

Publication ban: Any information that could identify the Complainant in the present decision shall not be published, broadcast or transmitted in any way.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:

Commanding Officer, "F" Division

Conduct Authority

and

Constable Dayne Lyons

Regimental Number 64429

Subject Member

Conduct Board Decision

Gina Lévesque

December 16, 2024

Sabine Georges, Conduct Authority Representative

Anita Atwal, Subject Member Representative

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SUMMARY

On September 21, 2023, Constable Dayne Lyons was served a *Notice of Conduct Hearing*, dated September 7, 2023, which contains two alleged contraventions of section 2.1 of the RCMP Code of Conduct. It is alleged that Constable Lyons engaged in sexual harassment by making rude and inappropriate comments to another member and by touching that same member without his consent.

On June 6, 2024, having heard from the Complainant and from Constable Lyons, the Conduct Board found both Allegations 1 and 2 not established.

INTRODUCTION

[1] On March 16, 2023, the Conduct Authority signed a *Notice to the Designated Officer* to request the initiation of a conduct hearing in this matter. On March 17, 2023, I 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 September 21, 2023, Constable Dayne Lyons was served with a *Notice of Conduct Hearing*, dated September 7, 2023, along with the investigation package. The *Notice of Conduct Hearing* contains two allegations of sexual harassment in contravention of section 2.1 of the RCMP Code of Conduct.

[3] On November 24, 2023, Constable Lyons provided his response to the *Notice of Conduct Hearing*, pursuant to subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291. While Constable Lyons admitted several particulars, he denied both allegations as a whole.

[4] The conduct hearing was held in person in Kelowna, British Columbia, from June 3 to 6, 2024. I heard evidence from the Complainant (Constable M.R.) and from Constable Lyons.

[5] On June 6, 2024, I delivered my oral decision on the allegations. I found Allegations 1 and 2 not to be established on a balance of probabilities.

[6] This decision is my final written decision on the allegations and incorporates, clarifies and expands upon my oral decision.

Publication ban

[7] On June 3, 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 M.R. in this decision, shall not be published, broadcast or transmitted in any way.

[8] In this decision, the quoted text from the *Notice of Conduct Hearing* and from my *Determination of Established Facts* has been amended to reflect the publication ban.

ALLEGATIONS

[9] The Allegations, as set out in the *Notice of Conduct Hearing*, read as follows:

[Particulars common to Allegations 1 and 2:]

1. At all material times you were a member of the Royal Canadian Mounted Police ["RCMP"], in General Duty and as a Media Relations Officer at [redacted] Detachment.
2. You attended a Christmas watch party intended for members of the [redacted] Watch.
3. You were drinking that night and you exhibited signs of heavy intoxication.
4. You stated that you were ill. You experienced emesis¹ that evening.
5. [Constable M.R.] attended the watch party with his spouse.

Allegation 1

On or between December 1, 2021, and December 25, 2021, at or near [redacted], in the Province of British Columbia, Constable Dayne Lyons has engaged in sexual harassment by making rude and inappropriate comments to another member contrary to section 2.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

[Particulars specific to Allegation 1]

6. You commented that [Constable M.R.] was “hot” and that you were attracted to him.
7. You approached [Constable M.R.] and told him that you wanted to see and touch his abdominal muscles.
8. You also made a comment out loud that you wanted “to be filled with cum” or something to that effect.

¹ Emesis means “an act or instance of vomiting”. Merriam-Webster.com Dictionary, “emesis”, accessed September 20, 2024, online: <<https://www.merriam-webster.com/dictionary/emesis>>.

9. In addition, you freely described yourself as “big booty bottom” which, refers to your sexual preferences.

10. [Constable M.R.] had not asked you about your sexual preferences. [Constable M.R.] did not wish to know about your sexual preferences.

11. Your behaviour towards [Constable M.R.] was unwanted, unsolicited, rude, inappropriate, offensive and constituted sexual harassment.

Allegation 2

On or between December 1, 2021, and December 25, 2021, at or near [redacted], in the Province of British Columbia, Constable Dayne Lyons has engaged in sexual harassment by inappropriately touching another member of the RCMP without his consent contrary to section 2.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

[Particulars specific to Allegation 2]

6. You attempted to put your hands down [Constable M.R.]’s shirt a couple times.

7. You continuously kept putting your hand on [Constable M.R.]’s chair and then on his leg.

8. You then put your hand up [Constable M.R.]’s shirt on his bare skin as you were attempting to put your hand down his pants.

9. [Constable M.R.] told you to stop multiple times, but you ignored his wishes and continued.

10. [Constable M.R.] did not consent to you touching him.

11. Your behaviour towards [Constable M.R.] was sexual in nature constituted sexual harassment, which includes sexual assault.

