# REPORT TO ROYAL CANADIAN MOUNTED POLICE

"Phase 2" Final Report Concerning Conduct Measures and Related Issues
under Part IV of the *Royal Canadian Mounted Police Act*

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## Table of Contents

## Executive Summary and Recommendations

This report is a part of our response to the request from the RCMP to conduct an assessment of its "conduct measures" (the equivalent of "penalties" or "dispositions" in some other jurisdictions) that flow after a formal finding of misconduct under Part IV of the *Royal Canadian Mounted Police Act*.

"Phase 1" of our assessment, delivered in 2022, emphasized three objectives: (i) examining the best practices in conduct measures; (ii) reviewing and assessing the RCMP *Conduct Measures Guide* to determine if the range of measures available to address harassment and sexual misconduct "reinforces the responsibility of members to promote and maintain good conduct in the RCMP"; and (iii) reviewing and assessing the conduct measures that conduct authorities and Conduct Boards have applied in cases of established conduct related to harassment and sexual misconduct.

As part of Phase 1, the RCMP also asked us to address other issues, including providing recommendations concerning (i) a modernized Conduct Measures Guide to meet police accountability expectations; (ii) the appropriate range of measures for harassment and sexual misconduct; and (iii) achieving the consistent application of the conduct measures, and effective ways to enhance guidance provided to conduct authorities.

As we wrote in paragraph 1.3 of our Phase 1 Report, much of Phase 1 divided into the general and the specific – providing a detailed examination of conduct measures generally, and then applying that analysis to one specific issue: sex-related misconduct.

Phase 2 could be reduced to applying that same general examination of conduct measures to various other forms of misconduct.

As with Phase 1, we conducted extensive research, consultation and review of RCMP decisions, which we describe in this report.

A resource like the Conduct Measures Guide is rare in police forces, and in our Phase 1 Report we endorsed its continued use as a resource, but with regular updates, and with increased reliance upon judgments of superior courts across Canada and other resources. In paragraphs 2.2 to 2.5 of our Phase 2 Report, we affirm that Phase 1 recommendation and provide a recommendation that expands upon that theme:

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**Recommendation 1:**

In addition to frequent revision of the Conduct Measures Guide to include relevant principles from superior court judgments and appeal tribunal decisions across Canada, the RCMP should proactively

monitor trends in the police complaint and discipline process, arising both in the RCMP workplace and in policing generally, and respond through a combination of policy development, education and (as appropriate) revision of the Conduct Measures Guide.

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In paragraphs 2.6 to 2.12 of our Phase 2 Report, we revisit the sources of guidance – court judgments, tribunal decisions and other sources – available to decision-makers, and encouraging use of those sources.

In paragraphs 2.13 to 2.25, we return briefly to the five principles that govern the calculation of a fit conduct measure, given some of the issues we identified in our Phase 2 review. We criticize the use of a test to calculate proportionality that frequently appears in decisions (paragraphs 2.20 to 2.22).

We continue to place emphasis on the need to ensure that any "joint submissions" concerning a conduct measure occur strictly in accordance with governing principles (paragraphs 2.26 to 2.31), providing a further recommendation concerning "joint penalty submissions":

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**Recommendation 2:**

In joint submissions on conduct measures, the RCMP should not use decisions from the pre-2014 version of Part IV, given the difference between the conduct measure provisions in the two statutory processes.

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We saw considerable lack of consistency among levels of decision-makers (Conduct Board, and Level 3-2-1 conduct authorities) and we are of the view that the RCMP should revisit the foundational balance between the legitimate need for efficient processing of Part IV matters, and the competing need for consistency and legal reasonableness amongst the various decision-makers (paragraphs 2.32 to 2.43). We provide this recommendation:

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**Recommendation 3:**

The specialized decision-makers at the Conduct Board level should also hear matters in which the employer may seek demotion.

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We continued by addressing criminal-behavior-related misconduct (paragraphs 3.1 to 3.11) and family-violence-related misconduct (paragraphs 4.1 to 4.20). In particular, we found several Conduct Board decisions involving family-violence-related allegations of misconduct to be of high quality. We have not provided a formal recommendation, and much of what we offer concerning family-violence-related misconduct reduces to encouraging the RCMP to adopt these particular Conduct Board decisions as standard practice, and incorporate the substance of them into a revised Conduct

Measures Guide (alongside leading court judgments). We also encourage the RCMP to address the disparity between these particular decisions and some other decisions that demonstrate a variety of demonstrable concerns.

Next, we addressed unlawful use of CPIC/CRPQ databases (paragraphs 5.1 to 5.10), relying both upon guidance from the Quebec Court of Appeal and a recent Part IV appeal decision. We also endorse the relevant pieces of the *Final Report on Tiller/Copland/Roach RCMP Class Action*. We provide the following recommendation:

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**Recommendation 4:**

Regarding misconduct related to unlawful use of CPIC/CRPQ databases, the RCMP should amend the CMG to incorporate (i) the analysis of the Quebec Court of Appeal in *Saint-Jean-sur-Richelieu* of this form of misconduct generally; (ii) the analysis of this issue in the *Eden* appeal decision; and (iii) the analysis of the relevant pieces of *Tiller/Copland/Roach*.

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We then address deceit and deceit-related discreditable conduct, examining several decisions and providing analysis (paragraphs 6.1 to 6.19).

We have attempted to contain the length of our Report, and so have not provided examples of concerns beyond those strictly required to illustrate our analysis. Our paragraphs 7.1 to 7.9 contain selected remarks addressing other forms of misconduct, principally to emphasize our comments concerning consistency of decisions among levels, and also the utility of relying upon leading court judgments to inform decision-makers.

We briefly address sex-related misconduct. Although we examined this category of misconduct in detail in our Phase 1 work, some of the decisions we reviewed in Phase 2 did involve gender-based workplace harassment and related issues. We note that the considerable evolution in this area of the law in the past very few years, and include reference to a recent judgment of the Ontario Court of Appeal as further evidence of the evolution of the law. We provide brief concluding remarks.

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# PART I – INTRODUCTION

## 1. Introduction

1.1 The starting point – the RCMP has asked for "a review of its conduct measures and related guides" that will address these questions:

> Does the RCMP have the appropriate range of conduct measures to maintain the confidence of Canadians in the RCMP? Are conduct measures being applied properly and consistently? If not, why and how can the system be enhanced to ensure the measures are applied properly and consistently going forward.

1.2 The work divides into two "phases". Much of our Phase 1 work divided principally into the general and the specific. First, the general: analysis and recommendations concerning a modernized Conduct Measures Guide, and explaining the legal principles that govern the calculation of a fit conduct measure, following a finding of misconduct. Second, the specific: address analysis and recommendations for the appropriate range of conduct measures specifically for sexual harassment and other sex-related misconduct.

1.3 In Phase 2, the RCMP has asked us to examine the Code of Conduct beyond misconduct related to sexual harassment and other sex-related misconduct. Much of our Phase 2 work sits on the foundation of the first "general" portion of Phase 1 – the "analysis and recommendations concerning a modernized Conduct Measures Guide, and how generally to craft a fit conduct measure after a finding of misconduct" – and we have reproduced only minor portions of that work in our Phase 2 Report.

1.4 We did revisit our recommendations that pertained to the first "general" portion of Phase 1, following our review of various aspects of misconduct beyond sexual harassment and other sex-related misconduct. We saw no need to modify any of those recommendations, although have added to one of them in our Recommendation 2, concerning joint penalty submissions.

1.5 The RCMP specifically asked us to identify "best practices", and the following excerpt from our Phase 1 Report captures our view of "best practices", which we have continued to use in our Phase 2 Report:

> 1.5 Each of these principal parts will sit on the foundation of our analysis of what we consider "best practices" across Canada. We have selected practices that have survived challenge in a superior court of justice. Legal principles confirmed in superior court judgments across Canada are the most defensible practice.
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> 1.6 We are of the opinion that reliance upon principles confirmed in superior court judgments to craft a fit conduct measure after a finding of misconduct, and also

> to address sexual harassment and other sex-related misconduct, will best enable the RCMP to meet the high expectations of the public, and of its employees.

1.6 As with Phase 1, this Phase 2 Report necessarily involves much detailed discussion of legal principles. We want our recommendations to have a demonstrable basis in law. We want what we say to be legally defensible, so the report relies extensively upon leading court judgments.

1.7 As with Phase 1, this Phase 2 Report necessarily involves looking over our shoulders, examining what has already occurred in the RCMP, and elsewhere. However, our report is intended to be principally forward-looking: providing analysis and recommendations that will assist the RCMP in its work. We also wish to ensure to the extent possible that what we say will anticipate and survive the next stage of development and evolution of the law over the next significant period of years.

1.8 The RCMP again provided us with access to a large number of decisions from late-2014 to present. These decisions involved all three levels of conduct authority, which are not public decisions, and decisions of conduct boards, and the conduct adjudicator (in an appeal function). We have reviewed these decisions as part of our work. As we examined more categories of misconduct, our review involved examining fewer decisions related to each kind of misconduct.

1.9 We have avoided making formal recommendations concerning minor issues, choosing instead to provide comment on those issues and encouraging the RCMP to consider them.

1.10 We wish to acknowledge the contributions of the people who participated in our group consultations, and especially the people who participated in our separate individual consultations. Each one of those conversations was distinctly useful.

1.11 We also wish to acknowledge the considerable contribution of various members of the RCMP in assisting us as we performed our work.

## 2. General Observations

2.1 We begin by offering general observations regarding common themes among many of the decisions. Some of these observations involve broad considerations, and other involve more "technical" legal issues. For convenience, we have organized our observations as follows:

(i) Use of the Conduct Measures Guide

(ii) Use of Precedents

(iii) Calculation of a Fit Conduct Measure

(iv) Joint Penalty Submissions

(v) Other Considerations

*(i) Use of the Conduct Measures Guide*

2.2 In our Phase 1 Report, we favored the continued use of the Conduct Measures Guide,[1] and offered the following formal Phase 1 recommendation:

> Recommendation 1:
>
> The RCMP should continue to use the Conduct Measures Guide, with revisions to include relevant principles from superior court judgments and appeal tribunal decisions across Canada, and to update the Conduct Measures Guide on an annual basis.

2.3 Our review of the decisions that the RCMP supplied as part of the Phase 2 process leads us to affirm this recommendation. The Conduct Measures Guide is a unique resource – to our knowledge at least, no other police agency in Canada has developed anything comparable – and the combination of a significant update and also continual updating to reflect significant court judgments and other developments would add to the value that this document brings to the task of balancing the four purposes/interests of the police complaint and discipline process.[2]

2.4 The Conduct Board decision in *Deroche*,[3] for example, has observed that the Conduct Measures Guide is "somewhat dated",[4] and that it omits particular issues.[5] Further: decision-makers must interpret the CMG "in the context of evolving societal standards, as established by the jurisprudence or applicable policies and legislation".[6] Uncritically, we agree: the pace of evolution in this area of the law over the past approximately ten years since the RCMP originally drafted the Conduct Measures Guide justifies not only updating the CMG but also keeping this document current, instead of relying upon periodic updates. As lawyers who spend much of our professional time in this specific area of the law, we do not see the pace of change slowing.

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[1] Paras. 1.11 to 1.14.

[2] See para. 2.13, *infra*, regarding the four purposes/interests.

[3] 2022 CAD 13 (under appeal).

[4] *Ibid* at para. 90.

[5] *Ibid* at paras. 95-99.

[6] *Ibid* at para. 84.

2.5 Given the brisk pace of change in this area of the law, we offer a further recommendation concerning proactive monitoring of trends, to address "hot button" issues early, through development of policy, education and (as appropriate) revising the Conduct Measures Guide:

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**Recommendation 1:**

In addition to frequent revision of the Conduct Measures Guide to include relevant principles from superior court judgments and appeal tribunal decisions across Canada, the RCMP should proactively monitor trends in the police complaint and discipline process, arising both in the RCMP workplace and in policing generally, and respond through a combination of policy development, education and (as appropriate) revision of the Conduct Measures Guide.

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*(ii) Use of Precedents*

2.6 Returning to the theme of "best practices in conduct processes", our discussion of best practices in conduct processes in our Phase 1 Report included the following:

> 2.1 As we state in our paragraph 1.5, above, we view "best practice" as a practice that has survived challenge in a superior court of justice, so "provide an analysis of best practices in conduct processes" will involve almost entirely an analysis of the current collection of principles, articulated by courts of law in their judgments, considering various police complaint and discipline processes across Canada that have a large measure of similarity or at least comparability.
> ...
> 2.3 Restating, for emphasis: superior court judgments will necessarily not be entirely consistent across the country, partly because legislation differs somewhat among jurisdictions, and also because judgments even within a jurisdiction are not always entirely consistent. Absolute precision is impossible, but practices that have survived a challenge at the court of appeal level or in another superior court of justice will provide the RCMP with the most reliable and defensible foundation for guidance.

2.7 "Best practices in conduct processes" will therefore place emphasis on the "fewest, biggest, best" court judgments. "Biggest" refers to the seniority of court judgments and tribunal decisions that your decision-makers have at their disposal as tools to inform their decisions. As we stated in our Phase 1 Report, decision-makers may have access to other sources of guidance, of course. The complete "list" of sources involving the police complaint and discipline process:

1. Supreme Court of Canada judgments: "bind" all courts and tribunals in the country (meaning that those judgments are "binding precedents"; the term *stare decisis* refers to this principle).

2. Federal Court of Appeal judgments: subject to Supreme Court of Canada judgments, "bind" the Federal courts and federal tribunals, including your decision-makers.

3. Federal Court judgments: subject to Supreme Court of Canada and Federal Court of Appeal judgments, bind federal tribunals below, including your decision-makers.

