ROYAL CANADIAN MOUNTED POLICE

in the matter of
an appeal of a conduct board decision pursuant to subsection 45.11(1) of the
Royal Canadian Mounted Police Act, RSC, 1985, c R-10

Between:

Deputy Commissioner Rob Hill
HRMIS Number 000045819

(Appellant)

and

Constable Kelly Brown
HRMIS Number 000145517

(Respondent)

(the Parties)

CONDUCT APPEAL DECISION

ADJUDICATOR: John Lawrence
DATE: September 12, 2024

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SYNOPSIS

The Respondent faced one allegation under section 7.1 of the RCMP Code of Conduct for engaging in discreditable conduct in a manner that is likely to discredit the Force. The Appellant was accused of touching a fellow member, for a sexual purpose and without her consent, during a walk home and then again at her residence.

The Conduct Board found that the allegation was established and imposed a financial penalty of 40 days, to be deducted from the Respondent's pay; ineligibility for promotion for a period of 2 years; and a direction to work under close supervision for a period of 1 year.

The Conduct Authority appealed the Conduct Board's decision not to dismiss the Respondent. On appeal, the Appellant argued that the Conduct Board relied on not factually accurate information; did not consider the totality of the evidence; made erroneous findings regarding Constable T.N.'s evidence; erred in law by not finding that the Respondent engaged in sexual assault; erred by imposing conduct measures based on the Conduct Board's subjective opinion; and erred by not considering dismissal as the appropriate conduct measure in the circumstances.

The Appeal was referred to the RCMP External Review Committee for review. The External Review Committee found that the Conduct Board erred by failing to find that the Respondent committed sexual assault, thereby rendering its decision clearly unreasonable. As a result, the External Review Committee recommended for the Respondent to be directed to resign from the Force within 14 days or to be otherwise dismissed.

The adjudicator found that the Conduct Board did establish that the Respondent committed sexual assault. Nevertheless, the adjudicator still determined that the Respondent should be dismissed from the Force because the Conduct Board made errors with respect to both the mitigating and aggravating factors that rendered the Conduct Measures decision clearly unreasonable.

INTRODUCTION

[1] Deputy Commissioner Rob Hill (the Appellant) appeals the conduct measures imposed by an RCMP Conduct Board. In its decision, the Conduct Board found that one allegation against Constable (Cst.) Kelly Brown (the Respondent) was established. The Allegation is one of engaging in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the RCMP Code of Conduct, a Schedule to the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

[2] The Conduct Board imposed a financial penalty of 40 days, to be deducted from the Respondent's pay; the ineligibility for promotion for a period of 2 years, to start from the date of the Respondent's reinstatement; and a direction to work under close supervision for a period of 1 year, to start from the date of the Respondent's reinstatement.

[3] The Appellant contests the findings made by the Conduct Board for both the Allegation and the conduct measures imposed. The Appellant contends that the decision contravenes the principles of procedural fairness, is based on an error of law for failure to find that the Respondent engaged in sexual assault, and is clearly unreasonable because the Conduct Board made unsupported and erroneous findings; failed to consider all relevant evidence; and made a subjective finding on the appropriate conduct measures.

[4] The Appellant is seeking a direction for the Respondent to resign from the Force within 14 days or be dismissed.

[5] In accordance with subsection 45.15(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*], the Appeal was referred to the RCMP External Review Committee (ERC) for review. In a report issued on May 29, 2024 (ERC C-2020-008 (C-106)) (the Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended for the Appeal to be allowed and for the Respondent to be ordered to resign within 14 days or to be otherwise dismissed.

[6] The Commissioner has the authority, under subsection 45.16(11) of the *RCMP Act*, to delegate his power to make final and binding decisions in conduct appeals and I have received such a delegation.

[7] In rendering my decision, I have considered the package of material that was before the Conduct Board, as well as the 501-page Appeal Record (Appeal) prepared by the Office for the Coordination of Grievances and Appeals (OCGA), and the Report, collectively referred to as the Record. I refer to documents in the Record by way of document title and page number of the electronic file.

[8] For the reasons that follow, the Appeal is allowed.

BACKGROUND FACTS

[9] The Conduct Board summarized the factual background leading to the conduct hearing as follows (Appeal, at page 9):

> […]
>
> [1] On or about July 5, 2017, while off-duty, [the Respondent] and [Cst. T.N.] attended a Watch party where both consumed alcohol. In the early hours of July 6, 2017, [the Respondent] and [Cst. T.N.] walked home to their respective residences. [The Respondent] is alleged to have touched [Cst. T.N.], for a sexual purpose and without her consent, during that walk home.
>
> [2] A Code of Conduct Investigation, under Part IV of the [*RCMP Act*], was initiated on July 24, 2017. The matter was also referred to the Alberta Serious Incident Response Team (ASIRT). Criminal charges were not [*sic*] pursued.
>
> […]

[10] The Respondent also allegedly touched the complainant, Cst. T.N., at her residence, for a sexual purpose and without consent.

[11] The Code of Conduct investigation gave rise to the following Allegation and particulars (Appeal, at pages 10 and 11):

> **Allegation 1**
>
> On or about July 6, 2017, at or near Leduc, in the province of Alberta, [the Respondent] behaved in a manner that is likely to discredit the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.
>
> Particulars
>
> 1. At all material times you were a member of the RCMP posted to "K" Division, Leduc detachment in Alberta. As a Leduc RCMP Detachment member you were assigned to "C" watch.

2. At all material times [Cst. T.N.] was a Leduc Detachment RCMP member and also assigned to "C" watch. Your personal residence and the personal residence of [Cst. T.N.] are in very close proximity to each other in the City of Leduc. It is accepted that both you and [Cst. T.N.] along with your respective spouses, frequently socialized together both as co-workers and neighbours.

3. Both you and [Cst. T.N.] were off-duty during the evening of July 5, 2017, casually socializing with work colleagues at the Original Joe's restaurant/bar in Leduc. The evening of socializing then moved to the residence of [Cst. M.K.] as he was being transferred from "C" watch. It is accepted that both you and [Cst. T.N.] consumed alcoholic beverages while socializing. At approximately [2 a.m.] on July 6, 2017, [Cst. T.N.] recognized that it was time to go home and you accompanied [Cst. T.N.] on the walk back to her personal residence. It is further accepted that no one else was present while on the walk back to your respective personal residences.

4. At one point while walking, [Cst. T.N.] stumbled and fell onto a patch of grass where she lay motionless. [Cst. T.N.] informed you: "Just leave me here I'll sleep outside for the night". It is accepted that you were concerned for [Cst. T.N.]'s well being and would not leave her alone in an intoxicated state to sleep outside. You began to rub the back of [Cst. T.N.]. You touched the outside of the shirt of [Cst. T.N.] over her right breast in a sexual manner. You did not have the consent of [Cst. T.N.] to touch her breast in a sexual manner. You took advantage of [Cst. T.N.] in her intoxicated state. Eventually [Cst. T.N.] got up and together you continued your walk home.

5. [Cst. T.N.] again stumbled and made a comment to you as she lay on the front lawn of an unknown individual's residence: "There's a TV show, like I'm fine, just leave me here for the night. I'll watch TV till I fall asleep." It is accepted that you were once again concerned for [Cst. T.N.]'s well-being and would not leave her alone in an intoxicated state to sleep outside on the lawn. You placed your hands inside the shirt and bra of [Cst. T.N.] and physically grabbed onto her right breast in a sexual manner. You took advantage of [Cst. T.N.] in her intoxicated state. Eventually [Cst. T.N.] got up and together you continued your walk home.

6. Upon arrival at her personal residence [Cst. T.N.] did not have her keys and the door was locked. Together you knocked on the door and rang the doorbell causing the dogs inside of the residence to commence barking. [Cst. T.N.] informed you that as she was now home it was fine and she will just sit on the front porch/step until her husband, RCMP [Cst. B.S.] awakes. You replied that you would stay with her and sat down beside her on the front porch/step. You then put your hand down the shirt of [Cst. T.N.] and began fondling her breast. [Cst. T.N.] said to you: "[Respondent]. stop." You did not have the consent of [Cst. T.N.] to

touch her breast in a sexual manner and committed a sexual assault. You took advantage of [Cst. T.N.] in her intoxicated state.

7. [Cst. B.S.] then appeared at the door way of the residence and turned on the light. Given the intoxicated state of [Cst. T.N.], [Cst. B.S.] requested your assistance to physically carry her into the residence. Together you carried [Cst. T.N.] into the residence and placed her on the couch inside. [Cst. B.S.] left the room and proceeded to go into the kitchen to get some water for [Cst. T.N.]. You leaned over the couch and proceeded to place one of your hands between the legs of [Cst. T.N.] in her vagina area and another hand under her shirt and bra touching her breast while fondling it. [Cst. T.N.] plainly stated to you: "[Respondent] stop." Your actions caused both the shirt and bra of [Cst. T.N.] to become disheveled exposing most of her right breast. You did not have the consent of [Cst. T.N.] to touch either her breast or between her legs in a sexual manner and committed a sexual assault. You took advantage of [Cst. T.N.] in her intoxicated state. Eventually [Cst. B.S.] returned to the couch and you left the residence in a hurried manner.
8. On July 23, 2017, [Cst. T.N.] reported that she was sexually assaulted by you to her supervisor, Sergeant [S.H.].

