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2020 CAD 29

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

a conduct hearing pursuant to the

Royal Canadian Mounted Police Act, RSC, 1985, c R-10

Between:

Assistant Commissioner Mark Fisher

Designated Conduct Authority

and

Constable Wade Chitrena
Regimental Number 57488

Subject Member

Conduct Board Decision

Gerald Annetts

December 8, 2020

Sergeant James Rowland and Ms. Shahana Khan, Conduct Authority Representatives

Mr. Brad Mitchell, Subject Member Representative

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SUMMARY

Constable Chitrena was accused of two contraventions of the RCMP Code of Conduct. At issue was his behaviour in capturing and printing a partially naked picture of a female detainee in RCMP cells for no operational purpose.

The evidentiary material before the Conduct Board was fulsome and complete. However, Constable Chitrena requested and was granted the opportunity to test the evidence of three Conduct Authority witnesses by way of cross-examination and to provide oral evidence himself. The conduct hearing was held on October 27 and 28, 2020, and on November 2, 2020, via video conference.

Both allegations against Constable Chitrena were found to be established. On November 2, 2020, the Conduct Board ordered him to resign within 14 days.

INTRODUCTION

[1] The Conduct Authority initiated the conduct hearing in this matter on September 25, 2019. Two allegations of misconduct were made against Constable Chitrena for an on-duty incident that occurred on October 11, 2018. On September 30, 2019, I was appointed as the Conduct Board.

ALLEGATIONS

[2] On April 2, 2020, the *Notice of Conduct Hearing* containing the two allegations of misconduct was served on Constable Chitrena. The allegations read as follows:

> **Allegation 1**
>
> On or about October 11, 2018, at or near Dillon, in the province of Saskatchewan, Constable Wade Chitrena engaged in discreditable conduct, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.
>
> *Particulars*
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police ("RCMP") posted to "F" Division, Buffalo Narrows detachment, in the province of Saskatchewan.
>
> 2. On August 21, 2018, Ms. [K.B.] was arrested in relation to PROS file 2018-[number redacted] and was placed in the Buffalo Narrows detachment Detox Cell. You were not involved in this arrest or placing Ms. [K.B.] in the Detox Cell.
>
> 3. On October 10, 2018, as Acting Corporal, you reviewed PROS file 2018-[number redacted], which included [Constable (Cst.)] Kristin Larton's Supplementary Occurrence Report. At [5:25 p.m.] you changed the "Remarks" from "null" to "Task concluded WJC".
>
> 4. Cst. Larton's Supplementary Occurrence Report contained, in part, the following account of Ms. [K.B.]'s actions while in the Detox Cell:
>
> > "[Ms. K.B.] moved to the back of the cell and started yelling at Members. She started stripping off her clothes. She took her sweater off and threw it on the ground, she took her t-shirt off and threw it on the ground took her bra off and threw it on the ground. [Ms. K.B.] was facing Members and made no attempt to cover herself. She was standing semi-naked (had her pants and underwear on) in front of all three Members. [...] At that point, [Ms. K.B.] ripped her pants off and was standing there in her underwear, topless and braless, still yelling at Members."
>
> 5. The computer in Dillon detachment's corporal's office, used by you, a Lenovo Thinkpad, RCMP Asset #945110 ("Lenovo Thinkpad"), operates on the RCMP ROSS system. When a user logs into the ROSS system it creates a folder with the user's [Human Resources Management Information System (HRMIS)] number acting as the user directory. Your user account name is your HRMIS number: 000179917.

6. The Lenovo Thinkpad has the software program Mitsubishi DX-PC60U, which can be used to view Buffalo Narrows Detox Cell footage. The default save directory for any screenshot from the program Mitsubishi DX-PC60U is C:\Users\{username}\Documents\cap_img.

7. On October 11, 2018, only your user account 000179917 had any activity on the ROSS System accessed through the Lenovo Thinkpad.

8. On October 11, 2018, at [1:57 p.m.], you created a picture named "P_RecorderA_20180822012748_082.bmp", which was saved in the C:\Users\000179917\Documents\cap_img directory. The picture is a screenshot from Buffalo Narrows Detox Cell footage, with a "DVR Time Date" of 2018/08/22 01:27:48 AM of Ms. [K.B.] in the Detox Cell while she was naked from the waist up and only wearing underwear. Cst. Larton can also be seen in the screenshot, with her back to the camera.

9. There was no operational reason to create this screenshot of Ms. [K.B.].

10. On October 11, 2018, at [1:58 p.m.], you printed this screenshot of Ms. [K.B.] on Dillon detachment printer Xerox A2M734121, where it was found unattended and in plain view.