4. Tribunals: tribunal decisions are not "binding precedents". The most important court of appeal judgment in the police complaint and discipline process concerning this point confirmed that "... tribunals are not bound by their previous decisions. The principle of *stare decisis* does not apply to administrative tribunals."[7] Tribunal decisions do offer valuable guidance, however, and are "persuasive" in certain situations, such as when no court judgment exists on a point, or in assessing parity as one of the components of a fit penalty. The Alberta Court of Appeal has explained:

> There is a difference between treating prior sanctioning decisions as binding authority and considering such decisions when assessing whether a sanction achieves fairness and parity. The latter is an accepted, and important, use of such decisions ...[8]

5. Steps 2 to 4 involving court judgments and tribunal decisions from other jurisdictions (not binding, but can be "persuasive"): a decision-maker can consider relevant court judgments and tribunal decisions from other jurisdictions.[9] Many Conduct Board decisions, for example, quite properly cite a prominent judgment of the Saskatchewan Court of Appeal concerning joint penalty submissions.[10]

6. Other sources of guidance: senior court judgments in the UK, Australia and very occasionally the USA, for example, and also public inquiry reports and academic articles. Conduct Board decisions have occasionally cited English court judgments, for example.[11]

7. In addition to sources involving the police complaint and discipline process, decision-makers also have some room to extract guidance from other regulated professions,

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[7] *Favretto* v *Ontario Provincial Police Commissioner* 2004 CanLII 34173 at para. 48 (ON CA), leave to appeal dismissed [2004] SCCA 562. The Federal Court has affirmed the same principle: *Elhatton* v *Canada (Attorney General)* 2014 FC 67 at para. 70; *Rendell* v *Canada (Attorney General)* 2001 FCT 710 at paras. 13, 17.

[8] *Constable A* v *Edmonton Police Service* 2017 ABCA 38 at para. 52.

[9] *Robin* v *Saskatchewan Police Commission* 2016 SKCA 159 at paras. 124-32.

[10] *Rault* v *Law Society of Saskatchewan* 2009 SKCA 81. See, for example, *Burgess* 2019 RCAD 14 at para. 26.

[11] Example: *Cormier* 2016 RCAD 2 at para. 46.

since courts of law often articulate basic principles that apply to regulated professions generally, including policing.[12]

8. Finally, decision-makers have some ability to rely upon principles of ordinary employment law. In *Lévis (City)* v *Fraternité des policiers de Lévis*,[13] the Supreme Court of Canada stated that "[r]eference to attenuating and aggravating circumstances in other employment law contexts may sometimes be useful, but this must be done with regard to the unique issues that are raised by the criminal conduct of police officers". Ordinary employment case law may be used as a baseline, subject to the higher conduct-expectation that applies to police officers. We addressed reliance upon employment law principles in our Phase 1 Report:

> In those issues involving employee behaviour common to all workplaces – and sex-related misconduct is one such issue – we recommend that the RCMP place greater reliance upon judgments of superior courts of justice across Canada involving all workplaces. The Conduct Measures Guide already contains some reference to judgments of superior courts of justice across Canada on "regular" employment matters. We will recommend much more such reliance, particularly involving the one area of particular focus in Phase I, sex-related misconduct.[14]

9. Citing any court judgment or tribunal decision is subject to whether it involved a judicial review or an appeal, with the different legal "standards of review" that apply to each, and also the considerable changes in those standards of review over time.

2.8 It follows from section 4 in the preceding paragraph that we do not favour heavy reliance upon historical RCMP tribunal case law. The "1988" legislative regime that existed until 2014 was sufficiently different than the present regime – certainly regarding conduct measures – that reliance upon decisions that arose in that old regime[15] will often fall outside "best practices in conduct processes". Reliance upon decisions from the process in force *before* 1988[16] will almost certainly fall well outside "best practices".

2.9 Also, a general risk exists from excessive reliance upon tribunal decisions, simply because superior court judgments may provide better guidance regarding the relevant principles, or

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[12] See, most recently, *Law Society of Saskatchewan* v *Abrametz* 2022 SCC 29 at para. 53.

[13] 2007 SCC 14 at para. 73.

[14] Para. 1.13, para. 4 (endnote omitted).

[15] See *Burgess*, *ibid* at para. 23 (in the final sentence), as an example.

[16] See *Genest* 2017 RCAD 2 at para. 89, affd 2020 CAD 19 (reference to an "ancient" case).

because particular tribunal decisions may not have survived intervening evolution of the law at the Supreme Court of Canada or in superior courts across Canada.

2.10 Some decisions involve the *parties* presenting a joint submission on penalty that relies (at least in part) on pre-2014 tribunal decisions, with the decision-maker then concluding that the principles that govern joint penalty submissions do not permit the decision-maker to refuse the joint proposal in that case.[17] This practice invites particular criticism.

2.11 We encourage decision-makers to rely upon the "fewest, biggest, best" court judgments (and tribunal decisions and other sources, if appropriate), which would require a means of ensuring that decision-makers have access to important decisions as they occur. For example, last year the Federal Court of Appeal rendered two judgments arising from Part IV decisions,[18] and the relevant parts of such judgments should be available to decision-makers in the same way that members of the judiciary access new court judgments.

2.12 Conduct authority representatives should likewise place before decision-makers the leading court judgments or tribunal decisions or other sources. In one case, for example, the CAR cited a labour arbitration decision in a matter in which an almost-identical court of appeal judgment existed in the police complaint and discipline process.[19] Such practices are not wrong, but may not always be the "best practice".

*(iii) Calculation of a Fit Conduct Measure*

2.13 We return briefly to our comments in our Phase I Report concerning the principles that govern the formulation of a fit conduct measure. The Supreme Court of Canada and courts of appeal have evolved five foundational principles that govern the design of a fit conduct measure. Some of these principles also explicitly appear in the *Act* (as with police legislation in most jurisdictions). Pared to their absolute essence, the principles are the following:

1. Part IV should serve and balance four purposes (or "interests"): the public interest, the employer's interests, the respondent's interests, and the complainant's interests (if there is a complainant). The Supreme Court of Canada has placed emphasis on the public interest.[20]

[17] *El Aste* 2018 RCAD 18 at paras. 30-32, 39, for example.

[18] *Canada (Attorney General)* v *Muller* 2022 FCA 99; *Firsov* v *Canada (Attorney General)* 2022 FCA 191.

[19] *Roesler* 2020 CAD 13 at para. 66.

[20] *Law Society of Saskatchewan* v *Abrametz* 2022 SCC 29 at paras. 53, 98.

Notably, the Conduct Board decision in *Deroche*,[21] in expressing this principle, favoured the wording "those affected by the misconduct"[22] – in place of "the complainant's interests (if there is a complainant)" – which we fully endorse, and encourage the RCMP to include in a revised Conduct Measures Guide.

> Source: The Supreme Court of Canada judgment in *Lévis (City)* v *Fraternité des policiers de Lévis*[23] ("balancing of competing interests of the police officer facing dismissal, the municipality, both as an employer and as a public body responsible for the security of the public, and of the community as a whole in maintaining respect and confidence in its police officers"). Court of appeal judgments concerning other regulated professions have similarly addressed the various purposes/interests, of which the recent judgment of the Saskatchewan Court of Appeal in *Strom* v *Saskatchewan Registered Nurses' Association*[24] is an instructive example: "three groups have an interest in fair and effective professional self-governance; that is, the public, the profession, and the members of the profession who are subject to regulation and potential discipline".[25]

2. Remedial/corrective conduct measures should prevail, where appropriate.

> Source: *Royal Canadian Mounted Police Act*, s. 36.2(e) (one of the purposes of Part IV is to provide for the imposition of conduct measures that "where appropriate, ... are educative and remedial rather than punitive").

3. The presumption of the lowest penalty (justification is required for a higher penalty), subject to the "reasonable exercise of discretion in penalty".

> Source: This principle accords with basic principles found elsewhere, such as grievance arbitrations and wrongful dismissal.

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[21] 2022 CAD 13.

[22] *Ibid* at para. 82.

[23] 2007 SCC 14 at para. 24. On the balancing of interests, see also *Thériault* v *Royal Canadian Mounted Police* 2006 FCA 61 at para. 29 ("reconciling the need to protect the public and the credibility of the institution with that of providing fair treatment for its members and persons involved in it"); *Lewis* v *Canada (Attorney General)* 2021 FC 1385 at para. 76, affd 2023 FCA 15 ("Basic fairness demands that members, RCMP management, and the public all be assured that there is a common approach to the resolution of these types of questions relating to police discipline").

[24] 2020 SKCA 112 at para. 112. "It is difficult to generalize as to how these competing interests should be balanced when deciding whether professional misconduct has occurred other than by emphasizing [...] that the answer turns on all the circumstances of the case". *Ibid* at para. 114.

[25] It appears that, although particular behaviour was reported to the regulator, this case did not involve a formal "complainant".

As we discuss below, calculation of a conduct measure is not a precise mathematical formula. At the end of the process, a fit conduct measure must fall within an appropriate range, given the discretionary nature of penalty decisions in professional regulatory proceedings. The term "reasonable exercise of discretion in penalty"[26] captures the point.

4. A higher conduct-expectation applies to police officers.

   Source: The Supreme Court of Canada judgment in *Montréal (City)* v *Quebec (Commission des droits de la personne et des droits de la jeunesse)*,[27] states that a higher standard applies to police officers' conduct, compared to most other employees: "exemplary probity is an essential qualification for employment as a police officer", and the nature of police employment requires the "highest standard of moral character".[28] The *Act* also embraces this principle in s. 36.2(e).

5. Proportionality (sometimes called "contextual factors").

   Source: Both s. 36.2(e) of the *Act*, and s. 24(2) of Commissioner's Standing Orders (Conduct), SOR/2014-291 (referring specifically to Conduct Boards).

2.14 Further, on proportionality – it requires three steps:

1. A decision-maker must identify which proportionality considerations are *relevant* to the matter in question.

2. A decision-maker must determine whether each relevant proportionality consideration is *mitigating or aggravating or neutral* in the circumstances.

3. A decision-maker must appropriately *balance* – or *weigh* – the identified relevant proportionality considerations in accordance with the factual background of the matter, and the competing interests.

2.15 We emphasize on our comments in our Phase 1 Report concerning the *three* kinds of proportionality considerations. In our Phase 2 review, we saw many of the decisions at all four levels identify mitigating and aggravating proportionality considerations – and many decisions

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[26] *Husseini* v *York Regional Police Service* 2018 ONSC 283 at para. 44 (Div Ct), for example.

[27] 2008 SCC 48 at paras. 33, 86.

[28] Various court of appeal judgments have emphasized this principle, including the recent Federal Court of Appeal judgment in *Canada (Attorney General)* v *Muller* 2022 FCA 99 at paras. 15 and 20, involving Part IV of the *Royal Canadian Mounted Police Act*.

performed this task well – but very few recognized that the evidence will sometimes lead a decision-maker to conclude that a proportionality consideration (employment history, perhaps, or remorse) is *neutral*. In the words of the Quebec Court of Appeal:

> The mere fact that a given circumstance is not an aggravating factor does not mean that it is therefore a mitigating factor. At most, it is a neutral factor, which should neither negatively nor positively influence the nature or scope of the [conduct measure] ...[29]

2.16 Recognizing *neutral* proportionality considerations is important in part because one of the situations in which it arises involves the proportionality consideration of "remorse" (or "insight"[30]), where a member's guilty pleas or apology or other recognition will serve as a mitigating proportionality consideration, but a member's *failure* to demonstrate any such insight cannot aggravate a conduct measure, since members cannot suffer penalty for deciding to make full answer and defence.[31] We did not see this error in Conduct Board decisions that we reviewed. In *Greene*,[32] for example, the CAR had argued that the member's "absence of remorse or acceptance of responsibility for his actions" constituted an aggravating consideration. The Conduct Board disagreed, and correctly stated the principle:

> Every person accused of wrongdoing has the right to put his or her accuser to the test of proving the allegations. Expressions of regret or remorse, when one denies the allegations outright, are impossible. At best, this can be characterized as the absence of a mitigating factor. I cannot consider the absence of remorse to be an aggravating factor.

The error does appear regularly in decisions at Levels 3-2-1, however.[33]

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[29] *Fraternité des policiers et policières de Saint-Jean-sur-Richelieu inc* c *St-Jean-sur-Richelieu (Ville de)* 2016 QCCA 1086 at para. 79.

[30] The term "insight" appears in English decisions, and reflects a perhaps more nuanced understanding than "remorse". See A. Searle, "An insight into the relevance of insight in misconduct outcomes" UK Police Law Blog, 17 August 2020 https://www.ukpolicelawblog.com/an-insight-into-the-relevance-of-insight-in-misconduct-outcomes/.

[31] Assuming that making full answer and defence was the reason for failure to demonstrate remorse.

[32] 2017 RCAD 5 at paras. 120, 143.

[33] Decision #3 at page 4 (failure to cooperate with a criminal investigation, in particular, cannot aggravate penalty); Decision 18 (Level 2 conduct authority considered failure to "accept or identify that your use of force was inappropriate" aggravated penalty).

2.17 Thereafter, a range of fit penalties appears, the "range" allowing for the traditional measure of discretion that a decision-maker has in the process of devising a fit penalty. Again: the "reasonable exercise of discretion in penalty".[34]

2.18 For clarity: like penalty decisions generally, the specific proportionality consideration of *parity* does not expect a "perfect comparator situation".[35] Perfect consistency is not achievable,[36] in part because weighing proportionality considerations is a "balancing act" and decision-makers (like judges) "may very well have reasonable differences in the weight to be given to each one".[37] In examining the boundaries of an acceptable range of penalty, parity has forced the exercise of gauging how narrow or wide that range is, generating some divergent results. The extent of "reasonable exercise of discretion in penalty" has resisted lending itself to precise measure.

2.19 Our Phase 2 review of the decisions that the RCMP provided led us to conclude that many decisions at all levels omit one or more of the five foundational principles surveyed above in designing a fit conduct measure.

2.20 As noted, decisions at all levels do consistently emphasize proportionality,[38] and properly so, but sometimes not thoroughly, or correctly. In our view, considerable preventible difficulty arises from applying a formula that may well not accurately reflect the law that governs the calculus at the penalty. The following example illustrates:

> The RCMP External Review Committee has established a three-step test for the imposition of conduct measures. At first, the conduct board must consider the appropriate range of conduct measures applicable to the misconduct at issue. Then, it must consider the aggravating and mitigating factors. Finally, the conduct board must impose conduct measures which accurately and fairly reflect the gravity of the misconduct at issue, keeping in mind the principle of parity of sanction.[39]

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[34] *Husseini* v *York Regional Police Service* 2018 ONSC 283 at para. 44.

[35] *Reeves and London Police* 2021 ONCPC 3 at para. 53.