[*Sic throughout*]

[12] On October 31, 2018, in his *Response to the Allegations* pursuant to s.15(3) *CSO (Conduct)*, the Respondent denied the Allegation. However, he admitted some particulars and provided explanations for others (Material).

CONDUCT PROCEEDINGS

[13] The hearing was held from June 5 to 11, 2019. Five witnesses, including Cst. T.N., the Respondent and his wife, testified.

[14] On June 11, 2019, Conduct Board issued its oral decision, finding that the Allegation was established (Appeal, at page 10).

[15] On September 20, 2019, the Conduct Board issued its Record of Decision (Appeal, at pages 7 to 32).

Findings on the Allegation

[16] On May 29, 2024, the ERC summarized the contested facts and the Conduct Board's findings (Report, at paragraphs 21 to 28):

[21] Within the Decision, the Board outlined the facts that were not in dispute. The Board also explained the facts that were in dispute (Appeal, at pages 14 and 15):

> *[18] The parties do not agree on what transpired on the walk home, on the porch, or on the sectional sofa in* [Cst. T.N.]*'s residence. Nor do they agree on many aspects of what transpired between the alleged incidents, on July 6, 2017, and when* [Cst. T.N.] *reported the alleged non-consensual sexual touching to Sergeant* [H.] *on or about July 22, 2017.*
>
> *[19] The* [Member Representative] *was clear that consent is not at issue in this case. At no time has* [the Respondent] *indicated that the alleged acts of sexual touching were consensual. Rather,* [the Respondent] *denied that the incidents took place. Alternatively, he indicated that he had no recollection of the events in question.*
>
> *[20] There are four alleged incidents of unwanted sexual touching. The first two are alleged to have taken place on the walk home, when* [Cst. T.N.] *fell to the ground. These will be referred to as the first and second falls. The third is alleged to have occurred while* [Cst. T.N.] *and* [the Respondent] *were on the front porch of* [Cst. T.N.'s] *home. The fourth is alleged to have occurred when* [Cst. T.N.] *was lying on the sectional sofa inside her residence.*

[22] Regarding "the first fall", the Board provided the following findings [Appeal, at pages 22-23]:

a. Cst. [T.N.] left Cst. [M.K.]'s residence at approximately 2:00 AM and began walking home;

b. The Respondent caught up to Cst. [T.N.], who was walking "unassisted" just prior to falling down on the grass;

c. The Respondent asserted in his oral evidence that he did not recall this fall. However, the Board found the evidence of Cst. [T.N.] was preferable. It also found that the fall did take place; and,

d. While Cst. [T.N.] lay on the grass, physical contact with her breast, over her shirt, did occur. However, Cst. [T.N.]'s memory of the event was not reliable enough for the Board to find, on a balance of probabilities, that the physical contact was for a sexual purpose [Appeal, at page 22]. The Board noted that Cst. [T.N.] had "testified that she was, at least initially, of the view that the contact may have been a clumsy attempt to rouse her from apparent sleep."

[23] Regarding "the second fall", the Board found the following [Appeal, at page 23]:

a. Cst. [T.N.] and the Respondent continued on their walk;

b. The Respondent assisted Cst. [T.N.], by placing her left arm over his shoulder and his right arm around her back;

c. Cst. [T.N.]'s account of the fall was preferable, as it was consistent with various aspects of the available evidence;

d. Based on the totality of the evidence, the fall occurred as described by Cst. [T.N.];

e. The Respondent denied, or alternatively stated that he had no recollection of any further physical contact. However, Cst. [T.N.]'s account of the alleged incidents was more credible when assessed in the totality of the evidence;

f. Cst. [T.N.] acknowledged that her memory was not perfect with respect to every detail in terms of the walk home. However, the Board accepted the purpose of this touching was "unambiguous"; and,

g. In the circumstances, there is "no plausible explanation for touching someone's breast, underneath their clothing, for anything other than a sexual purpose."

[24] Regarding what occurred "on the porch", the Board found the following [Appeal, at pages 23-25]:

a. After the second fall, Cst. [T.N.] and the Respondent continued on their walk home;

b. The Respondent was with Cst. [T.N.] when she arrived home;

c. Cst. [T.N.] was locked out of her house;

d. After knocking on the door and/or ringing the bell, the Respondent waited with Cst. [T.N.], for Cst. [B.S.] to let her in;

e. It was implausible that Cst. [T.N.] and the Respondent remained in a static position for the five to seven minutes they were on the porch;

f. Cst. [T.N.] was sitting down on the porch and leaning up against the railing. Cst. [T.N.] recalled that she was in this position when the Respondent put his hand down her shirt and bra, and fondled her breast. Cst. [T.N.] recalled saying "stop" or "[Respondent], stop";

g. Cst. [T.N.] recalled that the Respondent was sitting next to her side, but he was not fully behind her. Cst. [T.N.]'s account on this point was credible but somewhat unreliable. The Respondent's account on this point was neither credible nor reliable. The Board observed:

> *[64] In his written statement to ASIRT,* [the Respondent] *had no recollection of being on the porch. In his section 15 response, he remembered some elements of the time on the porch, but he did not recall sitting down beside her. In his oral evidence, he reported standing with* [Cst. T.N.] *off to the side or behind him. In cross-examination,* [the Respondent] *acknowledged that he was behind* [Cst. T.N.] *when* [Cst. B.S.] *came to the door.*

h. The evidence of Cst. [B.S.] was most reliable, regarding the Respondent's positioning in relation to that of Cst. [T.N.]. Further, Cst. [B.S.] described seeing the Respondent crouching by Cst. [T.N.], with his arms around her and his hand in her chest area. Cst. [B.S.] also described how he heard Cst. [T.N.] say "stop" twice, before she and the Respondent became aware of his presence. Cst. [B.S.] also recalled how the Respondent's hand "shot back" when he became aware of Cst. [B.S.]'s presence, and the Respondent looked as though he had been caught doing something he should not have been doing;

i. The Respondent denied touching Cst. [T.N.];

j. The [Member Representative] argued that the word "stop" could have been a request for the Respondent to stop trying to help Cst. [T.N.] stand. It was not contested that Cst. [T.N.] told the Respondent, several times during their walk, to leave her to her own devices and go home, nor was it contested that the Respondent would not leave Cst. [T.N.] intoxicated and alone. However, in examining the circumstances, and in particular the observations of Cst. [B.S.], which placed the Respondent's hand in Cst. [T.N.]'s chest area when she said "stop", the Board found it was more plausible that the word "stop" was a clear indication of a lack of consent to unwanted sexual touching; and,

k. Based on the totality of the evidence, the Respondent touched Cst. [T.N.]'s breast under her shirt and bra, without her consent and for a sexual purpose.

[25] Regarding what occurred "on the sofa", the Board found the following [Appeal, at pages 25-27]:

a. Although the Respondent's evidence in the record was inconsistent, he acknowledged that he assisted Cst. [B.S.] to carry Cst. [T.N.] into the house. The Respondent also acknowledged that he and Cst. [B.S.] placed Cst. [T.N.] lying down on the sectional sofa;

b. Cst. [T.N.] was lying down with her head towards the kitchen counter and her feet towards the front door;

c. Cst. [T.N.] recalled how Cst. [B.S.] left her and the Respondent at the sofa, to get her a glass of water in the kitchen. According to Cst. [T.N.], the Respondent, who was leaning over her, slid his hand under her shirt and bra, touching her breast. Cst. [T.N.] recalled telling the Respondent to stop;

d. The Respondent had no recollection of his time at Cst. [T.N.]'s house;

e. The Respondent, Cst. [T.N.] and Cst. [B.S.] all agreed on the layout of the house, Cst. [T.N.]'s position on the sofa, and that Cst. [B.S.] would have an unobstructed view from the kitchen to the sofa;

f. Cst. [B.S.]'s evidence, on the whole, was consistent with Cst. [T.N.]'s evidence. Cst. [B.S.] was clear that his back was to the sofa while he was getting water from the fridge. Cst. [B.S.] recalled hearing Cst. [T.N.] say "stop." This caused Cst. [B.S.] to look over to the sofa, where he observed the Respondent quickly pulling his hand away from Cst. [T.N.]'s chest area. The Respondent's expression was that of someone who had been caught doing something he should not have been doing. The Respondent left the house immediately thereafter;

g. Cst. [T.N.] recalled the Respondent's hand under her shirt and bra, pushing it to the side, and him fondling her breast;