11. There was no operational reason to print this screenshot of Ms. [K.B.].

12. The screenshot is an intimate/sexualized image of Ms. [K.B.].

13. On November 6, 2018, in regards to the above, you were charged with one count of Breach of Trust contrary to Section 122 of the Criminal Code.

14. Your actions amount to discreditable conduct.

Allegation 2

On or about October 11, 2018, at or near Dillon, in the province of Saskatchewan, Constable Wade Chitrena used RCMP IT for an improper purposes contrary to section 4.6 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars:

1. At all material times you were a member of the Royal Canadian Mounted Police ("RCMP") posted to "F" Division, Buffalo Narrows detachment, in the province of Saskatchewan.

2. On August 21, 2018, Ms. [K.B.] was arrested in relation to PROS file 2018-[number redacted] and was placed in the Buffalo Narrows detachment Detox Cell. You were not involved in this arrest or placing Ms. [K.B.] in the Detox Cell.

3. On October 10, 2018, as Acting Corporal, you reviewed PROS file 2018-[number redacted], which included Cst. Kristin Larton's Supplementary Occurrence Report. At [5:25 p.m.] you changed the "Remarks" from "null" to "Task concluded WJC".

4. Cst. Larton's Supplementary Occurrence Report contained, in part, the following account of Ms. [K.B.]'s actions while in the Detox Cell:

> "[Ms. K.B.] moved to the back of the cell and started yelling at Members. She started stripping off her clothes. She took her sweater off and threw it on the ground, she took her t-shirt off and threw it on the ground took her bra off and threw it on the ground. [Ms. K.B.] was facing Members and made no attempt to cover herself. She was standing semi-naked (had her pants and underwear on) in front of all three Members. [...] At that point, [Ms. K.B.] ripped her pants off and was standing there in her underwear, topless and braless, still yelling at Members."

5. The computer in Dillon detachment's corporal's office, used by you, a Lenovo Thinkpad, RCMP Asset #945110 ("Lenovo Thinkpad"), operates on the RCMP ROSS system. When a user logs into the ROSS system it creates a folder with the user's HRMIS number acting as the user directory. Your user account name is your HRMIS number: 000179917.

6. The Lenovo Thinkpad has the software program Mitsubishi DX-PC60U, which can be used to view Buffalo Narrows Detox Cell footage. The default save directory for any screenshot from the program Mitsubishi DX-PC60U is C:\Users\{username}\Documents\cap_img.

7. On October 11, 2018, only your user account 000179917 had any activity on the ROSS System accessed through the Lenovo Thinkpad.

8. On October 11, 2018, at [1:57 p.m.], you created a picture named "P_RecorderA_20180822012748_082.bmp", which was saved in the C:\Users\000179917\Documents\cap_img directory. The picture is a screenshot from Buffalo Narrows Detox Cell footage, with a "DVR Time Date" of 2018/08/22 01:27:48 AM of Ms. [K.B.] in the Detox Cell while she was naked from the waist up and only wearing underwear. Cst. Larton can also be seen in the screenshot, with her back to the camera.

9. There was no operational reason to create this screenshot of Ms. [K.B.].

10. On October 11, 2018, at [1:58 p.m.], you printed this screenshot of Ms. [K.B.] on Dillon detachment printer Xerox A2M734121, where it was found unattended and in plain view.

11. There was no operational reason to print this screenshot of Ms. [K.B.].

> 12. The screenshot is an intimate/sexualized image of Ms. [K.B.].
>
> 13. You therefore misused RCMP property and equipment to print an intimate/sexualized image of Ms. [K.B.].
>
> [*Sic throughout*]

[3] Pursuant to subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], Constable Chitrena provided his response to the *Notice of Conduct Hearing*. He acknowledged that he viewed the video of Ms. K.B. in the detox cell to ensure that appropriate force was used by the members involved in dealing with her, but he denied that he either captured or printed any still photographs from that video footage.

Decision on the Allegations

[4] In addition to considering the investigative material, the Conduct Board heard from three Conduct Authority witnesses during the course of the hearing proper: Constable Kristin Larton, Corporal Ashley St. Germaine and Sergeant Paul Fisher. Constable Chitrena also took the stand to testify in his own defence.

[5] In the end, most of the facts are not in dispute. Ms. K.B. was taken into custody in the late evening hours of August 21, 2018, by Constables Larton and Rochlow and transported to Buffalo Narrows Detachment to be lodged into cells. She was heavily intoxicated and, as a result, belligerent, resistive, obstructive and arguably assaultive with the members involved in dealing with her.

[6] Because she was thought to be a suicide threat, once in cells, she was asked to remove her clothing down to one layer. At one point in time, she became angry and stated that members just wanted to see her naked as she threw her pants at Constable Larton. When she later appeared to be trying to strangle herself with an article of clothing, the members made the decision that her clothes had to be removed in exchange for a suicide smock. At that point, she refused to remove her panties and three members took her to the ground and removed them, after which she was provided with the suicide smock.