[36] *Gemmell and Vancouver Police*, BC Adj, 27 July 2005 at 10 ("consistency cannot always be achieved").

[37] *Gould and Toronto Police* 2016 CanLII 64893 at para. 27 (ON CPC).

[38] *El Aste* 2018 RCAD 18 at para. 29, for example. See also *Doktor* 2020 CAD 18 at para. 5.

[39] *Burgess* 2019 RCAD 14 at para. 13. See also *Genest* 2020 CAD 19 at para. 50 (the correct legal framework: "the appropriate three-part process for determining conduct measures as follows: first, establish the range of appropriate measures that must be considered; second, identify the aggravating and mitigating factors; and third, choose conduct measures that are fair, just and appropriate to the gravity of the misconduct"); *Girard* 2020 CAD 30 at para. 47.

2.21 We found a modified version of this formula even in Conduct Board decisions that we considered among the very best decisions we reviewed:

> In determining the appropriate conduct measures, I must start by determining the appropriate range of measures. I must then identify the aggravating and mitigating factors. Finally, I must weigh those factors as well as balance the interests of the public, the RCMP, the subject member and the affected parties to arrive at my decision.[40]

2.22 We see three concerns with this formula:

1. This formula addresses only proportionality, and omits full consideration of the other four basic principles that appear in judgments of the Supreme Court of Canada (or other courts), and/or in the legislation, as discussed above. For clarity: a conduct measure should reflect:

    i. a balancing of the four interests of the regulatory process

    ii. the presumption of the lowest penalty (absent justification for a higher one), subject to the "reasonable exercise of discretion in penalty"

    iii. the philosophy that remedial/corrective conduct measures should prevail, where appropriate

    iv. the higher conduct-expectation that the Supreme Court of Canada and courts of appeal apply to police officers

    v. the requirement of proportionality

2. Beginning the analysis with "at first, the conduct board must consider the appropriate range of conduct measures applicable to the misconduct at issue" may distort the penalty calculus. The "first" step should not be the range of permissible conduct measures: the range of fit conduct measures will be apparent only after a careful examination of the proportionality calculus,[41] and also ensuring that the conclusion concerning proportionality also accords with the other four principles that govern the calculation of penalty. A decision-maker would not know the range until fully considering the contextual factors (proportionality). The "range" is the end product, not the starting point.

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[40] *Deroche* 2022 CAD 13 at para. 86. See also *Doktor* 2020 CAD 18 at para. 29, for example ("determine the appropriate range of conduct measures applicable to the misconduct at issue and then weigh the aggravating and mitigating factors in order to determine the most appropriate measures to impose").

[41] Paras. 2.14 - 2.16, *supra*.

3. The gravity ("seriousness") of the misconduct *is* a mitigating/aggravating/neutral proportionality consideration – it's part of proportionality.

2.23 Our review of Phase 2 decisions leads us to reaffirm our recommendation from our Phase 1 Report that the RCMP should amend the Conduct Measures Guide to incorporate all five basic principles, and also incorporate the mechanics of assessing proportionality, as described above. We reproduce that recommendation, for convenience:

> Recommendation 2:
>
> The RCMP should amend the Conduct Measures Guide to incorporate the five foundational conduct measure principles that courts of law across Canada have developed over the past generation.

2.24 Some Conduct Board decisions, and many decisions below the Conduct Board level, contain technical (or more significant) errors that suggest the need for attention. Some examples:

(i) One decision stated that "the first goal of discipline is still rehabilitation".[42] The police complaint and discipline process serves and balances the four purposes (or "interests") explained above. The likelihood of rehabilitation is certainly a proportionality consideration, so can serve as a mitigating or aggravating factor (or a neutral factor), but it is not the "first goal of discipline".[43]

(ii) One Level 3 decision stated that "I have considered all of the aggravating and mitigating factors, as well as you do not have a previous discipline record". "No discipline record" (employment history) *is* one of the proportionality considerations (likely very mitigating in this case). The decision also stated that the member's actions "were well intentioned [and] did assist a vulnerable youth", which is not a proportionality consideration. Finally, the decision also imposed a global conduct measure for three established allegations, one of which involved sending "inappropriate" text messages to a adolescent girl that the member encountered in a youth facility as part of a missing persons investigation. The decision did not provide detail regarding the "inappropriate" text messages to the adolescent girl in the youth facility, a significant omission, given the gravity of such conduct.[44]

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[42] *Doktor* 2020 CAD 18 at para. 32.

[43] See also *Girard* 2020 CAD 30 at para. 59 ("rehabilitation is the primary purpose of the imposition of conduct measures").

[44] Decision #1. As to texting young women, see the appeal decision in *Eden* 2021 CAD 19, affg 2017 RCAD 7, and the Conduct Board decision in *Martin* 2021 CAD 23.

(iii) We also saw some errors regarding the proportionality consideration of "remorse" ("recognizing the seriousness of the misconduct"), such as a Level 2 decision in which the conduct authority stated that the member showed "little outward appearance of remorse during the [conduct] meeting", but also stated that "you took overall responsibility for your actions". Accepting "overall responsibility" in one of a variety of ways is the primary form of remorse.[45]

(iv) One Level 2 decision cited as a mitigating consideration that the member was a "junior/probationary member who likely was unaware of the consequences of his actions and the potential breach of the Code of Conduct", which is not a proportionality consideration, and (in any event) would seem discordant in circumstances in which the off-duty member used profanity towards a citizen during a parking dispute, and produced his police identification.[46] Other errors relating to proportionality considerations include one decision that included the fact that the misconduct occurred off-duty was mitigating, and also that "I believe you were going through a difficult period which can impact one's behaviour and perceptions".[47]

(v) The analysis of proportionality in another example referred to "aggravating, mitigating and public perception / organizational impact" (public perception ("damage to the reputation of the police force") *is* one of the proportionality considerations that can be aggravating or mitigating (or neutral). "Organizational impact" is the same.[48]

2.25 One final note on the proportionality portion of calculating a fit conduct measure: we are of the view that "loss of confidence of the Commanding Officer" should no longer form part of the penalty calculus, and recommend that the RCMP amend the CMG to incorporate the reasoning of the Conduct Board decision in *Vellani*:[49]

> The CAR has argued as an aggravating factor the loss of confidence of the Commanding Officer. I think the time has come, once and for all, to dispense with this antiquated concept. To begin with, the decision to dismiss an employee cannot be based upon the subjective evaluation of an employee's worth by any one individual.

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[45] Decision #15.

[46] Decision #20 (verbal reprimand). This decision did not fully explore the issue of a police officer producing police identification in the sort of off-duty situation as here.

[47] Decision #23. In this Level 2 decision, a civilian member exhibited profane and arrogant behaviour towards two members of another police force during a traffic stop in which she was driver, and also attempted to use her position as an employee of the RCMP to refuse to produce identification. The conduct measure imposed a reprimand and ordered the member to review the Code of Conduct.

[48] Decision #19. Decision #20 also contains this error.

[49] *Vellani* v *Canada (Attorney General)* 2023 FC 37, affg 2021 CAD 11, affg 2017 RCAD 3.

> It is an objective, legal analysis. Besides, under the current legislation, the concept of a loss of confidence is a tautology: the only cases a conduct board has the jurisdiction to decide are cases in which the Commanding Officer, as the conduct authority, has lost confidence and is seeking dismissal. It is not so much an aggravating factor as it is a precondition to the conduct board hearing the case at all.[50]

*(iii) Joint Penalty Submissions*

2.26 In our Phase 1 Report, we included a deliberately-detailed analysis of the principles that govern the use of joint penalty submissions in professional regulatory proceedings. That analysis included a discussion of both the judgment of the Supreme Court of Canada in *R* v *Anthony-Cook*,[51] and the recent judgment of the Alberta Court of Appeal in *R* v *Naslund*,[52] and concluded with a formal recommendation:

> Recommendation 3:
>
> The RCMP should amend the Conduct Measures Guide to include the principles that govern joint penalty submissions, and ensure that a decision to enter into a joint submissions fully accords with those principles.[53]

2.27 Aside from amending the CMG to include the principles from *R* v *Anthony-Cook* and *R* v *Naslund* that govern joint penalty submissions, "ensuring that a decision to enter into a joint submissions fully accords with those principles" is a different consideration, and reliance on the CMG in the meantime to assess the propriety of a joint penalty submission (even if treating the CMG as a guide and not prescriptively) may expose the RCMP to criticism on the basis that the CMG is outdated.[54] This concern remains particularly acute in cases involving the most serious findings of misconduct.[55]

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[50] *Ibid* 2017 RCAD 3 at para. 117.

[51] 2016 SCC 43.

[52] 2022 ABCA 6.

[53] Paras. 24.5 to 24.22.

[54] See, for example, *Constable X* 2021 CAD 1 at paras. 48-53. The Conduct Board wrote that, "[i]n order to determine whether the proposed conduct measures are against the public interest, it is helpful to have some sense of what the possible measures may be". The decision described the CMG as a "a useful reference" and a "guide", and that it is "not meant to be prescriptive". *Ibid* at para. 52. The difficulty is that relying on a dated document such as the CMG even as a guide may distort the result.

[55] *Ibid* at paras. 37-39, for example (Conduct Board accepted global conduct measure of 30 days loss of pay, medical treatment specified by the Health Services Officer and transfer, in a case involving three findings of misconduct of family violence involving a child, two of which involved actual assault).

2.28 Apart from our comments above concerning reliance upon tribunal decisions generally, a separate, specific concern arises in using, for guidance in other decisions, tribunal decisions that arose from joint penalty submissions. Conduct Board decisions have recognized this concern:

> Given the many intangible variables inherent in the negotiation process and given that these variables are rarely ever disclosed to the decision maker, the precedential value of decisions arising out of cases settled by way of joint submission is limited.[56]

2.29 The *Deroche*[57] Conduct Board decision has also contributed this analysis:

> At issue in this hearing was the extent to which prior conduct board decisions are instructive in assessing parity of sanctions. Most of the prior conduct board decisions cited by the parties involved joint proposals on conduct measures. The parties disagreed as to the weight that I should ascribe to these decisions.
>
> A particular challenge in the RCMP conduct process is the number of cases that are resolved by joint proposals on conduct measures. I heard submissions with respect to the relative severity of the incidences of family violence in these decisions in which conduct measures less than dismissal were imposed pursuant to joint proposals to the conduct boards. The Subject Member Representative drew my attention to such prior conduct board decisions. Furthermore, he argued that those cases involved more egregious acts of family violence did not result in dismissal. He provided:
>
> > [...] the law is pretty clear that normally a joint submission is to be accepted, unless it's contrary to the public interest.
> >
> > But in my view, that cuts both ways, is that clearly, in each case, the Conduct Board looked at the facts and concluded, weighing the aggravating and mitigating circumstances, *that the public interest was served by that sanction*.
> >
> > So in my view, [a joint proposal] does have some weight. And given the principle of parity of sentence, these decisions require consideration. [...]
> > [Emphasis added]
>
> The reasons for and the factors that lead Commanding Officers and subject members to agree to a particular joint proposal on conduct measures are several and varied. There are very limited circumstances in which a conduct board may refuse to accept a joint proposal. Furthermore, the proposed measures are often not what a conduct board would have imposed. However, that is not the test. The test, as set out by the Supreme Court of Canada in *Anthony-Cook*, is whether the proposed measures are

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[56] *Greene* 2017 RCAD 5 at para. 161. See also *Doktor* 2020 CAD 18 at para. 31, to the same effect (referring to a Conduct Board decision based upon a joint penalty submission: "therefore, it cannot be considered to have much precedential value").

[57] 2022 CAD 13 at paras. 100-103 (footnotes omitted).

against the public interest. This is a very high test, which requires that the proposed measures are:

> [...] so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of [in this case the conduct process] had broken down. [...]

The acceptance of a joint proposal by a conduct board cannot be viewed as its endorsement of the proposed measures as those that best serve the interests of the public. Rather, it reflects a compromise that does not offend the public interest. Consequently, while the previous conduct board decisions may provide an indication of an acceptable range of conduct measures for a category of misconduct, they are of little assistance to me in my analysis of how the aggravating and mitigating factors in this case are to be weighed.

2.30 At least one appeal decision has also instructively referred to this issue, with the adjudicator writing that "cases involving joint submissions may be instructive when the reasons fully explain the appropriateness of the proposal", and that "joint submissions reflect sanctions lower than the ordinary range".[58]

2.31 We return to our particular concerns surrounding the use, in joint penalty submissions, of decisions from the pre-2014 version of Part IV, given the difference between the conduct measure provisions in the two statutory processes,[59] and provide the following recommendation:

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**Recommendation 2:**

In joint submissions on conduct measures, the RCMP should not use decisions from the pre-2014 version of Part IV, given the difference between the conduct measure provisions in the two statutory processes.

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[58] *Vellani* v *Canada (Attorney General)* 2023 FC 37, affg 2021 CAD 11 at paras. 200-205, affg 2017 RCAD 3.

[59] *McCarty* 2020 CAD 17 at para. 41 (stating that pre-2014 Conduct Board decisions "may still be useful to provide a relative indication of where a particular conduct may fall within the range" but are "of somewhat limited value, as they are not reflective of the full range of measures that are currently available"); *Roesler* 2020 CAD 13 at para. 66 ("... all of the referenced RCMP Adjudication Board decisions were resolved under the former RCMP Conduct Process, three of which were resolved via joint submissions on measures, hence, they have limited applicability in the current process").

*(iv) Other Considerations*

2.32 As part of both our Phase 1 and Phase 2 consultations, we spoke to many people who perform various RCMP roles, and heard much about the chronic delay that characterized the pre-2014 regime. Our consequent understanding accords with the following excerpt from the judgment of the Federal Court in *Lewis* v *Canada (Attorney General)*:[60]

> A broader review of the legislative debates indicates that the proposed legislation was intended to "reorient and streamline a system that [was] bogged down in red tape, overburdened with administrative processes, and plagued with lengthy proceedings that [could] last for years in some cases" (House of Commons Debates, 41-1, No 146 (17 September 2012) at 1330 (Hon Ryan Leef); see also at 1210 (Hon Vic Toews, Minister of Public Safety)). As with the discussions cited by the Applicant, the debates show that the new legislation was intended to expedite the system by allowing more matters to be dealt with locally, thereby reducing delays:
>
> > For most disciplinary actions of any severity, for example, the RCMP is required to use a three-person adjudication board. These boards effectively undermine the role of front-line managers who lack the ability to resolve issues promptly, as well as the flexibility to make decisions on sanctions. As a result, the use of boards creates an adversarial work climate, not to mention long delays in the process.
> >
> > Under the proposed changes, front-line managers would finally gain the authority and responsibility to impose appropriate, punitive measures. These measures would range from remedial training to corrective action such as holding back pay. Managers would not have to resort to a formal board process, except in the case of dismissal (House of Commons Debates, 41-1, No 146 (17 September 2012) at 1210 (Hon.Vic Toews, Minister of Public Safety)).

