

**Publication ban:** Any information that could identify the complainant, Constable R.M., or one of the witnesses, Sergeant S.H., must not be published, broadcast or transmitted in any way.



**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:

**Designated Conduct Authority, “E” Division**

Conduct Authority

and

**Sergeant Duc Nguyen**  
Regimental Number 51148

Subject Member

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**Conduct Board Decision**

Sandra Weyand

June 4, 2024

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Ms. Sabine Georges and Dr. Janice Calzavara, Conduct Authority Representatives

Mr. Peter Thorning, Subject Member Representative

## Table of contents

<b>SUMMARY</b> .....	<b>3</b>
<b>INTRODUCTION</b> .....	<b>4</b>
PUBLICATION BANS .....	5
<b>ALLEGATION</b> .....	<b>5</b>
AGREED STATEMENT OF FACTS .....	6
DEFINITION OF SEXUAL HARASSMENT .....	7
APPLICABLE TEST.....	9
DECISION ON ALLEGATION .....	10
<i>Has the identity of the member been established?</i> .....	10
<i>Did the acts occur as alleged?</i> .....	10
<i>Do the acts amount to sexual harassment?</i> .....	23
<b>CONDUCT MEASURES</b> .....	<b>28</b>
POSITION OF THE PARTIES .....	30
<i>Conduct Authority Representatives Submissions</i> .....	30
<i>Subject Member Representative Submissions</i> .....	32
DECISION ON CONDUCT MEASURES .....	35
<i>Range of conduct measures</i> .....	36
<i>Mitigating factors</i> .....	36
<i>Aggravating factors</i> .....	38
<i>Analysis</i> .....	40
<b>CONCLUSION</b> .....	<b>41</b>

## **SUMMARY**

On March 16, 2023, Sergeant Duc Nguyen was served a *Notice of Conduct Hearing*, dated February 7, 2023. It contains one alleged contravention of section 2.1 of the RCMP Code of Conduct. Sergeant Nguyen is alleged to have sexually harassed another member and/or to have made rude and inappropriate comments of a sexual nature towards this same member.

On March 8, 2024, having heard from five witnesses, including Sergeant Nguyen, the Conduct Board found the allegation to be established.

On March 19, 2024, the Conduct Board heard submissions on conduct measures. Subsequently, on March 20, 2024, the Conduct Board directed for Sergeant Nguyen to be demoted, indefinitely, to the rank of corporal without the eligibility for promotion for a period of 2 years.

## INTRODUCTION

[1] On September 8, 2022, the Conduct Authority signed a *Notice to the Designated Officer* to request the initiation of a conduct hearing in relation to this matter. On September 9, 2022, Ms. Christine Sakiris 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*].

[2] On March 16, 2023, Sergeant Duc Nguyen was served with a *Notice of Conduct Hearing*, dated February 7, 2023, along with the investigation package. The *Notice of Conduct Hearing* contains one allegation of sexual harassment and/or inappropriate comments of a sexual nature in contravention of section 2.1 of the RCMP Code of Conduct.

[3] On March 20, 2023, following administrative changes, I was appointed as the new Conduct Board in this matter, pursuant to subsection 43(1) of the *RCMP Act*.

[4] On May 2, 2023, Sergeant Nguyen provided a partial response to the *Notice of Conduct Hearing*, pursuant to subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291. On May 12, 2023, he provided supplemental submissions.

[5] On November 22, 2023, the parties provided an *Agreed Statement of Facts* and a joint witness list.

[6] On January 16, 2024, I issued a *Determination of Established Facts*.

[7] From March 4 to 8, 2024, the Conduct Hearing was held in person, in Toronto, Ontario. I heard evidence from five witnesses, including Sergeant Nguyen.

[8] On March 8, 2024, I delivered the oral decision on the allegation, in which I found the allegation to be established on a balance of probabilities.

[9] The conduct measures phase was held virtually. On March 19, 2024, I heard submissions from the parties. On March 20, 2024, I delivered my oral decision on conduct measures, imposing an indefinite demotion to the rank of corporal with an ineligibility for promotion for a period of two years from the date of my oral decision.

[10] This written decision incorporates and expands upon both oral decisions.

### **Publication bans**

[11] On March 4, 2024, at the outset of the Conduct Hearing, I made an order restricting the publication of the identity of the complainant, pursuant to paragraph 45.1(7)(a) of the *RCMP Act*. Consequently, any information that may identify the complainant, who is referred to as Constable R.M. in this decision, must not be published, broadcast or transmitted in any way.

[12] That same day, I also made an order restricting the publication of the identity of one of the witnesses. Consequently, any information that may identify the witness, who is referred to as Sergeant S.H. in this decision, must not be published, broadcast or transmitted in any way.

### **ALLEGATION**

[13] The allegation, as set out in the *Notice of Conduct Hearing*, reads as follows:

#### **Allegation 1**

On or between July 28, 2021 and July 29, 2021, at or near Toronto, in the Province of Ontario, Sergeant Duc Nguyen has engaged in sexual harassment and/or made rude and inappropriate comments of a sexual nature to another member contrary to section 2.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

#### **Particulars**

1. At the time of the allegation, you were a member of the Royal Canadian Mounted Police (“RCMP”) posted to “O” Division, at the Toronto Airport Detachment, in Etobicoke, Ontario.
2. At the time of the allegation, you were a Non-Commissioned Officer (“NCO”) in charge of the Airport Detachment Border Integrity Unit in the role of Acting Staff Sergeant.
3. At the time of the allegation, Constable [R.M.] was posted to the Toronto Airport Detachment. She was in the process of completing her Recruit Field Training and had seven weeks of service.
4. On July 28, 2021, you attended the Chop Steakhouse Bar located at 801 Dixon Road, Toronto, Ontario for a work-related social gathering – a farewell party for Constable Walid Nsairi (“Cst. Nsairi”). Many employees from the Toronto Airport Detachment were also in attendance.

5. You became heavily intoxicated and started speaking in a loud and boisterous voice. You repeated offensive comments towards Sergeant [S.H.], for which you were cautioned and asked to stop.
6. Later in the gathering, you moved to the end of the table and sat directly across from Constable [R.M.] You looked at her and asked “So, [Constable R.M.], *do you like bent dicks?*” Constable [R.M.] refused to answer your clearly inappropriate question.
7. You continued asking the same question by rephrasing. Constable [R.M.] refused to engage with you, but you continued by asking her a series of sexually explicit questions including:
  - “*do you like bent dicks?*”;
  - “*Do you like [Sergeant S.H.’s] bent dick?*”;
  - “*I know you like it because it hits you in the right spot?*”;
  - “*How do you like it?*”.
  - “*You’re just being coy, come on... do you like bents dicks?... you like bent dicks... you’re just being coy*”
8. Further, you used your arm to represent Sergeant [S.H.]’s penis, and began making hand motions mimicking sexual acts.
9. Constable [R.M.] felt very upset and embarrassed by your inappropriate and offensive comments to her.
10. On July 29, 2021, the following day, you invited Constable [R.M.] into your office and had a closed door meeting to discuss the incident the day prior. You told her something to the effect of: “*you know we like to have fun here, right. You know like we like to have a good time right. We like to joke around. Like it’s all fun and games like*”.
11. Your behaviour towards Constable [R.M.] was rude, inappropriate, unwelcome, and constituted sexual harassment.

[*Sic throughout*]

### **Agreed statement of facts**

[14] On November 6, 2023, the parties provided me with an *Agreed Statement of Facts*, which was subsequently signed by Sergeant Nguyen on November 22, 2023. Consequently, on January 16, 2024, I issued a *Determination of Established Facts*. Furthermore, following the Conduct Hearing, I also made additional findings of fact, which I will provide later in this decision.

[15] The *Determination of Established Facts* reads as follows:

1. At all material times, Sergeant Nguyen was a member of the Royal Canadian Mounted Police, posted to “O” Division, at the Toronto Airport Detachment, in Etobicoke, Ontario.
2. At the time of the allegation, Sergeant Nguyen was a Non-Commissioned Officer (“NCO”) in charge of the Airport Detachment Border Integrity Unit and acting as Staff Sergeant.
3. At the time of the allegation, Constable R.M. was posted to the Toronto Airport Detachment. She was in the process of completing her Recruit Field Training and had seven weeks of service.
4. On July 28, 2021, Sergeant Nguyen attended the Chop Steakhouse Bar located at 801 Dixon Road, Toronto, Ontario for a farewell party of [Constable Nsairi]. Many employees of the Toronto Airport Detachment were also in attendance.
5. During the gathering, Sergeant Nguyen used his arm as a representation of Sergeant S.H.’s penis, began making hand motions mimicking sexual acts and made comments such as “[Sergeant S.H.] has a bent dick” while referring to Sergeant S.H.’s penis.
6. Later in the gathering, Constable R.M. was sitting in a small group setting with Sergeant Nguyen, Staff Sergeant Francis, Constable Nsairi, Constable Schwarz, and Constable Sirbu, and Sergeant Nguyen engaged in a discussion with her by asking her questions.
7. Sergeant Nguyen asked Constable R.M. a series of questions generally pertaining to “bent dicks” and hitting “in the right spot”. Sergeant Nguyen also suggested to Constable R.M. to not be “coy”.
8. On July 29, 2021, the following day, Sergeant Nguyen invited Constable R.M. into his office and had a closed-door meeting to discuss the comments made the day prior. Sergeant Nguyen offered an apology to Constable R.M. if she was offended by his comments. Sergeant Nguyen did not repeat the comments for which he was apologizing for, but referenced his conduct instead.

