REPORT TO ROYAL CANADIAN MOUNTED POLICE

"Phase 1" Final Report Concerning Conduct Measures,
and the Application of Conduct Measures to Sex-Related Misconduct
under Part IV of the *Royal Canadian Mounted Police Act*

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Executive Summary and Recommendations

This report is the result of 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*.

This report is "Phase I", which (i) examines the best practices in conduct measures; (ii) reviews and assesses 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) reviews and assesses 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 I, the RCMP has also asked us to provide 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.

Finally, the RCMP has asked us to complete an intersectional analysis and identification of trends, and to address the specific recommendations of the Hon. Michel Bastarache in the Independent Assessors Report (*Broken Dreams*), part of the Implementation of the Merlo Davidson Settlement Agreement.

We conducted extensive research, consultation and review of RCMP decisions, all of which we describe in our report.

As "best practices", we have adopted the evolved set of practices that have survived challenge in a superior court of justice: we regard legal principles confirmed in superior court judgments across Canada as the most defensible practice. As a result, this report consistently references court judgments, and excerpts from those judgments, simply because we wish to offer the most robust justification for what we recommend.

A resource like the Conduct Measures Guide is rare in police forces, and we endorse its continued use as a resource, but with regular updates, and with increased reliance upon judgments of superior courts across Canada. Hence, our first 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.

We begin our analysis with an examination of the legal principles that explain how to best craft a "conduct measure" – what older language would call a "penalty" – and identify the five foundational principles that generally have evolved across Canada. The most complex of those five principles is *proportionality*, which we address in considerable detail. We urge the RCMP to incorporate those principles into the Conduct Measures Guide:

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.

We want to place emphasis on the need to ensure that any joint submissions concerning a conduct measure be strictly in accordance with governing principles, and explain that issue in detail:

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.

After the general examination of conduct measures, we proceeded to the one specific issue that the RCMP asked us to address: sex-related misconduct. We found that the Conduct Measures Guide did not provide adequate guidance to decision-makers in matters involving sex-related misconduct. We found further that many of the decisions did not adequately reflect current superior court jurisprudence in matters involving sex-related misconduct. For convenience, we reproduce our recommendations, as follows:

Recommendation 4:

In matters involving sexual harassment, and all forms of sex-related misconduct, RCMP decision-makers should employ appropriate analysis and emphasis on the consideration of "public interest".

Recommendation 5:

The law governing sexual harassment should apply in the police workplace in the same way as it does in all workplaces, but combined with the expectation of a higher standard of conduct in the police, as articulated by the Supreme Court of Canada and courts of appeal. The RCMP should therefore place reliance upon judgments of superior courts concerning all workplaces, not just the police-sector, as the baseline to determine conduct measures.

Recommendation 6:

Subject to the presumptive dismissal provisions in Recommendations 13, 15 and 16, in matters involving sexual harassment, and all forms of sex-related misconduct, RCMP decision-makers should fully apply the "mechanics" of proportionality described in Part II – "(i) *identify* the relevant proportionality considerations in the circumstances, (ii) *assess* whether each relevant proportionality consideration is *mitigating* or *aggravating* or *neutral* in the circumstances, and then (iii) appropriately *balance* (or "weigh") those various considerations" – and also ensure that they employ appropriate analysis and emphasis on the employer duty to provide a safe workplace.

Recommendation 7:

In any decision that involves "transfer" as a conduct measure, RCMP decision-makers should ensure that they employ appropriate analysis and emphasis on workplace safety, and fully assess the risk to employees in the new location. In particular, decision-makers should consider the current principles from superior court judgments that examine enhanced workplace safety legislation across Canada.

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 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.

Recommendation 12:

Part IV decision-makers should not use ambiguous or vague language if a sexual assault is what occurred. The continued use of terms such as "unwelcome sexual touching" is inaccurate and unhelpful.