[*Sic throughout*]

FACTS ESTABLISHED BY CONDUCT BOARD

[10] While he denied that his behaviour amounted to sexual harassment, Constable Lyons admitted most of the particulars contained in the *Notice of Conduct Hearing* in his response to the Allegations. On May 10, 2024, I issued a *Determination of Established Facts* based on Constable Lyons’ admissions.

[11] On May 22, 2024, Constable Lyons admitted to additional particulars.

[12] Consequently, the next day, I issued an *Amended Determination of Established Facts* to include Constable Lyons’ additional admissions, which I found were consistent with the material

in the Record. The *Amended Determination of Established Facts* sets out the following facts, which are undisputed by the parties:

Facts Related to all Allegations

- a) At all material times, Constable Lyons was a member of the [RCMP], working in General Duty at [redacted] Detachment, in the province of British Columbia.
- b) On December 18, 2021, Constable Lyons attended a portion of a Christmas watch party intended for members of the [redacted] Watch of the [redacted] Detachment. The party took place at the [redacted] Pub in [redacted], British Columbia.
- c) Constable Lyons was drinking that night and he exhibited signs of heavy intoxication.
- d) Constable Lyons stated that he was ill and he experienced emesis that evening.
- e) Constable [M.R.] attended the watch party with his spouse.

Facts Related to Allegation 1

- f) While at the party, Constable Lyons commented that Constable [M.R.] was “hot” and attractive.
- g) While at the party, Constable Lyons told Constable [M.R.] that he wanted to touch his abdominal muscles.
- h) While at the party, Constable Lyons made a comment out loud that he wanted “to be filled with cum” or something to that effect.
- i) In addition, during the party, Constable Lyons described himself as “big booty bottom” or something to that effect.
- j) Constable [M.R.] did not ask Constable Lyons about his sexual preferences.

Facts Related to Allegation 2

- k) Constable Lyons attempted to put his hands down Constable [M.R.]’s shirt a couple of times.
- l) Constable Lyons kept putting his hand on Constable [M.R.]’s chair and then on his leg.
- m) While at the Party, Constable Lyons touched Constable [M.R.]’s bare skin in the stomach area.
- n) Constable [M.R.] told Constable Lyons to stop multiple times.
- o) Constable [M.R.] did not consent to Constable Lyons touching him.

EVIDENCE

[13] The Record before me includes the following:

- a. the Code of Conduct Investigation Report, dated August 31, 2022, and supporting material;
- b. the transcribed statement from Constable M.R.;
- c. the transcribed statements from six interviewed witnesses;
- d. a written statement from Constable Lyons;
- e. an audio recorded statement and transcript of a statement from Constable Jonathon Williams obtained following a further investigation request;
- f. copies of various texts and Instagram messages exchanged between Constable Lyons and Constable M.R.;
- g. a photograph of Constables Lyons and M.R.; and
- h. copies of messages exchanged in a Watch Group chat.

[14] During the conduct hearing, I heard oral evidence from Constables M.R. and Lyons.

[15] The credibility and reliability of the witnesses were not at issue in this case in light of Constable Lyons' admissions to the essential elements of the Allegations. Nonetheless, considering that the Parties' Representatives commented on this issue during their submissions, I will address the credibility and reliability of the witnesses who testified at the hearing, starting with the applicable legal principles.

Applicable legal principles to determine credibility and reliability of evidence

[16] In assessing the credibility of witnesses, I must consider whether they are being truthful and 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.²

[17] In assessing credibility, I must not look at a witness's evidence in isolation but rather at the totality of the evidence. I must also consider the impact of the inconsistencies in that evidence and whether they impact the witness's credibility when taken as a whole in the context of the totality of the evidence.³

[18] The British Columbia Court of Appeal notes that a witness's evidence cannot be assessed solely on their demeanour, that is, that they appear to be telling the truth.⁴ Rather, a trier of fact must determine whether the witness's story is consistent with the most probable interpretation of the surrounding facts.

[19] 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.⁵

Credibility and reliability of witnesses

[20] I find both Constable M.R. and Constable Lyons were credible witnesses.

[21] Constable M.R. was a frank, calm and well-spoken witness. He was balanced when expressing himself and did not seek to embellish or exaggerate his answers, nor perfect them over time. He was honest in his answers when he did not remember something. I find he was a reliable witness.

² *R. v R.E.M.*, 2008 SCC 51, at paragraph 65.

³ *F.H. v McDougall*, 2008 SCC 53 [*McDougall*], at paragraph 58.

⁴ *Faryna v Chorny*, 1951 CanLII 252 (BC CA), at page 357.

⁵ *McDougall*, at paragraph 58.