### **Definition of sexual harassment**

[16] The RCMP has adopted the Treasury Board definition of harassment. The RCMP *Conduct Measures Guide* (November 2014), at page 13, specifies:

[...]

Improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. [...]

[17] Treasury Board, and the RCMP, also accepted the definition of sexual harassment in the workplace by the Supreme Court of Canada:

Sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.<sup>1</sup>

[18] The RCMP *Conduct Measures Guide* (November 2014), at page 13, further specifies that sexual harassment is:

[...]

any conduct, comment, gesture or contact of a sexual nature that is likely to cause offence or humiliation to any employee, or that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion. [...]

[19] At the time of the relevant incident, the applicable RCMP policy was being updated to reflect the changes to the *Canada Labour Code*, RSC, 1985, c L-2 [*Canada Labour Code*]. Moreover, RCMP *Administration Manual*, Chapter XII.8 “Investigation and Resolution of Harassment Complaints”, was rescinded in January 2021 and replaced with *Administration Manual*, Chapter 2.1 “Work Place Harassment and Violence Prevention, Investigation, and Resolution” at the end of July 2021.

[20] While *Administration Manual* 2.1 did not come into effect until July 30, 2021, the *Canada Labour Code* was applicable to the RCMP, as a federally regulated employer, starting in January 2021.

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<sup>1</sup> *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 [*Janzen*], at part V.

[21] Sexual harassment is defined in *Administration Manual 2.1* (July 30, 2021, version), section 2.1.25, as the following:

[...] any conduct, comment, gesture, or contact of a sexual nature that is likely to cause offence or humiliation to any employee, or that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment, or on any opportunity for training or promotion.

[22] The definition in *Administration Manual 2.1* provides a good indicator of how sexual harassment may be defined when considering the *Canada Labour Code*. Having said that, given that the policy was not in effect until two days after the incident at issue, I will focus on the Treasury Board adopted definitions and existing jurisprudence, such as *Janzen*.

[23] In addition, I note that jurisprudence, such as the decisions in *Foerderer*<sup>2</sup> and *CUPE*,<sup>3</sup> also make it clear that the lack of intention to cause harm does not relieve the individual of responsibility.

### **Applicable test**

[24] In RCMP conduct matters, to prove a contravention under section 2.1 of the Code of Conduct, the Conduct Authority must establish the following:

- a) the identity of the member;
- b) whether the acts occurred as alleged; and
- c) whether the acts are indicative of a lack of respect and courtesy amounting to harassment, sexual or otherwise.

[25] Furthermore, to establish the third item of the test, one must consider whether a reasonable person, with knowledge of all of the facts of the case, and knowledge not only of policing in general but of policing in the RCMP in particular, would have known or ought to have known the acts or words were belittling, degrading or humiliating or would give offence or cause harm. Additionally, for sex-related matters, one must determine whether the harassment was sexual in nature.

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<sup>2</sup> *Foerderer v Nova Chemicals Corporation*, 2007 ABQB 349 (CanLII) [*Foerderer*], at paragraph 94.

<sup>3</sup> *Calgary City and CUPE, Local 709 (Schmaltz)*, 2017 CarswellAlta 308 [*CUPE*].

## **Decision on allegation**

*Has the identity of the member been established?*

[26] Sergeant Nguyen's identity is not in question. Therefore, the first part of the test is met.

*Did the acts occur as alleged?*

[27] From the outset, Sergeant Nguyen has admitted to having made the comment "[Sergeant S.H.] has a bent dick" as well as to asking Constable R.M. questions generally pertaining to "bent dicks" and hitting "in the right spot". He also admits to using his arm as a representation of Sergeant S.H.'s penis and to making hand motions to mimic sexual acts, as set out in Particular 8 of the *Notice of Conduct Hearing*.

[28] In coming to my decision, I have considered all parts of the written Record, including statements from several witnesses present at the July 28, 2021, farewell party and heard oral evidence during the allegation phase of this matter that address the words uttered by Sergeant Nguyen, either generally or directed to Constable R.M. specifically. I have carefully assessed the weight to be attributed to each, as well as counsels' submissions.

[29] I specifically note the statements provided by Sergeant Oliveros, Staff Sergeant Francis, and Sergeant S.H. and will incorporate the relevant excerpts of their evidence where relevant in my analysis.

### ***Oral evidence and credibility***

[30] I heard oral evidence from five witnesses. In assessing a witness's evidence, I must consider whether they are being truthful as well as whether their evidence is reliable (that is, 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>4</sup>

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<sup>4</sup> *R. v R.E.M.*, 2008 SCC 51, at paragraph 65.

[31] The British Columbia Court of Appeal notes that a witness's evidence cannot be assessed solely on their demeanour,<sup>5</sup> that is, 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.

[32] 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>6</sup>

[33] The Conduct Authority Representatives submitted that all of the witnesses were engaged, balanced and credible. The Subject Member Representative took issue with Constable Schwarz's testimony, highlighting issues of recollection within his oral evidence, and with Constable R.M.'s testimony, pointing to several areas of inconsistencies between her oral evidence and prior statements that she had provided as part of the conduct process and the Independent Centre for Harassment Resolution process.

[34] I will discuss each witnesses' testimony in turn as well as address any credibility concerns that I may have.

### **Constable R.M.**

[35] I found Constable R.M. to be thoughtful, calm and well spoken. While there were some inconsistencies within her testimony and her prior statements, these were in relation to peripheral issues. On the whole, I am satisfied that Constable R.M.'s recollection remained consistent at its core and that she is a credible and reliable witness.

[36] At the time of the alleged incident on July 28, 2021, Constable R.M. was 25 years old and had only graduated from Depot 7 weeks prior. She was still navigating a big life change, getting used to her first posting at Toronto Airport Detachment, and she did not have family and friends close by to support her. Constable R.M. did not know many of the other members at Toronto Airport Detachment and attended the farewell party to meet more of her colleagues. She arrived at the party with her Acting Field Coach, Constable Marion Sirbu, and with another recent recruit,

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<sup>5</sup> *Faryna v Chorney*, [1952] 2 DLR 354, at page 357.

<sup>6</sup> *F.H. v McDougall*, 2008 SCC 53, at paragraph 58.

Constable Schwarz. The three members were still on duty at the time of the event; however, they had received permission to attend while remaining operationally ready.

[37] Constable R.M. described and drew a diagram of the seating arrangements at the social event. The seating was not disputed by any of the other witnesses. She described Sergeant Nguyen as being seated at the opposite end of the table from her when they first arrived. She explained that he later moved to sit right across from her when the group of attendees became smaller.

[38] Constable R.M. stated that even while Sergeant Nguyen was seated at the other end of the table, which she described as being about 20 feet in length, she could hear him act in a boisterous and belligerent manner, repeatedly shouting, “[Sergeant S.H.] has a bent dick.” She recalled several other members asking him to stop, not directly, but with words such as “know your audience” or “there are juniors here”. While Sergeant Nguyen would pause for a moment, he would continuously find ways to incorporate the inappropriate topic back into the conversation.

[39] Constable R.M. said that she heard comments with respect to Sergeant Nguyen having seen Sergeant S.H.’s penis in the shower and that he “could fuck a bitch from around the corner.” She also spoke to signs of intoxication she noticed on the part of Sergeant Nguyen.

[40] Constable R.M. testified that, after Sergeant Nguyen moved closer to her end of the table, unprompted, he again raised the topic of Sergeant S.H.’s penis. He then leaned towards Constable R.M., looked her in the eyes, and asked, “So, [Constable R.M.], do you like bent dicks?” She stated that she was at a loss for words, did not know how to respond to the question and had hoped that someone else would interject. Constable R.M. explained that she managed to state that she was not going to answer the question. She testified that Sergeant Nguyen then pressed further, “come on, I know you like them. You can tell me. Do you like bent dicks?” and then words to the effect of “you can tell me”, “you are just being coy with me”, “I know you like bent dicks because they hit you in the right spot”. Constable R.M. stated that Sergeant Nguyen also made hand gestures while making these statements, turning his arm at a 90-degree angle to show the shape of a bent penis.

[41] Constable R.M. described feeling very uncomfortable and tense. She stated that she felt singled out, belittled, demeaned and embarrassed. Though pressed greatly on the issue by the

Subject Member Representative, Constable R.M. testified that she did not laugh in response to Sergeant Nguyen's questions, not even with an uncomfortable laugh. She did recall other members laughing but could not specify whether they were actually laughing in reaction to Sergeant Nguyen's comments.