[7] Constable Larton recorded all of this in her supplementary report and the events were captured by the cellblock video. Approximately six weeks later, on October 10, 2018, Constable Larton's hard copy file hit Constable Chitrena's desk in his capacity as the Acting Corporal Supervisor. He reviewed the file, the related PROS file containing her supplementary report and the cellblock video. The next day, on October 11, 2018, Constable Chitrena logged into an RCMP ROSS laptop computer in the Detachment and again viewed the cellblock video. Forensic examination of that computer during the course of the Code of Conduct investigation determined that, at 1:57:09 p.m. that day, a screenshot from the video was taken of Ms. K.B. in her cell, clothed only in her panties. A copy of that image was then sent to the Detachment general printer/fax machine. On the following day, Constable Larton found the printed image still on the printer. Constable Chitrena admits that he viewed the cellblock video, but he denies that he captured the screenshot from the video or printed the picture.

[8] In the course of witness examination by counsel and in argument on both sides, a lot was made about the operational necessity of Constable Chitrena viewing the cellblock video footage of what occurred on August 21, 2018, with Ms. K.B. The Conduct Authority's position is that it was not necessary and the fact that he did so unnecessarily supports the allegation that he captured the screenshot and then printed it. Constable Chitrena's position is that he was simply doing his job in order to ensure that the members involved acted appropriately in their dealings with Ms. K.B. In the circumstances of this case, I can see how a reasonable supervisor would consider it necessary given the potential for a public complaint or to ensure reasonable force was used, so I can't say that it was completely unrelated to his duties.

[9] However, that is not the issue in this case. His viewing of the video is not what is alleged to contravene the Code of Conduct. The issue in both allegations is whether he captured and printed an "intimate/sexualized" screenshot from the cellblock video of a mostly naked Ms. K.B. for no operational reason. The evidence that he did so is compelling.

[10] A screenshot was taken from the CCVE video footage of the Dillon Detachment employee entrance at 1:51 p.m. on October 11, 2018. Constable Chitrena acknowledges that it was him in the screenshot and that he was returning to the Detachment at that time. He further

acknowledges that the only other person on duty that day was Constable Rochlow, who was in Buffalo Narrows on a prisoner escort at the relevant time. He indicates that he did not see anyone else at the Detachment for the rest of the day. That necessarily means that when the screenshot was captured from the video of Ms. K.B. at 1:57 p.m. and printed at 1:58 p.m. as detailed by Sergeant Fisher, Constable Chitrena was the only one there. He did not leave the Detachment again until 2:11 p.m., at which time he responded to a call for service at the school across the street. That call came in directly to Constable Chitrena at the Detachment and not through Telecoms; thus, there is no record of when it actually took place, but it was obviously before 2:11 p.m. when he advised Telecoms that he was on his way to the school.

[11] Sergeant Fisher testified that the screenshot was saved and printed from the laptop computer on which only Constable Chitrena was logged into at the time and to which only he had logged into on that day. When that is combined with the other evidence, there is only reasonable inference to be drawn: Constable Chitrena captured the screenshot and sent it to the printer, where it was found the next day by Constable Larton.

[12] The evidence of Sergeant Fisher and of Corporal St. Germaine is also compelling that capturing that screenshot from the video and sending it to the printer is not something that can happen by accident. Both the saved and printed images were exactly the same. This means that the video was paused and the screenshot taken at the exact moment Ms. K.B. was fully exposed to the camera. This was followed by the two-step process of sending the captured screenshot to the printer. There were a total of four user interactions required in capturing and printing the intimate image. Thus, it could have only been done intentionally by Constable Chitrena.

[13] Therefore, I find that the first element in the four-part test for discreditable conduct has been established, the Conduct Authority has proven on a balance of probabilities the particulars of Allegation 1 and more specifically that Constable Chitrena captured the screenshot and printed the intimate image of Ms. K.B. for no operational reason.

[14] Having made that determination, I must then determine if a reasonable person in society, with knowledge of all the relevant circumstances, including the realities of policing in general

and of the RCMP in particular, would view Constable Chitrena's conduct as likely to discredit the Force. I find that to be the case for the following reasons.

[15] Ms. K.B. was arrested and in the custody of the RCMP. No matter her behaviour that night, from the moment she was taken into custody, the Force was responsible to ensure that she was safe and that her rights were respected. The responsibility of the RCMP is minimally and very briefly confirmed in the *Operational Manual*, sections 19.3.1.3 and 19.3.1.4., when it comes to caring for people who are taken into custody:

> 1. 3. A person in RCMP custody will be treated with decency and provided with all the rights accorded to him/her by law.
>
> 1. 4. The RCMP is responsible for the well-being and protection of persons in its custody.

