he joined the surveillance team in an attempt to follow the target; however, the camera inadvertently continued to record for 25 minutes.

[62] According to Constable Bourque, during those 25 minutes, there is a black screen but the camera recorded whatever was being said over the air as well as a personal conversation he had. After being told that he could not vet the video, he opined that there was no evidentiary value to the 10-second clip as they already had previously recorded the target entering and exiting the locations.

[63] Constable Bourque confirmed that he deleted the video as he believed that he had the discretion to do so.

[64] When Constable Bourque was first confronted, on March 11, 2020, with the allegation that he had deleted a video clip of a target exiting a residence under surveillance, which was evidence in a criminal investigation, he readily admitted that he did.

[65] On or around March 18, 2020, Constable Bourque sent Constable Pichette and Corporal Potvin a text message apologizing for deleting the video.<sup>7</sup>

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<sup>7</sup> Annex A, *Corporal Mathieu Potvin's Section 15(3) CSO (Conduct) Response to a Code of Conduct*, dated April 22, 2022.



[66] Furthermore, during his testimony before me, Constable Bourque again admitted to deleting the video clip as he was of the opinion that it was of poor quality and had no evidentiary value.

[67] Based on the foregoing, I find that the Conduct Authority has established on a balance of probabilities that Constable Bourque took a 25-minute video that included 10 seconds of a target during the May 15, 2019, surveillance and thereafter deleted it.

*Agreement with the surveillance team*

[68] Constable Bourque admitted every particular of Allegation 1, except for particular 5, which reads:

5. You made an agreement with the surveillance team not to disclose the video you took at [8:18 p.m.] (the “Video”) although it was evidence in a criminal investigation. You also made an agreement to create and submit documentation that would be consistent with this action.

[69] During his testimony, Constable Bourque denied any agreement with members of the surveillance team. He testified that he made the decision to delete the video as he felt it had no evidentiary value and he noted his observation on the surveillance report.

[70] Corporal Potvin, Constable Cormier and Constable Pichette all testified that, on May 15, 2019, they understood that Constable Bourque had attempted to take a video of the target, but that his camera malfunctioned. All three denied any agreement to either destroy the video or to submit documentation that would be consistent with this action.

[71] The Conduct Authority Representative, in her submissions, opines that the transcript of the radio communication establishes that Constable Bourque and Corporal Potvin agreed to suppress the video and to produce a false surveillance report.

[72] She points to Corporal Potvin’s statement, at line 537 of Exhibit 1, which reads:

Graham I didn't write that, I didn't write yet that you did uh, you took a video so we can act as if it never happened.<sup>8</sup>

[73] The Conduct Authority Representative wants me to draw the inference that by stating “we can act as if it never happened” and Constable Bourque responding “Yeah, just leave it out”<sup>9</sup> constitutes an agreement to suppress the video.

[74] However, the Conduct Authority Representative's submissions do not address the fact that Corporal Potvin and Constables Pichette and Cormier testified that they did not understand that there was a video. To the contrary, they understood that Constable Bourque had tried to take a video and that the camera malfunctioned.

[75] Corporal Potvin testified that he was referring to the camera malfunction when he stated that “we can act as if it never happened”.

[76] Constable Bourque essentially admitted to all of the particulars of this allegation, with the exception of conspiring with the surveillance team not to disclose the video clip and to create and submit documentation that would be consistent with this action.

[77] There is no evidence before me to dispute every witnesses' testimony, including Constable Bourque's, that there never was an agreement not to disclose the video clip. I note that there is undisputed evidence that, other than Constable Bourque, none of the surveillance team members knew that Constable Bourque had taken a 25-minute video that included 10 seconds of the target exiting a residence under surveillance.

[78] Finally, I note that Constable Pichette vetted the month of May 2019 radio communications and that he flagged the May 15, 2019, conversation as being irrelevant. By doing so, he was drawing the Crown's attention to the discussion.