[42] Constable R.M. explained that it took her some time to reflect on the situation. She stated that she was influenced in how to assess her own feelings by others' comments, such as those of Constable Sirbu, who remarked on the way back to the Detachment that evening that he hoped she understood Sergeant Nguyen's humour.

[43] Constable R.M. then also addressed the apology she received from Sergeant Nguyen the following day. She described being pulled out of a larger meeting by Sergeant Nguyen and being led to his office. She described Sergeant Nguyen's apology as a series of leading questions, such as "You know we like to have fun here? You know we like to joke around here? We like to have a good time, right?" Constable R.M. stated that she agreed with each of these questions because she felt she had no choice. She explained that she wanted to get out of the meeting as quickly as possible. Constable R.M. added that she felt very uncomfortable in a closed-door office, by herself, with Sergeant Nguyen, and noted the significant power imbalance the situation presented.

[44] Constable R.M. stated that she felt that Sergeant Nguyen did not apologize for his specific actions; rather, he only gave a more general apology, should she have felt things had gotten "too wild yesterday". While she did not recall the exact words used, Constable R.M. recalled feeling that Sergeant Nguyen did not take ownership for his actions and that she was being manipulated.

[45] Constable R.M. testified that Sergeant Nguyen was avoiding her and purposely ignoring her after the incident.

[46] Constable R.M. explained that it was only when she spoke to her Field Coach, Constable McCarthy, about a different issue that she brought Sergeant Nguyen's comments to Constable McCarthy's attention. Constable R.M. had previously been under the impression that Constable McCarthy had been briefed on the July 28, 2021, incident by the senior staff in attendance or by her Acting Field Coach, Constable Sirbu, but she then realized that this had not been the case. Her disclosure to Constable McCarthy at that time then set the harassment process in motion.

Constable R.M. also noted that the fact that no one had mentioned anything sooner or supported her in filing a complaint caused her to feel mistrust in the workplace.

[47] Constable R.M. admitted to having responded to being fine when approached by Constable Sirbu and Constable McCarthy (prior to realizing Constable McCarthy was unaware of the full extent of what transpired at the party) about how she was doing. She testified that she was struggling with what had been said to her and with how to figure out what to do about it, reviewing the sexual harassment policy and other materials. She stated that she was embarrassed to discuss the matter and felt that she had not been approached at the appropriate time or in the appropriate place, with others being able to overhear the conversation. Constable R.M. also explained that she did not seek out to speak to Constable Sirbu and Constable McCarthy at a better time because she continued to feel uneasy. Furthermore, she stated that her feelings were being influenced by others seemingly not thinking the comments were as inappropriate as she had perceived them to be.

[48] Constable R.M. stated that she has been in therapy as a result of what transpired.

### **Sergeant Nguyen**

[49] I found Sergeant Nguyen to be forthcoming and genuine in his recollection of the July 28, 2021, incident and the days following, as well as throughout this conduct process as a whole. I found him to be credible and reliable.

[50] I incorporate much of Sergeant Nguyen's evidence as part of my analysis. As such, I will only highlight some of his testimony here to set up my findings of fact as well as to provide an overview of his recollection of events.

[51] Sergeant Nguyen explained that the line of commentary and language used at the relevant time started due to another member joking about Sergeant Nguyen being able to spy on men in the shower in the Detachment locker room. Sergeant Nguyen stated that this was an ongoing, running joke that harkened back about 15 years to when the back of his locker faced the showers and other members joked that he would spy on men in the shower through the rivets in the back of his locker. Sergeant Nguyen described being caught off guard by those comments initially, feeling like his sexuality was being questioned, but then viewed the comments as a joke.

[52] The jokes at that time resulted in some graffiti being drawn on the back of Sergeant Nguyen's locker by other members, circling the rivet holes and adding the words "Duc's 3D Spycam". Sergeant Nguyen added that the graffiti continues to exist on the locker now, some 15 years later.

[53] Sergeant Nguyen stated that he went along with the humour when the shower comment was once again made to him on July 28, 2021. He explained that he responded by stating that he could see that Sergeant S.H. has a bent dick. Sergeant Nguyen testified that, given that this was received with laughter, he took it as a successful joke and followed it up with additional related comments. He also admitted to using his arm, bent at the elbow, to represent a bent penis.

[54] Sergeant Nguyen stated that when he moved further down the table, as the group that evening got smaller, he once again sparked up the same joke with the smaller group, reasoning that this would break the ice and get laughter going.

[55] Sergeant Nguyen admitted to questioning Constable R.M. directly, but qualifies this by stating that it was a 15-second conversation. He adds that Constable R.M. gave him no indication that she disapproved of his comments. Sergeant Nguyen emphasized that the interaction was very quick and that he did not interpret Constable R.M.'s response, that she was not going to answer his question, as an indication that she was offended or wanted him to stop his comments. He stated that she laughed and did not leave the table, something he would not have expected her to do if she had been offended.

[56] Sergeant Nguyen testified that he did not hear anyone caution him or ask him to stop until Staff Sergeant Francis pulled him aside at the very end of the evening. Having said that, during cross-examination, Sergeant Nguyen acknowledged that Sergeant S.H. stated, "Hey Staff, enough". However, Sergeant Nguyen mentioned that he did not take this to mean that he should stop the comments. Rather, he stated that he felt that Sergeant S.H. was also being lighthearted and joking because he was not actually a Staff Sergeant and, as such, interpreted Sergeant S.H.'s choice of words as sarcasm. Sergeant Nguyen explained that the comment was not stern and that he did not realize Sergeant S.H. was offended at that time.

[57] Sergeant Nguyen stated that he consumed three mixed drinks during the relevant event and that his behaviour was likely jovial and boisterous to some extent.

[58] Sergeant Nguyen testified that he was on the verge of burnout at the end of July 2021, but he acknowledged that this was not an excuse for what transpired.

[59] During his testimony, Sergeant Nguyen acknowledged that his comments were inappropriate and unacceptable for the environment and stated that he was also aware of that at the end of the evening on July 28, 2021, and, consequently, sought to apologize to Sergeant S.H. and Constable R.M. the following day, a day he had previously booked off as vacation. He met with both members separately on the morning of July 29, 2021, and apologized for the comments he had made.

[60] In addressing the apology he provided to Constable R.M., Sergeant Nguyen explained that he asked Constable R.M. into his office and stated that he wanted an opportunity to check in with her because he was unsure if she had been offended by his comments from the previous evening. He spoke about the comments having been made in jest and let Constable R.M. know that he is approachable and accessible if she wanted to speak with him or if there were any issues. Sergeant Nguyen testified that he felt like she accepted his apology when she said that she had no issues and had “worked with cops before”. Sergeant Nguyen stated that he ended the conversation by stating, “Are we good?” and that she replied with, “We are good.” When asked about Constable R.M. stating that she felt intimidated in the room with him, Sergeant Nguyen responded that she is entitled to those feelings, but that his intentions were noble.

[61] Sergeant Nguyen added that, until he heard about the harassment claim against him, he had no reason to question whether Constable R.M. was feeling fine about the situation. As such, he did not treat her any differently than anyone else. Furthermore, he stated that he did not ignore her, as had been stated by Constable R.M., and that he did not purposely leave her off any emails.

[62] When challenged on cross-examination, Sergeant Nguyen stated that he was unaware of the RCMP zero tolerance policy with respect to harassment and could not recall specific training in that regard, save one course in 2006.

[63] Speaking further to his position within Toronto Airport Detachment, Sergeant Nguyen stated that, while he was Acting Staff Sergeant at the time, he views the work as being done by a team and does not see a rank associated with each member. Upon the Conduct Authority Representatives pressing further, he did acknowledge that junior members normally respect command and that he was in charge of managing the team. Lastly, he acknowledged that one should lead by example, especially in front of junior members.

### **Constable Schwarz**

[64] Constable Schwarz appeared by way of video conference, having just been transferred to Rankin Inlet Detachment the week prior to the start of the Conduct Hearing. His first posting out of Depot was to Toronto Airport Detachment, starting May 10, 2021. Constable Schwarz reported not having had a relationship outside of work with either Sergeant Nguyen or Constable R.M. At work, his relationship with Sergeant Nguyen was limited to just a few minor interactions. Constable Schwarz had graduated from Depot just a few troops ahead of Constable R.M. He stated that Constable R.M. was nice, helpful and a pleasure to work with.

[65] Constable Schwarz recalled the seating arrangements at the July 28, 2021, party. He also testified that he believed that Sergeant Nguyen was not drunk but probably had a couple of drinks. Constable Schwarz stated that Sergeant Nguyen was in a good mood and laughing.

[66] Constable Schwarz testified that he observed Sergeant Nguyen ask Sergeant S.H. whether his penis was perpendicular. He interpreted Sergeant S.H. not liking the question because his face went red.