h. The evidence of both Cst. [B.S.] and Cst. [T.N.] was consistent on the point that Cst. [T.N.]'s shirt and bra were not displaced when she had been placed on the sofa by Cst. [B.S.] and the Respondent. Cst. [T.N.]'s clothes were displaced when the Respondent stepped away from the sofa and left;

i. The discrepancy between Cst. [T.N.]'s and Cst. [B.S.]'s recollection of the colour of Cst. [T.N.]'s bra was a peripheral issue, to which no weight was assigned;

j. Cst. [B.S.]'s evidence, that the Respondent was at the front of the couch rather than behind it, was found by the Board to be more reliable. Cst. [B.S.] was relatively sober and had an unobstructed view of both Cst. [T.N.] and the Respondent;

k. In terms of the discrepancy between Cst. [T.N.]'s and Cst. [B.S.]'s recollections of the Respondent's position when the alleged sexual touching took place, this did not significantly affect the overall reliability of Cst. [T.N.]'s account of the nature of the non-consensual sexual touching. Further, Cst. [B.S.]'s evidence was consistent with Cst. [T.N.]'s overall recollection. Cst. [B.S.] heard Cst. [T.N.] say "stop", he saw the Respondent's hand at Cst. [T.N.]'s chest before the Respondent quickly pulled it away, he observed Cst. [T.N.]'s breast exposed, and he confirmed that Cst. [T.N.] began crying and told him that the Respondent had been touching her breast;

l. The word "stop", heard by Cst. [B.S.], enhanced the reliability of Cst. [T.N.]'s recollection of the alleged non-consensual sexual touching;

m. The Board did not agree with, and described as "simply not likely", the [Member Representative]'s suggestion that the word "stop" by Cst. [T.N.] could have referred to the Respondent's efforts to move her. There was "no cause" for the Respondent to be assisting Cst. [T.N.] "once she was in her own house with her spouse";

n. In terms of the different recollections as to whether Cst. [T.N.]'s left or right breast was exposed, and whether it was fully or two-thirds exposed, Cst. [T.N.] reported that it was her right breast, whereas

> Cst. [B.S.] reported that it was Cst. [T.N.]'s left breast. The Board did not place significant weight on this discrepancy when assessing the overall reliability of Cst. [T.N.]'s and Cst. [B.S.]'s account; and,
>
> o. Considering the totality of the evidence, the Board found that it was more likely than not that the Respondent touched Cst. [T.N.]'s breast for a sexual purpose, without her consent, and that her breast was exposed as a result of the sexual contact.
>
> [26] Overall, the Board determined that the Respondent could not point to a plausible motive for Cst. [T.N.] to fabricate Allegation 1. The Board explained [Appeal, at pages 27 to 28]:
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> *[78] [...]* [The Respondent] *offered two possible "motives". First, he suggested that the allegations "escalated" as her relationship with* [Cst. B.S.] *deteriorated. As noted in paragraph 47,* [the Respondent's] *assertion that he was not aware of the details of the allegation was disproven. Second,* [the Respondent] *"speculated" that* [Cst. T.N.] *may have been motivated by a desire to seek a relationship with him. I find it implausible that anyone would seek to initiate a relationship by accusing their romantic interest of sexual misconduct.*
>
> [27] The Board found that, based on the totality of the evidence, particulars 1, 2, 3, 5, 6 and 7 were established on a balance of probabilities, and the Respondent had touched Cst. [T.N.]'s breast(s) for a sexual purpose and without her consent three times [Appeal, at page 28]. However, particular 4 was not established [Appeal, at page 28]. The Board explained that "a reasonable person in society, with knowledge of all of the relevant circumstances, including the realities of policing in general and the RCMP in particular, would view [the Respondent's] actions as likely to bring discredit to the Force." [Appeal, at page 28] The Board also found that the Respondent's actions were "sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him" [Appeal, at page 28].
>
> [28] Accordingly, the Board determined that Allegation 1 was established on a balance of probabilities, as the Respondent was found to have engaged in discreditable conduct, contrary to section 7.1 of the *Code of Conduct* [Appeal, at page 28].

Conduct measures phase

[17] The ERC then summarized the Parties' submissions on conduct measures as follows (Report, at paragraphs 30 to 32):

> [30] The Appellant requested that the Respondent be ordered to resign within 14 days. The Appellant's view was that the nature of the allegation was unrelated to the adequacy of the Respondent's performance of his duties, and

as such, the Appellant submitted that the Respondent's Performance Evaluations and Letters of Reference should be given little weight. Further, the Appellant argued that the Respondent's actions were essentially criminal in nature, and should be viewed in the most serious light. The Appellant also argued that the Federal Court and previous conduct boards have recognized the public interest in sexual misconduct matters and the need to address sexual misconduct and harassment. The Appellant cited the public's interest in ensuring that the RCMP addresses sexual misconduct cases in light of the seriousness of the nature of such a contravention. The Appellant also emphasized the need for deterrence. [Appeal, at pages 28-29].

[31] The [Member Representative], on the Respondent's behalf, requested a financial penalty of between 30 and 45 days, as well as any additional sanction deemed appropriate by the Board, short of dismissal [Appeal, at page 29; Material, [Respondent], Transcripts, RCMP-[Respondent] 11JUN2019, at page 64]. The [Member Representative] cited other cases, arguing that the misconduct in those cases was more egregious than that of the Respondent [Appeal, at page 29]. Although the [Member Representative] acknowledged the need to address sexual misconduct and harassment within the RCMP, the [Member Representative] argued that matters involving long-term, systemic harassment within the workplace are distinguishable from cases of off-duty conduct involving excessive alcohol consumption over a short time period [Appeal, at page 29; Material, [Respondent], Transcripts, RCMP-(Respondent)11JUN2019, at pages 35-41]. The [Member Representative] argued that in the latter types of cases, dismissal was not the outcome [Appeal, at page 29]. Further, the [Member Representative] indicated that the Respondent's actions could be viewed as sexual assault. However, he argued that no criminal charges were laid against the Respondent [Appeal, at page 29; Material, (Respondent), Transcripts, RCMP-[Respondent]-11 JUN2019, at pages 39-40]. The [Member Representative] agreed with the [Conduct Authority Representative]'s arguments regarding the public interest, and noted some additional considerations [Appeal, at page 29]. The [Member Representative] also submitted that the letters of support for the Respondent, including from his immediate supervisor, all described the Respondent's impugned conduct as out of character, and spoke to his professionalism with colleagues and the public [Appeal, at page 29]. The [Member Representative] suggested that in considering the totality of these factors, the public interest in denouncing the Respondent's conduct did not completely outweigh the public interest in retaining him [Appeal, at page 30]. In support of his position, the [Member Representative] cited decisions issued by previous conduct boards [Appeal, at page 30].

[32] In rebuttal, the Appellant argued that no weight should be ascribed to the presence or absence of criminal charges [Appeal, at page 30]. With regard to previous cases involving similar misconduct, the Appellant explained that, "[w]e deal with a system where a number of individuals voluntarily resign."

[18] The ERC next summarized the relevant evidence relied upon during the conduct measures phase (Report, at paragraphs 34 to 36):

> **1. Reference and Support Letters**
>
> [34] The Respondent provided several letters of support. Some of those letters described the Respondent as a kind, respectful, honest and trustworthy individual. They also described, in part, the Respondent as: valued; professional; knowledgeable and well-rounded; caring, passionate and helpful; courageous, thoughtful, a team player and easy to get along with; a great member and friend, hard-working and strong-willed, a respected colleague and good friend, someone who embodies integrity both in and out of uniform; and reliable.
>
> [35] Some of the letters explained that the Respondent's alleged conduct was out of character. In one letter, the author stated, "I have had the opportunity to attend social functions with [the Respondent] and I never observed him drinking to excess or getting out of control." In another letter, the author stated, "I was very shocked when I was made aware of the allegations as they are totally out of character for [the Respondent]." The author of another letter stated, "I was in dismay when I became aware of the allegations as they are absolutely out of character for [the Respondent] [Correspondence folder – RE: RCMP File No 2019335737 – ERC File No C-2020-008 [Respondent].MRSanctionReferences.letters.pdf, at pages 3-10].
>
> **2. Performance Evaluation**
>
> [36] The Board's Decision also refers to assessments of the Respondent's performance which described, in part, the Respondent's ability to address his task que effectively and efficiently. The assessments also described, in part, examples of how the Respondent took initiative by mentoring struggling members and supporting detachment objectives, his honest and professional approach towards people, his ability to work well with co-workers, and his display of good team values [Correspondence folder – RE: RCMP File No 2019335737-ERC-File_No C-2020-008,(Respondent]. MR Sanction References.letters.pdf, at page2].