[22] Constable Lyons was an articulate and forthright witness. He answered questions directly and clearly during both his examination in chief and cross-examination.

[23] The Conduct Authority Representative submitted that Constable Lyons could not be considered a reliable witness because he admitted that his memory of the party is patchy as a result of his alcohol consumption that night.

[24] I agree that Constable Lyons cannot be considered a reliable witness in relation to the events that occurred at the party. However, he admitted for the most part to all the particulars of his behaviour that night, as described in the *Notice of Conduct Hearing*, and these facts were not in dispute before me. I find that Constable Lyons was a reliable witness in relation to the other elements of his testimony, such as his friendship with Constable M.R. and his interpretation of the various messages exchanged between them.

FINDINGS OF FACT

[25] Following the testimonies heard at the conduct hearing from both Constable M.R. and Constable Lyons, I made additional findings of fact.

[26] During his testimony at the conduct hearing, Constable M.R. described the part of the body where he was touched by Constable Lyons as his right-side rib area. Consequently, I amend my findings of facts and find that, while at the party, Constable Lyons touched Constable M.R.'s bare skin on his right-side rib area. I also note that Constable M.R. did not testify to Constable Lyons touching his leg.

[27] Constable M.R. and Constable Lyons became friends as soon as Constable Lyons arrived at the detachment in September 2021. They worked on the same watch and had a good working relationship. They sometimes met for breakfast or lunch while off duty.

[28] They both felt comfortable with each other and supported each other. Constable M.R. was aware of Constable Lyons' sexual orientation and was not bothered by it. Constable Lyons confirmed that Constable M.R. never treated him differently because of his sexual orientation. He

explained that he usually has difficulties being himself, but felt comfortable around Constable M.R.

[29] Constable M.R. and Constable Lyons started communicating frequently on and off duty, by text and on social media, where they engaged in friendly jokes and banter. They communicated on various topics; some related to work, others to their personal life. Their exchanges included emojis, pictures and TikTok videos. Constable M.R. did not recall them exchanging videos with sexual content but admitted it was possible. I was not provided with the TikTok videos referenced in the text exchanges. Consequently, I am unable to make a finding in relation to the nature of those videos.

[30] I find that the text messages and Instagram messages exchanged from September 2021 to November 2021 support the existence of a friendship between Constable M.R. and Constable Lyons. Having said that, those messages also demonstrate that their friendship gradually deteriorated over time. Constable M.R. and Constable Lyons testified that, at one point, they realized they had different policing styles and views.

[31] I note that Constable Lyons used more emojis and nicknames than Constable M.R. in their exchanges. However, I attribute this to their different personalities.

[32] Constable M.R. testified that while some of Constable Lyons' messages could be interpreted as having a sexual overtone, he never interpreted these messages as such and "never way he never took it the wrong way."⁶ He indicated that the text messages exchanged with Constable Lyons were of a joking nature.

⁶ Transcript of June 3, 2024, at page 17, line 1.

[33] Constable Lyons described their messages as “banter, joyful, flirty, back and forth.”⁷ He admitted that some of his messages had a sexual overtone but felt that these were sent in response to Constable M.R.’s messages, which had a similar tone.

[34] I find that two individuals can perceive the same message or emoji differently based on their perception and background. Based on the evidence before me, I do not find that the content of the messages in this case is overly sexual. Only two exchanges contain comments or emojis that can be interpreted as having a sexual undertone. I do not agree with the Conduct Authority Representative’s position that those exchanges were one-sided. I find that both Constable Lyons and Constable M.R. sent messages or emojis that could be seen as having a sexual meaning.

[35] When asked how he felt about Constable Lyons commenting on Instagram that he was “so hot”, Constable M.R. indicated that it did not bother him because he felt comfortable with himself, with Constable Lyons and with their friendship. Similarly, when asked to provide his interpretation of some of the emojis included in Constable Lyons’ messages, Constable M.R. indicated not having a specific interpretation, not being bothered by the emojis and how Constable Lyons always used many emojis in his messages.

[36] Constable M.R. and Constable Lyons eventually grew apart as they began to have different viewpoints. Constable M.R. felt that Constable Lyons was often trying to direct him on operational matters, while Constable Lyons observed that Constable M.R. was becoming more reclusive as he was dealing with different stressors in his professional life.

[37] On November 8, 2021, Constable M.R. and Constable Lyons met for breakfast to discuss their issues in the hopes of moving forward. The meeting was inconclusive, but there was an understanding that they would continue to work together as professionals. Despite their differences, Constable M.R. and Constable Lyons remained friends.

⁷ Transcript of June 3, 2024, at page 80, lines 17-18.

