

# communiqué

**OCTOBER - DECEMBER 2000**

## *Message from the Chair*

I am pleased to announce the appointment of a new Executive Director at the Committee, Norman Sabourin, who will also be fulfilling the duties of Senior Legal Counsel. Originally from Montreal, Mr. Sabourin received his Law degree from the University of Ottawa. In 1993, he became Director of the Citizenship Program at Citizenship and Immigration Canada. He was assigned to the Privy Council Office in 1997 where his responsibilities included heading research projects, elaborating strategies and advising the Minister of Intergovernmental Affairs. He returned to Citizenship and Immigration Canada in 1998 as Registrar of Canadian Citizenship, where one of his main responsibilities was to advise the Minister of Citizenship and Immigration on citizenship issues, including the government's proposed legislation amending the Citizenship Act.

Garry Wetzel, who had been filling in as Executive Director over the past year, has returned to the Commission for Public Complaints against the RCMP. He served the Committee well at a critical time.

The Committee will very shortly be issuing its preliminary report on the use of dispute resolution techniques in disciplinary proceedings against

members who are alleged to have engaged in serious misconduct. The report will be posted on the Committee's web site. If you have an opportunity to read it, I would be very interested in receiving your observations, either in writing or by telephone.



*Philippe Rabot*

**Between October and December 2000, the Committee issued recommendations in the following matters:**

**D-69** The Appellant was the subject of one allegation of disgraceful conduct arising from his use of force on a person in custody.

The appellant and another, more junior, female member responded to a call about damage to property. On the way, they arrested a man for being intoxicated in a public place. The man was handcuffed and placed in the back of the police car. Upon arrival at the location of the damage, they realized that the call arose from a domestic assault incident and that the man in their custody was the suspect in this assault. Due to limitations relating to search of a prisoner by a RCMP member of the

opposite sex, the suspect had to be searched by the appellant before being driven to the station. While attempting to carry out the search, the appellant hit the prisoner in the stomach two times, jabbed him in his left eye and jerked his head back and forth, while shouting profanities and words to the effect that the suspect "should not do that to women". The appellant then released pepper spray in the prisoner's face. As a result of this incident the appellant was charged with assault.

The appellant admitted the allegation before the Adjudication Board. The Appropriate Officer recommended a sanction of forfeiture of ten days pay, a reprimand and a recommendation for counselling. The appellant argued that forfeiture of ten days pay was excessive. The Adjudication Board informed the parties that it would consider imposing a sanction higher than forfeiture of ten days pay and would not be bound by the Appropriate Officer's recommendation. The appellant submitted that the possibility of a sanction of dismissal required different preparation than that which had been done and suggested that the proceeding be adjourned to allow adequate preparation. The Board allowed an adjournment of 90 minutes and the appellant then completed his presentation of evidence on the

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sanction. The Board found that the Appellant had acted with a degree of premeditation and with the intent to punish the prisoner, and ordered the Appellant to resign.

The appellant appealed the sanction. In his appeal, the appellant argued that the quality of his legal representation fell below the acceptable standard, that the Adjudication Board had breached natural justice by not clearly advising him that it was seriously contemplating dismissal as a sanction and by not adjourning the hearing to allow him to adequately prepare for that possibility. He also argued that the sanction was too severe, given previous similar cases, none of which resulted in dismissal.

The Acting Chair of the Committee determined that the record did not contain sufficient evidence as to whether the Appellant's actions were premeditated and intended as punishment. For this reason, the Acting Chair conducted a hearing into the matter. The Committee's hearing received additional evidence relating to the Appellant's behaviour while attempting to search the prisoner and the circumstances that might have caused the Appellant to resort to the particular force that he employed.

The Committee found that the Adjudication Board's decision to adjourn the proceeding for only 90 minutes was unfair because it did not allow the Appellant to adequately prepare in regard to the appropriate sanction. On the basis of all of the evidence received at the two hearings, the Committee also

found that the evidence did not support a conclusion that the Appellant acted with premeditation and intent to punish the prisoner. In the Committee's view, the Appellant's use of force was a spontaneous outburst that arose primarily from frustration in attempting to safely carry out a search of a prisoner who, although not clearly unco-operative, was presenting some difficulties for the Appellant. The Committee also found that the sanction imposed did not respect the principle of parity of sanction.