[67] Constable Schwarz testified that, Sergeant Nguyen subsequently looked at Constable R.M. and asked her if she liked perpendicular penises. Constable R.M. said that she did not want to answer the question, which prompted Sergeant Nguyen to repeat his question. Upon being asked for further details about Constable R.M.'s demeanour, Constable Schwarz described her as surprised, maybe even a little bit shocked by the question. Even with these reactions, Constable Schwarz testified that Sergeant Nguyen did not stop right away but continued to ask Constable R.M. the same question a few more times. Constable Schwarz estimated that the

interaction lasted maybe a minute or two. He described the situation as uncomfortable and testified that he did not enjoy the social event.

[68] On cross-examination, Constable Schwarz conceded, after being pressed extensively, that he could not recall with precision what was said at the party. This was followed by further inconsistencies with respect to him stating that he was certain about some of the language that he recalled hearing and then reneging on that when the Subject Member Representative continued his questioning. Constable Schwarz appeared flustered and uncertain when questioned on cross-examination.

[69] On the point of Sergeant S.H.'s reaction to Sergeant Nguyen's comments, during cross-examination, the Subject Member Representative pointed out that Constable Schwarz previously said in his statement that Sergeant S.H. took it as a joke<sup>7</sup> but now states that Sergeant S.H. did not like the comments and that his face went red. Constable Schwarz did not have an explanation for this inconsistency.

[70] The most notable issue of Constable Schwarz's ability to recollect was with respect to whether Sergeant Nguyen was drunk. During examination in chief, he testified that Sergeant Nguyen was not. However, when taken to that statement during cross-examination, Constable Schwarz could not recall having said that Sergeant Nguyen was not drunk just a few minutes earlier. Given this discrepancy, as well as his uncertainty and inability to recall what was said on July 28, 2021, I find his testimony to be unreliable and have given it little weight, only retaining those parts that are also corroborated by other witnesses.

[71] Accordingly, two statements made by Constable Schwarz that I have taken into consideration are that he did not notice any major changes to the work environment following Sergeant Nguyen's comments on July 28, 2021, and that he did not recall any specific jokes with respect to "bent dicks" or running jokes, in general, within Toronto Airport Detachment prior to the party on July 28, 2021.

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<sup>7</sup> Conduct Authority Representatives Disclosure Binder, tab 13A – Statement of Constable Schwarz, at line 147.

### **Constable Sirbu**

[72] Constable Sirbu continues to be posted to Toronto Airport Detachment. He testified in person with a calm demeanour. He was unshaken, consistent and took his time in answering questions. I found that Constable Sirbu answered to the best of his abilities, stating that he did not recall when he might have been unsure. I consider him to be a credible and reliable witness.

[73] Constable Sirbu described Sergeant Nguyen as a hard worker, who is well liked and respected as well as always being there for anyone who may have a question or who may require guidance.

[74] Constable Sirbu testified that, when he arrived at the venue on July 28, 2021, Sergeant Nguyen was already present. He recalled hearing lots of laughter from the end of the table where Sergeant Nguyen was seated and overheard comments about Sergeant S.H. having a penis that was bent. When asked, he stated that he did not know the context and did not hear any other comments from that end of the table.

[75] Constable Sirbu then recalled comments being made directly to Constable R.M. He testified that Sergeant Nguyen was lively and animated. On cross-examination, he stated that there was a level of intoxication present. Constable Sirbu testified that Sergeant Nguyen continued his story about Sergeant S.H.'s bent dick, asking Constable R.M. whether she knew "what that's like". He recalled that Constable R.M. laughed uncomfortably and that she was rigid, which caused him to register her discomfort, curb his own laughter, and tell Sergeant Nguyen, "that's enough".<sup>8</sup> On cross-examination, the Conduct Authority Representatives verified that his intention with that statement was to get Sergeant Nguyen to stop his comments, which he stated that Sergeant Nguyen did not do right away, but the topic did change gradually. In addition, Constable Sirbu stated that he made a mental note to later ask Sergeant Nguyen to apologize to Constable R.M., which he did not have to raise with Sergeant Nguyen because an apology had already been provided.

[76] Constable Sirbu testified that during the days after the event, and following Sergeant Nguyen's apology, he asked Constable R.M. if she was okay, to which she responded she was. As

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<sup>8</sup> Conduct Authority Representatives Disclosure Binder, Tab 14A – Statement of Constable Sirbu, at line 66.

Constable R.M.'s assigned temporary Field Coach, Constable Sirbu felt he had a professional as well as personal responsibility to check in with Constable R.M. He stated that he had no reason to further question her response or whether Sergeant's Nguyen's apology had been sufficient.

[77] With respect to the graffiti on Sergeant Nguyen's locker, Constable Sirbu testified that he had not heard any comments about it and that he did not think anything of it. He simply chalked it up to something meaningless written on the locker akin to what one may see in public bathroom stalls.

[78] Lastly, I wish to note and emphasize Constable Sirbu's apt description of the challenges and stressors one faces when transitioning from Depot to their first posting. Constable Sirbu described the empathy he felt for Constable R.M. and for Constable Schwarz, the latter being his full-time assigned recruit. He also described the challenges both were going through while adjusting to Toronto Airport Detachment and to a new home without friends and family.

### **Sergeant Holmes**

[79] Sergeant Holmes testified via video conference from his Liaison Officer posting in Washington, D.C. He appeared well spoken, as well as consistent in his recollection and with his prior statement. I consider Sergeant Holmes to be a credible and reliable witness.

[80] Sergeant Holmes testified that he was caught off guard by Sergeant Nguyen's comments about another member's penis. He stated that, at the relevant time, Sergeant Nguyen was chatty, boisterous and kept coming back to talking about Sergeant S.H.'s penis. He explained that the nature of the joke was out of character for Sergeant Nguyen. He also stated that he had previously heard some commentary about graffiti on Sergeant Nguyen's old locker and a joke that he could see other members shower from his locker, but never about Sergeant S.H.'s genitalia.

[81] Sergeant Holmes described feeling stunned and uncomfortable. He testified that he did not give Sergeant Nguyen any indication that he did not want to engage in the discussion he was starting, but tried to encourage him to move on to another topic. Sergeant Holmes did not overhear any of the commentary specifically directed towards Constable R.M.

[82] Sergeant Holmes was clear in that, as a sergeant, you do not need to be told how to conduct yourself around junior members. Rather, this is something you are expected to know.

*Factual findings*

[83] As outlined in my *Determination of Established Facts* and in Sergeant Nguyen's response to the allegation, I find that Sergeant Nguyen stated that "Sergeant S.H. has a bent dick" and that he asked Constable R.M. "Do you like bent dicks?" I also find that he commented that "It hits the right spot" (meaning penises of that nature) and "don't be coy" (meaning, when no verbal response was obtained from Constable R.M., he suggested that she was being "coy" or shy by not responding).

[84] The remaining alleged language used is outlined in Particular 7 of the *Notice of Conduct Hearing*. Specifically, it reads: "Do you like [Sergeant S.H.'s] bent dick?", "I know you like it", "How do you like it?" and "you like bent dicks."

[85] Although I agree with the Subject Member Representative that the members present at the event may not all recall the same precise wording that Sergeant Nguyen used, the general gist of the comments is consistent among all of those who overheard them and in the same vein as the admissions already made by Sergeant Nguyen.

[86] Though not mentioned in the *Notice of Conduct Hearing*, Sergeant Nguyen also admits to stating words to the effect that a bent penis could have sex with someone from around the corner. The exact wording of this statement was the subject of much debate at the Conduct Hearing, but this is the verbiage to which Sergeant Nguyen agreed. Furthermore, I include it here to emphasize that the general discussion and context followed the same type of theme and commentary throughout the party, namely, sexual comments about bent penises and, specifically, Sergeant S.H.'s penis and a bent penis's ability to hit in the right spot.

[87] I do not have sufficient evidence to conclude that Sergeant Nguyen specifically asked Constable R.M. whether she liked Sergeant S.H.'s bent dick or if it would hit **her** in the right spot or if she knew what it was like. However, I find that the question of whether she likes bent dick, immediately followed by "it hits the right spot" qualifies why she may like it and relates the

comments to her preferences. Thus, I accept Constable R.M.'s evidence that these comments had the effect of causing her to feel like her sexual preferences were being questioned.

[88] To that end, it is inconceivable to me that Sergeant Nguyen would himself feel embarrassed and feel like his sexual orientation and preferences were questioned when he was asked about whether he watched other men shower in the locker room but be unable to understand how or why Constable R.M. may feel the same way when asked if she liked bent dicks and if they hit in the right spot.

[89] With respect to whether Sergeant Nguyen was cautioned and asked to stop making comments, the evidence establishes that at least some members made attempts to curb Sergeant Nguyen's commentary. Sergeant Oliveros' notes and statement reflect that she stated "know your audience" and Sergeant S.H. mentioned in his statement that he attempted to halt the conversation by stating, "that's enough", which was corroborated by Constable Sirbu. Furthermore, Constable Sirbu, himself, also told Sergeant Nguyen "enough" after hearing him question Constable R.M. Additionally, Constable R.M. attempted to evade the conversation by indicating that she did not wish to answer Sergeant Nguyen's question, thereby also providing an indication that comments should stop. For the purposes of my factual findings, I find that Sergeant Nguyen was cautioned.