Recommendation 13:

The RCMP should amend the Conduct Measures Guide to provide that presumptive dismissal should be the conduct measure for sexual harassment that also meets the definition of sexual assault, whether on a criminal or civil level. For clarity, presumptive dismissal means that in such a case, the conduct measure of dismissal must be imposed, unless the subject member shows that specific circumstances justify another conduct measure.

Recommendation 14:

The RCMP should amend the Conduct Measures Guide to provide that, in findings of sexual harassment that do not involve sexual assault, the "aggravated range" would include dismissal, in order to accord with superior court judgments, but would not include "presumptive" dismissal. The "normal" range should also be significantly increased, because the top of the present "normal" range is forfeiture of 1 day of pay.

Recommendation 15:

The RCMP should amend the Conduct Measures Guide to provide that "where an inappropriate relationship is a direct conflict of interest, or involves exploitation", the conduct measure should be presumptive dismissal, and related untruthfulness (or "attempts to conceal involvement in the relationship") will be a highly aggravating factor.

Recommendation 16:

The RCMP should amend the Conduct Measures Guide to provide that presumptive dismissal should be the conduct measure for improper relationships with members of the public, which means sexual relationships (or attempts) between police officers and members of the community where those relationships involve an abuse of professional trust, including sexual involvement (or attempts) with citizens or analogous behaviour that is otherwise inappropriate.

Finally, we needed to recognize the considerable feedback from many people with whom we spoke who expressed concerns regarding the process itself. Hence, our Addendum and final recommendation:

Addendum and Recommendation 17:

We are grateful for the time, energy and thought donated by the various stakeholders with whom we consulted. Their insights and advice on how best to update the Conduct Measures guide were invaluable to our work. Many of their comments, however, extended beyond merely amending the Guide. It became clear that there still remains a well-reasoned desire to review the process by which

the Guide's conduct measures are applied, including the organization and selection of appropriate conduct authorities, the nature and type of conduct hearings, the appellate process, and the relationship of the RCMP to its oversight bodies.

These matters fall outside the remit of the contract and our mandate. Some of the issues in the process can be instituted only with the benefit of statutory amendments to the *RCMP Act* or the Commissioner's Standing Orders. Nonetheless, we see our work here as only the first step in an improvement to the RCMP discipline scheme. Accordingly, we recommend and encourage the RCMP to undertake a review of the remaining processes in their current discipline framework to address these concerns.

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PART I – INTRODUCTION

1. Introduction

1.1 The Contract describes the work that 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 specific tasks are as follows:

- Complete a review of 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.
- Complete a review and analysis of conduct measures applied in cases of established conduct related to harassment and sexual misconduct by conduct authorities and Conduct Boards (see below definition).
- Complete an intersectional (Gender-based Analysis Plus (GBA+) and Equity, Diversity and Inclusion (EDI)) analysis and identification of trends based on available data.
- Engage with internal and external stakeholders and experts, including but not limited to survivors of harassment, subject members, the National Police Federation, conduct authorities, conduct advisors, Professional Responsibility Unit investigators, Management Advisory Board (MA) member(s), and other diverse groups of people, to identify lessons learned, gaps and other key issues.
- Provide recommendations to the RCMP on:
  - A modernized conduct measures guide to meet police accountability expectations
  - The appropriate range of measures for harassment and sexual misconduct
  - Achieving the consistent application of the conduct measures
  - Effective ways to enhance guidance provided to conduct authorities
  - Addressing the specific recommendations in the Independent Assessors report (The Honourable Michel Bastarache released his Final Report on the Implementation of the Merlo Davidson Settlement Agreement)

1.3 It follows that much of this report divides principally into the general and the specific: analysis and recommendations concerning a modernized Conduct Measures Guide, and how generally to craft a fit conduct measure after a finding of misconduct, and then address analysis and recommendations for the appropriate range of conduct measures specifically for sexual harassment and other sex-related misconduct. At the conclusion, we address the related recommendations that the Hon. Michel Bastarache offered in his Independent Assessors report.