2.33 That legitimate need for a more efficient process led to (among other things) more localized decision-making and therefore the creation of an enormous number of conduct authorities. That large body of conduct authorities will (necessarily) have a higher risk of writing decisions containing errors, because (i) the subject-matter is complicated, and decision-writing in particular is complicated; (ii) many conduct authorities will accumulate little experience because typically (given the number of them) they will write few decisions; and (iii) conduct authorities are all people with considerable other responsibilities.

2.34 We emphasize the basic point that the subject-matter is complicated, and decision-writing in particular is complicated. Decision-making and decision-writing in professional misconduct

[60] 2021 FC 1385 at para. 82, affd (on other grounds) 2023 FCA 15.

proceedings involves specialized skills,[61] and decision-writing has created much difficulty for professional regulatory tribunals, including lawyers.[62] Further, for a variety of reasons – not the least of which involve disclosure in criminal matters in accordance with the judgment of the Supreme Court of Canada in *McNeil* – even apparently-minor matters now require an appreciable level of specialized skills.

2.35 Apart from the concerns we expressed in our Phase 1 Report regarding decisions involving sex-related misconduct, Conduct Board decisions that we reviewed are generally of high quality. Some of them are outstanding. In Level 3-2-1 decisions, however, the quality of reasons varies considerably. Our review of the decisions that the RCMP supplied contained examples of very well-written decisions,[63] including decisions that referred to RCMP resources that assist conduct authorities in writing decisions.[64] However, some of the decisions are open to criticism, and lead to inconsistency in the Part IV process among levels and also divisions.

2.36 We are of the view that the RCMP should revisit the foundational balance between the legitimate need for more efficient processing of Part IV matters, and the competing need for consistency and legal reasonableness amongst the various decision-makers. Furthermore, we fear exposure to the conduct measure of demotion without the benefit of a hearing is vulnerable to challenge for want of procedural fairness, especially when the appeal is on the record (as distinct from a full hearing).

2.37 We offered the following recommendations in our Phase 1 Report:

> Recommendation 8:
>
> To obtain parity within the RCMP in responding to sexual harassment, and all forms of sex-related misconduct, serious matters should be decided by a select group of specialized decision-makers.
>
> Recommendation 9:
>
> A select group of decision-makers with responsibility for serious matters should have reasonable tenure (should not quickly "rotate" to another assignment), should receive

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[61] One instructive example of this point appears in the January 2023 judgment of the Federal Court in *Vellani* v *Canada (Attorney General)* 2023 FC 37, affg 2021 CAD 11, affg 2017 RCAD 3. Very skilled and experienced decision-makers and decision-writers authored the Conduct Board decision and the appeal decision, but the matter proceeded to an application for judicial review based upon fine points of law.

[62] The teaching case is *Law Society of Upper Canada* v *Neinstein* 2010 ONCA 193.

[63] Decision #6 is one example of a careful decision at Level 3.

[64] Decision #8 at para. 7, as an illustration.

> specialized education in the principles that govern sexual harassment, and all forms of sex-related misconduct, and be properly resourced.
>
> Recommendation 10:
>
> A select group of decision-makers with responsibility for serious matters should have highly-responsive access to highly-specialized legal advice, which means lawyers with deep experience in both the police complaint and discipline process and human rights law, because even the best possible process will fail if starved for ready access to the highest calibre of legal support.
>
> Recommendation 11:
>
> Allegations of sex-related misconduct should not be heard at Level 3 but by conduct boards, given both the legislative limit on conduct measures, and (in particular) the restricted nature of the Level 3 process, which does not enable a subject member to make full answer and defence in the same way that a conduct board hearing does. For comparison, proceedings in the grievance arbitration process and wrongful dismissal litigation provide extensive opportunity for full hearings, given the employment risk involved. Using conduct boards to hear allegations of sex-related misconduct would permit RCMP members to make full answer and defence.

2.38 We are of the view that the RCMP should move further away from the view that the Conduct Board's primary role is to hear cases in which the employer seeks dismissal.[65] Given the present level of complexity in the police complaint and discipline process, we believe that "specialized decision-makers" should also hear matters beyond those in the Phase 1 recommendations reproduced in the previous paragraph.

2.39 While recognizing the legitimate interests in streamlining the process – described in the excerpted material in our paragraph 2.32, above – we believe that the specialized decision-makers at the Conduct Board level should also hear matters in which the employer may seek demotion.

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**Recommendation 3:**

The specialized decision-makers at the Conduct Board level should also hear matters in which the employer may seek demotion.

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2.40 None of the previous paragraph should be interpreted to conclude that conduct meetings have no place. There are certainly some comparisons between conduct meetings and some of the

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[65] See, for example, *Deroche* 2022 CAD 13 at para. 106 ("by virtue of having sought the appointment of a conduct board, the Conduct Authority indicated his intent to seek Constable Deroche's dismissal").

"informal resolution" processes in some jurisdictions, and the conduct meeting may well have utility beyond the most apparently-minor matters.

2.41 Several decisions state that "it is a well-established principle that dismissal is only to be considered in the most extreme cases".[66] The better view is that dismissal may be available for less than the "the most extreme and egregious cases" where, for example, the member has a history of misconduct.[67] Comparable professional regulatory regimes provide some guidance: in the regulation of the legal profession, for example, disbarment remains the most severe penalty, but "is not reserved for cases involving dishonest dealing with money, nor is it reserved for the hypothetical 'worst case and worst offender'".[68]

2.42 The Conduct Board in *Doktor*[69] accurately restates the content of the rule against automatic penalty (dismissal or otherwise), and the principle of presumptive penalty, and we encourage the RCMP to incorporate this explanation into the Conduct Measures Guide:

1. "a policy cannot be invoked that fetters the discretion of a conduct board":[70] this language accurately reflects the principle that under common law, a decision-maker in the police complaint and discipline process cannot impose an automatic penalty (one that, following a finding of misconduct, would automatically apply despite unique considerations at the penalty stage)

2. "From previous cases and from the Conduct Measures Guide, it is clear that in such circumstances dismissal will be the normal result, absent extraordinary mitigating circumstances. Therefore, that must be the starting point ...": this language accurately reflects the principle that under common law, a *presumptive* penalty may apply to particular disciplinary misconduct, such that a particular penalty will presumptively apply, subject to the regulated professional demonstrating "special circumstances" (the

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[66] *Girard* 2020 CAD 30 at para. 59. To the same affect: *Genest* 2020 CAD 19 at para. 42, affg 2017 RCAD 2 ("only the most extreme and egregious cases suggest dismissal as an option"). We did not examine *Calandrini* 2018 RCAD 10 for the purposes of our Phase 2 Report, but the Conduct Board in *Doktor* 2020 CAD 18 refers to the portion in *Calandrini* stating that dismissal is "a last resort in sanctioning professional misconduct, and must be reserved for the most egregious of cases" (para. 196).

[67] *Wells* v *Cornwall Police Service* 2022 ONSC 5460 at para. 24 (findings of misconduct alone did not warrant dismissal, except for the "very serious" prior misconduct and consequent penalty (demotion to fourth-class constable); in the present proceeding, "problems of honesty, integrity and trustworthiness were regarded as persisting problems").

[68] *Virk* v *Law Society of Alberta* 2022 ABCA 2 at para. 40, for example.

[69] 2020 CAD 18 at paras. 21, 25, 28-29.

[70] *Ibid* at para. 25.

term used in the statutory presumptive penalty provisions in the Quebec *Police Act*[71]) or the equivalent "extraordinary mitigating circumstances" that the Conduct Board used in *Doktor*.

2.43 We saw a small number of decisions that appeared too minor to generate formal legal proceedings. One example involved a finding of misconduct for smoking on RCMP premises.[72] We are of the view that decisions would be improved by avoiding reliance upon criminal law terminology such as "sentencing".[73] We did not see many of these references, so we mention this consideration only briefly, but the evolution of the police complaint and discipline process from its historically punitive approach and towards a more remedial philosophy has included less reliance upon criminal law principles generally and, in any event, only a court of law may impose a true "sentence".[74]

## 3. Criminal Behaviour

3.1 Beginning with the leading court judgments or tribunal decisions ("fewest, biggest, best"), the Supreme Court of Canada judgment in *Lévis (City)* v *Fraternité des policiers de Lévis Inc*[75] remains the leading court judgment addressing the significance of criminal behaviour by police officers, including off-duty criminal behaviour, and contains the following statements of law:

> [M]ost, if not all, criminal offences committed by a municipal police officer will be connected to his or her employment due to the importance of public confidence in the police officer's abilities to discharge his or her duties.[76]
> ...
> In deciding whether there are specific circumstances, the arbitrator must not lose sight of the special role of police officers and the effect of a criminal conviction on their capacity to carry out their functions. A criminal conviction, whether it occurs on-duty or off-duty, brings into question the moral authority and integrity required by a police officer to discharge his or her responsibility to uphold the

[71] S. 119, discussed *infra*.

[72] Decision #15.

[73] *Noël* 2019 RCAD 11 at para. 24.

[74] See P. Ceyssens, *Legal Aspects of Policing* at section 5.10(a)(i). We offer this comment recognizing that even courts of law still use criminal law terms. Example: reference to "punishment" in *Vellani* v *Canada (Attorney General)* 2023 FC 37 at para. 108, affg 2021 CAD 11, affg 2017 RCAD 3.

[75] 2007 SCC 14.

[76] *Ibid* at para. 43.

> law and to protect the public. It undermines the confidence and trust of the public in the ability of a police officer to carry out his or her duties faithfully ...[77]

3.2 The various criminal convictions in *Fraternité des policiers de Lévis* engaged the statutory presumptive dismissal provisions in s. 119, para 2 of the Quebec *Police Act*, requiring the police officer to demonstrate "special circumstances" that would justify a penalty other than dismissal.[78] The Supreme Court of Canada concluded that the police officer did not demonstrate "special circumstances" that would justify a penalty other than dismissal.

> While dismissal is the harshest disciplinary sanction that can be imposed, it is worth recalling that the criminal offences targeted by both paragraphs of s. 119 P.A. are serious ones. They are all offences for which Parliament has considered it necessary to attach the possibility of significant terms of imprisonment. A conviction for a summary offence does not entail dismissal in all cases. Dismissal is only mandatorily prescribed for indictable or hybrid offences that can be prosecuted either by indictment or summary conviction.[79]

3.3 Court of appeal judgments across Canada have made similar statements concerning the effect of a criminal conviction. The Alberta Court of Appeal concluded as follows:

> As said in *R* v *Beaudry*, 2007 SCC 5 at paras 35 to 39 [...], individual police officers are given a significant degree of power and discretion. The duty that accompanies that power and discretion must be served with reliable integrity and devotion and must be seen to be served that way. As stated in *Lévis (City)* v *Fraternité des policiers de Lévis Inc.*, 2007 SCC 14 at para 43 [...]: "most, if not all, criminal offences committed by a municipal police officer will be connected to his or her employment due to the importance of public confidence in the police officer's abilities to discharge his or her duties."[80]

3.4 The Quebec Court of Appeal has endorsed the same approach: "The functions of the police officer are such that the public has a right to expect that his or her behaviour will be of a high

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[77] *Ibid* at para. 70.

[78] Para. 2 of s. 119 relies on the reference in s. 119, para. 1 to a police officer "found guilty, in any place, of an act or omission referred to in subparagraph 3 of the first paragraph of section 115" (that portion of s. 115 refers to "an act or omission defined in the *Criminal Code* [...] as an offence, or of an offence referred to in section 183 of that *Code* under one of the Acts listed therein"). Para. 2 of s. 119 then provides that a disciplinary sanction of dismissal must be imposed on any police officer found guilty, in any place, of such an act or omission *punishable on summary conviction or by indictment*, unless the police officer shows that specific circumstances justify another sanction. (our emphasis). While Quebec has included a presumptive penalty in its statute, the common law also permits presumptive penalties. See paras. 31.24 to 31.27 of our Phase I Report.

[79] 2007 SCC 14 at para. 71.

[80] *Quaidoo* v *Edmonton Police Service* 2015 ABCA 381 at para. 52.

standard, conform to the requirements of the law and will warrant the respect and confidence due to those entrusted with enforcing the law and more specifically that he or she will not commit a criminal act".[81]

3.5 Some Conduct Board decisions have examined the difference between behaviour that has resulted in a finding of guilt or conviction in a criminal court, and identical behaviour that resulted in no investigation, or no charge or no finding of guilt. In one example involving family violence, the member caused injury to his spouse and "caused her to fear for her safety", and the Conduct Board accepted the parties' joint submission that this conduct "is the equivalent of a criminal offence".[82] This approach accords with practices in some other jurisdictions. The leading Ontario Police Commission decision on point, for example, has favored the view that the behaviour constituting misconduct should be the primary focus of analysis, "whether a conviction is registered or not":

> In reviewing the cases presented to him the Hearing Officer applied a distinction between those that resulted in a criminal conviction and those that were resolved without a conviction. In our view, that distinction is too restrictive. The actions constituting misconduct committed by an officer must be carefully considered in each case whether a conviction is registered or not. Consequently, a penalty decision must be reviewed in the context of each factual circumstance.
> ...
> A criminal conviction is certainly an aggravating factor. However, in an administrative disciplinary hearing there is a different standard of proof. Therefore, as indicated, a hearing officer must consider all cases involving similar factual circumstances in coming to a decision on penalty.[83]

3.6 We encourage decision-makers in matters that involve conduct that "is the equivalent of a criminal offence" to begin with a brief analysis of *Fraternité des policiers de Lévis* if a conviction has resulted, or a brief analysis of the jurisprudence even if no conviction resulted but a finding of misconduct involves a matter that "is the equivalent of a criminal offence".