[79] I heard that, while vetting the disclosure, surveillance members had the power to delete portions of the original transcript. Had there been an agreement to suppress evidence and submit

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<sup>8</sup> Exhibit 1, *Transcript of radio communication, 2019-05-15 & 2019-05-16*, line 537, at page 10 of 18.

<sup>9</sup> Exhibit 1, *Transcript of radio communication, 2019-05-15 & 2019-05-16*, line 539, at page 10 of 18.

a false report, it follows that the Crown's attention would not have been drawn to this exchange and that it could have simply been deleted.

[80] Therefore, I find that the Conduct Authority has failed on a balance of probabilities to demonstrate that Constable Bourque made an agreement with the surveillance team not to disclose the video taken at 8:18 p.m. I further find that the Conduct Authority has failed to establish that there was an agreement to create and submit documentation that would be consistent with this action.

*Is Constable Bourque's behaviour discreditable?*

[81] The Conduct Authority Representative argued that Constable Bourque's conduct has serious impacts on the criminal investigation the surveillance team was conducting in that: a) it might preclude the target of the ability to make a full answer and defence to the charges he faces; b) it might preclude the Crown from prosecuting the case; and c) it brings the administration of justice into disrepute.

[82] The Conduct Authority Representative drew my attention to a 2014 Saskatchewan Queen's Bench decision<sup>10</sup> where a stay of proceedings was ordered as a result of a breach of the accused's rights.

[83] The Conduct Authority Representative highlighted the facts of that case: an RCMP constable intentionally muted the audio recording of conversations between himself and other police officers, which were germane to the ongoing investigation and arrest of Mr. Santos, as well as conversations between the accused and other officers.

[84] The Conduct Authority Representative pointed to the following comment of Justice Gunn:<sup>11</sup>

[149] Cst. Harris' actions were in direct contravention of the written RCMP policy. Cst. Harris chose to deliberately contravene this written policy. Cst. Harris was an experienced police officer and knew of his obligation and the Crown's obligation for disclosure. I find that Cst. Harris' actions in relation to muting the audio recording were done in bad faith and were done

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<sup>10</sup> *R v Santos*, 2014 SKQB 5 (CanLII) [*R. v Santos*].

<sup>11</sup> *R v Santos*, at page 56, paragraph 149.

to frustrate the Crown's obligation to provide disclosure of these very conversations.

[85] The Conduct Authority Representative submitted that the decision as to whether or not evidence is relevant and must be disclosed is that of the Crown, not Constable Bourque's. I agree.

[86] The Subject Member Representative, on the other hand, noted that there was no evidence that Constable Bourque destroyed the video clip for the purpose of keeping it from the defence or to frustrate the Crown's obligation to provide full disclosure. He destroyed the video because it contained 25 minutes of personal information as well as a conversation with or about his spouse and he judged it to be irrelevant.

[87] The Subject Member Representative argued that there was no evidence that the target was hampered in his ability to make a full answer and defence since Constable Bourque's observation of the target was noted in the surveillance report and the surveillance team had other video clips of him entering and exiting the location throughout the investigation.

[88] During his testimony at the target's Preliminary Inquiry, on June 2, 2020, Constable Bourque admitted that he knew police officers had the legal and moral obligation to turn over the information obtained during the course of an investigation to the Crown and that it was the Crown's decision to determine what needed to be released to defence. He knew as well that Crown counsel could vet out personal identifiers or evidence that was clearly not relevant.

[89] Constable Bourque maintained during his testimony before me that he intentionally deleted the video because he believed he had the discretion to do so if he felt the evidence was irrelevant.

[90] Constable Bourque testified that since they already had the target on video, coming and going from the residence, and that he noted his May 15, 2019, observation on the surveillance report, he did not have the intent to suppress evidence from the defence.

[91] The facts and evidence before me are not analogous to *R. v Santos*. There was no evidence presented that Constable Bourque was acting in bad faith or in an attempt to frustrate the Crown's obligation to provide disclosure.

[92] Furthermore, the deletion of the video clip did not result in a stay of proceedings. I heard evidence that the main target of the criminal investigation, captured on the deleted video, was arrested, charged and convicted of drug trafficking.