[16] Constable Larton and the other members working that night took that responsibility seriously by ensuring she was not able to harm herself. Under the circumstances, that unfortunately required them to remove her clothing and replacing them with a suicide smock. As is evident in the video footage of the interactions in the cellblock, they did what they could in the circumstances to afford her privacy in her state of undress.

[17] However, Constable Chitrena reviewed the video footage, ostensibly for legitimate supervisory purposes, but he then took several active steps in order to capture a screenshot and print that image of the almost naked Ms. K.B. for his own personal purposes. It was for his own personal purposes because even he agreed that there could be no operational reason to do so. This is a blatant violation of her right to privacy and an infringement of her sexual integrity. I make this finding with the Supreme Court of Canada's finding in mind in *R. v Jarvis*, [2019] 1 SCR (CanLii). In *Jarvis*, the Court held that whether the observation is sexual in nature and infringes the subject's sexual integrity should be decided on an objective standard in light of all the circumstances. Given the Ms. K.B.'s state of undress captured in the screenshot and the printed image as well as the lack of an operational reason for capturing or printing the screenshot, the only reasonable inference to be drawn is that the observation was sexual in nature and infringes Ms. K.B.'s sexual integrity. This amounts to conduct likely to discredit the Force.

[18] Finally, I must determine whether the conduct is sufficiently related to his duties and functions as a police officer as to provide the Force with a legitimate interest in disciplining him. From the evidence before me, I find that Constable Chitrena committed this contravention while on-duty and while charged to protect the interests of people in vulnerable situations such as Ms. K.B. Therefore, I have no hesitation in making that finding. Allegation 1 is established.

[19] Allegation 2 alleges that Constable Chitrena "used RCMP IT for an improper purpose" contrary to section 4.6 of the Code of Conduct. The wording of section 4.6 of the Code of Conduct is as follows:

> Members use government-issued equipment and property only for authorized purposes and activities.

[20] The particulars alleged in Allegation 2 are mostly the same as contained in Allegation 1. Thus, for the same reasons, I find that the Conduct Authority has proven that Constable Chitrena used the RCMP ROSS laptop computer to capture the screenshot and print the intimate photograph of Ms. K.B. Given my finding that there was no operational purpose in doing so, the use of that computer and printer necessarily amounts to an unauthorized purpose. Therefore, I find that Allegation 2 is also established.

[21] The parties agree that the *Kienapple* principle applies in the circumstances of this case, *Kienapple v. R.*, 1974 (CanLii) 14 (SCC). Therefore, I conditionally stay Allegation 2 pending the results of any potential appeal in relation to either or both allegations.

CONDUCT MEASURES

[22] Having found that the allegations are established, subsection 45(4) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*], and the *Conduct Measures Guide* require that I impose "a fair and just measure that is commensurate to the gravity of the contravention, the degree of blameworthiness of the member, and the presence of mitigating and aggravating factors". Pursuant to paragraph 36.2(e) of the *RCMP Act*, conduct measures must be "proportionate to the nature and circumstances of the contravention of the Code of Conduct, and where appropriate, educative and remedial rather than punitive".

[23] The Conduct Authority is seeking Constable Chitrena's dismissal, while Constable Chitrena argues that any conduct measures short of dismissal are appropriate. Neither party offered oral evidence in the conduct measures phase of the hearing. Constable Chitrena did not take the witness stand in this phase of the hearing, but he did address the Conduct Board during counsel's submissions. He also filed a medical report prepared by his treating psychologist.

[24] In making my determination on the appropriate sanction, I must first consider the appropriate range of measures and then take into account the aggravating and mitigating factors present in this case. I am not bound by the decisions of other conduct boards, but previously decided cases of a similar nature do help to establish the applicable range of sanctions. The principle of parity of sanction seeks to ensure fairness so that similar forms of misconduct are treated in a similar fashion. This lends predictability to conduct matters. In addition, the *Conduct Measures Guide* is available for guidance on considerations around the imposition of conduct measures. However, it is not binding or determinative as it is just that, a guide.

[25] Having reviewed the cases presented by both parties, when it comes to misconduct involving breach of trust and on-duty sexual misconduct, the range of sanction is fairly narrow and extends from a substantial forfeiture of pay to dismissal. While this specific contravention is not covered by the *Conduct Measures Guide*, one can see that related breach of trust and sexual misconduct offences are dealt with very seriously. This case provides a good example of why they have to be. On the night of August 21, 2018, Ms. K.B. was not having her best day. She was in police custody and in an advanced state of intoxication that didn't result in her best behaviour. As it must be for the purposes of supervision and documentation, her actions that night were captured by cellblock video, and she would have been aware of that. That is expected when one is taken into custody in this day and age.