3.7 As with other categories of misconduct, our review noted significant inconsistency among levels of decision-making. Some of the decisions outside of the Conduct Board level appeared to involve very low conduct measures for significant misconduct. In one example, a Level 2 conduct authority imposed a conduct measure of 8 days forfeiture of annual leave, a reprimand

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[81] *Fraternité des policières et policiers de Montréal* v *Sûreté du Québec* 2007 QCCA 1086 at para. 51.

[82] *Noël* 2019 RCAD 11 at para. 22.

[83] *Schlarbaum and Chatham-Kent Police* 2013 ONCPC 5 at paras. 70-71 (impaired driving).

and training in a case in which a member hit a restrained prisoner, and in which the member had previous findings of misconduct and a criminal conviction for a use of force matter.[84]

3.8 We examined a Level 2 decision that involved an off-duty assault arising from a parking dispute and a related allegation for failing to appropriately self-disclose the criminal investigation to the employer.[85] The assault consisted of punching a person through an open vehicle window, and the conduct measure (three-day forfeiture of annual leave) appeared discordant when compared to the conduct measure for the failure to self-report (two-day forfeiture of annual leave). The decision provides a further illustration of the conduct authority noting the fact of the criminal investigation, but making no mention of the outcome of the parallel criminal investigation. The decision also cites "financial hardship" as a mitigating proportionality consideration. Although significant personal circumstances may serve as a mitigating proportionality consideration,[86] decision-makers should provide some details and ensure that they give appropriate weight to such circumstances and also that a relationship exists between the circumstances and the misconduct.[87]

3.9 The decisions revealed occasional examples of offences outside of the criminal law. One example appeared in a decision in which the conduct authority made a finding of misconduct related to a member consuming liquor in a community that had passed a by-law prohibiting the possession of intoxicants.[88]

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[84] Decision #18.

[85] Decision #14.

[86] *Favretto* v *Ontario Provincial Police Commissioner* 2004 CanLII 34173 (ON CA), leave to appeal refused [2005] 1 SCR xiii (framed as provocation), for example. See also *Llewellyn* v *College of Registered Nurses of Prince Edward Island* 2022 PESC 36 at para. 56 (analogous professional regulation context in which misconduct under nursing legislation occurred "in a circumstance of personal distress, dealing with a critically ill parent", an example of personal circumstances "properly factored" into the determination of a fit penalty).

[87] See the judgment of the Québec Court of Appeal in *Association des policiers provinciaux du Québec* c *Sûreté du Québec* 2010 QCCA 2053 at para 62, leave to appeal dismissed 2011 CanLII 29803 (SCC) (arbitrator gave disproportionate weight to "the description of his domestic situation at the time he committed the offence for which he was convicted [and] improperly took into account the relationship between those circumstances, which were not compelling, and [the respondent police officer's] illegal access to confidential information in the CRPQ that he knew he was not entitled to obtain").

[88] Decision #15 (reprimand).

3.10 Our review of similar cases involving misuse of weapons noted an inconsistency concerning whether a criminal investigation actually occurred.[89] In some cases, especially outside of the Conduct Board, the fact that a criminal investigation occurred receives only brief mention, and sometimes without basic information, such as the outcome of the criminal law process.[90]

3.11 We have not provided a recommendation regarding specific amendments to the Conduct Measures Guide, but encourage a comprehensive revision, given both the volume of superior court judgments in the past decade, and the need to increase to the extent possible the consistency of decisions among the four levels and also among RCMP divisions.

## 4. Family Violence

4.1 We address this issue as follows:

- General Approach
- Best Practices
- Concerns – Conduct Board Decisions
- Concerns – Level 3 Decisions
- Concerns – Level 2 Decisions

• *General Approach*

4.2 Returning to our view that decisions should reflect the "fewest, biggest, best" court judgments (or other sources), the most senior-level court judgment involving family-violence-related misconduct is the judgment of the Supreme Court of Canada in *Lévis (City)* v *Fraternité des policiers de Lévis Inc*.[91] Although *Fraternité des policiers de Lévis* provides limited guidance concerning conduct measures for this specifical type of misconduct (because one global penalty captured a variety of different misconducts), it does offer useful guidance concerning the proportionality considerations of "public interest" and "seriousness". The core details:

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[89] *Roesler* 2020 CAD 13 at para. 66 (pointing loaded firearm at another member in office after extended teasing; no mention of criminal investigation); *Girard* 2020 CAD 30 at para. 61 (while preparing for duty at the beginning of a shift, police officer reached up and grabbed a shotgun from the shotgun rack, and handled the shotgun in an unsafe manner by "not performing a safety and mechanical check" and by pointing the shotgun in the direction of another police officer in the room; criminal charge).

[90] A Level 3 illustration appears in Decision #5, for example. Decision #18 (Level 2 conduct authority) also refers to a criminal investigation, but not the outcome.

[91] 2007 SCC 14.

> The criminal conduct which led to the dismissal occurred on December 29 and 30, 2000. It would appear that on the evening of the 29th, Belleau, who was on leave at the time, had a heated argument with his spouse, Johanne Robitaille. He had been drinking heavily and he later admitted that he was intoxicated. The dispute worsened and Belleau became violent. When the police arrived, they found Robitaille wandering outside without a jacket, clutching her dog. They arrested Belleau and searched the house. In the basement they found three unsecured firearms. The next morning, Belleau was released on condition that he not communicate in any way with Robitaille. Less than two hours after his release, he breached that condition by appearing at the house of Robitaille's parents, where Robitaille was present. Belleau was arrested once more. On February 2, 2001, he pleaded guilty to threatening to cause death or bodily harm, assault, three counts of storing a firearm in a careless manner or without reasonable safety precautions, and failing to comply with a condition of his undertaking.

4.3 The various criminal convictions engaged the statutory presumptive dismissal provisions in s. 119, para 2 of the Quebec *Police Act*, requiring the police officer to demonstrate "special circumstances" that would justify a penalty other than dismissal.[92] The Supreme Court of Canada disagreed with the original decision-maker for failing to properly relate the factors related to the "special role of a police officer", and stated the following concerning the proportionality considerations of "public interest" and "seriousness":

> ... though it may have been reasonable for the arbitrator to take into account that there were no traces of violence or physical harm, it was not reasonable for him to attach great importance to this fact without considering the violent nature of the conduct of the officer. Even if there are no definitive findings of fact regarding specific acts of violence, the context here is one of domestic violence, and the officer pleaded guilty to a charge of assault on his wife; this is a very important consideration in light of the reliance of the public on police intervention in such cases, one the arbitrator could not reasonably ignore.[93]

4.4 Three other court judgments over the past 30 years (particularly the *Rendell* judgment) offer examples of judicial authority concerning both the merits (whether an allegation of misconduct is proved), and conduct measures (how superior courts have treated penalty in cases of proven family-violence-related misconduct). As always, the standard qualification applies: one should consider the age of court judgments, the specific litigated statutory provision, and whether the decision involved an appeal or an application for judicial review (and the consequent legal standard of review that the law required a court to apply to an appeal or a judicial review, which standards have varied considerably over the past generation):

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[92] "A disciplinary sanction of dismissal must, once the judgment concerned has become *res judicata*, be imposed on any police officer [...] found guilty, in any place, of such an act or omission punishable on summary conviction or by indictment, unless the police officer [...] shows that specific circumstances justify another sanction".

[93] *Ibid* at para. 75.

(i) the RCMP case of *Rendell* v *Canada (Attorney General)*[94] (during a "transfer" party with other members of his unit, the respondent behaved towards his wife (also a member) in a fashion that led to three findings of misconduct and a conviction of assault; "a prolonged series of attacks, not just one spur of the moment lapse of judgment" and police officer abused his wife "physically, emotionally and psychologically"; judicial review against dismissal unsuccessful).

(ii) *Halifax Regional Police Service* v *Wilms*[95] (police officer involved in a dispute with his wife; found guilty of assault and uttering of a death threat and received a conditional discharge; tribunal reinstated police officer following dismissal under *Police Act* process, imposing a 30-day unpaid suspension and a 6-month period of close supervision; tribunal concluded that although the pushes and the threats arose in the context of an angry outburst, the assault consisted of two pushes when the police officer had only one free hand at the time; Nova Scotia Supreme Court dismissed application for judicial review of the tribunal decision).

(iii) *Veinot* v *Saskatchewan Police Commission*[96] (adolescent stepdaughter attempted to leave the apartment during an "emotional discussion" and the police officer restrained her ("slapped her face at least three times, resulting in some bruising"); police officer also found guilty of common assault; required resignation upheld on judicial review).

4.5 Various Conduct Board decisions have relied upon *Rendell* v *Canada (Attorney General)*, which remains the leading RCMP court judgment on point, despite arising under pre-2014 legislation.[97] We endorse this approach. Citing the Supreme Court of Canada judgment in *Fraternité des policiers de Lévis* concerning the proportionality considerations of "public interest" and "seriousness" would also be appropriate.

- *Best Practices*

4.6 We reviewed several Conduct Board decisions involving family-violence-related allegations of misconduct, and found particular ones to be of high quality.[98] Much of what we offer in this Report concerning family-violence-related misconduct reduces to encouraging the RCMP to adopt these particular Conduct Board decisions as standard practice, and incorporate the

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[94] 2001 FCT 710.

[95] (1999) 177 NSR (2d) 320 (SC).

[96] 1990 CanLII 7417 (SK QB).

[97] *Toma* 2020 CAD 14 at paras. 78, 113; *Constable X* 2021 CAD 1 at paras. 40-44.

[98] *Whalen* 2021 CAD 1 offers one example, in which the analysis on the merits (whether or not the evidence proved an allegation of misconduct) was of high quality.

substance of them into a revised Conduct Measures Guide (alongside leading court judgments). The CMG is distinctly in need of revision in this area. We also encourage the RCMP to address the disparity between these particular Conduct Board decisions and some other decisions that demonstrate a variety of concerns, not the least of which is that the Level 2 process is not an appropriate forum to decide family-violence-related allegations of misconduct.

4.7 Among the Conduct Board decisions that we recommend in this regard is *Deroche*.[99] We offer the following comments concerning *Deroche*:

(i) For ease of reference, we quote the following excerpt from the Conduct Board decision concerning the substance of the four misconduct allegations:

> [74] With respect to Allegation 1, Constable Deroche threw and broke B.G.'s phone and Apple watch in the course of their arguments. He physically assaulted B.G. by slapping her in the face, pushing her up the stairs, causing her to trip and hit her head and shoulder on the wall. The slap caused minor injury to B.G., namely swelling and a red mark on her face.
>
> [75] With respect to Allegation 2, Constable Deroche threatened to punch B.G. in the face, in front of her three young children.
>
> [76] With respect to Allegations 3 and 4, Constable Deroche threatened to shoot B.G. and/or himself on three occasions, over three consecutive days. He uttered the final threat in front of B.G.'s then 12-year-old daughter, whom he had directed to sit with them at the table in order to bear witness to their exchange.
>
> [77] Constable Deroche's actions resulted in criminal charges, which were resolved when he entered into a Peace Bond. A necessary component of a Peace Bond is that the victim has a reasonable fear of violence. Furthermore, Constable Deroche did acknowledge that B.G. had reason to fear for her safety.

(ii) The Conduct Board concluded that the evidence proved each of the four allegations,[100] and stated the following:

> He perpetrated multiple incidents of physical and emotional abuse, including threats on B.G.'s life over a five-month period. When the totality of the evidence is considered, these facts establish a prolonged pattern of intimate partner violence that escalated over time. On one occasion, B.G. suffered an injury as a direct result of Constable Deroche's actions. Constable Deroche's

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[99] 2022 CAD 13.

[100] *Ibid* at para. 80.

> threats, as set out in Allegations 3 and 4, involved the threatened use of weapons and arose in the context of intimate partner violence.[101]

(iii) The Conduct Board stated the following concerning the "Assault/Domestic Violence" language in section 7.21 of the Conduct Measures Guide:

> The term "domestic violence" in and of itself is not reflective of the broad understanding of the scope of abusive behaviours that may arise in family or intimate partner relationships. The courts have, in recent years, expressly recognized the full scope of abusive behaviours and their impact on victims as well as other family members, and on children in particular.[102]

(iv) The Conduct Board cited section 2.4.1.1. of the RCMP *Operational Manual*, which refers to the Department of Justice definition of "family violence" and sought guidance from counsel,[103] concluding as follows:

> I further find that sections 7.21 and 7.22 of the Conduct Measures Guide, to the extent that they suggest a narrow definition of "domestic violence" as describing acts of physical violence and that they fail to recognize the impact of this violence on its victims, are inconsistent with the current law and societal standards. I have accordingly applied the Department of Justice definition of family violence, including its description of the impact on victims, in my interpretation and application of these provisions.[104]

(v) Aside from our concerns expressed above surrounding the default test found in many decisions for calculating conduct measures,[105] the reasoning of Conduct Board concerning conduct measures is detailed. The decision divides the proportionality consideration of "seriousness" into various components, for example, and examines each.[106] The decision identifies and examines the proportionality considerations of

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[101] *Ibid* at para. 108.

[102] *Ibid* at para. 90.

[103] *Ibid* at paras. 90-97.

[104] *Ibid* at para. 99.

[105] *Ibid* at para. 86, discussed *supra* at paras. 2.20 to 2.22.

[106] *Ibid*, beginning at para. 111. Thus: the intrinsic seriousness of family violence (paras. 111-112); the escalation of it in the present case (para. 114); the presence of breach of trust in the present case (paras. 114-116); the attempt to control in the present case (paras. 117-119); the impact of the behaviour on the persons affected (paras. 120-124); and the threatened use of weapons (paras. 125-126).

remorse, employment history and likelihood of rehabilitation.[107] The decision also examined in detail the proportionality consideration of disability.[108]

4.8 The Conduct Board decision in *Toma*[109] provides a further example of detailed reasoning in a case involving family-violence-related findings of misconduct, and may contribute to the revision of the Conduct Measures Guide.