[38] Constable M.R. mentioned that he considers the incident at the Christmas party to have ended their friendship. Constable M.R. and Constable Lyons continued working together for two or three months after the party, without any issues. However, tensions remained between them as Constable Lyons felt that Constable M.R. was not taking his fair share of service calls and Constable M.R. felt that Constable Lyons was often trying to direct him on operational matters and criticized him over the radio.

[39] On March 22, 2022, Constable M.R. requested to be moved to another watch because of an incident involving Constable Lyons voicing some frustrations over the radio. Constable M.R. disclosed the Christmas party incident at the same time. It is this disclosure that initiated the conduct process against Constable Lyons. Constable M.R. was transferred to a different watch as a result of reporting these incidents.

ANALYSIS

[40] Constable Lyons is facing two alleged contraventions of section 2.1 of the Code of Conduct. This section states that “[m]embers treat every person with respect and courtesy and do not engage in discrimination or harassment.” While section 2.1 of the Code of Conduct is meant to cover a wide range of discourteous behaviours, the allegations against Constable Lyons were specifically limited to having engaged in sexual harassment. Therefore, it is necessary to examine the definition of sexual harassment.

Definition of sexual harassment

[41] The RCMP policy in effect at the relevant time is found in *Administration Manual*, Chapter 2.1 “*Work Place Harassment and Violence Prevention, Investigation, and Resolution*”. This policy version came into force on July 30, 2021, following the amendment to the *Canada Labour Code*, RSC, 1985, c L-2.

[42] Sexual harassment is defined at *Administration Manual* 2.1.2.1.25 as:

2. 1. 25. [...] 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.

[43] The same definition is also found in the RCMP *Conduct Measures Guide* (November 2014), at page 13.

[44] Furthermore, *Administration Manual* 2.1.3.1.6 states:

3. 1. 6. Harassment generally involves a series of behaviours that persist over time. However, a serious one-time incident can also be considered harassment. Harassment can be direct or indirect, obvious or subtle, physical or psychological. It can occur in many ways, such as through spoken words, text, gestures, and images. Whether an individual intended to harass someone is not relevant to determining whether there has been harassment. Rather, the only issue is whether a reasonable person would have known that the behaviour in question was unwelcome.

[45] Per *Administration Manual* 2.1.1.9, while RCMP policy applies to harassment situations that occur in workplaces controlled by the RCMP, it also extends to incidents that occur away from the workplace, if the incidents that arise are linked to employment.

Applicable test

[46] To establish an allegation of sexual harassment under section 2.1 of the Code of Conduct, the Conduct Authority must establish each of the following elements on a balance of probabilities:

- a. the identity of the subject member;
- b. the conduct(s), comment(s), gesture(s) or contact(s) that the subject member is alleged to have engaged in;
- c. the sexual nature of the conduct(s), comment(s), gesture(s) or contact(s); and
- d. whether the subject member's actions are indicative of a lack of respect and courtesy, amounting to sexual harassment. In other words, would a reasonable person with knowledge of all the facts of the case, and knowledge not only of policing in general but policing in the RCMP in particular, would have known or ought to have known that the actions of the subject member would cause offence or humiliation to any employee or be

perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

[47] In applying this test, I must consider the totality of the circumstances.

Decision on Allegations

[48] Pursuant to subsection 45(1) of the *RCMP Act*, my role is to decide whether each allegation contained in the *Notice of Conduct Hearing* is established on a balance of probabilities. In other words, I must determine whether it is more likely than not that Constable Lyons has contravened the Code of Conduct by engaging in sexual harassment. Per subsection 45(4) of the *RCMP Act*, if I find any of the allegations to be established, then I must impose appropriate conduct measures.

[49] The onus is on the Conduct Authority to demonstrate that the allegations are established. That demonstration must be made with evidence that is “sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.”⁸ The Supreme Court of Canada also specifies that there is “no objective standard to measure sufficiency”.⁹ As the Conduct Board in this matter, it is my responsibility to determine whether this burden has been met by the Conduct Authority.

[50] The incidents at the centre of these proceedings took place at a watch Christmas party that was organized by an employee of the Detachment. The reservation at the restaurant was made as an RCMP function. All of the attendees were employees of the Detachment, including members and clerical support staff, as well as their significant others.

[51] Given this, I am satisfied that the party was an event related to work. It was linked to employment and consequently falls within the definition of a workplace, as specified in the RCMP harassment policy. Furthermore, it is well established that police officers are held to a higher

⁸ *McDougall*, at paragraph 46.

⁹ *McDougall*, at paragraph 46.

standard than the general public and that members of the RCMP must adhere to the Code of Conduct both on and off duty.