[26] However, the obligation to protect a detainee's privacy rights when a recording of them is created does not end when she is released from custody. Ms. K.B. would not expect, six weeks later, for someone to capture an intimate image from that video and print it for their own personal satisfaction. That was a violation of her sexual integrity, of her privacy rights and a serious breach of the duty of care that Constable Chitrena, as a police officer, owed Ms. K.B.

Whether or not he is ultimately convicted in criminal court for the Breach of Trust offence for which he has been charged, his actions generally fall into that category of misconduct.

[27] Where dismissal is not the result in this type of case, it is generally due to mitigating factors outweighing the aggravating factors in the circumstances of a particular case. In this case, I see the range of appropriate conduct measures as being from a very high forfeiture of pay and other secondary measures to dismissal.

[28] Having established the range of appropriate conduct measures, I am required to assess the aggravating and mitigating factors present in the circumstances of this case. In terms of aggravating factors, the Conduct Authority presented the following:

- Constable Chitrena has previous discipline. In 2014, he was reprimanded for disgraceful conduct under the previous discipline system. While on-duty and without her consent, he stood behind a matron and pulled her shirt away from her body so that he could see a tattoo on her upper back. While this prior discipline is somewhat dated, it is related in that it involves violating another woman's bodily integrity. The reprimand that he received should have served as a warning to Constable Chitrena against the kind of misconduct involved in this case.

- Constable Chitrena is an experienced member and in an acting supervisor's position at the time. He knew better.

- Constable Chitrena's actions resulted in criminal charges and publicity. While he maintains that members of the public have supported him through this, there is no doubt that the publicity involved will, to some extent, tarnish the reputation of the Force and every other member who wears the uniform.

[29] The Conduct Authority argued that Constable Chitrena lied on the witness stand and that this is a serious aggravating factor. He was asked directly on cross-examination if he created the screenshot of Ms. K.B. and he responded no. He was also asked if he printed that image of Ms. K.B. and he again said no. The Conduct Authority argued that this is not a case where the

member remained silent, chose to test the evidence and was ultimately found to have contravened the Code of Conduct. Rather he chose to take the stand and testify; in the course of his testimony, he lied under oath to those very specific questions that were put to him in the face of overwhelming evidence.

[30] This is a very nuanced issue. First, it is difficult to determine where denying the allegation crosses the line of appropriateness. No one would argue that an accused subject member is within their right to make the prosecution prove its case. There is no issue if they didn't take the stand and simply forced the prosecution to do so. But what is the effect if they choose to take the witness stand and, under oath, deny the allegations in the face of overwhelming evidence?

[31] This issue was dealt with by the Alberta Court of Appeal in *Toy v Edmonton (Police Service)*, 2018 ABCA 37 (CanlII) [*Toy*]. In that case, Constable Toy was appealing a decision of the Alberta Law Enforcement Review Board to uphold a decision of a Presiding Officer dismissing him from the Edmonton Police Service. The Presiding Officer found that Constable Toy had been deceitful in both a sworn involuntary statement and while giving oral evidence (his testimony) at a hearing held in relation to an earlier, separate discipline matter.

[32] Constable Toy had been summonsed as a witness in a 2009 appeal hearing before the Alberta Law Enforcement Review Board. In his sworn statement, Constable Toy had denied looking at materials on and/or beside legal counsel's table during a break in that proceeding. In 2012, at his own disciplinary hearing, he was found guilty of discreditable conduct for having looked at the materials after his testimony in which his denial of the allegations was disbelieved. This led to further disciplinary charges and convictions for deceit in 2015 after the Presiding Officer found that Constable Toy had lied in his sworn statement and in his testimony given at the 2012 hearing. He was dismissed as a result.

[33] As one of his grounds of appeal, Constable Toy argued that the Alberta Law Enforcement Review Board erred by endorsing the creation of a new category of disciplinary offence. In essence, Constable Toy argued that if a police officer challenges a version of events in a

disciplinary hearing rather than admitting to wrongdoing, and his version is not accepted, then he will be charged with deceit in giving testimony under oath, which will inevitably be punished by dismissal. The Court of Appeal dealt with that argument at paragraph 69:

> [69] As stated in Quaidoo at para 50, his position appears to assume that a Presiding Officer would be unable to distinguish between "a sincere but wrong-headed perspective as to the facts viewed in hindsight on the one hand" and what was found here, a willful and prolonged deceit motivated by self-interest, and lacking remorse. "There is a difference between calling upon the prosecution to make its case, and actively advancing falsehoods."

[34] While the Alberta Court of Appeal recognized that there is a difference between the two situations, it provided little guidance in making that determination. Did Constable Chitrena actively advance falsehoods by answering those questions in the negative or was he calling upon the prosecution to make its case?