• *Concerns – Conduct Board Decisions*

4.9 *Toma* does refer to three other Conduct Board decisions in which conduct measures turned on joint penalty submissions. The Conduct Board in *Toma* did not rely upon these cases, and we have limited ability to offer comment, simply because we have no way of knowing the circumstances that led to the joint submissions.

4.10 As noted in paragraph 2.10, above, some decisions involve the parties presenting a joint submission on penalty that relies (at least in part) on pre-2014 tribunal decisions, with the decision-maker then concluding that the principles that govern joint penalty submissions do not permit the decision-maker to refuse the joint proposal in that case.[110] We have sufficient concern surrounding this practice, certainly in the context of family violence, that we have provided Recommendation 2, above.

4.11 Conduct Board decisions have accepted joint penalty submissions without full examination, and in particular without reference to the leading court judgments. In one example, the Conduct Board accepted a joint penalty submission following a family-violence-related finding of misconduct without referring to *Rendell* v *Canada (Attorney General)*, or the analysis of the Supreme Court of Canada in its *Fraternité des policiers de Lévis* judgment concerning the proportionality considerations of "public interest" and "seriousness". Instead, the Conduct Board relied upon two of its own decisions in which the Conduct Board had accepted joint penalty submissions.[111]

4.12 In one example, the Conduct Board provided a clear and succinct analysis of whether the evidence proved misconduct, specifically relying upon *Rendell*. At the stage of calculating a fit conduct measure, however, the decision accepted a joint penalty submission and omitted "public interest" as a *proportionality* consideration. It also did not include in its analysis of

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[107] *Ibid* at paras. 127-131, 138-140.

[108] *Ibid* at paras. 132-140.

[109] 2020 CAD 14.

[110] *El Aste* 2018 RCAD 18 at paras. 30-32, 39, for example.

[111] *Noël* 2019 RCAD 11 at para. 22.

"seriousness" as a proportionality consideration that, although (apparently) no criminal proceedings resulted, at least two of the three allegations were the discipline equivalent of criminal offences.[112]

4.13 One Conduct Board decision stated the following concerning the effect (in calculating the conduct measure) of media reports of the member's behaviour in a matter involving family violence, and the related unlawful entry of another person's residence and the subsequent assault of that person:

> There is public awareness of the incident, as evidenced by the media accounts of the incident. I have not ascribed any weight to the views expressed in the articles provided to me. [...] I will simply state that while media accounts of the incident have the effect of raising public awareness of the incident, I do not ascribe significant weight to this factor.[113]

This analysis would have been improved with reference to the judgment of the Supreme Court of Canada in *Fraternité des policiers de Lévis*,[114] on this point:

> Although the issue of public trust and confidence should not be approached exclusively from the vantage of media reports, it is also unreasonable to suggest that had the public been properly informed of the specific circumstances, it would still have confidence in Belleau as a police officer. Unfortunately, whether they tell the whole story or not, media reports of criminal conduct by police officers do have an effect on public confidence, and, once lost, that confidence is extremely difficult to regain. Moreover, it is entirely possible that for some members of the public, even if they were informed of the specific circumstances, they would still lack confidence in Belleau's ability to perform his duties. One only needs to think of a victim of domestic abuse to realize that some would have understandable difficulty trusting Belleau. This is not to say that such considerations should necessarily trump any specific circumstances that have been proven. Rather, public confidence must be an important part of the balancing that takes place when considering whether specific circumstances are found to justify the avoidance of dismissal.

4.14 This case resulted in a conduct measure of a financial penalty of 10 days pay, forfeiture of 8 days of annual leave, a one-year promotion ineligibility, transfer, and HSO-prescribed medical treatment. This conduct measure appears open to question, even if strongly-mitigating proportionality considerations exist.

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112 *Constable X* 2021 CAD 1.

113 *McCarty* 2020 CAD 17 at para. 49(f).

114 2007 SCC 14 at para. 24 at para. 79.

- *Concerns – Level 3 Decisions*

4.15 At the Level 3 Conduct Authority level, various decisions generated concern. In one example,[115] a member received an 8-month demotion, a period of promotion-ineligibility, loss of 20 days' pay, a reprimand, and HSO-prescribed medical treatment. The concern in this case is that a matter of this seriousness would ideally be heard in a full hearing (Conduct Board) and not a conduct meeting. Another Level 3 example involved the member hitting his spouse on one occasion, resulting in a criminal charge of assault (unresolved at the time of the decision). The member had a problematic employment history and, as with the previous decision, held a rank. The conduct measures consisted of promotional ineligibility, forfeiture of 10 days' pay and a reprimand.[116] This conduct measure appears open to question.

4.16 Another Level 3 decision involved a plea of guilty to a criminal charge of assault arising from an incident in which a child reported that "his father ... was beating up his mother", both of whom were members. The thrust of the finding appears to be that the respondent member, carrying a bottle of liquor, returned to the residence during the dissolution of the relationship, and "she took the liquor from him and threw it out the door onto the driveway where it smashed ... as she was turning back from the door to face him he punched her in the left side of the head ...". The respondent member was suffering from significant medical issues. The decision is vulnerable to the criticism that the analysis leading to the conduct measures was exceptionally brief, including no reference to any leading court judgments for guidance, and the conduct measure (forfeiture of 3 days' leave) falls outside the range of both the leading court judgments and Conduct Board decisions.[117]

- *Concerns – Level 2 Decisions*

4.17 We examined several Level 2 decisions that concerned family violence. Given the judgment of the Supreme Court of Canada in *Fraternité des policiers de Lévis*, the RCMP should ordinarily not use Level 2 for cases involving family-violence-related allegations, given the intrinsic gravity of such matters and the comparatively very limited range of conduct measures available at Level 2.[118]

4.18 In addition to the gravity of such matters and the very limited range of conduct measures available at Level 2, many cases involving family violence involve considerable complexity, which a Level 2 conduct meeting will inevitably struggle to capture. One example involved

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[115] Decision #2.

[116] Decision #3.

[117] Decision #7.

[118] Commissioner's Standing Orders (Conduct), SOR/2014-291, s. 4.

three allegations of family-violence-related misconduct, resulting in the conduct authority engaging in an intricate (and commendable) analysis of the evidence, and making a finding of misconduct in one of those three allegations. Apart from the observation all four interests in the police complaint and discipline process would justify deciding a case of such complexity only after a full hearing, the principal conduct measure in this case involved forfeiture of two days of annual leave, which falls far outside the range of both the leading court judgments and Conduct Board decisions.[119]

4.19 In one Level 2 example, a senior-in-rank member threatened to kill his wife, resulting in a criminal investigation by the province's independent agency. The decision does note the fact of the criminal investigation, but does not mention the result of the criminal process, a difficulty that also appears in other decisions. The decision properly credited the member for seeking treatment for alcohol abuse, successfully completing the rehabilitation process, and the consequent five months of sobriety. However, the decision also contains various irregularities concerning conduct measures: "possible medical diagnosis" is not a recognized mitigating factor (evidence is required, among other requirements), and his status as a senior NCO with long service is likewise not a mitigating factor (high rank typically constitutes an aggravating factor). Also, the conduct measure of forfeiture of five days of annual leave falls outside the range of penalty for such misconduct.[120] Another Level 2 decision imposed forfeiture of six days of annual leave following a finding of misconduct for one allegation of family violence.[121]

4.20 Beyond our comments in paragraph 4.6, above, we have not provided a formal recommendation concerning family-violence-related misconduct.

## 5. Unlawful Use of CPIC/CRPQ Databases

5.1 As with other categories of misconduct, decision-makers should begin with reliance upon the primary sources of judicial or other relevant guidance. In the case of unlawful use of CPIC/CRPQ databases, two judgments of the Quebec Court of Appeal provide that guidance. The recent *Final Report on Tiller/Copland/Roach RCMP Class Action* provides further guidance.

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[119] Decision #10. The conduct authority also required the member to comply with the HSO's instructions and directions.

[120] Decision #9.

[121] Decision #11.

5.2 In the first of the two judgments – *Fraternité des policiers et policières de Saint-Jean-sur-Richelieu inc* c *St-Jean-sur-Richelieu (Ville de)*[122] – the Quebec Court of Appeal stated the following:

> Clearly, the circumstances of this case shine a light on the fact that the message of denunciation and deterrence intended for offending police officers in disciplinary and professional ethics cases involving illegal CRPQ consultations has failed to achieve the objective sought, since illegal consultations of the CRPQ, as St-Martin's case illustrates, are still inexplicably frequent today.
>
> A possible reason for this frequency might be the very lenient punishment such consultations incur, despite the objectively serious nature of this type of breach. In recent judgments, the Comité de déontologie policière has characterized illegal consultations of the CRPQ as [translation] "serious breaches" that are [translation] always reprehensible", as [translation] "disrespectful of the authority of the law and the courts and a failure to collaborate with the administration of justice", and as [translation] "misconduct that undermines the role of the police". Nevertheless, the sanctions imposed for this offence, which is in fact criminal in nature, have been trivial, ranging from reprimands to a few days' suspension for every illegal consultation.
>
> In short, the time has come to emphasize deterrence when sanctioning such behaviour, instead of imposing sanctions that represent nothing more than brief inconveniences.[123]

We discuss *Saint-Jean-sur-Richelieu* further below.

5.3 The statement of the Court of Appeal that this misconduct "is in fact criminal in nature" refers to s. 342.1 of the *Criminal Code*:

> 342.1 (1) Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years, or is guilty of an offence punishable on summary conviction who, fraudulently and without colour of right,
>
> (a) obtains, directly or indirectly, any computer service;
>
> (b) by means of an electro-magnetic, acoustic, mechanical or other device, intercepts or causes to be intercepted, directly or indirectly, any function of a computer system;

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[122] 2016 QCCA 1086.

[123] *Ibid* at paras. 95-97 (footnotes omitted).

> (c) uses or causes to be used, directly or indirectly, a computer system with intent to commit an offence under paragraph (a) or (b) or under section 430 in relation to computer data or a computer system; or
>
> (d) uses, possesses, traffics in or permits another person to have access to a computer password that would enable a person to commit an offence under paragraph (a), (b) or (c).[124]

5.4 The second leading court judgment, *Association des policiers provinciaux du Québec* c *Sûreté du Québec*,[125] provides one illustration of the approach to improper database use elsewhere. A criminal conviction arose from a charge of unauthorized use of a computer,[126] following an acrimonious matrimonial breakdown and the police officer's efforts to locate his wife and son. Although the various incidents involving improper access to CRPQ were combined into one count in the indictment, there were six such separate events over eight months, four relating to his former wife and two relating to his former mother-in-law, each of the six "could have formed the basis of a separate count in an indictment". The conviction triggered the presumptive dismissal provisions in s. 119 of the Quebec *Police Act*, and the Court of Appeal concluded that the police officer did not discharge the burden of establishing "special circumstances" to displace the presumptive dismissal. The Court of Appeal upheld the remedy of dismissal.

5.5 In the *Final Report on Tiller/Copland/Roach RCMP Class Action*, the Assessors placed emphasis on the link between misuse of CPIC/CRPQ databases and gender-based workplace harassment:

> Many claimants reported that Regular Members accessed confidential databases to obtain, use, and share a claimant's personal information, including but not limited to contact information or marital status. This inappropriate use of such information was a routine form of harassment and intimidation. Some claimants reported Regular Members showing up at their homes while on duty and without a work-related reason for doing so. These visits were perceived as an exercise and display of power, which often reinforced a controlling workplace dynamic. Other claimants observed members driving in their neighbourhoods, following them in their vehicles, and stopping them for no apparent reason.[127]

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[124] Definitions appear in s. 342.1(2).

[125] 2010 QCCA 2053, leave to appeal dismissed 2011 CanLII 29803 (SCC).

[126] *Criminal Code*, s. 342.1(1)(a), as noted *supra*. The disciplinary proceedings also involved a separate criminal conviction for assault.

[127] Office of the Assessors, June 2022, at 33.

5.6 Among the formal recommendations in Part 3 of their Report, the Assessors wrote the following, under recommendation 7 ("Conduct a review of workplace security in order to ensure the safety and security of women in RCMP workplaces"):

> Finally, the personal safety and security of claimants was compromised by improper use of information technology. In addition to accessing personal information related to relationship status, home addresses, and private telephone numbers, harassers also accessed personal, confidential medical information to harass and demean claimants. Such behaviour should result in mandatory disciplinary action.[128]

5.7 Returning to the leading *Saint-Jean-sur-Richelieu* Quebec Court of Appeal judgment, we offer the following comments:

(i) The original tribunal (an arbitrator) had concluded that the respondent police officer, who held a senior rank, had consulted CRPQ illegally for purposes characterized as "strictly personal" on 70 occasions to search 10 people, mostly women.[129] The Court of Appeal concluded that dismissal was a fit conduct measure for this behaviour and various other findings of misconduct, and placed emphasis on his behaviour involving two particular women.

(ii) Regarding one of the two women, the Court of Appeal stated as follows:

> Madam [P] did not know [the respondent] but had smiled at him during a softball game she attended ... in which her husband was playing. Madam [P] wanted to be sociable, as she was with the other people she met during these games. A few days later, knowing that her husband would be absent, [the respondent] called her at home to ask her what her smile meant. He had gotten her telephone number from the CRPQ.
> ...
> Evidently, her relationship was thrown into turmoil when [the respondent] called her (knowing that her husband was not home) for a purpose that had nothing to do with his role as a police officer. Undoubtedly to minimize the impact of this intrusion on Madam [P], the arbitrator chose not to provide any more details than those I reproduce in paragraph [53] above.[130]

(iii) As to the second woman, the allegations involved information that the respondent obtained from both CRPQ and "police department archives". He met the woman, who

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128 *Ibid* at 44.

129 *Ibid* at paras. 37-50. He also searched himself on various occasions, and various family members, including several searches in one month "to look up the addresses of family members so he could mail them invitations to a party". *Ibid* at paras. 48-49.