Decision on conduct measures

[19] Following consideration of submissions and evidence, the Conduct Board determined that (Appeal, at page 33):

> The behaviour in question arose off-duty and constituted an isolated incident. This is in contrast to repeated and prolonged behaviours described in several of the cases cited [*Calandrini* – RCAD, *Cardinal*]. In this case I find that the mitigating factors are sufficient to support the imposition of serious conduct

> measures, short of dismissal. Collectively, these mitigating factors suggest that there is a minimal risk of recidivism.

[20] On this basis the Conduct Board imposed a financial penalty of 40 days' pay; ineligibility for promotion for a period of 2 years; and a direction to work under close supervision for a period of 1 year, starting from the date of the Respondent's reinstatement (Appeal, at page 33).

APPEAL

[21] On October 7, 2019, the Appellant filed his Form 6437 – *Statement of Appeal*, indicating that the Conduct Board's decision was reached in a manner that contravened the applicable principles of procedural fairness, was based on an error of law, and is clearly unreasonable. The Appellant agrees with the Conduct Board's decision with respect to the establishment of the allegation, but he asserts that the conduct measures imposed by the Conduct Board was clearly unreasonable (Appeal, at pages 3 to 5).

[22] The ERC summarized the Appellant's ground of appeal as follows (Report, at paragraph 42):

> […]
>
> a. The Board's Decision was clearly unreasonable;
>
> i. It contained information which was not factually accurate;
>
> ii. The totality of the evidence was not considered by the Board; and,
>
> iii. It contained erroneous findings regarding Cst. [T.N.]'s evidence, whose testimony was not properly acknowledged by the Board;
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> b. The Board erred in law by not finding that the Respondent engaged in sexual assault; and,
>
> c. The Board erred by imposing conduct measures that were based on the Board's subjective opinion, and not considering that dismissal was the appropriate conduct measure in the circumstances. [Appeal, at pages 60 to 67].

[23] The ERC found that the scope of the appeal was broad enough that it also encompassed the Conduct Board's findings on Allegation 1.

[24] I am also of the view that the Conduct Board's finds regarding Allegation 1 must be reviewed as well as it is directly linked to the conduct measure that was imposed.

Preliminary issues

[25] I am satisfied that there are no issues with respect to standing or timeliness.

Considerations on appeal

[26] The appeals process in conduct matters does not afford the appellant the opportunity to have their case reassessed (*de novo*) before a new decision maker. It is an opportunity to challenge a decision already made. In considering the appeal of a conduct decision, the adjudicator's role is governed by subsection 33(1) of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289:

> 33 (1) The Commissioner, when rendering a decision as to the disposition of the appeal, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

[27] Moreover, when it comes to an appeal of conduct measures, subsection 45.16(3) of the *RCMP Act* provides the potential outcomes:

> (3) The Commissioner may dispose of an appeal in respect of a conduct measure imposed by a conduct board or a conduct authority by
>
> (a) dismissing the appeal and confirming the conduct measure; or
>
> (b) allowing the appeal and either rescinding the conduct measure or, subject to subsection (4) or (5), imposing another conduct measure.

[28] Policy at section 5.6.2 of the *Administration Manual*, Chapter II.3 "Grievances and Appeals" (July 9, 2015, version), states that the adjudicator must consider the following documents in their decision-making process:

> 5. 6. 2. The adjudicator will consider the appeal form, the written decision being appealed, material relied upon and provided by the decision maker, submissions or other information submitted by the parties, and in those instances where an appeal was referred to the [ERC], the [ERC]'s report regarding the appeal.

[29] Furthermore, it is important to note that ERC recommendations are not binding upon my decision. I am nevertheless required, by subsection 45.16(8) of the *RCMP Act*, to provide reasons when I depart from ERC findings and recommendations.

Procedural fairness

[30] When an appellant claims that a conduct board's decision is made in breach of the applicable principles of procedural fairness, they must demonstrate that the conduct board did not follow adequate procedure in reaching the impugned decision. The appellant must establish that one of the following rights have been breached:

- The right to a decision from the person who hears the case;
- The right to know what matter will be decided and the right to be given a fair opportunity to state their case on this matter;
- The right to a decision from an unbiased decision maker;
- The right to reasons for the decision.

[31] On appeal, procedural fairness is assessed with the strict standard of review of correctness:

> [48] On issues of procedural fairness, the standard of review is correctness. More precisely, whether described as a correctness standard of review or as this Court's obligation to ensure that the process was procedurally fair, judicial review of procedural fairness involves no margin of appreciation or deference by a reviewing court. The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond: [citation omitted]. In *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, de Montigny JA said "[w]hat matters, at the end of the day, is whether or not procedural fairness has been met" (at para 35).[1]

[32] Upon consideration of the entire Record, I find no contravention of procedural fairness relating to the Appellant's right to be heard.

[1] *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321, at paragraph 48.

[33] The Appellant raises no issue with the impartiality of the Conduct Board, nor did my review identify any. I am satisfied that his right to be heard by an impartial adjudicator, or Conduct Board in this case, was respected.

[34] Lastly, the principles of procedural fairness require that the Appellant be provided with a written decision and the reasons for it. There is no dispute that the Appellant received the Conduct Board's decision and is aware of its content.

[35] In accordance with the requirements of procedural fairness, I find that the Appellant's rights to procedural fairness were met throughout the conduct process.

[36] I recognize that the Appellant has argued that the Conduct Board's deliberate understatement of the evidence respecting the gravity of the Respondent's behaviour amounts to a breach of procedural fairness for failure to categorize the Respondent's behaviour as sexual assault. However, the ERC interpreted this submission as error of law in that the Conduct Board allegedly failed to apply the test for sexual assault and instead minimized the gravity of the impugned behaviour. I agree with the ERC that this argument does not refer to procedural fairness. With that being said and as I will address later in my analysis.

Error of law

[37] An error of law is generally described as the application of an incorrect legal requirement, or a failure to consider a requisite element of a legal test.[2] It requires proof that the decision maker, in rendering a decision, relied on an incorrect law or legal standard. If an incorrect legal test was applied, the appellate body does not owe the initial decision maker deference, and the standard of review would be correctness.[3] Questions of mixed law and fact are distinguished from pure errors of law; as such, they would be reviewed under the clearly unreasonable standard.[4]

[38] The Conduct Board had stated (Appeal, page 13):

> Any reference to sexual assault should be understood as a reference to allegations of sexual assault within a civil context, as referenced in

[2] *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*], at paragraph 36.
[3] *Dunsmuir v New Brunswick*, 2008 SCC 9, at paragraph 34.
[4] *Housen*, at paragraph 36.

> *McDougall*.[5] The findings set out in this decision should not be interpreted as a determination as to whether a sexual assault, as set out in the Criminal Code, RSC, 1985, c C-46, has been established.

[39] In *McDougall*, the court had confirmed that in civil matters the standard of proof is on a balance of probabilities, unlike criminal matters where the standard of proof is the much more onerous beyond a shadow of doubt standard.

[40] I concur with the Conduct Board that *McDougall* establishes the standard of proof for civil matters.

[41] However, the ERC went further and found that the Conduct Board erred in law by not applying the test for establishing whether a sexual assault had occurred, as set out by the Supreme Court of Canada in *Ewanchuk*[6].

[42] The ERC explained that while *Ewanchuk* is the criminal law test for the offence of sexual assault, it had been applied to a RCMP conduct matter by the Federal Court in *MacLeod*[7]. The ERC noted that the *Ewanchuk* test has been used by other decision makers in administrative law contexts, referencing both *TS v Dufferin-Peel Catholic District School* Board (EA s.311.7) and *Safher v. Deputy Head (Correctional Service of Canada)*, along with ERC Recommendations in D-139, D-121 and C-0555.

[43] As set out in the three part *Ewanchuk* test, the following elements must be present:

> 1) physical relations that are sexual in nature;
>
> 2) a finding that the complainant's state of mind was that she did not consent to the sexual touching taking place; and,
>
> 3) a finding that the accused person knew that the complainant did not consent, or was reckless to or willfully blind regarding the issue of consent, or did not take reasonable steps to ascertain the Complainant's consent.

[44] I agree with the ERC that *Ewanchuk* is the proper legal test to determine if a person's actions constituted a sexual assault, even in a civil context.

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[5] *F.H. McDougal*, 2009 SCC 53 [*McDougal*]
[6] *R v Ewarchuk* [1999] SCC, [*Ewarchuk*].
[7] *MacLeod v. Canada (Attorney General)*,2013 FC 770 [*MacLeod*].

[45] Further the ERC noted that "the SCC reiterated that the application of a wrong legal principle or the failure to apply a legal test, are errors of law [*R v Chung*, 2020 SCC 8, paras. 17-18]" (Report, paragraph 47).

[46] The ERC is correct the Conduct Board did not specifically reference the three part *Ewanchuk* test by name. This leads to the question: Did the Conduct Authority apply the Ewanchuk test in its decision, without actually identifying it?