1.4 The contract also asks that we identify and provide an analysis of "best practices", and complete an intersectional analysis and identification of trends.

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.

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.

1.7 It follows that this report 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 defensible, so the report contains extensive reliance upon court of appeal judgments throughout, for example. For convenience, supporting references appear in endnotes.

1.8 Our 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.

1.9 The RCMP provided us with access to over 250 sex-related misconduct 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 reviewed them all carefully, and offer a variety of conclusions and recommendations.

1.10 We wish to fully acknowledge the contributions of the many people who participated in our group consultations, and also in separate individual consultations. Each one of those conversations was distinctly useful. We also wish to acknowledge the considerable contribution of various members of the RCMP in assisting us as we performed our work.

- *The Present Conduct Measures Guide*

1.11 We will take the opportunity here to discuss the Conduct Measures Guide, which states the following:

> This Guide serves the dual purpose of establishing the appropriate range of measures for a variety of the most common types of misconduct that have been encountered amongst the police community in general, and the RCMP in particular, and providing the decision maker with a comprehensive source of factors to consider when determining the appropriate conduct measure(s).
> ...
> With this authority comes the additional responsibility to properly articulate the reasons for a decision, in order to withstand the scrutiny of an appeal or judicial review by the Federal Court.
> ...
> ... this will eliminate a significant level of subjectivity in identifying possible measures, and provide a framework for discussion.
> ...
> The Conduct Measures Guide will also further facilitate the achievement of organizational consistency in the application of the conduct process, and outline the Force's expectations for members pertaining to matters of conduct.[1]

1.12 In our experience, it is rare to see a resource like the Conduct Measures Guide in police forces, and we endorse its continued use as a resource available to decision-makers involved in the police complaint and discipline process. We think it should be updated regularly, and rely on judgments of superior courts across Canada.

1.13 The Conduct Measures Guide in its present form relies upon selected decisions and guidance from sources outside of the RCMP. We offer the following comments concerning reliance upon outside decisions and guidance:

1. We recommend that the RCMP not rely upon summaries of decisions that appear in sources such as annual reports,[2] simply because they ordinarily lack detailed analysis, so have little value.

2. Reliance upon appeal tribunal decisions provides a more robust foundation for comparison. The primary appeal tribunals in the police complaint and discipline process include the Québec Comité de déontologie policière,[3] the Ontario Civilian Police Commission,[4] the Alberta Law Enforcement Review Board,[5] and the Nova Scotia Police Review Board.[6] The Conduct Measures Guide does refer to various appeal tribunal decisions.[7] Appeal tribunal decisions will also necessarily involve more serious matters, as the Conduct Measures Guide properly notes,[8] but also typically contain more detailed analyses of various legal issues that will assist the RCMP in maintaining a defensible base of comparison upon which to rely. Appeal tribunal

decisions also have become more readily accessible on CanLII or elsewhere. We recommend that the RCMP place greater reliance upon appeal tribunal decisions across Canada involving the police complaint and discipline process.

3. As noted, we also recommend that the RCMP place greater reliance upon principles found in judgments of superior courts of justice across Canada involving the police complaint and discipline process. As we discuss below, these 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. However, as discussed, matters that have survived a challenge in a superior court of justice will provide the most reliable and defensible foundation for guidance.

4. 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.[9] We will recommend much more such reliance, particularly involving the one area of particular focus in Phase I, sex-related misconduct.

1.14 Courts of law and tribunals in one jurisdiction need not follow judgments of courts of law in another jurisdiction, of course – they are not "bound" by those judgments – but may, and regularly do, find such judgments "persuasive". The Saskatchewan Court of Appeal has recently rejected an argument that ("insofar as it relates to administrative law grounds and standards of review") a difference in statutory language constituted a meaningful difference or that it made Ontario jurisprudence inapplicable in the context of that case.[10] The Court of Appeal then used case law from outside Saskatchewan concerning conduct measures in its judgment.[11]

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.