[90] I further find that Sergeant Nguyen did engage in repetitive questioning towards Constable R.M. He, himself, testified that he raised the topic of Sergeant S.H.'s bent dick numerous times throughout conversations in the earlier part of the afternoon with Sergeant S.H. as well as other members sitting around him. This is corroborated by all witnesses. This is also strengthened by Sergeant Holmes' version of the events. He stated that when he arrived, he was repeatedly asked by Sergeant Nguyen whether he was aware of Sergeant S.H.'s bent dick; an interaction not denied by Sergeant Nguyen. Given this pattern, I find that it is more likely than not that Sergeant Nguyen not only asked Constable R.M. whether she liked bent dicks and whether it hits in the right spot, followed by telling her not to be coy in quick succession, but also repeated these comments, perhaps in slight variations in their wording, more than once. I note that this persistent nature carried on despite Sergeant Nguyen having been cautioned, as I have already found.

[91] In terms of Sergeant Nguyen's level of intoxication, volume and tone of voice, I heard from several witnesses and read statements from others that confirm that Sergeant Nguyen was consuming alcohol and experienced some level of intoxication that caused him to be jovial and speak more loudly and in a more boisterous tone than he normally would. Sergeant Nguyen stated that he consumed three drinks, but that he remained of "sound body and mind." I do not find that he was "heavily" intoxicated, but to say that he was not influenced by alcohol is inconsistent with the evidence before me. As a result, I find that he was under the influence of alcohol to some degree.

[92] With respect to Particular 10 in the *Notice of Conduct Hearing*, I find that Sergeant Nguyen provided Constable R.M. with an apology in a closed-door meeting on the day following the incident. Both Constable R.M. and Sergeant Nguyen testified to this fact, although they had different versions of the depth of that apology. I found Sergeant Nguyen to be credible in his recounting of his apology and the quality of same. I found him to be genuine in his remorse and accept that he apologized to Constable R.M. at the earliest opportunity, acknowledging that he had acted inappropriately.

[93] Consequently, I find that the acts at the core of the Particulars occurred as alleged and the second part of the test is met.

*Do the acts amount to sexual harassment?*

[94] The Subject Member Representative submitted that the specific circumstances surrounding the event were such that members were joking around and the discussion was met with laughter. He further points to the general culture of the Detachment, and more specifically, to the graffiti on Sergeant Nguyen's old locker, to show that the nature of the environment within Toronto Airport Detachment is one filled with running jokes and sexual humour. In fact, Sergeant Nguyen testified that he was incited to make the comments he did on the afternoon of July 28, 2021, because another member initiated the discussion by asking him about being able to see other members shower from his locker.

[95] I was not presented with any evidence to allow me to conclude that Sergeant Nguyen made the comments he did in response to sexual comments directed at him at the farewell gathering.

None of the witnesses, other than Sergeant Nguyen himself, testified to such a conversation taking place. Nevertheless, I acknowledge that the graffiti on Sergeant Nguyen's locker exists and that he may well have been the subject of sexual commentary himself, when the graffiti was first created about 15 years ago and perhaps even at the gathering on July 28, 2021. Having said that, others exhibiting this type of humour does not give Sergeant Nguyen permission to then direct sexual commentary towards those around him.

[96] Furthermore, with the exception of Sergeant Holmes, who stated that he may have heard something about the locker graffiti but could not remember from whom or any other details about the topic, no other witnesses testified that they were aware of a running joke regarding the locker graffiti, Sergeant S.H.'s genitals or similar sexual commentary. Each witness was specifically questioned in that regard. In addition, multiple witnesses mentioned in their statements that this type of behaviour and commentary is out of character for Sergeant Nguyen. Sergeant Holmes and Sergeant S.H. also specifically said in their statements that it caught them off guard, which suggests that the type of language at issue here is not typical of the environment.

[97] Sergeant Nguyen also testified that the graffiti has been in place since 2008 or 2009, and that, since then, the membership at Toronto Airport Detachment has drastically changed. Therefore, those members who might have viewed and potentially started this as a joke are no longer present at the Detachment. Suffice it to say, I find that the group gathered on July 28, 2021, was not one to regularly engage in sexual commentary and was not aware of jokes with a sexual innuendo circulating among members.

[98] Given the foregoing, I emphatically reject the suggestion that this is the typical work culture or environment at Toronto Airport Detachment.

[99] In addition, and more specifically, there is also no indication that Constable R.M. was a willing participant in this type of humour—at this event or otherwise. While I do not doubt that there was laughter at the gathering and the evidence demonstrates that some members were laughing in response to the sexual comments being made, Sergeant S.H. and Constable R.M. did not partake in that humour. It is possible that Constable R.M. may have initially reacted with an

uncomfortable laugh, but she then made it clear that she did not want to answer Sergeant Nguyen's question. Sergeant Nguyen, instead of stopping, questioned her further.

[100] While I agree with the Subject Member Representative's submission that the specific circumstances of any case need to be considered, I point out that what may have been tolerated as passable comments, locker room or sexual humour, in days past is no longer acceptable.

[101] Furthermore, it is well established that police officers are held to a higher standard than the general public. Members of the RCMP must adhere to the Code of Conduct both on and off duty. In this instance, the acts in question took place at a work-related event. RCMP policy makes it clear that an employee's workplace can include third-party premises and after-work functions, such as the farewell gathering that forms the scene of the events in this matter. In addition, Constable R.M. was on duty at the time of the incident.

[102] Furthermore, though Sergeant Nguyen was not Constable R.M.'s direct line supervisor, he was certainly in a position of authority over her, by virtue of his rank and seniority. He was Acting Staff Sergeant, which is the second highest rank at Toronto Airport Detachment. In addition, Sergeant Nguyen oversaw several teams, including Constable R.M.'s team. At the time of the incident, he was 41 years old, had 17 years of service and described various work experiences where he would have made connections with many colleagues.

[103] In contrast, at the time of the incident, Constable R.M. was 25 years old, had 7 weeks of service and was adjusting to her first posting out of Depot, without family and friends for support. Moreover, she was the youngest and most junior member present at the event and the only female member at the table when Sergeant Nguyen directed his comments to her.

[104] Although there is no typical behaviour for anyone who is faced with inappropriate sexual comments, it is clear to me that Constable R.M. felt uncomfortable and humiliated by Sergeant Nguyen's comments. I found her evidence in that regard to be impactful and sincere. I heard testimony to confirm that Constable R.M. appeared uncomfortable. Even if she did laugh at Sergeant Nguyen's comments, it was an uncomfortable laugh and she appeared rigid in her demeanour, according to statements by Constable Sirbu, who was sitting next to Sergeant Nguyen at the time. Even he, who reacted with laughter himself, testified that he curtailed his laughter

when he observed Constable R.M.'s outward appearance, stating that he noticed that she was uncomfortable.

[105] In addition, Constable R.M. stating she was "fine" when asked by Constable McCarthy after the incident and in response to the apology given by Sergeant Nguyen is not determinative of her state of mind or of the effects that the comments had on her. Rather, this is perpetuating the stereotype of how someone is supposed to act following an incident involving sexual commentary, which has no place in our society in this day and age.

[106] Going back to the events in question, Sergeant Nguyen did nothing to verify his perception that Constable R.M. welcomed the sexualized comments. He presumed that his actions were welcome, relying on Constable R.M.'s acquiescence and uncomfortable laughter as indicators of her state of mind. Presumptions that a co-worker enjoys sexual behaviour have no place in modern society or workplaces. As outlined in *Foerderer*,<sup>9</sup> it is incumbent on those initiating or participating in the conduct to ensure that it is welcomed by those targeted. Sergeant Nguyen had an obligation to ensure that his conduct was welcome. He relied on faulty presumptions based on outdated and stereotypical views. He failed to draw on his training and he failed to consider Constable R.M.'s attempts to get him to stop his line of questioning as well as others' attempts to get him to realize that he was overstepping. At a work function, Sergeant Nguyen used Constable R.M. as a target, being the only female and most junior member present and, as such, he abused his power as a senior member and leader (a notion outlined in *Deep Creek Store*,<sup>10</sup> which was submitted by the Conduct Authority Representatives). Moreover, Sergeant Nguyen's conduct detrimentally affected Constable R.M.'s work environment.

[107] Furthermore, the Conduct Authority Representatives brought to my attention jurisprudence that demonstrates that it is inappropriate for a police officer to make demeaning and sexist remarks, whether the comments are directed at third parties or overheard.<sup>11</sup> So that even if a person was not offended, or not immediately offended, by the remarks, it does not diminish the nature of inappropriateness. To be clear, I do find that Constable R.M. was offended, but find it noteworthy

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<sup>9</sup> *Foerderer* at paragraph 108.

<sup>10</sup> *Ms. K. v Deep Creek Store and another*, 2021 BCHRT 158, at paragraph 73.