First and second elements of the Ewanchuk test

[47] The Conduct Board had summed up the evidence as follows (Appeal, at page 67):

> [67] On the totality of the evidence, I find that [the Respondent] touched [Cst T.N.'s] N's breast, under her shirt and bra, without her consent and for a sexual purpose.

[48] The ERC accepted that the Conduct Board had found that there was a physical touching for a sexual purpose and that it was without consent, and that these determinations satisfied the first two elements of the *Ewanchuk* test.

Third element of the Ewanchuk test

[49] The ERC then turned then turned to the third element which was; did the Respondent know that there was a lack of consent, was reckless to or wilfully blind regarding the issue of consent, or did not take reasonable steps to ascertain consent?

[50] The ERC found that the Conduct Board had not fully turned its mind to the final part of the *Ewanchuk* test. The ERC opined that this was an error of law, and they recommended setting the Conduct Authority's decision aside and substitute a new decision in its place.

[51] The Conduct Board in is decision provided a detailed account of the events of the evening specifically: the first fall, the second fall, on the porch, and on the sofa.

[52] Under the heading "Facts not in dispute" the Conduct Board stressed (Appeal, at page 14):

> [19] The [Member Representative] was clear that consent is not at issue in this case. At no time has [the Responded] denied that the incidents took place.

> Alternatively, he indicated that he had no recollection of the events in question.

[53] Accordingly, it is clear that the Respondent was not arguing that this was a case of mistaken consent.

[54] The Conduct Board went on to state that Cst. B.S. did hear Cst. T.N. say "stop" and that Cst. T.N. expression was "one of someone who had been caught doing something he shouldn't" and that the Respondent "left the house immediately thereafter" (Appeal at page 26).

[55] I am satisfied that the Conduct Board did briefly look at the final element of the *Ewanchuk* test, but unfortunately, they did not flush out all the evidence and properly apply it to the conduct measure. Accordingly, I respectfully disagree with the ERC that this is a question of pure law and find it to be one of mixed law and fact, which will be further considered when I turn to the appropriate conduct measure.

Clearly unreasonable

[56] The Federal Court of Appeal confirms that the term "clearly unreasonable" is equivalent to the common law standard of "patent unreasonableness".[8] Essentially, a decision is clearly, or patently, unreasonable if the "defect is apparent on the face of the tribunal's reasons", in other words, if it is "openly, evidently, clearly" wrong.[9] However, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable".[10] The decision must be "clearly irrational", "evidently not in accordance with reason" or "so flawed that no amount of curial deference can justify letting it stand".[11] Merely demonstrating that the reasons provided are **insufficient** is not enough.[12] Such is the standard imposed by the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289, at subsection 33(1).

[57] Under this ground of appeal, I find that the following questions must be answered:

a) Did the Conduct Board fail to rely on factually incorrect information?

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[8] *Smith v Canada (Attorney General)*, 2021 FCA 73, at paragraph 56.
[9] *Canada (Director of Investigation and Research) v Southam Inc*., [1997] 1 SCR 748 [*Southam*], at paragraph 57.
[10] *Southam*, at paragraph 57.
[11] *Law Society of New Brunswick v Ryan*, 2003 SCC 20, at paragraph 52.
[12] *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25, at paragraph 30.

b) Did the Conduct Board fail to consider the relevant evidence?

c) Did the Conduct Board fail to make a proper finding of Cst. T.N.'s evidence?

a) Did the Conduct Board rely on factually incorrect information?

[58] The Appellant submits that the Conduct Board made a clearly unreasonable finding when it stated that criminal charges "were not pursued" against the Respondent (Appeal, at page 62).

[59] The Appellant advises that the Crown had not made a final decision on whether to pursue criminal charges against the Respondent at the time the Conduct Board issued its decision as follows (Appeal, at page 62):

> 13. The [Conduct Authority Representative (CAR)] submits that the [Board] submission at paragraph 2 that criminal charges "were not pursued" is not factually accurate. The CAR submits that at the time of the hearing, the Crown had not yet finalized its decision on whether or not to pursue criminal charges. The CAR submits the Crown's position was relayed to both the [Board] and the MR at the PHC #2 as noted in the email summary of the 2019-03-04, in which the [Board] wrote: "The CAR confirmed that ASIRT's Report to Crown Counsel is waiting for review. He has made inquiries with the Crown's Office, and the Crown does not have any concerns about the conduct matter proceeding." [Pre-hearing Conferences, (Respondent) PHC#2_2 pdf folder, 2019-03-04 at page 3]. The CAR understands that the criminal matter has now concluded with a disposition.

[60] The Respondent indicates that the Appellant has not provided the Conduct Board any proof that the he was convicted or even charged with a criminal offence (Appeal, at page 324). Therefore, the Respondent claims that the Conduct Board's statement was "entirely factually accurate" at the time the Conduct Board issued its decision (Appeal, at page 329).

[61] The ERC summarized the factually incorrect information contained in the Conduct Board's Record of Decision as follows (Report, at paragraphs 56 and 57):

> [56] Within the introduction section of the Decision, the Board noted that, "[c]riminal charges were not pursued" [Appeal, at page 9]. The Material indicates that the Alberta Serious Incident Response Team (ASIRT) conducted a Criminal Code investigation and disclosed, to the RCMP Professional Responsibility Unit (PRU), statements that were obtained in relation to that parallel statutory investigation [Material, Investigation Binder – (Respondent)- 2017336472, page 28]. The Material also contains an

> email by the Board which summarizes one of the pre-hearing conferences that was held. The email states, in part:
>
> > *The* [Conduct Authority Representative] *confirmed that ASIRT's Report to Crown Counsel is waiting for review. He has made inquiries with the Crown's office, and the Crown does not have any concerns about the conduct matter proceeding. [...]* [Material, Respondent, Pre-hearing Conferences, page 5].
>
> As indicated earlier, the conduct hearing was held between June 5 and 7, 2019, and the Board's [Record of Decision] is dated September 20, 2019. Based on these dates, I find that at the relevant time of the hearing, the Board was aware of ASIRT's involvement and the ongoing *Criminal Code* investigation. However, a decision had not yet been communicated by the Crown, regarding whether to proceed with criminal charges against the Respondent. Therefore, I find that it was factually erroneous for the Board to state, within its Decision, that criminal charges were not pursued because the Board could not have known if charges were pursued. Accordingly, the Board should have stated that a decision by the Crown had not yet been made.
>
> [57] In addition, within the Decision, the Board commented that "[n]o weight was ascribed to the Crown's decision not to pursue charges in this matter" [Appeal, at page 9]. For this second comment to be considered factually accurate, there needed to have been a final decision by the Crown to not pursue criminal charges against the Respondent. However, this had not occurred at the time of the Board's Decision. Accordingly, this particular aspect of the Board's Decision, particularly the use of the word "decision" in that context, was also factually erroneous.

[62] I agree with the Conduct Board and the ERC that the decision regarding criminal charges was a separate and distinct process.

[63] However, once the allegation that the Respondent breached section 7.1 of the Code of Conduct was established, the Conduct Board ought to have considered that the Respondent was also the subject of a serious investigation, that was investigated by ASIRT, and that the matter was before the Crown at the time in question. This fact demonstrated the serious nature of the allegations. It would follow that if the allegation was established in the criminal proceedings that it would bring discredit to the RCMP. Thus, it ought to have been considered as an aggravating factor.

b) Did the Conduct Board fail to consider the relevant evidence?

[64] The Appellant submits that the Conduct Board made a clearly unreasonable decision because it failed to consider the totality of the evidence (Appeal, at pages 60 and 65). However, the Appellant has not identified what specific evidence was overlooked.

[65] As part of his submission, the Appellant refers to paragraph 79 of the Record of Decision, wherein the Conduct Board stated (Appeal, at page 28):

> [79] On the totality of the evidence, I find that particular 4 is not established on a balance of probabilities. However, I find that particulars 1, 2, 3, 5, 6 and 7 are established on a balance of probabilities and that, in the early hours of July 6, 2017, [the Respondent] touched [Cst. T.N.'s] breast(s), for a sexual purpose and without her consent, three times. The [Conduct Authority Representative] has accordingly established on a balance of probabilities the acts that constitute the alleged behaviour, as well as the identity of the member who is alleged to have committed these acts.

[66] The Appellant submits that, in finding the particulars established, the Conduct Board understated the severity of the finding, by refusing to explicitly acknowledge that the impugned conduct was sexual assault.

[67] Meanwhile, the Respondent indicates that the Appellant's claims lack justification (Appeal, at page 65) and that the Appellant has failed to discharge his onus to justify overturning the decision (Appeal, at page 328).

[68] The ERC determined, and I agree, that the Appellant contradicted his own submission when he acknowledged that the Conduct Board did conduct an analysis of the "totality of the evidence" in his appeal submission (Appeal, at page 427):

> […]
>
> 7. […] The [Conduct Authority Representative] submits that the [Conduct Board] conducted a detailed analysis of the totality of the evidence, including the *viva voce* evidence of [the Respondent] on the *McDougall* standard with respect to the establishment of the allegation.
>
> […]

[69] Therefore, the Appellant has acknowledged that this argument is unfounded.