PART II – BEST PRACTICES IN CONDUCT MEASURES

2. Best Practices in Conduct Processes – Introduction

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.

2.2 The RCMP has stipulated that the "an analysis of best practices in conduct processes" is "including but not limited to, those of a sample of operational organizations with similar conduct regimes". We have examined what we consider the best sources that will serve as a basis for the recommendations we offer.

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.

• *Terminology*

2.4 Any discussion of "best practices" necessarily involves brief reference to choice of language.

2.5 First, most formal hearings in the police complaint and discipline process typically divide into the "first stage" and the "second stage". The first stage: the hearing "on the merits", the purpose of which involves determining whether the evidence is sufficient to prove the allegation(s), and properly support a finding of misconduct. The second stage – the "penalty stage" – will occur only in the event of a finding of misconduct, of course, and will typically involve hearing evidence and formal legal submissions concerning a fit conduct measure.

2.6 Some terminology specifically concerning the "penalty stage": Broadly speaking, since the 1970s, the police complaint and discipline process has evolved, moving away from a "punitive" philosophy, and towards an approach that favours correction and remediation, where appropriate. It follows that terms such as "conduct measures" (which the RCMP uses), "disposition" (which the Nova Scotia Police Review Board has used)[12] or "remedy",[13] are preferable to "penalty" or "sanction", and certainly "sentencing" or "punishment".[14] (Use of the term "conviction", referring to a "finding of misconduct" at the first stage, likewise invites criticism.)

2.7 Nonetheless, you will see courts of law,[15] administrative tribunals,[16] and statutes[17] still use punitive "conviction", "sentencing" and "punishment" terminology. The New Brunswick Code of Professional Conduct Regulation, for example, still provides that corrective and disciplinary measures shall seek to correct and educate the member of a police force, "rather than to blame and punish the member", unless certain conditions intervene.[18]

2.8 The terms "sentencing" and "punishment" are discordant also because administrative tribunals cannot impose formal sentences in the manner of a criminal court: a conduct measure in professional discipline proceedings cannot include true punishment. Discipline decisions in other professions have concluded that "[i]t is neither our function nor our purpose to punish anyone".[19] The British Columbia Court of Appeal (although in the context of different regulatory process) has spoken of the legal inability of an administrative tribunal to impose a purely retributive or denunciatory penalty:

> [S]ecurities commissions, not being criminal courts, may not impose penalties that are 'punitive' in the sense of being designed to punish an offender for past transgressions. They may, however, impose penalties that place burdens (even very heavy burdens) on offenders, as long as the penalties are designed to encourage compliance with regulations in the future. In essence, penalties may be directed at general or specific deterrence and at protection of the public; penalties that are purely retributive or denunciatory, however, are not appropriately imposed by administrative tribunals.[20]

2.9 Aside from choice of words (avoiding "conviction", "sentencing", "punishment"), *any* reliance upon criminal law principles requires very considerable care, especially given the modern evolution of the philosophy of police complaint and discipline process. The recent judgment of the Alberta Court of Appeal in *Constable A* v *Edmonton Police Service*[21] concisely articulates the principles:

1. criminal law sentencing norms and principles "are not directly transplanted into sanctioning decisions for police misconduct"; and

2. criminal law sentencing principles may have some application, "to the extent that doing so is acceptable and proportional to the innate requirements of the system, the reasonable expectations of parties within the system, to the objectives of the system, and to the intent of the Legislature in light of the larger social interests that the Legislature seeks to serve".[22]

2.10 The *Royal Canadian Mounted Police Act* authorizes conduct measures in four principal ways.

2.11 A "Level 1" conduct authority ("members ... in command of a detachment and persons who report directly to an officer or to a person who holds an equivalent managerial position")[23] may impose one or more of the following "remedial conduct measures" against a subject member:

(a) an admonishment;

(b) a direction to work under close supervision for a period of not more than one year;

(c) a direction to undergo training;

(d) a direction to undergo medical treatment as specified by a Health Services Officer;

(e) a direction to attend counselling sessions or complete a rehabilitative program;

(f) a direction to complete a program or engage in an activity;

(g) a removal, restriction or modification of duties as specified by the conduct authority for a period of not more than one year;

(h) a reassignment to another position not involving a relocation or demotion;

(i) a reprimand;

(j) a financial penalty of not more than eight hours of the member's pay, deducted from the member's pay.[24]

2.12 A Level 1 conduct authority and a subject member may also agree on the imposition of "any other conduct measure, other than a financial penalty or a corrective or serious conduct measure".[25]

2.13 A "Level 2" conduct authority ("officers, or persons who hold equivalent managerial positions")[26] may impose, in addition to the "remedial conduct measures" available to a Level 1 conduct authority, one or more of the following "corrective conduct measures":

(a) an ineligibility for promotion for a period of not more than one year;

(b) a deferment of pay increment for a period of not more than one year;

(c) a suspension from duty without pay for a period of not more than 80 hours;

(d) a financial penalty of not more than 80 hours of the member's pay, deducted from the member's pay;

(e) a forfeiture of annual leave for a period of not more than 80 hours;

(f) any combination of the measures referred to in paragraphs (c) to (e) totalling not more than 80 hours.[27]

2.14 A "Level 3" conduct authority (officers in command of a Division)[28] may impose, "in addition to any remedial and corrective conduct measures", one or more of the following "serious conduct measures":

(a) a removal, restriction or modification of duties as specified by the conduct authority for a period of not more than three years;

(b) an ineligibility for promotion for a period of not more than three years;

(c) a deferment of pay increment for a period of not more than two years;

(d) a reduction to the next lower rate of pay for a period of not more than two years;

(e) a demotion for a period of not more than three years;

(f) a demotion for an indefinite period;

(g) a transfer to another work location;

(h) a suspension from duty without pay;

(i) a forfeiture of annual leave for a period of not more than 160 hours;

(j) a financial penalty deducted from the member's pay.[29]

2.15 Finally, if a "conduct board" concludes that the evidence establishes an allegation of a contravention of a provision of the Code of Conduct, s. 45(4) requires the conduct board to impose "any one or more" of the conduct measures stipulated:

> (4) If a conduct board decides that an allegation of a contravention of a provision of the Code of Conduct by a member is established, the conduct board shall impose any one or more of the following conduct measures on the member, namely,
>
> (a) recommendation for dismissal from the Force, if the member is a Deputy Commissioner, or dismissal from the Force, if the member is not a Deputy Commissioner,
>
> (b) direction to resign from the Force and, in default of resigning within 14 days after being directed to do so, recommendation for dismissal from the Force, if the member is a Deputy Commissioner, or dismissal from the Force, if the member is not a Deputy Commissioner, or
>
> (c) one or more of the conduct measures provided for in the rules.

As to "conduct measures provided for in the rules", the Commissioner's Standing Orders provide that conduct boards may impose "any of the measures" in s. 5(1).[30]

2.16 In addition to those four sources of authority, a conduct adjudicator at the appeal stage can also impose conduct measures.[31]

3. Crafting a Fit Conduct Measure – Overview

3.1 Despite the perhaps-obvious point that the police complaint and discipline process differs somewhat among Canadian jurisdictions, the evolution of the jurisprudence has developed five general principles that serve as the foundation for the process of crafting a fit conduct measure, following any formal finding of misconduct after the first stage of a hearing.[32]

3.2 Should anyone ever wish that "best practices in conduct processes" be distilled to one sentence, we would respond that "best practices in conduct processes" means the application of these five foundational principles.