[52] Since Constable Lyons' identity is not in question, I am satisfied that the first element of the test under section 2.1 of the Code of Conduct is met for both Allegations.

[53] In addition, as a result of Constable Lyons' admissions as well as my findings of fact from the *Amended Determination of Established Facts* and following testimonies heard at the conduct hearing, I conclude that the Conduct Authority has also established the second element of the test under section 2.1 of the Code of Conduct, for both Allegations, namely, the acts that constitute the behaviour.

[54] Constable Lyons denies that his behaviour the night of the Christmas party amounts to sexual harassment. Consequently, I am required to consider whether the third and fourth elements of the test for sexual harassment have been established by the Conduct Authority, namely, whether Constable Lyons' actions were sexual in nature and whether a reasonable person would have known or ought to have known that Constable Lyons' actions would cause offence or humiliation. I will examine these elements of the test for each allegation in turn.

Allegation 1

[55] Allegation 1 states that Constable Lyons engaged in sexual harassment by making rude and inappropriate comments to another member.

[56] In regard to this allegation, Constable Lyons admitted having made the following comments:

- a. Constable M.R. was hot and attractive.
- b. He wanted to touch Constable M.R.'s abdominal muscles.
- c. He wanted "to be filled with cum" or something to that effect.
- d. He described himself as "big booty bottom" or something to that effect.

[57] The Conduct Authority Representative submits that these comments demonstrate a continuation of Constable Lyons' unprofessional behaviour during the course of a work-related gathering and argues that Constable Lyons' comments constituted sexual harassment, as they were sexual in nature and unwelcomed.

[58] The Subject Member Representative submits that the comments made by Constable Lyons do not amount to sexual harassment as they are not sexual in nature, based on the Supreme Court of Canada's objective test set out in *Chase*.¹⁰ In the alternative, she submits that even if the comments are found to be sexual in nature, they do not meet "the ought to know test under the harassment test" when considering the types of banter exchanged between Constable M.R. and Constable Lyons in the course of their friendship.

[59] I note that the Supreme Court provides a definition of the criminal offence of sexual assault and direction regarding the test to be applied in determining the sexual nature of an impugned conduct in the context of a sexual assault.¹¹ While not directly applicable to the comments forming the basis for Allegation 1, the *Chase* decision does offer some useful guidance. The determination of whether a specific behaviour is sexual in nature should be based on the test of the reasonable person in the circumstances. In other words, the question is whether the sexual nature of the behaviour or comment would be obvious to a reasonable observer, when viewed in light of the totality of the circumstances.

[60] I will examine each of the comments contained in Allegation 1 to determine whether they satisfy the third and fourth elements of the test under section 2.1 of the Code of Conduct.

"Hot and attractive" comment

[61] The Conduct Authority Representative indicates that this comment is sexual in nature but does not provide any explanation to support this position. She advances that Constable Lyons was

¹⁰ *R. v Chase*, [1987] 2 SCR 293 [*Chase*], at paragraph 11.

¹¹ *Chase*, at paragraph 11.

attracted to Constable M.R. and that because of that attraction, commenting that Constable M.R. was hot and attractive was sexual in nature.

[62] I was not provided with any evidence that Constable Lyons was attracted to Constable M.R. Both members testified at the hearing that they were friends. Constable Lyons admitted to commenting that Constable M.R. was “hot and attractive”. He explained that this comment was meant as a compliment concerning Constable M.R.’s physique and not because he is attracted to Constable M.R.

[63] In addition, there is no evidence demonstrating whether this comment was made on one occasion, if it was repeated throughout the evening or even if it was made directly to Constable M.R. or after Constable M.R. had already left the gathering.

[64] I accept Constable Lyons’ evidence that the comment was simply a compliment to Constable M.R. with no sexual connotation. I find this conclusion is consistent with the text messages exchanged between Constable Lyons and Constable M.R. during their friendship, where Constable Lyons made a similar comment to Constable M.R. in one of their exchanges on Instagram and also referred to him as “Hockey Bro” and “Home Gym Bro” in reference to Constable M.R.’s level of physical fitness.

[65] I find that the Conduct Authority did not provide me with sufficiently clear, cogent and convincing evidence to support the position that this comment was sexual in nature. I am not convinced that a reasonable observer aware of all the circumstances, particularly the friendship that existed between Constable M.R. and Constable Lyons, would conclude that a comment complimenting someone on their physical appearance in the circumstances of this case was sexual in nature.

[66] Therefore, I find that Constable Lyons’ comment about Constable M.R. being “hot and attractive”, in the context of their relationship, was a compliment and was not sexual in nature. Thus, I find that the Conduct Authority has failed to establish the third element of the test for sexual harassment under section 2.1 of the Code of Conduct.