[70] I further adopt the ERC's analysis with respect to the Conduct Board's handling of the evidence (Report, at paragraph 70):

> [70] In terms of whether the Board considered the totality of the evidence, I refer to the well established principle that decision makers are presumed to have reviewed and considered all evidence put before them, and that this presumption exists regardless of whether or not the evidence is referred to in the decision [*Terigho c. Canada (Citizenship and Immigration)*, 2006 CF 835; *Amos v. Canada (Public Works and Government Services)*, 2007 FC 72]. I observe that the Board received oral evidence from five witnesses including Cst. [T.N.], Cst. [B.S.] (Cst. [T.N.]'s then husband), Cst. [J.P.], the Respondent, and [Ms. E.B.] (the Respondent's spouse) [Appeal, at page 13]. Within the Decision, the Board noted the requirement to carefully assess the credibility and reliability of the evidence of each witness, and in particular, that of the Respondent and Cst. [T.N.] [Appeal, at page 15]. Citing the decision in *McDougall*, the Board also noted the need to consider the totality of the evidence [Appeal, at page 12]. I find that the Board did so. As an example, in considering the Respondent's evidence, the Board described the Respondent's recollection and/or lack thereof as appearing to be "selective" [Appeal, at page 20] and noted that the Respondent's "recollection varied significantly between his October 11, 2017, written statement to ASIRT, his section 15 response, and his oral evidence" [Appeal, at page 20]. The Board went on to outline other aspects of the Respondent's evidence that were not credible, and noted that it had concerns about the reliability of his evidence [Appeal, at pages 21 to 22]. The Board also issued findings on other aspects of witness evidence. For example, the Board found that although the evidence of Cst. [J.P.] was credible, it was not reliable [Appeal, at page 16]. The evidence of [Ms. E.B.] was found to be credible, and on the whole, it was consistent with that of other witnesses [Appeal, at page 17]. Further, the Decision indicates that the parties submitted, and the Board agreed, that the evidence of Cst. [B.S.] was the most credible and reliable [Appeal, at page 17].

[71] In short, the Appellant has failed to demonstrate that the Conduct Board failed to consider the relevant evidence.

c) Did the Conduct Board fail to make a proper finding of Cst. T.N.'s evidence?

[72] The Appellant disputes the manner in which the Conduct Board characterized the testimony of Cst. T.N.

[73] The Appellant argues that the Conduct Board erroneously relied on unfounded claims made by the Respondent with respect to Cst. T.N.'s evidence. The ERC noted (Report, at paragraphs 72 and 73):

> [72] According to the Appellant, the [Member Representative] misspoke when he suggested that Cst. [T.N.] was being disagreeable during cross-examination and that she had stated "it's still sexual assault." [Appeal, at page 65]. In fact, the Appellant argues that Cst. [T.N.] did not say this.
>
> [73] In the Appellant's view, the Board erred by relying upon the unfounded assertions of the [Member Representative], suggesting that Cst. [T.N.] had "editorialized" the sexual assault. [Appeal, at page 65].

[74] In particular, the Appellant objects to the Conduct Board's statement at paragraph 36 of the Record of Decision (Appeal, at page 19):

> [36] [Cst. T.N.] was on occasion "editorializing", unresponsive or defensive. For example, [Cst. T.N.] made comments to the effect of "it's still sexual assault".

[75] The ERC then summarized the Appellant's submission as follows (Report, at paragraphs 74 and 75):

> [74] The Appellant acknowledges that in Cst. [T.N.]'s oral testimony, she frequently referred to having been sexually assaulted by the Respondent [Appeal, at page 64]. The Appellant submits that Cst. [T.N.] used the term "sexual assault" a total of ten times in direct examination and twice in cross-examination [Appeal, at page 64]. The Appellant argues that Cst. [T.N.] was confident in her position that she was sexually assaulted by the Respondent [Appeal, at page 64]. In the Appellant's view, Cst. [T.N.]'s confidence should not be mistaken for editorializing or defensiveness, and the evidence does not support a finding that she editorialized her sexual assault [Appeal, at pages 64 to 65].
>
> [75] The Appellant also argues that in light of paragraph 98 of the Decision, the evidence concerning the impact on Cst. [T.N.] was not properly considered by the Board [Appeal, at page 68]. In the Appellant's view, this resulted in a clearly unreasonable Decision. [Appeal, at page 68]. The Appellant submits that Cst. [T.N.] experienced a violation of trust, loss of self-esteem, a period of ostracization at work, that she subsequently self-medicated with excessive alcohol, and that the Respondent's actions directly impacted both her marriage and sex life [Appeal, at page 168]. The Appellant adds that Cst. [T.N.] experienced a breach of her right to personal privacy and

> autonomy, and "multiple violations of her sexual integrity" [Appeal, at page 68] […].

[76] The Respondent argued in reply (Appeal, at page 330):

> […]
>
> The Board cannot have erred according to para. 26 of the [Appellant's] submissions "by relying upon the unfounded assertions of the [Member Representative]" (para. 26) since the Board largely decided against those submissions and found [the Respondent] to be culpable. Those submissions related to credibility and culpability. They were not addressing sanction. And a reading of the full record in any case does support the submissions made, even if the tentatively suggested quote offered without the benefit of the transcript turned out in the end not to be as precise as was hoped for.
>
> […]

[77] The ERC determined that the Conduct Board did not make any erroneous findings with respect to Cst. T.N.'s testimony. I agree.

[78] The Conduct Board characterized Cst. T.N.'s testimony, in part, as follows (Appeal, at pages 18 and 19):

> […]
>
> [33] I have concerns about the credibility and reliability of both Constable [T.N.'s] and [the Respondent's] evidence. My concerns fall into the same general categories for both members: a) variations in their evidence; b) propensity to embellish; c) lack of responsiveness, editorializing, or deflection when answering questions; and d) unfounded assertions. In exploring these concerns, I have cited some examples of my observations. These are examples and should not be interpreted as exhaustive.
>
> […]
>
> [36] [Cst. T.N.] was on occasion "editorializing", unresponsive or defensive. For example, [Cst. T.N.] made comments to the effect of "it's still sexual assault".
>
> […]

[79] I find that the ERC appropriately addressed the Conduct Board's handling of the "sexual assault" comments made by Cst. T.N. (Report, at paragraph 81):

> [81] Although the Appellant argues that Cst. [T.N.] did not say "it's still sexual assault", the Material indicates that Cst. [T.N.] stated, in part, "the sexual assault still happened" [Material, [Respondent], Transcripts, RCMP-[Respondent]-05-06-19, page 172, line 17]. I find that it was not clearly unreasonable for the Board to have found that Cst. [T.N.] stated such wording. I also find that it was open to the Board to consider the evidence of witnesses, including that of Cst. [T.N.], and draw its own conclusions regarding the evidence before it. In fact, it was not only open to the Board; the Board was required to do so.

[80] Moreover, the Conduct Board accurately captured the impact that the Appellant's behaviour had upon Cst. T.N. (Appeal, at page 31):

> […]
>
> 3. [The Respondent's] actions had a negative impact on [Cst. T.N.], both in her personal and work life. She and [Cst. B.S.] reported that she struggled in dealing with her feelings after the incidents. This negatively impacted her personal health and added further stress to her already strained marriage. She also described feeling ostracized at work after the incidents were reported. She has since transferred to another detachment.
>
> […]

[81] I find that the Conduct Board clearly demonstrated that it appropriately weighed and considered the evidence tendered by Cst. T.N. when reaching their decision on whether the Allegation was established or not.

Conclusion

[82] The ERC confirmed the test for discreditable conduct was met in relation to the Respondent's misconduct. I agree that a reasonable person in society, with knowledge of all of the relevant circumstances, including the realities of policing in general and the RCMP in particular, would view the Respondent's behaviour as likely to discredit the Force as set out in section 7.1 of the Code of Conduct.

[83] That being said, I have concerns with the application of the facts with respect to the conduct measure imposed by the Conduct Board.

Conduct measures

[84] The Appellant disputes the conduct measures imposed, submitting that they fail to acknowledge the gravity of the Respondent's behaviour. The Appellant insists that the Respondent should have been asked to resign within 14 days or otherwise be dismissed from the Force.

[85] With respect to conduct measures imposed, the Conduct Board is due great deference. The Supreme Court has commented on the deference owed upon a review of sanction measures:

> [43] […] I agree that an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor can justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate. However, in my opinion, every such error will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning. If the rule were that strict, its application could undermine the discretion conferred on sentencing judges. […]
>
> [44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.[13]

[86] Accordingly, a conduct appeal adjudicator should only intervene where the conduct measure:

> […] is unreasonable, fails to consider all relevant matters (including important mitigating factors), considers irrelevant aggravating factors, demonstrates a manifest error in principle, is clearly disproportionate with the conduct and the sanction in other previous similar cases, or would amount to an injustice. […][14]

[87] In other words, conduct measures should rarely be overturned on appeal.