<sup>11</sup> *Lewin and Toronto Police Service*, 2001 CanLII 56739 (ON CPC), at paragraph 43.

that this is not an essential element when objectively assessing the inappropriateness of Sergeant Nguyen's conduct. For the purposes of the elements that constitute sexual harassment, I find that Sergeant Nguyen's comments did cause offence and humiliation.

[108] Sergeant Nguyen's inappropriate, discourteous, crude and sexualized comments and gestures, even if meant in a humorous or joking manner, demonstrated a serious lack of judgment and are incompatible with the duties and responsibilities of a member of the RCMP, as set out in section 37 of the *RCMP Act* as well as in the Commissioner's clear direction with respect to acceptable workplace conduct.

[109] I find that Sergeant Nguyen's comments and actions were not only inappropriate, but also disrespectful and completely improper, especially given his role as a sergeant and, what is more, as an acting staff sergeant at that time.

[110] I find that a reasonable person, with knowledge of all of the facts of this case, and knowledge not only of policing in general but of policing in the RCMP in particular, would have known or ought to have known the words or comments made by Sergeant Nguyen were belittling, degrading or humiliating, would give offence or cause harm and, further, would constitute sexual harassment.

[111] It is vital that members' interactions with the public, colleagues and others are respectful, professional and contribute to the public's confidence in credible, trustworthy policing. Though the standard is not perfection, the public expects that a member, whether on or off duty, conducts themselves with the highest level of professionalism when interacting with the public and each other.

[112] The Commissioner has emphasized that harassment of any kind is unacceptable and will not be tolerated in the RCMP. Harassment in the workplace, and especially sexual harassment, represents one of the most significant organizational issues the RCMP has been and is currently facing. Harassment is serious and needs to be addressed promptly and with sensitivity. The RCMP is committed to providing a healthy, safe and respectful workplace, free of discrimination and harassment. Every employee has a role to play in upholding a respectful environment.

[113] The legal principles that govern sexual harassment of all kinds have seen enormous evolution in a very short period of time, in workplaces in general, and in the police workplace in particular.

[114] A fellow conduct board, in a recent conduct decision, emphasizes:

[183] There is no excuse, in this day and age, to tolerate this type of behaviour in any workplace, let alone a police detachment entrusted with serving a diverse community with respect, tolerance and devoid of preconceived judgmental opinions or beliefs [...]

[...]

[185] There can no longer be acceptance or tolerance of this type of misconduct, which shatters the trust of employees in their employer, the RCMP.<sup>12</sup>

[115] I find that Sergeant Nguyen's comments were repetitive despite cautions to refrain from further commentary and amounted to questioning Constable R.M.'s sexual preferences, causing her offence, embarrassment and humiliation. His comments were unquestionably crude, sexual, inappropriate and discourteous, and constitute sexual harassment. Consequently, I find that the allegation is established on a balance of probabilities.

## CONDUCT MEASURES

[116] I note that, in their submissions, both the Conduct Authority Representatives and the Subject Member Representative referenced the *Ceyssens and Childs Report*.<sup>13</sup> It was emphasized that there are five principles that serve as a foundation for the crafting of a fit conduct measure.<sup>14</sup>

[117] The first principle is that a determination of an appropriate sanction involves, at its core, a balancing of interests: the public, the RCMP as an employer, the subject member to be treated fairly and those affected by the misconduct at issue (in this case, Constable R.M.).

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<sup>12</sup> *Commanding Officer, National Division and Reid*, 2023 CAD 13 [Reid], at paragraphs 183 and 185.

<sup>13</sup> Ceyssens, Paul and Childs, Scott, *Report to the Royal Canadian Mounted Police "Phase 1" Final Report Concerning Conduct Measures, and the Application of Conduct Measures to Sex-Related Misconduct under Part IV of the Royal Canadian Mounted Police*, February 24, 2022 [*Ceyssens and Childs Report*].

<sup>14</sup> *Ceyssens and Childs Report*, at pages 17 to 22.

[118] I highlight more specifically the “public interest”, which ensures a high standard of conduct in the police service and public confidence in that service.

[119] The powers granted to a police officer are considerable; the public justifiably expects members of the RCMP to observe the highest ethical and professional standards.

[120] The Supreme Court of Canada has placed emphasis on the public interest by stating that “[t]he purposes of disciplinary bodies are to protect the public, to regulate the profession and to preserve public confidence in the profession”.<sup>15</sup>

[121] The second foundational principle to be used in crafting a fit conduct measure is that remedial and corrective measures should prevail, where possible.

[122] The third foundational principle is the presumption that one should impose the least onerous disposition. However, this presumption will be displaced if the public interest or other specified considerations should prevail.

[123] The fourth principle is proportionality. This principle is composed of three elements: 1) the identification of the relevant proportionality factors; 2) an assessment of whether the identified proportionality factors are mitigating, aggravating, or neutral; and 3) a balancing or weighing of these considerations.

[124] Finally, the fifth principle is that a higher standard of conduct applies to police officers primarily due to the fact that they hold a position of trust in society and are consequently held to a higher moral standard.<sup>16</sup>

[125] The RCMP *Conduct Measures Guide* (November 2014), while not prescriptive, is intended to promote parity of sanction. However, as also submitted by the Conduct Authority Representatives, it has its limitations. Furthermore, it must be read in the context of evolving societal standards, as established by the jurisprudence or applicable policies and legislation.

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<sup>15</sup> *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29, at paragraph 53.

<sup>16</sup> *Montréal (City) v Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, at paragraphs 33 and 86.

[126] 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.

### **Position of the parties**

#### *Conduct Authority Representatives Submissions*

[127] As the appropriate conduct measure in this case, the Conduct Authority Representatives reiterates that the Conduct Authority is seeking a direction for Sergeant Nguyen to resign from the RCMP. They submit that his retention would impair the public's confidence and trust in the Force and its ability to promote a harassment-free workplace.

[128] In support of that position, the Conduct Authority Representatives outline the RCMP renewed core values and the ways in which Sergeant Nguyen has failed to maintain these values.

[129] The Conduct Authority Representatives submit that Sergeant Nguyen was given all the tools required to be an effective manager and leader. He was entrusted with responsibilities that come with a higher rank. Yet, despite all of the training provided and experience he brought to his role, Sergeant Nguyen failed to apply what he was taught and abused his authority. The Conduct Authority Representatives state that this demonstrates that Sergeant Nguyen does not have rehabilitative potential.

[130] The Conduct Authority Representatives outline some of the factors that I should consider when arriving at a fit conduct measure, namely the frequency of the misconduct, whether the harassment is of a sexual nature, whether the conduct persisted, if it exploited a position of authority and the effect it had on the complainant. They surmise that the commentary was persistent, that the complainant was vulnerable vis-à-vis Sergeant Nguyen, that he abused his authority and that the effect on the complainant was grave.

[131] The Conduct Authority Representatives draw my attention to the 2016 Queen's Bench decision in *Williams*,<sup>17</sup> where, among other allegations, the accused asked the complainant a

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<sup>17</sup> *Darren Williams and Police Appeals Tribunal, Commissioner of Police of the Metropolis*, [2016] EWHC 2708 (QB) [*Williams*].

number of inappropriate personal questions at a social function. The panel dismissed the member, highlighting that the fact that the inappropriate acts took place in front of junior staff was a significant consideration as was the public confidence in the police service. The member had a particular responsibility to ensure that his conduct was exemplary and to be a role model to his subordinate officers. In fact, the court concluded that a “high-ranking officer must suffer a harder fall than would a junior officer in similar circumstances”.

[132] The Conduct Authority Representatives point to Constable R.M.’s victim impact statement wherein she states that Sergeant Nguyen’s actions tremendously impacted her trust, safety and confidence in the workplace as well as have left her with significant and lingering mental health effects that impact her daily functioning. The Conduct Authority Representatives ask me to place significant weight on this victim impact statement.

[133] As previously outlined, the Conduct Authority Representatives question whether Sergeant Nguyen put forward an expression of genuine remorse and a true apology.

[134] The Conduct Authority Representatives further submit that seeking Sergeant Nguyen’s resignation is not punitive; rather, it is a recognition that the RCMP is changing in response to and in accordance with the public’s expectations and the growing concerns with respect to sexual harassment in the organization.

[135] The Conduct Authority Representatives highlight the recent conduct board decision in *Reid* and, in particular, the notion that even in the absence of any physical touch, verbal sexually harassing behaviour is sufficient to warrant dismissal, particularly where a perpetrator is someone in a position of trust and authority, like Sergeant Nguyen. In addition, she notes that the victims in *Reid* expressed significant impact, which, again, she suggests is also the case here.

[136] Finally, the Conduct Authority Representatives point me to the Ontario Superior Court decision in *Fleming*,<sup>18</sup> which speaks to sexual harassment poisoning the workplace and the employer’s duty to protect its employees from this type of behaviour. This case also outlines some of the factors to be considered when assessing measures. It states that any penalty should account

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<sup>18</sup> *Fleming v Ricoh Canada Inc.*, 2003 CanLII 2435 (ONSC) [*Fleming*].

for the frequency and duration of the harassment, the nature of the incident, an employer's sexual harassment policy and communication of same to its employees, a warning or caution for the exhibited behaviour, the relationship between the complainant and subject member, the member's position of power and authority, as well as the impact and cumulative effect of the impugned behaviour.