[67] Furthermore, I am not convinced that the Conduct Authority has established the fourth element of the test either. Indeed, I do not find that a reasonable person aware of all the facts of the case would have known or ought to have known that commenting that Constable M.R. was hot and attractive would cause offence or humiliation.

[68] The evidence reveals that Constable Lyons made a similar comment to Constable M.R. on Instagram during one of their exchanges. On November 15, 2021, he writes “Ur [*sic*] so hot”. When questioned about this specific comment, Constable M.R. indicated that it did not bother him as he felt comfortable around Constable Lyons and comfortable with their friendship. In fact, in response to this comment, Constable M.R. laughed and replied “woulda [*sic*] been [emojis of a sweaty face and 3 flames] if the invite got here in time”.

[69] In addition, when Constable M.R. was asked during his examination in chief whether Constable Lyons had commented about his physical appearance the night of the incident, he replied that he could not recall any specific comments other than Constable Lyons saying that he wanted to touch his abdominals. I note that he also did not reference the “hot and attractive” comment in his statement to the conduct investigator either.

[70] Therefore, in light of the totality of the circumstances, I cannot conclude that a reasonable person, with knowledge of all the facts of the case, and knowledge not only of policing in general but policing in the RCMP in particular, would conclude that commenting that Constable M.R. was hot and attractive would cause offence or humiliation and constitute sexual harassment.

“Want to touch the abdominal muscles” comment

[71] Once again, to establish that this comment amounted to sexual harassment, the Conduct Authority has to prove the third element of the test, namely that it was sexual in nature.

[72] The Conduct Authority Representative submits that this comment was an unsolicited, inappropriate sexual comment that must be considered in the context of Constable Lyons telling Constable M.R. that he was hot and attractive. She argues that, based on that attraction, Constable Lyons wanted to touch Constable M.R.’s abdominals. The Conduct Authority Representative concludes that, as a result, this comment is also sexual in nature.

[73] I cannot agree with the Conduct Authority Representative's submissions for various reasons.

[74] As discussed in my analysis under the previous comment, I was not provided with any evidence that Constable Lyons was attracted to Constable M.R. The evidence before me clearly established that Constable Lyons and Constable M.R. were friends. Constable Lyons' admission is that he told Constable M.R. that he was hot and attractive, not that he was attracted to him.

[75] Additionally, the Conduct Authority did not establish that Constable Lyons telling Constable M.R. that he was hot and attractive was sexual in nature for the reasons outlined in my analysis of the previous section.

[76] Furthermore, the argument advanced by the Conduct Authority assumes that Constable Lyons had to be attracted to Constable M.R. because of his sexual orientation. However, the evidence does not support the existence of such an attraction.

[77] During his testimony, Constable Lyons explained that asking if he could touch Constable M.R.'s abdominal muscles was in the same vein as the "hot and attractive comment", namely that it was made to compliment Constable M.R. on his appearance.

[78] There is no question that Constable Lyons' comment was inappropriate. It is not the type of discussion you engage in at a work function, even if it is meant as a compliment. However, the Conduct Authority Representative did not provide me with sufficiently clear, cogent and convincing evidence to support her position that Constable Lyons' comment of wanting to touch Constable M.R.'s abdominal muscles was sexual in nature on a balance of probabilities. In addition, I am not convinced that a reasonable observer, aware of all the circumstances, would reach that conclusion.

[79] Consequently, I cannot conclude that Constable Lyons commenting on wanting to touch Constable M.R.'s abdominal muscles constituted sexual harassment.

“Filled with cum” and “big booty bottom” comments

[80] The evidence reveals that Constable Lyons, throughout the evening, repeatedly commented that he wanted to be “filled with cum” and that he was a “big booty bottom”.

[81] Constable M.R. mentioned that, to him, the “big booty bottom” comment referenced Constable Lyons’ sexual preferences. Others, present at the party, had that same understanding.

[82] Constable Lyons indicates that this comment was directed at himself in a self-deprecating manner. He explains that, in the gay community, the term “bottom” is used as slang for “airhead”.

[83] While I appreciate the explanation offered by Constable Lyons regarding the meaning of this comment, I was not provided with any evidence to support it. Therefore, I agree with the Conduct Authority Representative that the commonly accepted meaning of this word in the gay community is usually a male receiving sex.

[84] As for the “filled with cum” comment, during her oral submissions, the Subject Member Representative indicated that Constable Lyons admitted that this comment was sexual in nature.

[85] Therefore, I find that both the “big booty bottom” and the “filled with cum” comments were sexual in nature.

[86] There is no question that these comments were highly inappropriate, unprofessional, crude and discourteous. The Christmas party was held in a public place and Constable Lyons made the comments in the presence of colleagues, a recruit and civilians. I agree with the Conduct Authority Representative that there is no place for this type of language, even less so in the context of a work-related gathering.