3.3 Each of the five principles is important, and the most technical principle involves assessing *proportionality*.

3.4 The next stage in our discussion involves an examination of these five principles. There is an element of complexity to any discussion of these five principles, as you will imagine, despite our efforts to reduce them to their essence. However, everyone involved in the police complaint and discipline process, and everyone who examines that process, should fully understand these principles and their application and also their intrinsic complexity.

3.5 The RCMP has asked us to provide recommendations concerning "a modernized conduct measures guide to meet police accountability expectations". We would have the RCMP amend the Conduct Measures Guide to incorporate these five foundational principles, based upon the explanation that we offer in this report. We now turn to the explanation.

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.

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4. Crafting a Fit Conduct Measure – Principle #1

4.1 *The first principle*: A conduct measure must fully accord with the purposes of the police complaint and discipline process.[33]

4.2 The present Conduct Measures Guide states the following:

> It is generally acknowledged that the primary purpose of "discipline" is to correct improper conduct, to rehabilitate the member, and to preserve the public trust in the RCMP.

> ...
> Essentially, a conduct authority must strike a balance between the need to hold members accountable for their actions in order to maintain public trust, and the obligation to treat members in a fair and consistent manner.[34]

4.3 We suggest a broader set of purposes, based on various judgments of the Supreme Court of Canada and courts of appeal.

4.4 In our opinion, superior court judgments support the conclusion that the police complaint and discipline process should serve and balance four distinct purposes.

4.5 The first purpose of the police complaint and discipline process is the *public* interest: ensuring a high standard of conduct in the constabulary,[35] and public confidence in the constabulary.[36]

4.6 In the case of the RCMP, s. 36.2 of *Royal Canadian Mounted Police Act* specifically provides that the purposes of Part IV include:

> (b) to provide for the establishment of a Code of Conduct that emphasizes the importance of maintaining the public trust and reinforces the high standard of conduct expected of members;
>
> (c) to ensure that members are responsible and accountable for the promotion and maintenance of good conduct in the Force;

4.7 RCMP Conduct Board decisions in some various cases have identified this purpose well, as these two excerpts illustrate:

> The police discipline system plays a vital role in maintaining the public's confidence in the Force.
> ...
> The powers granted a police officer are considerable; the public justifiably expects members of the RCMP to observe the highest ethical and professional standards.

4.8 An Ontario court judgment explored this purpose in a case in which a respondent police officer argued, among other things, that the complainant had no direct personal interest in the outcome of an application to extend a particular time period in a complaint, "other than a possible sense of 'satisfaction' or a 'sense of grievance'". The court disagreed:

> ... this submission minimizes one of the fundamental purposes of the complaints system: to ensure transparency and enhance public confidence in the process. Police officers have extraordinary powers to control the public. The public has an interest in ensuring that those powers are exercised in accordance with the law. It is an interest that extends beyond a personal "sense of grievance." Public confidence in those who are responsible for the administration of justice, including police officers, is essential to the health of a free and democratic society.[37]

4.9 The second purpose of the police complaint and discipline process is the *employer's* interests in its "dual capacity" as an employer seeking maintaining integrity and discipline in the police workplace,[38] and as "a public body responsible for the security of the public".[39]

4.10 The third purpose of the police complaint and discipline process is the interests of a *respondent police officer* in being treated fairly.[40]

4.11 The fourth purpose of the police complaint and discipline process is, in cases where other individuals are affected, to ensure that the interests of persons such as public complainants or other RCMP employees are addressed.