[93] I find that the act of destroying evidence in a criminal investigation is sufficient to meet the threshold of discreditable conduct.

[94] It is well established that police officers are held to a higher standard of conduct and have extraordinary powers given to them in order to serve and protect members of the public and **uphold our laws**.

[95] I find that a reasonable person, with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would view Constable Bourque's act as likely to bring discredit to the Force.

[96] Allegation 1 is established on a balance of probabilities.

### **Allegation 2 – Providing a false and misleading statement**

[97] Section 8.1 of the RCMP Code of Conduct states: "Members provide complete, accurate and timely accounts pertaining to the carrying out of their responsibilities, the performance of their duties, the conduct of investigations, the actions of other employees and the operation and administration of the Force."

[98] The first question is whether the statement in question is accurate. If I find it to be inaccurate, then I must determine which of the three categories set out by the conduct board in *Girard*<sup>12</sup> is applicable.

[99] The conduct board in *Girard*<sup>13</sup> found that when a member is alleged to have contravened section 8.1 of the Code of Conduct and, in particular, is alleged to have made a false, misleading or inaccurate report, there are generally three categories of cases:

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<sup>12</sup> *Deputy Commissioner Curtis Zablocki and Constable Jason Girard*, 2020 CAD 30 [*Girard*].

<sup>13</sup> *Girard*, at paragraphs 25 and 26.

[...]

- a) Where the police officer knew the statements he made were false, misleading or inaccurate;
- b) Where the police officer was negligent, reckless or careless as to the validity of the statements being purveyed; and
- c) Where the police officer makes an honest but mistaken statement that ultimately turns out to be false, misleading or inaccurate.

[26] The first two categories attract liability, while the third does not.

[100] This analysis is also consistent with the *Conduct Measures Guide*, at page 62, which cites the same principles as articulated by Ceyskens.<sup>14</sup>

[101] During his sworn testimony at the Preliminary Inquiry on June 2, 2020, Constable Bourque conceded that the surveillance report was misleading in that it failed to mention the 25-minute video that included 10 seconds of the target of May 15, 2019.

[102] In his subsection 15(3) *CSO (Conduct)* response to the Code of Conduct, dated November 11, 2021, Constable Bourque admitted that, when he reviewed and signed the surveillance report, it contained false and misleading information.

[103] I have found as an established fact that Constable Bourque attested to the truthfulness of the surveillance report knowing that it failed to mention the 25-minute video that included 10 seconds of the target taken during the surveillance of May 15, 2019.

[104] Consequently, I find that Constable Bourque knew that he was providing a false and misleading report. This was not an honest but mistaken statement, Constable Bourque had the intent to deceive.

[105] Allegation 2 is established.

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<sup>14</sup> Ceyskens, Paul, *Legal Aspects of Policing*, Earls Court Legal Press, Volume II, Chapter 6, revised March 2012, pages 6-117 to 6-119.

## **CONDUCT MEASURES**

### **Constable Bourque's submission**

[106] At the outset of the conduct measures phase, Constable Bourque read a prepared statement. I have considered this statement in arriving at my decision on conduct measures.

[107] Constable Bourque testified that being a member of the RCMP is a privilege and an honour. He spoke to his previous service, absence of misconduct and positive performance logs.

[108] Constable Bourque acknowledged that, on May 15 and 16, 2019, he made a costly assumption that has affected him both personally and professionally, and that impacted his colleagues.

[109] Constable Bourque apologized to his fellow police officers, Codiak Detachment, Codiak Street Crime, and specifically to Corporal Potvin as well as Constables Cormier and Pichette for his lack of judgment in May 2019.

[110] Constable Bourque testified to the personal turmoil he has endured for the past two years because of his misconduct and the impact it has had on his social and family life. He admitted to receiving counselling sessions to help save his marriage and thanked his wife for her commitment to him.