The Committee recommended that the Commissioner rescind the sanction of ordering the Appellant to resign and impose a sanction of forfeiture of seven days pay and a reprimand.

## Commissioner's Decision

The Commissioner's decision may be summarized as follows:

*In this case, the parties jointly submitted an agreement on facts to the board and the allegation of disgraceful conduct was established. In the sanction phase of the hearing the AOR advised that he was seeking a forfeiture of ten days pay, a reprimand and counselling - this was the maximum sanction which the appellant had anticipated and which the MR had prepared to address in her submissions to the board.*

*After hearing some testimony on sanction, the board signalled to the parties that it intended to consider the increased sanction of dismissal. The MR advised the board that she*

*had not prepared to address such a sanction. At this point the board should have adjourned for a period of time sufficient to satisfy itself that the parties could properly prepare to address the increased sanction. Instead the board allowed the MR to adjourn for a short period (ninety minutes) and then continue. This was clearly insufficient in light of her previous comments, and the appellant was ultimately dismissed.*

*The Commissioner agreed fully with the analysis of the External Review Committee (ERC) when it stated that the responsibility to ensure that the appellant was treated fairly rested first and foremost with the board and that the failure to do so in this case constituted a breach of the natural justice duty of fairness upon the board. The two key components of this duty in such situations are that the board must clearly signal to the parties that it is contemplating a higher sanction; and, the board must adjourn the hearing for a period of time sufficient to satisfy itself (the board) that the parties will be able to properly prepare to address the increased sanction.*

*The Commissioner then examined the additional material which had been submitted before the ERC hearing which had been convened as part of the appeal, and he fully agreed with the ERC that the conduct of the appellant was not premeditated and that the appropriate sanction should be a forfeiture of seven days pay and a reprimand.*

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**D-70** The Appellant was the subject of four allegations of disgraceful conduct regarding incidents in which he had allegedly broken the front door of his girlfriend's residence, entered and physically attacked her, resisted his arrest and breached the terms of his release from custody. The Appellant testified that he could not remember the events that had occurred at the residence. He pleaded that he had been functioning as an automaton as a result of an adverse drug reaction. The Respondent presented rebuttal evidence from the victim, as similar fact evidence, to rebut expert evidence concerning the Appellant's state of mind at the time of the incident. The Adjudication Board admitted the similar fact evidence. The Board rejected the Appellant's defense and found three allegations to have been established. It rejected the Appropriate Officer's request that the Appellant be dismissed, and imposed the following sanction: forfeiture of pay for 10 days, a reprimand and recommendations for a transfer and for continued counselling. The Appellant appealed the Board's finding that three allegations of misconduct have been established.

The Appellant argued that the victim's rebuttal evidence presented by the Respondent as similar fact evidence, should have been found inadmissible by the Board. The Appellant also argued that the evidence of his two expert witnesses was misapplied by the Board and was not given enough weight.

The Committee first noted that it was the Appellant who had the onus to prove that his actions were involuntary and not the Respondent

to prove intent. The Committee found that the rebuttal evidence did not amount to similar fact evidence and should not have been admitted. However, the Committee found that the rebuttal evidence was not a significant factor in the Board's decision to reject the Appellant's defense. The Committee stated that determining whether the Board had adequate grounds to reject the Appellant's defense depended mostly on whether it assessed the expert evidence properly.

The Committee found that the Board properly assessed the evidence of the first expert witness. The Committee noted that this witness testified that the Appellant was suffering from Post-traumatic Stress Disorder (PTSD), but did not state that the Appellant's misconduct was attributable to his PTSD. Moreover, the Committee found no error in the Board's use of this witness' testimony in assessing the Appellant's credibility.

The Committee also found that the Board made reasonable findings with regards to the second expert witness. The Committee found that while this expert had come to the conclusion that the Appellant suffered an adverse reaction to the medication he was taking, his evidence did not establish that, the night of the incidents, the Appellant probably had no control on his actions because of the medication.

The Committee recommended that the appeal be dismissed.