4.12 The principle that the police complaint and discipline process should *serve and balance* those four distinct purposes is best illustrated in a judgment involving the Québec *Police Act* in which the Supreme Court of Canada spoke of "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".[41]

5. Crafting a Fit Conduct Measure – Principle #2

5.1 *The second principle*: Corrective and remedial dispositions should prevail, where appropriate. This second principle reflects the evolution over the past two generations towards a more remedial philosophy in the police complaint and discipline process, and found support in *The Report of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the Royal Canadian Mounted Police* (the Marin Commission *Report*):

> Not all problems giving rise to breaches of discipline, misconduct or unsatisfactory job performance can be corrected through the use of punishment. While a remedial approach to discipline recognizes that sanctions may sometimes be necessary, it also recognizes that there are many situations in which punishment is not only inappropriate, but unfair.
>
> Problems of performance and conduct may be due to inconsistencies between rules, regulations and directives and the operational requirements of policing. In other cases, local conditions such as shortage of adequate manpower, ineffective leadership and supervision or a protracted stress situation may give rise to problems of either conduct or performance.
>
> In a remedial system, steps would be taken to ensure that, before punitive action of any sort was taken, the above considerations had been reviewed and precluded as contributing factors of any significance. Only if a supervisor is assured that a particular difficulty relates primarily to the individual concerned should punishment of any sort be imposed [...] If a problem results from circumstances over which the individual has

> no control, it is obvious that unless the circumstances are changed the problem will not be remedied by attempting to correct the behaviour of the individual.
>
> Even in those cases where the individual is the source of the problem, punishment may not be the appropriate response. An inability to adjust to local conditions, inadequate training, a lack of familiarization with new requirements and regulations or a personality clash with a supervisor may account for whatever difficulty arises. Here again, accurate identification of the source of a difficulty must preclude any disciplinary action, punitive or non-punitive.
>
> When discipline is necessary, an approach which seeks to correct and educate a member should precede one that seeks to assign blame and impose punishment.
> ...
> Where conditions beyond the responsibility of the member are found to be contributing factors to problems of either performance or conduct, no disciplinary action should be taken. Rather, a supervisor should report such matters and take whatever corrective action he deems necessary.[42]

5.2 Section 36.2(e) of the *Royal Canadian Mounted Police Act* specifically incorporates this philosophy, providing that one of the purposes of Part IV is:

> (e) to provide, in relation to the contravention of any provision of the Code of Conduct, for the imposition of conduct measures that are proportionate to the nature and circumstances of the contravention and, *where appropriate, that are educative and remedial rather than punitive*. [our emphasis]

5.3 This approach is not RCMP-specific. Other jurisdictions have codified this principle. The British Columbia *Police Act*[43] provides that if the discipline authority considers that one or more measures are necessary, "an approach that seeks to correct and educate the member" takes precedence, "unless it is unworkable or would bring the administration of police discipline into disrepute". New Brunswick's provision is similar,[44] albeit with the archaic "blame and punish" language:

> 3 The corrective and disciplinary measures ... shall seek to correct and educate the member of a police force who is alleged to have committed a breach of the code under section 35 rather than to blame and punish the member unless
>
> (a) the corrective and disciplinary measures would bring the administration of police discipline into disrepute,
>
> (b) the corrective and disciplinary measures would bring the reputation of the police force with which the member is employed into disrepute, or
>
> (c) the circumstances make it impractical for the parties to a settlement conference to agree to, or the arbitrator to impose, corrective and disciplinary measures that seek to correct and educate the member.

5.4 "Corrective dispositions should prevail, where appropriate": An examination of "where appropriate" appears in a judgment of the Alberta Court of Appeal in which a police officer whose "egregious" misconduct involved intentional and repeated lying under oath – "not mere social lies, nor lies respecting administrative matters, but related to core operational matters such that it fell within the highest range of seriousness" – failed to convince the Court of Appeal that the presiding officer committed an error by concluding that a remedial approach to discipline should not apply.[45]

5.5 Another example appears in a judgment of the New Brunswick Court of Appeal,[46] considering the regulation we reproduce in our paragraph 5.3, above. The Court of Appeal upheld the dismissal of a police officer after findings of misconduct for theft and attempting to use her position as a police officer for personal gain.[47]