*Subject Member Representative Submissions*

[137] The Subject Member Representative submits that a sanction less than dismissal is appropriate on the facts of this case.

[138] The Subject Member Representative raises the same factors for consideration that have been outlined by the Conduct Authority Representatives, but he concludes that the behaviour in question was not frequent in nature nor repetitive over time. He did not dispute the impact the incident has had on the complainant; however, he cautions that this is just one factor to consider.

[139] Similarly, he points out that, when considering the factor of having been asked to stop the behaviour, I should appreciate that there are different levels to such cautions. In *Reid*, the subject member was specifically taken aside, several times over the course of a year or more, and asked to stop his commentary. Whereas in the matter at hand, the whole incident took place over a short period of time, a matter of minutes, at a social function at which Sergeant Nguyen did not hear any of the comments asking him to stop and no one took him aside in the moment. When he was spoken to by Staff Sergeant Francis after the fact, Sergeant Nguyen recounts immediately feeling badly and seeking to apologize and to change his behaviour.

[140] Furthermore, with respect to the facts in *Reid*, the Subject Member Representative notes that the case at hand does not display the targeted, cruel and demeaning comments found in *Reid*, and that the persistent pattern of commentary over the course of 18 months does not exist here. He also distinguishes the relevance of the *Calandrini*,<sup>19</sup> *Fleming* and *Williams* decisions raised by the Conduct Authority Representatives on their facts, given that there was no physical component to

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<sup>19</sup> *Commanding Officer, "National Headquarters" Division and Calandrini*, 2018 RCAD 10 [*Calandrini*].

Sergeant Nguyen's actions, nor did he proposition Constable R.M. in the way the subject members of the previously mentioned cases did.

[141] The Subject Member Representative canvasses six other prior conduct decisions as well as the *Foerderer* decision. *Foerderer* suggests that sexual harassment exists on a spectrum with non-consensual physical touching at the most serious end and less serious forms of harassment, such as sexual verbal remarks, crude jokes and suggestive wording and gestures at the other end.

[142] In the conduct board decision of *Allen*,<sup>20</sup> the member attended an off-duty Christmas party where alcohol was consumed and reached into a co-worker's pants, under her underwear, when assisting her while she was vomiting. The member in that case had no recollection of the event due to his level of intoxication. The conduct board in that matter imposed a reprimand, a forfeiture of pay of 30 days, ineligibility for promotion for a period of 2 years and a direction to receive counselling on alcohol abuse. The Subject Member Representative specifically notes that this member, like Sergeant Nguyen, had no prior discipline and an above-average work record. He further points out that the actions in *Allen* also involved physical touching, which is not part of the misconduct in the present matter.

[143] In *Calandrini*, sexual harassment in the workplace was established for the subject member grabbing a co-worker's buttocks and making sexual remarks. The Subject Member Representative asks me to consider that these actions occurred over a period of time and involved physical touching. Additionally, it was general knowledge in the workplace that the complainant in that matter suffered from an aversion to being touched. While dismissal was the conduct measure ordered, the Subject Member Representative asks me to distinguish that matter on this basis.

[144] The Subject Member Representative also points to the Commissioner's appeal decision in *Caram*.<sup>21</sup> In that case, the conduct board did not make a finding of harassment, and the member was sanctioned to a forfeiture of 45 days' pay, a transfer order and a direction to continue psychotherapy. On appeal, it was argued that the subject member's conduct amounted to sexual harassment. The Commissioner found that the conduct did amount to sexual harassment and

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<sup>20</sup> *Commanding Officer, "H" Division and Allen*, 2019 RCAD 10 [*Allen*].

<sup>21</sup> *Commanding Officer, "E" Division and Caram*, 2021 CAD 05 [*Caram*].

increased the number of days of forfeiture of pay. As such, the Subject Member Representative highlights that, even with the finding of sexual harassment, the member was not ordered to be dismissed.

[145] Next, the Subject Member Representative raises the conduct board decision in *Little*.<sup>22</sup> While on duty, the subject member made inappropriate sexual comments to another member and touched his thigh without consent. On another occasion, the subject member squeezed the other member's genitals without consent. Both allegations were established and a forfeiture of 20 days' pay and 10 days of leave were ordered, along with ineligibility for promotion for a period of 2 years, a direction to work under close supervision for 1 year and a restriction of work locations, so that the subject member would not be working with the complainant.

[146] Another appeal decision flagged by the Subject Member Representative is that of *Pulsifer*,<sup>23</sup> decided by the Commissioner in 2022. The conduct board found two allegations under section 7.1 of the Code of Conduct, arising out of a team-building event at a pub, established and imposed a total of 35 days' forfeiture of pay, ineligibility for promotion for a period of 2 years and a direction to receive counselling. The actions in this case involved physical touch without consent underneath the shirts of two other members. The Commissioner upheld the conduct board's decision.

[147] Lastly, the Subject Member Representative draws my attention to the 2020 conduct board decision in *Weatherdon*,<sup>24</sup> which dealt with a single allegation under section 7.1 of the Code of Conduct. The misconduct involved non-consensual touching and unwanted sexual advances at a G7-related event. A joint proposal in that matter resulted in the subject member's demotion for a period of two years and a transfer to general duty policing.

[148] All but one of the aforementioned conduct files (that one being *Calandrini*, which the Subject Member Representative asks to be distinguished on its facts, as I have already outlined) fell short of dismissal. Furthermore, the Subject Member Representative asks me to consider the

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<sup>22</sup> *Commanding Officer, "E" Division and Little*, 2020 CAD 1 [*Little*].

<sup>23</sup> *Commanding Officer, "H" Division and Pulsifer*, 2022 CAD 06 [*Pulsifer*].

<sup>24</sup> *Commanding Officer, "K" Division and Weatherdon*, 2020 CAD 16 [*Weatherdon*].

fact patterns in those matters together with their respective sanctions to arrive at the conclusion that dismissal is also not warranted for Sergeant Nguyen.

[149] In crafting a fit conduct measure, the Subject Member Representative emphasizes that the measures need to be remedial and corrective, where appropriate, and the presumption is that the least onerous disposition be imposed.

[150] The Subject Member Representative proposes the following mitigating factors:

- a) Sergeant Nguyen accepted responsibility.
- b) He provided a genuine apology and is remorseful, which the Subject Member Representative backs with Staff Sergeant Francis's statement regarding Sergeant Nguyen's fragile emotional state on the day following the incident.
- c) He has an excellent work record and has demonstrated an aptitude for policing.
- d) He suffered from undiagnosed emotional issues at the time of the incident and was under great stress.
- e) He has 32 letters of support, which suggest that the displayed behaviour was out of character and that he is a well-respected member.
- f) He has good potential for rehabilitation, given that he acknowledges his inappropriate behaviour, has shown remorse and taken steps to work on his coping strategies.
- g) The comments made were a one-time occurrence and out of character for Sergeant Nguyen.

[151] The Subject Member Representative concludes by stating that when considering the foundational principles for crafting a fit conduct measure, similar prior conduct board decisions, and the mitigating factors in this case, the appropriate conduct measure is a forfeiture of pay, somewhere in the range of 20 to 45 days.

### **Decision on conduct measures**

[152] I will begin my analysis by setting out the appropriate range of measures and then go through the mitigating, aggravating, and neutral considerations relevant in this case. Finally, I will set out how I have weighed those factors and balanced the interests of the public, the RCMP, the subject member and the victims, in arriving at my decision.

*Range of conduct measures*

[153] With respect to the appropriate range, I considered the parties' submissions as well as the cases they presented in support of their positions. I find that the appropriate range for a sanction in this case, a case of sexual harassment, is in the aggravated range, namely a forfeiture of pay of 20 days or more, in combination with other conduct measures, up to and including dismissal.

*Mitigating factors*

[154] In accordance with *Black's Law Dictionary (11<sup>th</sup> ed. 2019)*, I note that the mitigating factors do not constitute a justification or an excuse for a subject member's misconduct, but, in fairness to them, these may be taken into consideration to reduce the severity of the sanction imposed to appropriately deal with the misconduct.

[155] I consider it mitigating that Sergeant Nguyen has no prior discipline, nor does he have negative performance logs on any of the submitted performance evaluations. I note only one minor comment that was made in the spring of 2011,<sup>25</sup> which stated that he became resistant to taking direction from a Peel Regional Police Non-Commissioned Officer with whom he was working as part of a Joint Force Operation at that time. However, this was treated as a difference in working and management styles, and there is no indication that it became a larger issue. No other performance assessment indicates a similar event, nor is that issue similar to the incident at hand.

[156] As evidenced by the many reference letters provided by Sergeant Nguyen, he is reported as being experienced and well trained with a strong work ethic and passion for policing. In addition, the letters address that the exhibited misconduct is out of character for Sergeant Nguyen.