[111] In closing, Constable Bourque stated that, in May 2019, his professional judgment failed and he made a mistake. He took full responsibility for his actions and understood why the RCMP takes these matters seriously in order to protect the interest of the public and the integrity of the Force.

[112] Constable Bourque advised that, moving forward, his plan is to use this experience to grow both as a person and, hopefully, as a public servant, in any capacity. He concluded by stating that he was, and still is, proud to be a "Mountie".

## Decision on conduct measures

[113] Having established contraventions of the Code of Conduct, I am now statutorily obliged to impose appropriate and proportionate conduct measures. Subsection 24(2) of the *CSO (Conduct)* obliges the imposition of conduct measures that are “proportionate to the nature and circumstances of the contravention of the Code of Conduct”. Paragraph 36.2(e) of the *RCMP Act* holds the following:

[...] in relation to the contravention of any provision of the Code of Conduct, for the imposition of conduct measures that are proportionate to the nature and circumstances of the contravention and, where appropriate, that are educative and remedial rather than punitive [...]

[114] The determination of an appropriate sanction involves, at its core, a balancing of interests: the public, the RCMP as an employer, the member to be treated fairly, and of those affected by the misconduct at issue. Fairness to the member requires, in part, that the conduct measures imposed are proportionate to the nature and circumstances of the contravention.

[115] There is also the principle of the parity of sanction. The *Conduct Measures Guide*, while not prescriptive, is intended to promote parity of sanction. It has its limitations, some of which the Conduct Authority Representative attempted to address in her submission. What is clear is that the *Conduct Measures Guide* must be read in the context of evolving societal standards, as established by jurisprudence or applicable policies and legislation.

[116] Similarly, while I am not bound by prior conduct decisions, they can provide some guidance with respect to the appropriate range of sanctions for a particular category of behaviour.

[117] I will begin by setting out the appropriate range of measures. I will then go through the mitigating and aggravating factors. Finally, I will briefly set out how I have weighed those factors, and balanced the interests of the public, the RCMP, the member and the affected parties, in arriving at my decision.

[118] With respect to the appropriate range, I have considered counsels’ submissions as well as the cases presented. I find that the appropriate range for a global sanction in this case is from a



forfeiture of pay of 20 days or more, alone or in combination with other conduct measures, to dismissal.

[119] Turning to the aggravating factors in this case, the Conduct Authority Representative has argued as an aggravating factor the loss of confidence of the Commanding Officer. As noted by the conduct board in *Vellani*:<sup>15</sup>

[117] [...] I think the time has come, once and for all, to dispense with this antiquated concept. To begin with, the decision to dismiss an employee cannot be based upon the subjective evaluation of an employee's worth by any one individual. It is an objective, legal analysis. Besides, under the current legislation, the concept of loss of confidence is a tautology: the only cases a conduct board has the jurisdiction to decide are cases in which the Commanding Officer, as the conduct authority, has lost confidence and is seeking dismissal. It is not so much an aggravating factor as it is a precondition to the conduct board hearing the case at all.

[120] As additional aggravating factors, the Conduct Authority Representative noted that the misconduct involved the destruction of evidence and that Constable Bourque signed off on a report that contained false information. With respect, these are not aggravating factors, they are elements of the allegations or misconduct.

[121] *Black's Law Dictionary*<sup>16</sup> defines "aggravation" as follows:

Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself. [...]

[122] The Conduct Board finds the following aggravating circumstances.

[123] First is the seriousness of the misconduct, namely destroying evidence obtained in the course of a criminal investigation and then signing off on a surveillance report to attest to its accuracy knowing full well that this was inaccurate.

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<sup>15</sup> *Commanding Officer "E" Division v Constable Fareez Vellani*, 2017 RCAD 3 [Vellani], at paragraph 117.

<sup>16</sup> *Black's Law Dictionary*. "Aggravation Definition & Meaning – Black's Law Dictionary." *The Law Dictionary*, 4 November 2011, online at: <https://thelawdictionary.org/aggravation/#:~:text=AGGRAVATION%20Definition%20%26%20Legal%20Meaning&text=Any%20circumstance%20attending%20the%20commission,the%20crime%20or%20tort%20itself>.