[88] The ERC summarized the Appellant's submission on conduct measures as follows (Report, at paragraphs 152 to 154):

> [152] The Appellant submits that the Board imposed a sanction that was not proportionate to the gravity of the established allegation [Appeal, at page 68].

[13] *R v Lacasse*, 2015 SCC 64, at paragraphs 43 to 44.
[14] Commissioner's decision D-115, at paragraph 44.

> He takes exception to the Board's reference to what he describes as the "limited precedential value" of "old system" case law. In the Appellant's view, the approach of imposing a significant financial penalty, as satisfying the severity of the allegation, is an improper approach. The Appellant explains that he does not accept an approach that views the loss of money as wholly satisfying the need for deterrence, where allegations of sexual assault are involved [Appeal, at page 68].
>
> [153] In addition, the Appellant submits that the Board's justification leading up to the imposition of conduct measures was improper, unreasonable and procedurally unfair [Appeal, at pages 62 to 63]. As previously explained, the Appellant argues that the Board understated the evidence and that this impacted the rationality of the Board's reasoning [Appeal, at page 62]. The Appellant also refers to what he describes as an "unsupported legal constraint", which he argues justifies a finding that the Board's Decision on the conduct measures was unreasonable and untenable [Appeal, at page 63].
>
> [154] Moreover, the Appellant argues that the conduct measures imposed were based entirely on the Board's subjective opinion [Appeal, at page 61]. He also submits that the Board's finding at paragraph 98 of its Decision was a subjective statement [Appeal, at page 67]. For context, paragraph 98 stated [Appeal, at page 33]:
>
> > *[98] Taking the totality of the circumstances into account, I find that a loss of employment would be a disproportionate response to* [the Respondent's] *misconduct. However, I find that significant conduct measures are required not only to address specific and general deterrence, but also to provide some reassurance of ongoing oversight in order to ensure that this behaviour is not repeated. In addition, in light of the poor judgment demonstrated by* [the Respondent], *I find that a period of reintegration is required before he may be eligible for any promotion*.

[89] The ERC then summarized the Respondent's submission on conduct measures (Report, at paragraphs 156 to 160):

> [156] Further, the Respondent disagrees with the Appellant's assertion that the sanction imposed was entirely based upon the Board's subjective opinion. The Respondent submits that the Board, in considering sanction, carefully considered the precedents enunciated in eight previous conduct board decisions [Appeal, at page 329]. The Respondent takes exception to what he describes as the Appellant improperly implying that the Board had "ulterior motives" [Appeal, at page 329].
>
> [157] In addition, the Respondent takes exception to what he describes as the Appellant's attack on "the integrity of the RCMP's own conduct system" [Appeal, at page 331]. The Respondent argues that the Appellant did not cite any authority for his argument that, in view of the severity of the Allegation,

> it was improper for the Board to impose a significant financial penalty [Appeal, at page 331]. The Respondent argues that financial penalties are "typically" involved in matters before administrative tribunals [Appeal, at page 331]. He expresses his view that sexual assaults, if proven in criminal court, do not result in loss of employment "either" [Appeal, at page 331]. The Respondent submits that the Appellant's continual mixing of criminal and administrative proceedings is improper, and has the effect of causing the Appellant's submissions to have no persuasive weight [Appeal, at page 331].
>
> [158] With respect to the issue of proportionality, the Respondent, in support of his view, cites the conduct board decisions in *Caram* [RCMP Conduct Board Decision: Constable Benjamin Caram, 2017 RCAD]. which I note was the board's decision in C-042, and *Pulsifer* [RCMP Conduct Board Decision: Constable Devin Pulsifer, 2019 RCAD]. which I note was the board's decision in C-055. The Respondent submits that those matters involved circumstances similar to those of the present matter, yet neither resulted in loss of employment [Appeal, at page 332]. The Respondent submits that even if other matters have resulted in dismissal, the discretion of conduct boards "should not lightly be interfered with" [Appeal, at page 332].
>
> [159] Overall, the Respondent argues the Appellant has failed to discharge the onus of demonstrating that the Decision should be overturned on appeal [Appeal, at page 328]. He adds that the Appellant has failed to demonstrate the unreasonableness of the Board's decision to retain the Respondent's employment [Appeal, at page 331].

[90] The RCMP and ERC have long used a three-part process to identify appropriate conduct measures:

> • Determine the appropriate range of sanction, given the seriousness of the conduct;
>
> • Determine any mitigating and/or aggravating factors; and
>
> • Select a penalty that best reflects the severity of the misconduct, and the nexus of the misconduct and the requirements of the policing profession.

[91] A conduct board is not required to reference each step as a *de facto* test; however, they must demonstrate consideration of each essential element.

[92] Here, the Conduct Board noted that the appropriate range of sanction includes dismissal of the Respondent. However, the Conduct Board further determined that dismissal is **not** the only sanction that would be acceptable in the circumstances (Appeal, at page 31).

[93] Next, the Conduct Board considered the aggravating and mitigating factors (Appeal, at pages 31 to 32):

> […]
>
> [93] I find the following to be aggravating factors in this case:
>
> 1. [The Respondent] has 12 years of service, and is one of the senior members on C Watch. As noted by [Cst. J.P.], junior members look up to him. He has demonstrated poor judgment, which falls below what one would expect from a member with his years of service.
> 2. I find that [the Respondent], by his actions, breached a trust with [Cst. T.N.]. However, I do not find that the circumstances of this case warrant the classification of [Cst. T.N.] as a "vulnerable person". That designation is more reflective of someone whose personal security, or emotional well-being, is significantly compromised, and/or where there is a power imbalance. While [Cst. T.N.] was quite intoxicated, I do not find that she was "vulnerable" in this sense.
> 3. [The Respondent]'s actions had a negative impact on [Cst. T.N.], both in her personal and work life. She and [Cst. B.S.] reported that she struggled in dealing with her feelings after the incidents. This negatively impacted her personal health and added further stress to her already strained marriage. She also described feeling ostracized at work after the incidents were reported. She has since transferred to another detachment.
>
> [94] I find the following to be mitigating factors in this case:
>
> 1. [The Respondent] has approximately 12 years of productive service with the RCMP. He has no prior record of misconduct. His performance assessments are positive.
> 2. [The Respondent] has the ongoing support of his colleagues and immediate supervisor.
> 3. Based on all of the evidence before me, [the Respondent]'s level of intoxication was an isolated incident and out of character. [Ms. E.B.] reported that she had never seen him so intoxicated, nor since that date. I note here that [Ms. E.B.] and [the Respondent] have been in a relationship for over five years. [Cst. T.N.] also noted that she had never seen [the Respondent] so intoxicated.
> 4. [The Respondent]'s actions towards [Cst. T.N.] were an isolated incident and out of character. Here I refer to the evidence of all of the witnesses, who confirmed no prior issues of this nature. His behaviour was, based on the Record and the letters of support that I received as the Conduct Board, out of character and a divergence

> from what is described as his usual respectful, kind and professional manner.
>
> 5. When [Cst. T.N.] confronted [the Respondent] about his behaviour, his spontaneous reaction demonstrated remorse, and a desire to try to mitigate the negative impact of his actions. [Cst. T.N.] acknowledged that [the Respondent] did try to respect her wishes, when they discussed how to address the situation.

[94] Based on these considerations, the Conduct Board arrived at the following conclusions (Appeal, at pages 32 to 33):

> […]
>
> [97] The behaviour in question arose off-duty and constituted an isolated incident. This is in contrast to repeated and prolonged behaviours described in several of the cases cited [e.g. *Calandrini*- RCAD; *Cardinal*]. In this case, I find that the mitigating factors are sufficient to support the imposition of serious conduct measures short of dismissal. Collectively, these mitigating factors suggest that there is minimal risk of recidivism.
>
> [98] Taking the totality of the circumstances into account, I find that a loss of employment would be a disproportionate response to [the Respondent's] misconduct, However, I find that significant conduct measures are required not only to address specific and general deterrence, but also to provide some reassurance of ongoing oversight in order to ensure that this behaviour is not repeated. In addition, in light of the poor judgment demonstrated by [the Respondent], I find that a period of reintegration is required before he may be eligible for any promotion.
>
> [99] Having found the allegation to be established and in accordance with paragraph 45(4)(c) of the *RCMP Act*, I impose the following conduct measures:
>
> a) A financial penalty of 40 days' pay, to be deducted [from the Respondent]'s pay;
>
> b) Ineligibility for promotion for a period of 2 years, to start from the date of [the Respondent]'s reinstatement; and
>
> c) A direction to work under close supervision for a period of l year, to start from the date of [the Respondent]'s reinstatement.
>
> […]

[95] The Appellant argues that the conduct measures that were imposed were subjective and without merit.