[157] I note that all but a handful of the 32 reference letters specifically speak to knowledge of the Allegation Sergeant Nguyen faces in this matter. This strengthens the weight of those opinions. Having said that, several letters also speak to how Sergeant Nguyen exemplifies the RCMP core values and the fact that he would not make the remarks he did. I give no weight to these statements, given that I have already established that he did display the inappropriate behaviour in question.

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<sup>25</sup> Sergeant Nguyen's *Employment File* (March 14, 2024), at page 69.

[158] I make specific note of the character reference letter written by Sergeant Christopher Hung for its comprehensive account of Sergeant Nguyen's work ethic, the various roles he has occupied within the RCMP, as well as his dedication and continued potential. Similarly, I appreciate Sergeant Dmitri Malakhov's words given that he dove deeper into the specific elements of the Allegation in this matter and fully acknowledged the seriousness of Sergeant Nguyen's misconduct on July 28, 2021. I have attributed considerable weight to these two letters and consider them to be a significant mitigating factor.

[159] There is no doubt that Sergeant Nguyen has the support of his peers, of members of different ranks and of individuals from across categories of employees and partner agencies. I accept that the exhibited behaviour was out of character for him and that this constitutes a mitigating factor.

[160] The Subject Member Representative submits that the fact that Sergeant Nguyen has accepted responsibility, admitted to the inappropriateness of his comments and acknowledged the misconduct is a mitigating circumstance. I accept his submission in that regard.

[161] Furthermore, Sergeant Nguyen apologized to both Sergeant S.H. and Constable R.M., who suffered as a result of his sexual harassment. The Subject Member Representative submits that the apology provided to Constable R.M. was fulsome and evidenced remorse. In contrast, the Conduct Authority Representatives question the sincerity and depth of the apology.

[162] I found Sergeant Nguyen to be genuine in his remorse when he testified before me and I accept that his apology represents a recognition that his behaviour was completely unacceptable. This is a mitigating factor.

[163] The Subject Member Representative submits that an additional mitigating factor is that Sergeant Nguyen has demonstrated good potential to be rehabilitated and that there is minimal likelihood of the behaviour being repeated. He relies on the fact that Sergeant Nguyen demonstrated an understanding of his wrongdoing, has acknowledged the inappropriateness of his comments from the outset and had sought out Constable R.M. and Sergeant S.H. to apologize to them as a strong indication that he can be rehabilitated.

[164] I note that Sergeant Nguyen testified that he has reflected on his actions. He did so immediately following the event in question, coming to the decision that he needed to apologize. Furthermore, he did so at the earliest opportunity, going to the Detachment the day after the incident on a day that he had previously booked off as vacation. Sergeant Nguyen also testified that he has reflected on his behaviour since the beginning of this conduct process, that he recognizes the seriousness of what he is facing and that he has sought help to allow him to cope with stressors in his life.

[165] Sergeant Nguyen's recognition that he failed in his role and responsibilities as a sergeant and acting staff sergeant as well as the recognition that his comments were completely improper, inappropriate and offensive lead me to believe that he has shown potential for rehabilitation. In addition, as already mentioned, Sergeant Nguyen's behaviour on July 28, 2021, was out of character for him. The language he used was limited to the incident that day and not the norm in how he interacts with others in general or with Constable R.M. specifically. This also points to the risk of recidivism being low. As such, I accept that he has potential for rehabilitation and this is a mitigating factor.

[166] Lastly, the Subject Member Representative states that Sergeant Nguyen's undiagnosed disorder and anxiety at the time of the incident contributed to his behaviour and should be seen as mitigating. In this regard, I agree with the Conduct Authority Representatives' submission that the single page medical report update provides little information on who drafted it, what the specific diagnosis might be, or the timelines within which Sergeant Nguyen might have been affected by these medical conditions. Though I do not doubt that Sergeant Nguyen was managing different stressors in his life, I do not have any evidence to conclude that he was suffering from any specific mental health concerns or that this had any impact on his conduct on July 28, 2021. Accordingly, I consider this to be a neutral factor.

*Aggravating factors*

[167] I note that, in accordance with *Black's Law Dictionary (11<sup>th</sup> ed. 2019)*, these are any circumstance attending to the commission of the misconduct that increases its guilt or enormity or adds to its injurious consequences.

[168] I start with the seriousness of the misconduct. Sergeant Nguyen has nearly 20 years of service and, according to his records, has received extensive training between 2005 and 2021 with respect to creating and maintaining a respectful workplace. As submitted by the Conduct Authority Representatives, Sergeant Nguyen was given all the tools required by the RCMP to be an effective and respectful manager, and yet he failed to apply this training on July 28, 2021.

[169] I also note that when it comes to the sexual harassment, this was misconduct that was directed towards a young, junior member, who was the only female present at the time of the comments directed at her, which adds to its seriousness.

[170] Additionally, at the time of the incident, Sergeant Nguyen was a Non-Commissioned Officer, a sergeant, acting as a staff sergeant. As I discussed in my analysis on the Allegation, he was in a position of authority and should have been a role model who sets the tone for what was appropriate at Toronto Airport Detachment. In other words, he should have known better.

[171] I agree with the comments found in *Williams*, which was submitted by the Conduct Authority Representatives—rank and long service carry with them responsibility. The maintenance of public confidence and respect in the police service means that senior officers must face stricter or harsher consequences than would a junior officer in similar circumstances.

[172] Furthermore, this misconduct has had a lasting adverse psychological and emotional impact on the complainant. I heard from Constable R.M. during the allegation phase in that regard and I have reviewed her written victim impact statement, which speaks more in depth to the mental health decline she has suffered following the sexual harassment.

[173] As a result of these incidents, Constable R.M.'s perception of RCMP members has been negatively impacted. She felt hurt and disrespected by Sergeant Nguyen's sexualized comments. She doubts herself and her own feelings, and she continues to grapple with psychological scars on a daily basis.

[174] Lastly, I add that while I do not find Sergeant Nguyen's alcohol consumption to be an aggravating factor, he was under the influence of alcohol, which contributed to his inappropriate conduct at the event in question.

*Analysis*

[175] In weighing the aforementioned proportionality factors, I acknowledge that there is a presumption that one should impose the least onerous disposition, unless displaced by the public interest.

[176] Furthermore, I note that deterrence is of particular importance in this case, not only as a warning to other members, but also as assurance that this inappropriate and unacceptable behaviour is not repeated by Sergeant Nguyen. As the Conduct Authority Representatives submitted, the need for specific deterrence becomes even more acute when the perpetrator of the contravention is someone in a position of trust and authority, as Sergeant Nguyen was at the time.

[177] Sergeant Nguyen's misconduct is serious and directly affects the employer-employee relationship as well as the public's expectation of police officers in their dealings with members of society and each other. As also pointed out by the conduct board in the recent *Reid* decision, this type of misconduct breaches and jeopardizes the efforts the RCMP has made to ensure a safe, secure and harassment-free environment for its employees.

[178] Significant measures are required given the sexual nature and seriousness of the offence, Sergeant Nguyen's position of authority, and the profound impact his actions have had on Constable R.M.

[179] When weighing those factors with the mitigating elements, particularly, Sergeant Nguyen's remorse, uncharacteristic actions and comments during a single event (as opposed to over a period of time), his record as an exemplary member and his potential for rehabilitation, I find that the presumption of imposing the least onerous position is not displaced. Accordingly, I find the dismissal measure sought by the Conduct Authority to be disproportionate to the gravity of Sergeant Nguyen's conduct.

[180] Nevertheless, in order to maintain the public's trust and appropriately address the complainant's interests, measures at the higher end of the aggravated range are warranted.

[181] As I noted previously, this area of misconduct has seen much growth and development in a short period of time. While the jurisprudence and prior conduct board decisions presented add to

my analysis and considerations, with the exception of the decision in *Reid*, these do harken back at a few years, and I need to consider the evolving landscape when it comes to sexual misconduct.

[182] The public interest also requires that I impose measures that send a clear and unequivocal message when it comes to general and specific deterrence in sexual harassment matters. I need to be mindful that there can no longer be acceptance or tolerance of this type of misconduct, and, at the same time, I must position the specific facts of this case along the spectrum that constitutes sexual harassment.

[183] Having found the Allegation to be established and in accordance with paragraph 45(4)(c) of the *RCMP Act*, and seeing that I find Sergeant Nguyen's behaviour especially incompatible with that of a member in a leadership and authority position, I impose the following conduct measures in accordance with subsection 5(1) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291:

- a) An indefinite demotion from the rank of sergeant to the rank of corporal (at the highest pay increment of that level); and
- b) Ineligibility for promotion for a period of 2 years, commencing from the date of my oral decision on conduct measures on March 20, 2024.

## CONCLUSION

[184] Any interim measures in place should be resolved, in a timely fashion, in accordance with paragraph 23(1)(b) of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

[185] 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 Sergeant Nguyen as set out in section 45.11 of the *RCMP Act* and section 22 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289.

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Sandra Weyand  
Conduct Board

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Ottawa, Ontario