## UPDATE

**The Commissioner has provided his decision in the following matter summarized in the July/September 2000 Communiqué:**

**D-68** The appellant was the subject of one allegation of disgraceful conduct regarding an incident in which he had sexually assaulted a member of the public who had visited him at his home. The appellant admitted that he had engaged in sexual activity with the individual in question but maintained that this was entirely consensual. The appellant was ordered to resign within fourteen days.

The appellant appealed both the finding of misconduct and the sanction. The appellant challenged the Board's credibility determinations. The Committee found that the Board had drawn inappropriate inferences from the testimony provided by a taxi driver; that the Board had misused the evidence of a forensic psychologist and that it had misinterpreted the evidence provided by the alleged victim. The Committee found that the allegation of misconduct was not established and recommended that the appeal be allowed. The Committee commented that the Board seemed to have attributed the alleged misconduct to abuse of alcohol. The Committee noted that the evidence did not support such a conclusion.

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## **The Commissioner's decision is as follows:**

*In his decision on the allegation of disgraceful conduct, the Commissioner accepted the Committee's findings that there were "numerous and significant contradictions in the testimony of the victim" revealed through the testimony of the taxi driver and of the detachment commander. He also accepted the Committee's comments regarding the Board's interpretation of the testimony of the psychiatrist and the family doctor.*

*The Commissioner considered the Committee's position regarding the victim's credibility and the tendency of her conduct before, after and during her encounter with the appellant to indicate that she had developed a personal interest in him. Considering the standard of proof to be met, the Commissioner was not prepared to accept the testimony of the victim where it differed from that of the appellant and was not otherwise corroborated. He found that the victim may have consented to sex with the appellant.*

*This finding was not, however, determinative of the matter, given the pre-existing relationship of trust between the appellant and the victim which resulted from her earlier disclosure to him that she had been sexually assaulted. Although the Committee found that the contact between the appellant and the victim had been insufficient to render his relationship with her improper, the Commissioner disagreed on this issue. The appellant's relationship with the victim went beyond the mere knowledge that she contemplated*

*filing a report about an alleged assault. The record shows that she made an intimate, personal disclosure to the appellant about a prior sexual assault and that she had decided to discuss this matter with him because she felt that she could trust him. At the time of the incident, she was still trying to decide what course of action to follow.*

*The appellant had an obligation to respect this relationship of trust and to ensure that he did nothing to take advantage of it, yet he engaged in sexual relations while off duty with a person with whom he was in a position of trust as a result of his duties. The Commissioner found the allegation of disgraceful conduct to be established and the appeal against the finding was denied.*

*The Commissioner commented that he was satisfied that the hearing was conducted in a fair manner and that the oral reasons of the adjudication board must be sufficient to allow the parties to be able to properly prepare for the sanction portion of the hearing.*

*In his decision on sanction, the Commissioner indicated that the appellant's full work history, including prior discipline should be considered. The appellant's satisfactory work record, the expression of remorse for his actions and peer and community support were present. The fact that the appellant had been subject to serious prior discipline became a central issue for the Commissioner who considered whether the prior discipline was sufficiently convincing that dismissal was appropriate in this case.*

*The Commissioner found that members of the RCMP must conduct themselves in accordance with organizational values and must be accountable for their conduct. In this case, the appellant had an obligation to respect the position of trust that existed between himself and the victim, and he failed to do so.*

*The Commissioner also considered the role played by alcohol in this matter and the appellant's problems with alcohol and efforts to deal with the issue.*

*Finally, the Commissioner adopted the test for dismissal as outlined in Ennis v. Canadian Imperial Bank of Commerce, that "[t]he employee's conduct and the character it reveals, [is] such as to undermine or seriously impair the essential trust and confidence the employer is entitled to place in the circumstances of [this] particular relationship". Given all the circumstances of this case, the Commissioner chose dismissal as the appropriate remedy because the appellant, had "demonstrated through his actions that he is beyond rehabilitation to be able to maintain the high standards of conduct required of members of the RCMP".*

*The appellant was directed to resign forthwith and in default of resigning within fourteen days of receiving the written decision, he was to be dismissed from the RCMP.*