[35] In my view, his negative responses to the questions put to him amount to little more than a repetition of his denial of the allegations, given that those questions amount to precisely the misconduct alleged. It would be different if, in answering those questions, he spun a web of lies, for example, testifying that he saw someone else create and print the image. He didn't do that, he simply denied that it was him, a position that he has maintained since the proceedings were initiated. In my view, that cannot be a serious aggravating factor as argued by the Conduct Authority.

[36] I believe some support for that position is provided by Chief Justice Fraser of the Alberta Court of Appeal in the criminal case of *R. v Ambrose*, 2000 ABCA 264 (CanLii). Starting at paragraphs 71 to 75, Chief Justice Fraser stated:

> 71 Remorse has consistently been treated as a mitigating factor: R. v. Sawchyn, [1981] 5 W.W.R. 207 (Alta. C.A.) (leave to appeal refused [1981] 2 S.C.R. xi (S.C.C.)); R. v. Anderson (1992), 74 C.C.C. (3d) 523 (B.C. C.A.). But the absence of a mitigating factor does not necessarily translate into an aggravating factor. The oft-cited general principle is that a sentence higher than appropriate for the offence should not be imposed for lack of remorse, but that factor might well disentitle an accused to leniency which might otherwise have been extended: Sawchyn, supra.

> 72 Two different rationales have been offered in support of this approach. One is linked to the right of an accused to make full answer and defence. The theory is that if lack of remorse were to be treated as an aggravating factor, this would in effect punish those who choose to rely on their constitutional rights. Every accused has the constitutional right to make full answer and defence and to require the Crown to prove its case beyond a reasonable doubt: R. v. Kozy (1990), 58 C.C.C. (3d) 500 (Ont. C.A.); R. v. Valentini (1999), 132 C.C.C. (3d) 262 (Ont. C.A.).
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> 73 The other rationale is the proposition that an accused should not be sentenced for an offence for which he or she has not been convicted. This theory rests on the principle that if an accused misconducts himself or herself in their defence by, for example, lying on the witness stand, the proper course of action is to charge that person with perjury rather than increasing the sentence for the offence in question: R. v. V. (J.T.) (1998), 105 B.C.A.C. 42, 171 W.A.C. 42 (B.C. C.A.). In that decision, the British Columbia Court of Appeal specifically rejected the suggestion that the applicable principle is grounded in the right to make full answer and defence pointing out that there is no constitutional right to lie.
>
> 74 The English authorities have consistently declined to take into account the manner in which an accused has conducted his or her defence as a factor in sentencing: R. v. Dunbar (1966), 51 Cr. App. R. 57 (Eng. C.A.); R. v. Skone (1966), 51 Cr. App. R. 165 (Eng. C.A.); R. v. Harper (1967), 52 Cr. App. R. 21 (Eng. C.A.); and R. v. Blaize (June 10, 1997), Doc. 97/7862/Z3 (Eng. C.A.). This view has been accepted in Alberta: Sawchyn, supra. To suggest therefore that an accused should be subject to an aggravated sentence simply because of the way in which he or she has conducted their defence, or for that matter misconducted it, would be erroneous.
>
> 75 However, it does not follow that an accused receives, or should receive, the same sentence whether or not he or she is remorseful. To the contrary. As explained by Laycraft, J.A. (as he then was) in Sawchyn, supra at 218:
>
> > ... an accused who shows no remorse will, all other factors being equal, receive a higher sentence than an accused who does not.

[37] It is important to note that the Chief Justice's comments at paragraph 73 are reflected in the action taken by the Chief of Police in *Toy*. Constable Toy's penalty was not increased by the Presiding Officer at the first hearing for the deceit that he displayed on the witness stand during that hearing. Instead, a new investigation was conducted that resulted in new disciplinary charges and a finding of deceit, for which he was then dismissed at a second hearing.

[38] To summarize, I can only impose conduct measures for the allegations that I have found to be established in this conduct hearing. The fact that Constable Chitrena chose to maintain his denial of the allegations on the witness stand constitutes the exercise of his right to make full answer and defence. His exercise of that right cannot amount to an aggravating factor. However, the fact that he has not taken responsibility for his actions and shown no remorse amounts to a lack of an important mitigating factor and, all other things being equal, will result in more serious conduct measures than someone who did.

[39] Constable Chitrena brought forward the following mitigating factors:

- He has a positive work record and was in the promotion by exemption process at the time this incident occurred.

- When questioned by his Staff Sergeant at the time of the misconduct, he was candid in stating that he suffers from a porn addiction and continues to seek counselling for that. Constable Chitrena acknowledged that statement to his Staff Sergeant in his testimony; however, he made nothing more of it during the course of the hearing. It was not proffered as an explanation for his misconduct. Rather, he stated in his testimony that he told the Staff Sergeant this simply because it is part of who he is.