[124] Second, Constable Bourque's actions have a component of deceitfulness or a lack of honesty.

[125] Third, Constable Bourque was relatively senior in service with more than 10 years of service and should have known better. He was aware that the decision to disclose evidence rests with the Crown, not the police officer.

[126] The Conduct Authority Representative noted that Constable Bourque's actions undermined the credibility and reputation of the RCMP in light of the media attention that this matter has had. However, as submitted by the Subject Member Representative, there was no evidence submitted to me in support of this assertion. I reject this as an aggravating factor.

[127] The media attention, in and of itself, does constitute an aggravating circumstance as well as the fact that Constable Bourque's actions had the potential to compromise the criminal investigation. However, the reality is that the criminal investigation was not compromised and the subject of the investigation was charged, convicted and sentenced to 8.5 years in jail.

[128] The Conduct Authority Representative also argued that Constable Bourque's actions had compromised the relationship of the RCMP and Constable Bourque with a partner agency, that is, the PPSC. Again, as noted by the Subject Member Representative, no evidence was adduced to support this inference. Consequently, I attribute minimal weight to this factor.

[129] Now turning to the mitigating circumstances, I note that these do not constitute a justification or an excuse for the offence, but in fairness to Constable Bourque, these may be taken into consideration to reduce the severity of the sanction imposed and to appropriately deal with the misconduct.

[130] First and foremost, as submitted by the Subject Member Representative, Constable Bourque accepted responsibility and admitted the misconduct when first approached by Corporal De Botton in March 2020.

[131] Second, Constable Bourque immediately apologized to his team members for his actions. He has subsequently apologized to the Force, his colleagues and myself. The Conduct Authority Representative acknowledged that his apology was sincere.

[132] Third, Constable Bourque has no prior discipline, nor negative performance logs or negative comments on any of his performance evaluations. To the contrary, my review of the numerous performance assessments submitted by the Subject Member Representative establishes that Constable Bourque is reported on as being an above-average, dedicated member, who is professional and proud to be a member of the Force and to serve and protect the community in which he is posted, whether that be Iqaluit or Codiac.

[133] I accept the Subject Member Representative's submission that the letters of support he provided are from experienced police officers who supervised Constable Bourque over the years. They describe him as accountable, professional, compassionate and honest, which demonstrates that the misconduct of May 15 and 16, 2019, was an isolated incident, out of character or, as described by the Subject Member Representative, "a one off".

[134] Fourth, Constable Bourque has sought counselling from a certified counsellor, Jamie McFarlane, who provided a reference. He noted that Constable Bourque has engaged in deep reflection on the events that led to today and has gained insight into it. This, I find, demonstrates his potential for rehabilitation.

### **Conclusion on conduct measures**

[135] Having considered the Record before me, the nature of the misconduct, the mitigating and aggravating factors, and the cases referenced by the parties, I conclude that dismissal is not warranted in this matter. The mitigating factors, particularly the sincerity of Constable Bourque's remorse, his efforts to gain insight into the misconduct, his acceptance of responsibility for his actions, and the fact that this is an isolated incident in a now 13-year career, establish that it is appropriate to impose a penalty that is educative and remedial, and that satisfies the goal of individual and general deterrence.

[136] Based on the foregoing, I impose the following global conduct measure in accordance with paragraph 5(1)(j) of the *CSO (Conduct)*:

A financial penalty of 25 days to be deducted from Constable Bourque's pay.

[137] Any interim measures in place should be resolved, in a timely fashion, in accordance with section 23 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

[138] Either party may appeal this decision by filing a statement of appeal with the Commissioner within 14 days of the service of this decision on Constable Bourque as set out in section 45.11 of the *RCMP Act* and section 22 of the *Commissioner's Standing Order (Grievances and Appeals)*, SOR/2014-289.

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Louise Morel  
Conduct Board

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February 16, 2023  
Ottawa, Ontario