[96] The only event in which conduct measures would not be subjective would be where there is a mandatory minimum or prescribed guide for specific breaches of the Code of Conduct. Thus, the question is whether the conduct measures are clearly unreasonable, not whether they are subjective.

[97] The ERC agreed with the aggravating factors that the Conduct Board identified but also observed the following (Report, at paragraph 171):

> […] First, this matter did not involve just one incident. The Respondent touched Cst. TN's breast(s) several times. Second, some of the Respondent's egregious conduct took place in the victim's household. Cst. BS, her husband at the time, was also home and witnessed the Respondent pulling his hand away from Cst. TN's chest area.

[98] The ERC agreed with the first four mitigating factors as identified by the Conduct Board but added (Report, at paragraph 176):

> [176] I also agree with the fifth mitigating factor outlined above, to the extent that the Respondent expressed remorse. However, I also disagree with this fifth mitigating factor to some extent, given subsequent actions by the Respondent, including his denial of his misconduct.

[99] The ERC was not persuaded that there was a chance of recidivism was extremely low or very unlikely risk of repetitive behaviour.

[100] After reviewing the Record, I find the Conduct Board has failed to properly consider all the information which directly impacts the aggravating and mitigating factors. At this juncture I will now examine not only the aggravating factors, but also the mitigating factors as well.

Aggravating Factors

[101] The Conduct Board found that the Respondent's actions were likely to bring discredit to the Force contrary to the Code of Conduct, Section 7.1, "Discreditable Conduct".

[102] The RCMP *Conduct Measures Guide (Supplement) May 2019* (*Guide*) states that members of the RCMP are to behave in a manner that is not likely to discredit the Force. The *Guide* provides a non-exhaustive list of aggravating factors:

1. Seriousness of the misconduct

2. Lack of honesty and integrity (deceitfulness)

3. Potential to put both the public and members at risk

4. Prior discipline (Recent and/or relevant/similar)

5. Rank held by member (NCO role model, Officer held to higher standard, supervisory role)

6. Abuse of special position (e.g. exhibit custodian) to facilitate offence

7. Another police agency involved (or other government agency) (undermined RCMP's credibility and reputation, risk to compromise RCMP's relationship with agency partners)

8. Member(s) of the public/civilian involved

9. Deliberate action (planned, premeditation involved)

10. Conduct over an extended period of time (repetitive)

11. Criminal Code conviction (Alternative Measures Program vs. Absolute Discharge vs. Fine vs. Peace Bond)

12. Acted out of personal gain

13. Lost the trust of the community/Damaged the relationship

14. Breach of public trust

15. Used his/her status as police officer in an attempt to gain favour (e.g. displayed/ showed RCMP badge, identified him/herself as police officer)

16. Lack of remorse

17. Media attention

18. Impact on the victim (physical and emotional)

19. Potential to compromise investigation(s)

20. Involved human source

21. Warned in the past about the inappropriateness of the action

[Emphasis added.]

[103] The Conduct Board identified and considered the following aggravating factors:

1) The rank held by Respondent. The Conduct Board did acknowledge that the Respondent was a senior member, and that Cst T.N. was a junior member.

2) That there was a breach of trust by the Respondent's actions. The Board did not go as far as to find that Cst. T.N. was a vulnerable person.

3) That the Respondent's actions had a major impact on Cst. T.N.

[104] While I agree with the Conduct Board that Cst. T.N. was not a vulnerable person, it is clear that she was in a venerable state due to her intoxication. To this end, the Respondent took advantage of Cst. T.N.

[105] After a careful review of the record, I find that the Conduct Board failed to consider the following aggravating factors:

a) The seriousness of the misconduct, specifically that it was a sexual assault.

b) While this incident occurred in a relatively short period of time, it occurred more than once.

c) Cst. T.N. told the Respondent to "stop" at least twice.

d) This was not a case of the Respondent mistakenly or willfully believed that there was consent.

e) That the Respondent did directly touch Cst. T.N.'s breast, under her clothing.

f) That this incident triggered an investigation by an outside agency (ASIRT).

g) Given ASIRT's involvement there was a real likelihood that there would be a media release.

h) At the time of the Conduct Board's decision there was still a real possibility that criminal charges could be laid against the Respondent in this matter. The Conduct Board was mistaken regarding this fact.

i) As pointed out by the ERC, some of the egregious conduct took place in the victims home, where she should have felt safe.

j) That multiple mandatory training courses and messaging from RCMP management has been advocating a safe and respectful workplace for all employees for several years.

Mitigating factors

[106] As for mitigating factors the Conduct Board considered the following:

1) That the Respondent had 12 years of productive service.

2) That he had support of his colleagues and immediate supervisor.

3) That this was out of character for the Respondent.

4) That this was an isolated incident and again out of character.

5) That when confronted he spontaneous demonstrated remorse and tried to mitigate the negative impact of his actions.

[107] The ERC pointed out that the Respondent's PTSD may have been a mitigating factor.

[108] The ERC disagreed with the fifth mitigating factor, given the subsequent actions by the Respondent, including his denial of his misconduct.

[109] I also find the Respondents remorse to be disingenuous for the following reasons:

- Shortly after the occurrence, Cst. T.N. told the Respondent that one of them needed to move watches. The Respondent agreed at first but then told her that he could not move watches because of childcare issues. However, his children were not with him and they were in Grande Prairie (Part IV Code of Conduct Investigation, "K" division Professional Responsibility Unit, at page 34).

- As stated by the ERC, the Respondent maintained though out the conduct process that he did not sexually assault Cst. T.N.

- Curiously, the Respondent did state that he did not disbelieve Cst. T.N. and Cst. B.S.'s version.

- At one point in the conduct hearing the Respondent explained that he believed that it was Cst. T.N.'s intent to cause issues in his relationship and that she was potentially trying to make the him available so that she could pursuit him. Not only does this fail to show remorse, it is actually shifting the blame on the victim.

[110] I find that the Respondent did not take any reasonability for what he did to Cst. T.N. Thus, I disagree with the Conduct Board that the Respondent demonstrated remorse. I am of the view that the Conduct Board erred in considering this as a mitigating factor, where it was actually an aggravating factor.

Appropriate conduct measure

[111] Recall, the Conduct Board specifically stated that, while dismissal was an option, it was not prepared to impose this conduct measure in light of the mitigating factors identified. I find that the removal of remorse is a crucial mitigating factor and would have materially change the Conduct

Board's calculus, especially when coupled with the significant aggravating factors that were overlooked.

[112] Consider in C-055, which the Respondent classified as similar to this case, the Commissioner confirmed the Board's finding that: "[t]he Respondent showed genuine remorse for his actions and went as far as seeking treatment". Ultimately, in C-055, Commissioner confirmed that dismissal was not warranted in part due to the respondent's behaviour after the allegations. By contrast, here there was no genuine expression of remorse, a written apology or treatment for alcohol abuse. Therefore, I find that the mitigating factors are demonstrably less favourable than those identified in C-055. Meanwhile, the aggravating factors become far more significant when the damage to the Force's reputation is factored in.

[113] As noted by the Federal Court, "[w]e do not live in a perfect world, and cannot expect the reasons of a decision to be perfect either".[15] Moreover, the Supreme Court of Canada recognizes this reality by confirming that "[a]ny alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep."[16]

[114] While one of these errors alone may not be sufficient to warrant intervening in the Conduct Board decision, I am troubled by their cumulative impact. Given that the Conduct Board underemphasized the aggravating factors and overemphasized the mitigating factors, in a case that was already precariously close to dismissal, as per paragraph 45.16(3)(b) of the RCMP Act, I am prepared to intervene and impose my own conduct measure as I find the current conduct measures to be clearly unreasonable.

[115] When I factor in that the Respondent brought significant harm to the perception of the RCMP in the eyes of a fellow police force and the public at large, without demonstrable remorse, I find that the circumstances warrant the resignation of the Respondent from the Force within 14 days or that he be otherwise dismissed.

[15] *Laroche v Canada (Attorney General)*, 2013 FC 797, at paragraph 62.
[16] *Vavilov*, at paragraph 100.

DECISION

[116] Based on the foregoing, the Appeal is allowed. In accordance with paragraph 45.16(1)(b) of the *RCMP Act*, I confirm the findings made by the Conduct Board on the Allegation, namely that the Respondent conducted himself in a manner that is likely to discredit the RCMP, contrary to section 7.1 of the *Code of Conduct*.

[117] However, having found that the conduct measures that were prescribed by the Conduct Board are clearly unreasonable, I set them aside and impose the following conduct measure: the Respondent resigns from the RCMP within 14 days or be dismissed.

[118] Should the Parties disagree with my decision, they may seek recourse to the Federal Court pursuant to subsection 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

September 12, 2024

_____ _____

John Lawrence, Adjudicator Date