[87] I also agree with the Conduct Authority Representative that, in certain circumstances, comments do not necessarily need to be directed at anyone to constitute sexual harassment.

[88] However, as pointed out by the Subject Member Representative, the wording of Allegation 1 specifically states that the inappropriate and rude comments were directed at another member. The particulars of Allegation 1 set out that the “other member” is in fact Constable M.R.

[89] Subsection 45(1) of the *RCMP Act* states that my role is to decide whether each allegation of a contravention of the Code of Conduct **as contained in the notice of conduct hearing** is established on a balance of probabilities.

[90] While I agree with the Conduct Authority Representative that not all particulars pertaining to an allegation need to be proven to establish the allegation, I do note that each essential element forming the allegation must be proven on a balance of probabilities. Consequently, as a result of the wording contained in the *Notice of Conduct Hearing*, to establish Allegation 1, the Conduct Authority had to demonstrate that the inappropriate comments were directed at Constable M.R.

[91] I find that the Conduct Authority has failed to establish on a balance of probabilities that the “big booty bottom” comment and “filled with cum” comment were directed at Constable M.R. In fact, during her oral submissions, the Conduct Authority Representative acknowledged that these comments were not specifically directed at Constable M.R.

[92] The totality of the evidence supports the fact that these comments were not directed at anyone specifically. During his testimony, Constable M.R. indicated that these comments were not directed at anyone and certainly not directed at him. Others present at the party also reported Constable Lyons continuously making these comments about himself without targeting anyone specifically.

[93] It is established that the comments were sexual in nature, and I am convinced that a reasonable person, with knowledge of all the facts of the case, and knowledge not only of policing in general but policing in the RCMP in particular, would have known or ought to have known that these comments would cause offence or humiliation.

[94] However, I cannot conclude that Allegation 1 is established in relation to the “big booty bottom” and “filled with cum” comments because one of the essential elements of the allegation, which was introduced in the wording of the Allegation itself in the *Notice of Conduct Hearing*, namely that the comments were directed at Constable M.R., has not been established by the Conduct Authority.

[95] For the aforementioned reasons, I find that the Conduct Authority has failed on a balance of probabilities to establish that Constable Lyons has engaged in sexual harassment by making rude and inappropriate comments to another member.

[96] Given my findings on each of the comments made, as set out in the *Notice of Conduct Hearing*, Allegation 1 against Constable Lyons is not established.

Allegation 2

[97] Allegation 2 states that Constable Lyons has engaged in sexual harassment by inappropriately touching another member of the RCMP, without his consent, which amounts to sexual assault.

[98] From the outset, Constable Lyons admitted touching Constable M.R.'s bare skin in the stomach area. On May 22, 2024, he admitted the remaining particulars in Allegation 2, namely:

- a. he attempted to put his hands down Constable M.R.'s shirt a couple of times;
- b. he kept putting his hand on Constable M.R.'s chair and then on his leg;
- c. Constable M.R. told him to stop multiple times; and
- d. Constable M.R. did not consent to being touched by him.

[99] The Conduct Authority Representative references the test developed by the Supreme Court of Canada in *Ewanchuk*¹² to submit that Constable Lyons' actions constitute sexual assault. However, she indicates that the conduct process is not a criminal process. Therefore, the Conduct Authority has no requirement to prove the essential facts of the offence of sexual assault under the criminal standard. She references *McDougall* and submits that there is only one applicable civil

¹² *R. v Ewanchuk*, [1999] 1 SCR 330 [*Ewanchuk*].

standard, which is a balance of probabilities, regardless of the seriousness of the allegations at issue. I agree.

[100] I also agree with the Conduct Authority Representative that the *Ewanchuk* test to establish a sexual assault is relevant to both criminal and administrative contexts, in light of the Federal Court’s decision in *MacLeod*.¹³ To prove a sexual assault it must be demonstrated that the accused committed the *actus reus* and had the necessary *mens rea*.¹⁴ The *actus reus* of sexual assault requires proof of three elements¹⁵:

- a. touching;
- b. the sexual nature of the touching; and
- c. the absence of consent.

[101] Constable Lyons admitted to touching Constable M.R.’s leg and right-side rib without his consent. Therefore, the elements of “touching” and the “absence of consent” are established on a balance of probabilities, in other words, the elements of an assault.

[102] The Conduct Authority Representative argues that the physical touching in this instance was sexual in nature when considered in the context of Constable Lyons making sexual comments and complimenting Constable M.R. on his physique.