130 *Ibid* at paras. 47, 75.

had no connection to his workplace, at a social event, after which he searched her name on CRPQ nine times on one day "out of mere curiosity". He then "came to see her unannounced in a police vehicle and showed her a photo taken during her arrest for impaired driving a few years earlier, which he had illegally obtained from the police department archives".[131]

(iv) In upholding dismissal, the Court of Appeal rejected the original tribunal's finding that the respondent did not illegally obtain information with ("among other things") the objective of harming the person whose information he sought: "the evidence is clear that this statement is inaccurate with respect to two persons, and [he] committed concrete actions affecting them after he obtained information about them to which he had no right".[132]

(v) The Court of Appeal concluded that his goal in both matters was "to begin a romantic relationship",[133] and disagreed that the fact that he "did not obtain the information for criminal purposes or to transmit to third parties" should mitigate penalty: the arbitrator's determination that he did not send the illegally obtained information about the private lives of eight people and several members of his family to third parties is a mitigating factor was an error of law, and "to the extent that the arbitrator based himself on the arbitration case law, that case law is also unfounded in law".[134]

(vi) The Court of Appeal concluded as follows:

> It goes without saying that this type of conduct runs contrary to the exemplary image and integrity required to perform the duties of a police officer. Mr. St-Martin abused the power and privileged status conferred by his rank as a police officer. His actions seriously tarnish the image of the police forces and

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131 *Ibid* at paras. 45-46, 74. The original tribunal stated that "it is utterly inconceivable for a highly ranked police officer to appropriate part of the contents of his police station's archives to benefit from them personally". *Ibid* at para. 46.

132 *Ibid* at para. 75.

133 *Ibid* at paras. 74-75. As to one of the women, the Court of Appeal stated the following: "Evidently, her relationship was thrown into turmoil when [the respondent] called her (knowing that her husband was not home) for a purpose that had nothing to do with his role as a police officer. Undoubtedly to minimize the impact of this intrusion on [her], the arbitrator chose not to provide any more details than those I reproduce in paragraph [53] above." *Ibid* at para. 75.

134 *Ibid* at paras. 77-78.

> contribute to public loss of confidence in and respect for in these forces. He displayed contempt for justice, the very value he should have exemplified.[135]

5.8 The discussion should include the appeal decision in *Eden*,[136] which contains the following summary of events:

> The Appellant accessed RCMP electronic file information to obtain the cell phone number of Ms. A, a 17-year-old complainant of sexual assault. He initiated a number of text message and photograph exchanges with her and suggested meeting with her. The exchange ended when Ms. A's texts indicated suicidal thoughts and the Appellant called for assistance for her. In a separate series of events, the Appellant accessed RCMP electronic file information to obtain Ms. B's personal phone number after issuing Ms. B a speeding ticket. He sent her a text message to invite her for coffee and he expressed his interest in obtaining acupuncture from her husband as this was mentioned at the roadside stop.

5.9 These events generated four allegations of misconduct, two of which involved s. 4.6 (misuse of information management/information technology systems), and two under s. 7.1 (discreditable conduct) for using the phone numbers of the two women to initiate contact with them. The analysis in the appeal decision concerning conduct measures in particular is detailed and worthy of note,[137] and we recommend that the RCMP incorporate it into a revised Conduct Measures Guide.[138]

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135 *Ibid*.

136 2021 CAD 19 at para. 6, affg 2017 RCAD 7.

137 *Ibid* at paras. 77-119. *Eden* is likely the leading tribunal decision in Canada concerning this particular form of misconduct.

138 The one quibble with this decision is the brief recognition of decisions from the pre-2014 regime in the conduct measure calculus. *Ibid* at para. 114. The ERC should not be engaged in distinguishing "between these two cases and the one at hand" and making a finding in that regard that the adjudicator will elect to accept or not accept. In place of using such decisions as a source of guidance for parity or any other aspect of the penalty calculus, we would return to our comments in our para. 2.7, above, that "best practices in conduct processes" will place emphasis on the "fewest, biggest, best" court judgments. "Biggest" refers to the seniority of relevant court judgments and tribunal decisions, starting with the Supreme Court of Canada and courts of appeal. Here, the leading *Saint-Jean-sur-Richelieu* Quebec Court of Appeal judgment would have provided a higher level of guidance than tribunal decisions from the predecessor (and quite different) statutory regime. Perhaps more to the point, intervening societal change since those older decisions would independently diminish their utility.

5.10 Apart from *Eden*, we reviewed several decisions that filled the spectrum from the lower end of the spectrum[139] to the higher end.[140] We did observe some lack of consistency among the decisions, but in place of a minute dissection of the various decisions that we examined, we prefer to place emphasis on the best future direction, and provide the following recommendation:

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**Recommendation 4:**

Regarding misconduct related to unlawful use of CPIC/CRPQ databases, the RCMP should amend the CMG to incorporate (i) the analysis of the Quebec Court of Appeal in *Saint-Jean-sur-Richelieu* of this form of misconduct generally; (ii) the analysis of this issue in the *Eden* appeal decision; and (iii) the analysis contained in the relevant pieces of *Tiller/Copland/Roach*.

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## 6. Deceit and Deceit-Related Discreditable Conduct

6.1 The now-revoked Royal Canadian Mounted Police Regulations, 1988[141] provided that a member "shall not knowingly or wilfully make a false, misleading or inaccurate statement or report to any member who is superior in rank or who has authority over that member" pertaining to performance of that member's duties, any investigation, conduct concerning any member, or the operation or administration of the Force. This language does not appear in the present Code of Conduct of the Royal Canadian Mounted Police,[142] which addresses honesty as follows:

> 8.1 Members provide complete, accurate and timely accounts pertaining to the carrying out of their responsibilities, the performance of their duties, the conduct of investigations, the actions of other employees and the operation and administration of the Force.

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[139] Example: Decision #24 (member queried new constable assigned to detachment and shared results with colleagues; also queried member of neighboring law enforcement agency; conduct measures: reprimand; review policy; course).

[140] Example: *Genest* 2017 RCAD 2, affd 2020 CAD 19.

[141] SOR/1988-361, s. 43.

[142] Royal Canadian Mounted Police Regulations, 2014, SOR/2014-281, Schedule.

6.2 Generally speaking, the threshold issue concerning this category of deceit involves identifying the point beyond which an inaccurate account becomes culpable, as traditionally the governing principle is that inaccuracy alone is insufficient to prove dishonesty-related misconduct.[143]

6.3 Identifying the point beyond which an "inaccurate" account becomes culpable is important because of two competing objectives of the police complaint and discipline process in particular.

6.4 The *first* objective involves the need for public protection that arises from the potential consequences of inaccurate statements by police officers. The mental element in most legislation therefore captures actual intention to deceive (using the terms "intentionally", "wilfully", "knowingly"), and some legislation also includes "negligent" inaccuracy within culpable conduct.

6.5 The *second* objective involves protecting police officers against findings of deceit in situations where an inaccurate statement is the product of honest mistake.[144] Legislation therefore requires at least negligence to establish this category of misconduct. Without requiring a threshold of at least negligence before an inaccurate statement becomes professional disciplinary misconduct, honest mistakes and even "trifling inaccuracies" would support a finding of misconduct, and this category of deceit would in effect become a disciplinary offence of absolute liability.[145]

6.6 Using a decision from another jurisdiction for comparison, an adjudicator discussed these two objectives in examining the equivalent Manitoba provision, which – like s. 8.1 – does not explicitly address the required mental element:

> [G]iven the overall purpose of the statute, it is more likely that the legislature, by failing to qualify the statement, intended to cast a wide net. I interpret the disciplinary default to encompass both negligently untrue or inaccurate and wilfully false statements. I also find that a material omission may render a statement false. The public has a right to expect police officers, who hold such significant powers, to not only act without malice, but to live up to professional standards of reasonable care in discharging their duties.

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143 See P. Ceyssens, *Legal Aspects of Policing*, section 6.6(b)(ii), for the detailed discussion that is not required for present purposes.

144 The "teaching example" on this point: *Lloyd and London Police* (1999) 3 OPR 1345 at 1354 (OCCPS), in which a tribunal found it "not surprising" that a patrol officer who performed "hundreds" of checks in the course of duty may have made an inaccurate statement about one such check made almost a year after the event.

145 See P. Ceyssens, *Legal Aspects of Policing*, section 6.6(b)(ii), concerning this point.

> If officers are careless in their reports and statements – especially in regard to material matters, citizens can suffer significant negative consequences. ...
>
> On the other hand, in interpreting the ambit of this disciplinary default I have no doubt that courts will not find simple errors on non-material matters within its scope. Such matters would likely be screened out of the process as frivolous or too trivial to merit a public hearing. Police officers are human and can make errors. In addition, there must be evidence that the false statement *affected* the Applicant in some material way.[146]

6.7 Again, for emphasis: the old Royal Canadian Mounted Police Regulations, 1988 provided that an inaccurate statement became culpable when a member made such a statement "knowingly or wilfully". Now, s. 8.1 of the Code of Conduct of the Royal Canadian Mounted Police requires only that members provide "complete, accurate" accounts.

6.8 Court judgments will ultimately determine the proper interpretation of s. 8.1, but decision-makers should be alive to the tension between the public interest (protection from the "potential consequences of inaccurate statements by police officers", hence culpability for intentionally inaccurate accounts) and the interest of respondent police officers (protection against findings of misconduct for dishonesty when an inaccurate statement is the product of honest mistake).

6.9 The other prominent legal issue – especially at the conduct measure stage of a hearing, when considering proportionality considerations such as "public interest" and "seriousness of the misconduct" – involves the substance of the dishonesty. Not all acts of culpable inaccuracy have the same gravity, of course. In *Toy* v *Edmonton Police Service*,[147] the Alberta Court of Appeal has instructively endorsed a spectrum to assist in evaluating the substance of the dishonesty: whether dishonesty involved "mere social lies",[148] or "lies respecting administrative matters", or lies "related to core operational matters such that it fell within the highest range of seriousness".

6.10 In addition to that broad guide, particular cases will offer proportionality considerations that enable further assessment of the substance of the dishonesty. Even if an allegation involves "core operational matters", for example, further degrees of gravity exist. "Intentional lying

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146 *P* v *M*, MB Adj., 3 July 2002, at paras. 61-63.

147 2018 ABCA 37 at para. 57.

148 See, for example, *Mulholland and Peel Regional Police* 2014 ONCPC 19 (lied to supervisor regarding need for leave to attend to ill relative).

under oath" would fall at the end of the range of dishonesty involving "core operational matters". Intentional and *repeated* lying under oath would fall the far end of that range.[149]

6.11 Various important court judgments and leading tribunal decisions have arisen since the new Part IV regime became law in 2014, and we urge the RCMP to comprehensively amend the CMG to reflect this intervening evolution of the law. In *Cormier*,[150] for example, the Conduct Board placed emphasis on whether the member's behaviour involved personal gain:

> ... where dishonesty or a lack of integrity has been ascribed to a member, dismissal typically only occurs where there has been personal gain sought or obtained, and significant mitigating factors are absent.[151]

6.12 In *Cormier*, the member committed a variety of dishonest acts, including falsifying an email from the Crown, to prevent an impaired driving prosecution out of concern for the impaired driver's career in the transportation industry." He admitted his guilt to a *Criminal Code* charge (uttering a forged document), and received a conditional discharge. The motivation in this case was unrelated to personal gain (it was akin to an act of sympathy). "The conduct board determined that absent any motivation for self-benefit, loss of employment was disproportionate in the circumstances".

6.13 While "self-benefitting dishonesty"[152] will always form a part of penalty calculation (it speaks to the proportionality consideration of "seriousness of the misconduct", for example), we would have decision-makers at all levels also rely upon the spectrum of dishonesty-related misconduct that the Alberta Court of Appeal endorsed in *Toy* v *Edmonton Police Service*. The assessment of dishonesty-related misconduct turns on a full examination of all the circumstances, and decisions should not over-emphasize the element of "self-interest".

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149 2018 ABCA 37 at para. 62, for example ("repeatedly lied under oath in a [premeditated] fashion, and entirely for his or her own self-interest").

150 2016 RCAD 2 at para. 110.

151 See *Kohl* 2019 RCAD 18 at para. 157, to the same effect ("cases of dishonesty do not automatically result in dismissal"; dismissal is deemed to be an appropriate measure in cases involving "misconduct undertaken for personal gain" unless significant mitigating factors exist).

152 *Ibid* at para. 109 (defined as the act or acts of dishonesty involving "some sort of gain or advantage being sought or accruing to the member"; dishonesty used "in order for the member to obtain personal financial gain or benefit, to conceal the member's work-related deficiencies, to thwart investigation of the member, or to alter deficient documents to further an investigation").

6.14 In *Vellani* v *Canada (Attorney General)*,[153] an adjudicator upheld the Conduct Board's dismissal of the respondent police officer who reported vandalism to his personal vehicle (smashed passenger window) and theft of some contents. Later the same day, he advised the police investigator of further damage to the windshield and hood. He faced one allegation that he misled the investigator by failing to disclose that the damage to the windshield and hood arose from a collision while he was driving and talking on his phone. He faced a second allegation arising from his insurance claim in which he claimed that all the damage arose from the vandalism, repeated that claim in two verbal statements to the insurer, and lied on two occasions in solemn declarations before a notary. The Federal Court dismissed an application for judicial review in a judgment rendered in January, 2023, which included the following:

> I can appreciate that the Applicant has suffered from difficult life circumstances, and likely had a lapse in judgment, probably due to a state of panic. I do not wish to minimize the hardships he may have faced in his personal and professional life that may have led to this mistake.
>
> Unfortunately, the Applicant's situation went beyond an initial mistake. He exhibited repeated dishonesty over the course of five weeks and misled fellow RCMP members and the ICBC. It is this misconduct that led to the strict punishment of dismissal from the RCMP, which may have been less severe had the Applicant acted with candor and truthfulness following his mistake.[154]

6.15 *Vellani* offers an example of the need to examine all the circumstances surrounding the proportionality consideration of "seriousness" alone: the initial event, any subsequent related events (the "repeated dishonesty" reference from *Vellani*), the length of time involved, the character of the events (using the guidance in *Toy* produced in our paragraph 6.9, above), any attempts to correct, and certainly the degree of self-interest.

6.16 In one example,[155] a member subject to a recognizance fabricated evidence, demonstrating a lack of honesty and integrity in recognizance. The member's fabrication of threats was false and misleading, and resulted in a criminal investigation against a person with whom he had a significant personal dispute. The decision properly refers to "personal gain" (retaliation against the person in question), but this was not ordinary "personal gain" – the false statements "were designed to implicate [the person] in very serious criminal behaviour[156] –

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153 2023 FC 37, affg 2021 CAD 11, affg 2017 RCAD 3.