- Constable Chitrena has the qualified support of his Staff Sergeant, who indicated that he was a solid performer prior to this incident and that he was involved in the community. She indicated that, since this incident and while suspended with pay, he has met his reporting requirements.

[40] Constable Chitrena also argued that he suffers from an underlying medical condition that should be considered as a mitigating factor. In support of this argument, he submitted a letter, dated October 29, 2020, from his treating psychologist, Dr. Doug Jurgens.

[41] In his letter, Dr. Jurgens stated that he began treating Constable Chitrena on April 25, 2014, following a traumatic work incident. He indicated that Constable Chitrena could not be diagnosed with Post-Traumatic Stress Disorder (PTSD) as he did not present the full

constellation of required symptoms and a formal diagnostic assessment has never been requested nor completed. It is Dr. Jurgens' clinical opinion that Constable Chitrena was psychologically and emotionally altered by the 2014 work incident. He was not sufficiently avoidant to permit a diagnosis of PTSD, but he evidenced significant hyperarousal and re-experiencing, as well as struggling considerably with ongoing symptoms of exposure to trauma, sometimes referred to as "partial PTSD", although that is not a formal diagnostic category. He indicated that Constable Chitrena's work performance has been negatively affected by this traumatic work experience and subsequent work stressors. Symptoms of trauma exposure including, but not limited to, irritability, impatience, problems with attention and concentration due to ongoing sleep disruptions, difficulty controlling physiological arousal, difficulty controlling the content of one's thoughts leading to obsessing are significant psychological issues contributing to working below expectations.

[42] Dr. Jurgens also indicated that, after the occurrence of the incident subject of these proceedings, Constable Chitrena complained of compulsivity with pornography or more accurately that "he found he was dwelling on the idea of pornography, more than actually viewing it compulsively". However, and importantly, he advised that Constable Chitrena did not indicate compulsive actions associated with his obsessions. Dr. Jurgens indicated that the specific content of the obsessions is often not especially relevant unless it is associated with compulsive behaviour.

[43] Dr. Jurgens was not able to draw a link between the misconduct and either Constable Chitrena's possible "partial PTSD" or his pornography obsession. Nor was he able to provide a formal diagnosis or prognosis that would assist in assessing Constable Chitrena's rehabilitative potential or the likelihood of recidivism. A review of past cases reveals the importance of that information in the determination of the appropriate conduct measures by a conduct board. That is a significant missing piece of information in this case.

[44] It is also important to review Constable Chitrena's counselling history with Dr. Jerguns. After his initial session with Dr. Jerguns in 2014, Constable Chitrena attended therapy sessions regularly all the way through June 2015 and then more occasionally for a number of months

thereafter. Importantly, Dr. Jurgens did not see Constable Chitrena after March 2017 until he resumed attendance at counselling appointments in November 2018.

[45] During this 19-month period when he did not seek counselling from Dr. Jurgens, Constable Chitrena went through the stress of a marriage breakdown, he began living with a new partner and her children, and he was transferred from La Ronge Detachment to Buffalo Narrows Detachment and then into the Acting Corporal position in Dillon. These kinds of stressful times are when most people inclined to undergo counselling would seek their therapist's assistance. Constable Chitrena did not, explaining that he found his new partner to be a good sounding board and someone to whom he could speak. Of course, the timing of his return to counselling in November 2018 also coincides with the criminal and conduct investigations into the incident subject of these proceedings.

[46] All of this makes me disinclined to give Constable Chitrena's medical issues much weight as a mitigating factor. I have not been provided with any evidence that allows me to assess with any confidence his rehabilitative potential or the likelihood of recidivism.

[47] Constable Chitrena addressed the Conduct Board during the conduct measures phase. He described how he has been affected by these proceedings and how he doesn't feel he has received the support he should have from colleagues and the Force even prior to these proceedings. He accepted no responsibility for his misconduct, provided no apology and displayed no awareness of how his actions have negatively affected his colleagues or the Force. In short, he has displayed no remorse for his actions and displayed a profound lack of self-awareness.

[48] I also give limited weight to the natural consequences of his misconduct on himself and his family as a mitigating factor. Those are oftentimes the predictable, if unfortunate, result of one's misconduct. Glaringly absent in his representations was any indication that he had learned from his mistakes and any reassurance that this type of misconduct would not be repeated in the future. In short, I was left with the distinct impression that Constable Chitrena considers himself to be the victim as opposed to the perpetrator of this misconduct.