[103] The Subject Member Representative submits that the sexual nature of the touching is to be determined objectively. She references the decision in *Chase*, which sets out the factors to consider when determining whether a touching is of a sexual nature to a reasonable observer.¹⁶ The Subject

¹³*MacLeod v Canada (Attorney General)*, 2013 FC 770 [*Macleod*].

¹⁴ *Ewanchuk*, at paragraph 23.

¹⁵ *Ewanchuk*, at paragraph 25.

¹⁶ *Chase*, at paragraph 11.

Member Representative also references the Provincial Court of British Columbia to support her position that touching of the right-side rib, with one contact under the shirt, is not sexual in nature.¹⁷

[104] I note that the Conduct Authority Representative does not address the factors set out in *Chase* in her submissions.

[105] According to *Chase*, the factors to consider when determining whether a touching is of a sexual nature include:

11. [...] the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force [...].¹⁸

[106] During his testimony, Constable M.R. did not reference Constable Lyons touching his leg. He indicated that Constable Lyons touched him in his right-side rib area. I note that the leg and the rib area are not parts of the body ordinarily associated with sexual activity the way a person's genitalia and buttocks are.

[107] Constable M.R. recounted that Constable Lyons touched his side area six times, including once on his bare skin.

[108] The touching occurred at the Christmas party while Constable Lyons was heavily intoxicated.

[109] Constable Lyons told Constable M.R. that he wanted to touch his abdominal muscles.

[110] The touching of Constable M.R.'s right-side rib occurred after Constable Lyons had attempted to put his hands down Constable M.R.'s shirt a couple of times. Constable M.R. kept

¹⁷ *R. v A.A.*, 2019 BCPC 299, at paragraph 71.

¹⁸ *Chase*, at paragraph 11.

pushing Constable Lyons' hand away but Constable Lyons continued despite being told to stop multiple times.

[111] As the Supreme Court states, a sexual assault is an assault that "is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated."¹⁹ I am not convinced that a reasonable observer would conclude that the touching of Constable M.R.'s leg and right-side rib area was of a sexual nature.

[112] While I am satisfied that the touching of Constable M.R.'s leg and right-side rib certainly violated his personal integrity and made him feel uncomfortable, I do not find that this touching violated his sexual integrity. Therefore, I cannot conclude that Constable Lyons sexually assaulted Constable M.R. in light of the *Ewanchuk* test and the considerations found in *Chase*.

[113] The Conduct Authority Representative submits that, even if the test for sexual assault is not met, Constable Lyons' actions nonetheless constituted sexual harassment as a reasonable person with knowledge of all of the facts would conclude that the behaviour was sexual in nature and was likely to cause offence or humiliation.

[114] I do not agree. While I am satisfied that Constable Lyons' actions were clearly unwelcome based on Constable M.R.'s reaction to the touching, the Conduct Authority also had to establish the "sexual nature" of the touching to establish an allegation of sexual harassment under section 2.1 of the Code of Conduct.

[115] As previously explained in the analysis of the sexual assault test, I find that the Conduct Authority has failed to prove that Constable Lyons' touching of Constable M.R.'s leg and right-side rib area was sexual in nature. Consequently, it would be incompatible to conclude that the same behaviour is sexual in nature under the analysis for a contravention of section 2.1 of the Code of Conduct.

¹⁹ *Chase*, at paragraph 11.

[116] Consequently, I find that the Conduct Authority has not demonstrated the third element of the test to establish a contravention of section 2.1 for sexual harassment, namely that the behaviour was sexual in nature.

[117] Therefore, I find that Allegation 2 is not established on a balance of probabilities.

[118] That said, it is important to emphasize that this decision should in no way be interpreted as an acceptance of Constable Lyons' behaviour. The fact that the Allegations were not established does not mean that Constable Lyons' comments and actions were acceptable.

[119] To the contrary, Constable Lyons' crude, inappropriate and sexualized comments and his touching of Constable M.R. during the Christmas party demonstrated a serious lack of judgment. His behaviour was completely inappropriate and has no place at an RCMP work function.

[120] Based on the evidence that was before me, his behaviours would have deserved to be sanctioned. However, the manner in which the allegations were framed in the *Notice of Conduct Hearing* limited the possibility of establishing the Allegations on a basis other than sexual harassment.

[121] The wording of the Allegations required clear, cogent and convincing evidence to establish that the comments and touching were sexual in nature, an essential element of sexual harassment or sexual assault. I was not provided with such evidence.

CONCLUSION

[122] I find that allegations 1 and 2 are not established.

[123] 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.

[124] Either party may appeal this decision by filing a statement of appeal with the Commissioner within 14 days of the service of this decision on Constable Lyons 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.

October 31, 2024

Gina Lévesque
Conduct Board

Ottawa, Ontario