154 *Ibid* 2023 FC 37 at paras. 107-108.

155 *Greene* 2017 RCAD 5 at paras. 111, 150, 166, 168 in particular (allegations 2 and 4).

156 *Ibid* at para. 168.

and also was not "a one-time lapse in judgment, because there were several contraventions over a period of many months".[157] We found this Conduct Board decision especially thorough.

6.17 Another useful example involved multiple findings of misconduct for both breaching policy and dishonesty, after a member had seized a cooler that contained closed containers of beer, and issued a ticket. Instead of disposing of the liquor or filing it as an exhibit, he gifted it to the local fire station. He made a false written statement that he had disposed of the liquor, and told the firefighters to provide a false answer concerning the origin of beer, if asked. The Conduct Board imposed a global penalty of forfeiture of 35 days' pay, and the Commanding Officer unsuccessfully appealed, seeking the member's dismissal.[158] This case involved no actual personal gain, but did contain various other considerations that the appeal decision examined.

6.18 In *Girard*,[159] the Conduct Board imposed a requirement to resign following two findings of misconduct relating to a "reckless or careless" false statement to a supervisor regarding an operational matter (concerning the completion of an affidavit of service) and a false statement to the Crown in a "McNeil" form:

> ... some cases involving dishonesty and deception, the sanction imposed is rightfully something less than dismissal. However, past decisions make it entirely clear that one of the possible sanctions against members, whose actions demonstrate these characteristics, is dismissal from the RCMP. Dismissal was not imposed in those cases because the respective conduct boards found that there were sufficient mitigating circumstances to warrant a less severe sanction.[160]

6.19 The issue of consistency of decisions in the Part IV process is illustrated by comparing *Girard* with a Level 2 decision involving two findings of misconduct for disobeying an order to attend a conduct meeting, and another finding of misconduct for lying to one of the supervisors who issued an order to attend a conduct meeting. The conduct measures were forfeiture of 3 days pay for each of the first two, and forfeiture of 4 days pay for the third.[161]

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157 *Ibid* at para. 150.

158 *Clarke* 2019 RCAD 24, affg 2016 RCAD 3.

159 *Girard* 2020 CAD 30.

160 *Ibid* at para. 61. Compare *Greenlaw* 2019 RCAD 22 (filing a false report concerning alleged offences that CFS reported; 30 day forfeiture of pay, ineligibility to act in a supervisory role or position for one year, and ineligibility for promotion for one year, and a reprimand).

161 Decision #22.

## 7. Other Categories of Misconduct

7.1 We have attempted to provide assistance without overloading our report with case-by-case examinations, hence our focus on the more serious categories of misconduct. We propose to refer briefly to some other categories of misconduct to highlight both the utility of using the "leading" court judgment (or equivalent) as the foundation for the decision, and also our concerns relating to inconsistency among levels of decision-makers.

7.2 One category worth brief reference involves misconduct related to breach of undertaking or recognizance, and related issues. Analysis of misconduct allegations related to breach of an undertaking or recognizance should begin with the treatment of this issue by the Supreme Court of Canada in *Lévis (City)* v *Fraternité des policiers de Lévis*:

> More serious still is Belleau's conscious defiance of his undertaking to the court not to communicate with his spouse. As a police officer, Belleau would have known the importance of undertakings to the court. The breach of an undertaking by a police officer is especially serious, given the role that police officers play in the administration of justice. It suggests a lack of respect for the judicial system of which he forms an integral part. Moreover, the obligation not to communicate with his spouse was the most important obligation in the undertaking. The seriousness of the breach of this obligation is further evidenced by the fact that the Crown chose to prosecute the offence by way of indictment.
>
> The arbitrator excused Belleau's breach of his undertaking on the grounds that his conduct on December 29 and 30 had to be seen as forming a continuum. But it is difficult to see how his mental state and intoxication from the previous evening could reasonably explain Belleau's conduct the next day, several hours after the incident and two hours after he had agreed to the undertaking. There is no question that Belleau clearly understood the terms of his release. Indeed, his arraignment that day would have impressed upon him the seriousness of his actions the night before. I am thus unable to see how it would be reasonable to conclude that Belleau's conduct could be justified on the grounds that he was not fully aware of what he was doing when he breached his undertaking.[162]

7.3 The one Conduct Board decision of note in our review is *Greene*,[163] in which the Conduct Board made findings of misconduct related to a breach of an undertaking (no-contact order), breach of a condition to keep the peace (making a false allegation), and violation of a probation order (not being of good behaviour). The Conduct Board conducted a detailed analysis of a complicated and unusual matter, and ordered dismissal for these three and two

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[162] 2007 SCC 14 at paras. 77-78.

[163] *Greene* 2017 RCAD 5.

other findings of misconduct. The Conduct Board emphasized the obligation of police officers to uphold the administration of justice.[164]

7.4 In contrast, some Level 3 decisions appear to treat this issue lightly, considering the intrinsic seriousness of compliance with court orders. In one example, two breaches of a recognizance (no-contact order) resulted in forfeiture of three days of annual leave for each of the two.[165]

7.5 We encourage the RCMP to revise the Conduct Measures Guide to include the analysis of the Supreme Court of Canada to this issue (*Lévis (City)* v *Fraternité des policiers de Lévis*), and cite *Greene* as an appropriate treatment of allegations in this regard.

7.6 Another category worth brief reference involves misconduct related to misuse of firearms. We reviewed several decisions involving pointing a weapon at another member. In one decision, a member pointed a taser at a civilian employee following a workplace disagreement.[166] The matter also involved a guilty plea to one count of possession of a weapon for a dangerous purpose (s. 88(1) of the *Criminal Code*), resulting in a conditional discharge. In another decision, a police officer preparing for duty at the beginning of a shift reached up and grabbed a shotgun from the shotgun rack, and handled the weapon in an unsafe manner: "not performing a safety and mechanical check" and pointing the shotgun in the direction of another police officer in the room.[167] A third decision involved a member who drew her firearm and pointed it at another member in the office who had been teasing her. We would use these decisions to illustrate the point that decision-makers should have access to the leading decisions. In one Conduct Board case, for example, the CAR argued a labour arbitration decision in a matter in which an almost-identical court of appeal judgment existed in the police complaint and discipline process.[168]

7.7 Similar circumstances arose in a Level 3 decision: two substantiated allegations of unsafe handling of RCMP rifles (permitting carbine to be pointed at other members) and one substantiated allegation of attempting to taser another member "wilfully and in anger". This case was also almost-identical to the circumstances in the same leading court of appeal

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164 *Ibid* at paras 165, 169.

165 Decision #4. Another established allegation in the same decision relating to the member punching a hole in the drywall in his home resulted in a conduct measure of forfeiture of seven days of annual leave.

166 *Burgess* 2019 RCAD 14.

167 *Girard* 2020 CAD 30 at para. 61. The Conduct Board imposed a global conduct measure of forfeiture of 20 days' pay and a reprimand that included two other unrelated findings of misconduct.

168 Leading Court of Appeal judgment: *Favretto* v *Ontario Provincial Police Commissioner* 2004 CanLII 34173 (ON CA), leave to appeal refused [2005] 1 SCR xiii.

judgment, including bullying by other members.[169] Both these decisions would have benefitted from the analysis in the leading court of appeal judgment.

7.8 A further category worth brief reference involves discourtesy-related misconduct and misuse of authority as police officer,[170] including decisions involving on-duty extreme discourtesy to a person.[171] Some decisions involved off-duty extreme discourtesy to a person, such as a Level 2 decision in which an off-duty member used profanity towards a citizen during a parking dispute, and produced his police identification.[172] This decision did not fully explore the issue of a police officer producing police identification in the sort of off-duty situation as here. In another example, a member involved in a hockey game involving police and community members behaved with extreme discourtesy, with various significant complicating factors, including behaviour that led to a second allegation because the member told a person that he was "marked". The decision was generally alive to the complicating factors, but the conduct measure for the original behaviour (forfeiture of 2 days annual leave) appears distinctly inadequate.[173]

7.9 Some decisions involved off-duty members exhibiting discourtesy (sometimes extreme discourtesy) to other members in the context of a traffic stop. In one Level 2 example, a member exhibited profane and arrogant behaviour towards two members during a traffic stop in which he was a passenger in the stopped vehicle. He also attempted to use his position as a police officer to dissuade the two members from investigating a suspected impaired driver. The conduct measures appeared wholly inadequate: a reprimand for the extravagant behaviour towards the two members, and forfeiture of one day of annual leave for attempting to improperly use his position as a police officer.[174] In a similar Level 2 example, a civilian member exhibited profane and arrogant behaviour towards two members of another police force during a traffic stop in which she was driver. She also attempted to use her position as an employee of the RCMP to refuse to produce identification.[175] The conduct authority imposed a reprimand and ordered the member to review the Code of Conduct.

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169 Decision #8.

170 As to "misuse of authority", the recent judgment of the Nova Scotia Supreme Court in *O'Brien* v *LeRue* 2022 NSSC 379 at paras. 35-61 is a rare example of a decision concerning this aspect of misconduct (termed "unreasonable exercise of discretion" in this case), and may provide some value in revisions to the Conduct Measures Guide.

171 Decision #11 (4 days forfeiture of pay).

172 Decision #20 (verbal reprimand).

173 Decision #21.

174 Decision #19. Decision #20 also contains this error.

175 Decision #23.

## 8. Sex-Related Misconduct

8.1 Although we examined decisions involving sex-related misconduct in our Phase 1 Report, the decisions that the RCMP supplied for Phase 2 contained a small number of decisions in which at least one of the allegations involved sex-related misconduct. We see no need to reproduce any of our comments from our Phase 1 Report, but we provide brief commentary concerning the noteworthy decisions that we reviewed as part of the Phase 2 process.

8.2 One of the Phase 2 decisions involved a finding of misconduct arising from an allegation that a sergeant repeatedly used vile names when referring to his inspector. The conduct measure – forfeiture of 2 days of annual leave, apology, training – appeared distinctly discordant in the circumstances, particularly because of his choice of language and the number of occasions.[176]

8.3 In another example, the conduct authority made a finding of misconduct that a supervisor allowed the accessing and watching of a pornographic video in the detachment, imposing conduct measures of a reprimand and training.[177]

8.4 In another Level 2 decision, the conduct authority stated that the member who was the subject of a comment in a group email "wishes no further action taken", but recent court of appeal judgments have concluded that a decision-maker commits an error by focusing on the interests of the complainant and the respondent alone, without adequately considering the interests of all employees.[178] The conduct authority also incorrectly included as a mitigating proportionality consideration that "you have suffered as a result of your actions".[179]

8.5 Since our Phase 1 Report, another court of appeal judgment has affirmed the seriousness with which courts of law view workplace harassment.[180] This judgment,[181] like the other leading workplace-harassment-related court judgments in the past decade, arose in a non-police workplace, so did not involve an examination of the higher conduct-expectation that the law imposes on police officers. However, it did uphold the termination for just cause of a long-serving supervisor in circumstances that the Ontario Court of Appeal summarized as follows:

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176 Decision #15 (reprimand).

177 Decision #16.

178 See *Calgary (City)* v *CUPE Local 37* 2019 ABCA 388 at para. 56.

179 Decision #17.

180 See in particular section 29 in our Phase 1 Report, and also para. 32.3.

181 *Render* v *ThyssenKrupp Elevator (Canada) Limited* 2022 ONCA 310.

> The appellant was a 30-year employee in a managerial role. His dismissal followed a single incident that occurred in the workplace where the appellant slapped a female co-worker on her buttocks. The trial judge found that the incident caused a breakdown in the employment relationship that justified dismissal for cause.[182]

The Court of Appeal added the following comments:

> I would also add that this was a most unfortunate situation that arose out of an overly familiar and, as a result, inappropriate workplace atmosphere that was allowed to get out of hand. As this court said in Bannister almost 25 years ago, it is a workplace atmosphere that can no longer be tolerated. Although some may perceive it to be benign and all in good fun, those on the receiving end of personal "jokes" do not view it that way. And when things go too far, as they did in this case, the legal consequences can be severe. Every workplace should be based on mutual respect among co-workers. An atmosphere of mutual respect will naturally generate the boundaries of behaviour that should not be crossed.[183]

## 9. Concluding Remarks

9.1 Our review of the RODs, the Conduct Measures Guide, and our bilateral discussions with stakeholders highlighted an important anomaly in the governance of the RCMP workplace. The RCMP workplace is primarily comprised of sworn police officers, appointed under the *Royal Canadian Mounted Police Act*. But it also includes two separate categories of non-police staff: civilian members, appointed under the *Royal Canadian Mounted Police Act*, performing specialized, technical, and administrative duties; and public service employees, appointed under the *Public Service Employment Act*, often performing similar specialized, technical, and administrative duties.

9.2 The civilian members are subject to the RCMP Code of Conduct, and the Conduct Measures Guide is employed in determining their discipline. The public service employees are governed by the Public Service Employee Code of Conduct. The Conduct Measures Guide plays no part in the discipline of the public service employees. This unique situation creates two scenarios that we wish to briefly address.

9.3 First, we have repeatedly emphasized the higher conduct-expectation that the courts place upon police officers, and the impact that duty has in the imposition of appropriate conduct measures. We pause to observe here that civilian RCMP members may not be bound to the same extent by that heightened duty. All things being equal, a civilian member committing the same misconduct as a police officer might properly incur a reduced disciplinary penalty as a result. This is not to suggest that other aggravating factors, such as the effect of misconduct on the reputation of the Force or the impact of public interest will not play a

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[182] *Ibid* at para. 1.

[183] *Ibid* at para. 70.

significant role. Rather, it is to highlight that civilian members are placed slightly differently in the calculation of conduct measures. A revised Conduct Measures Guide should address that issue clearly.

9.4 Second, the application of two different Codes of Conduct with two different discipline schemes for civilian members and public service employees, who may be performing identical duties seated beside each other, is likely to lead to discordant outcomes. This discordance can only negatively affect morale and workplace satisfaction, and create circumstances that lead to unhelpful legal challenges with unpredictable results.

9.5 We encourage the RCMP to make best efforts to coordinate discipline processes between the civilian members and public service employees to reduce disparities in treatment and outcomes.

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W. Scott Childs

January 31, 2023