[49] The Conduct Authority relied on the cases of *Commanding Officer "E" Division and Constable Eden*, 2017 RCAD 7; *Commanding Officer "E" Division and Constable Hedderson*, 2018 RCAD 19; *Commanding Officer "E" Division and Constable Genest*, 2017 RCAD 2 (affirmed by the Commissioner in 2020 CAD 15) [*Genest*]. He also relied on *R. v Tompkins*, 2013 BCSC 2265 (CanLii) [*Tompkins*]. *Tompkins* is a criminal case involving a guard at the RCMP cellblock in Kamloops, British Columbia, "viewing and inviting others to view on CCVE sexual acts between two prisoners, contrary to the standard of responsibility and conduct demanded of him by the nature of his office and for a purpose other than the public good, contrary to section 122 of the Criminal Code". That case was put forward to make the point that Constable Chitrena's actions in this case amount to a breach of trust under the *Criminal Code*, RSC, 1985, c C-46. Regardless if that is found to be the case in the end, I find his actions to be a breach of trust in the general sense of that term.

[50] Constable Chitrena similarly relied on *Genest* for the proposition that conduct of this type should not result in a subject member's dismissal. The relevant quote from *Genest* on which both parties relied is as follows:

> […] The Force is indeed an institution of rehabilitation where circumstances permit, and most disciplinary action falls into this category. For those members, who, like the Subject Member, are prepared to accept the consequences of their actions, provided their misconduct is not so serious as to warrant dismissal, the Force will go a considerable distance in assisting them in their ongoing efforts towards rehabilitation. Our personnel continues to be our greatest asset, and dismissal must only be viewed as a last resort. […] [*Sic throughout*]

[51] Despite the obvious contradiction contained in the second sentence of that quote, I think the intended sentiment is fair. Where a member accepts responsibility for their actions (in the end), the first goal of discipline is rehabilitation. Unfortunately, Constable Chitrena has not accepted responsibility for his actions.

[52] Constable Chitrena also relied on the cases of *Commanding Officer "F" Division and Constable Tremblay*, 2018 RCAD 15; *Commanding Officer "K" Division and Constable*

Coulombe, 2019 RCAD 19; and *Commanding Officer "K" Division and Constable Burgess*, 2019 RCAD 14.

[53] The cases cited by the parties resulted in different outcomes for the subject members involved; some were dismissed, while others were retained with the imposition of very serious conduct measures. However, the common thread amongst the cases is that dismissal was a potential result in each of the cases. Where it was not imposed as the appropriate conduct measure, it was because the mitigating factors outweighed the aggravating factors in the circumstances of that case. The predominant mitigating factor present in those cases was the acceptance of responsibility by the subject member combined with an explanation for the misconduct involved, factors that allowed the conduct boards to assess and predict rehabilitative potential and the risk of recidivism. As I have previously indicated, that important evidence is not present here. As a result, I am unable to satisfy myself that this type of misconduct will not be repeated by Constable Chitrena.

[54] Where those factors are not present in very serious cases of misconduct, then dismissal is considered. That principle is reflected in the case of *Ennis v the Canadian Imperial Bank of Commerce*, (1986) BCJ 1742, in which the Court said in relation to dismissing an employee:

> […] Real misconduct or incompetence must be demonstrated. The employee's conduct and the character it reveals must be such as to undermine or seriously impair the essential trust and confidence the employer is entitled to place in an employee in the circumstances of their particular relationship. The employer's behaviour must show that he is repudiating the contract of employment or one of its essential ingredients. […]

[55] As the conduct board noted in Commanding Officer "E" Division and Constable *Vellani*, 2017 RCAD 3, although rehabilitative potential is an important consideration, it does not overcome the right to terminate employment when the breach goes to the heart of the employer-employee relationship.

[56] In my view, Constable Chitrena's conduct is inconsistent with the terms of his service and incompatible with the due and faithful discharge of his duties. He used his position as an

RCMP officer to capture and print an intimate image of a young vulnerable prisoner in RCMP custody to satisfy his own voyeurism and, in the process, violated her sexual integrity. The aggravating factors present in his case outweigh the mitigating factors. In particular, he has failed to acknowledge any responsibility for his actions in the face of overwhelming evidence. He has also failed to address the reasons for the misconduct. In short, he has provided me with no basis upon which to satisfy myself that he can be rehabilitated.

CONCLUSION

[57] The powers granted to a police officer are considerable and, as a result, the public reasonably expects members of the RCMP to observe the highest ethical and professional standards. Under these circumstances and given the position of responsibility and trust held by Constable Chitrena as a police officer sworn to enforce the law, I simply cannot justify retaining him as a member of the Force. That would not be in the public interest. As a result, I direct Constable Chitrena to resign. If he fails to do so within 14 days, then I direct that he be dismissed.

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

December 8, 2020

Gerald Annetts — Edmonton, Alberta

Conduct Board