6. Crafting a Fit Conduct Measure – Principle #3

6.1 *The third principle*: presumption of the least onerous disposition, which presumption would be displaced if the public interest or other specified considerations should prevail. British Columbia has formally and concisely articulated this principle in s. 19(3) of the Code of Professional Conduct Regulation:[48]

> (3) If the discipline authority considers that one or more disciplinary or corrective measures are necessary, the disciplinary authority must choose the least onerous disciplinary or corrective measures in relation to the police officer concerned unless one or both of the following would be undermined:
>
> (a) organizational effectiveness of the municipal police department with which the police officer is employed;
>
> (b) public confidence in the administration of police discipline.

6.2 This principle roughly compares with other employment and labour law processes, which we discuss below.

7. Crafting a Fit Conduct Measure – Principle #4

7.1 *The fourth principle*: proportionality, which requires at least that the decision-maker (i) *identify* the relevant proportionality considerations in the circumstances, (ii) *assess* whether each relevant proportionality consideration is *mitigating* or *aggravating* or *neutral* in the circumstances, and then (iii) appropriately *balance* (or "weigh") those various considerations. As proportionality is the most complex of the four principles, we provide a more detailed analysis separately, below.

8. Crafting a Fit Conduct Measure – Principle #5

8.1 *The fifth principle*: The law is clear that a higher standard applies to police officers' conduct, compared to employees generally, principally because police hold a position of trust. In the words of the Supreme Court of Canada, "exemplary probity is an essential qualification for employment as a police officer",[49] and the nature of police employment requires the "highest standard of moral character".[50] We also expand on this fifth principle, below.

8.2 Pausing here, to summarize: the evolution of the jurisprudence has developed five general principles that serve as the foundation for the process of crafting a fit conduct measure, and we endorse the view that "best practices in conduct processes" means the application of these five foundational principles:

1. A conduct measure must fully accord with the four purposes of the police complaint and discipline process:

    i. the *public* interest: ensuring a high standard of conduct in the constabulary, and public confidence in the constabulary

    ii. the *employer's* interests in its "dual capacity" as an employer seeking maintaining integrity and discipline in the police workplace, and as "a public body responsible for the security of the public"

    iii. the interests of a *respondent police officer* in being treated fairly

    iv. in cases where *other individuals* are affected, to ensure that the interests of those individuals (such as public complainants or other RCMP employees) are addressed.

2. Corrective and remedial dispositions should prevail, where appropriate.

3. A presumption of the least onerous disposition applies, which presumption would be displaced if the public interest or other specified considerations should prevail.

4. Proportionality.

5. A higher standard applies to police officers' conduct, compared to employees generally, principally because police hold a position of trust.

9. The Principle of Proportionality

9.1 Proportionality, reduced to its essence, means that a conduct measure must reflect the unique circumstances (or "context") of each case. It requires that any conduct measure be the product of a "contextual analysis". Again, s. 36.2(e) of *Royal Canadian Mounted Police Act* explicitly stipulates proportionality as one of the purposes of Part IV:

> (e) to provide, in relation to the contravention of any provision of the Code of Conduct, for the imposition of *conduct measures that are proportionate to the nature and circumstances of the contravention* and, where appropriate, that are educative and remedial rather than punitive. [our emphasis][51]

9.2 Proportionality principally involves a careful treatment of a standard list of "considerations" (or proportionality "factors"), discussed below.

9.3 These proportionality "factors" divide for convenience into those relating to the offence and those relating to the person. In the words of the Alberta Court of Appeal, "[a] fit sanction is also proportional; it reflects the moral blameworthiness of the person being sanctioned and the gravity of the misconduct".[52]

9.4 The Conduct Measures Guide includes a list of mitigating factors and a separate list of aggravating factors.[53] The list in the next paragraph, by contrast, identifies factors that can be mitigating or aggravating or neutral, depending on the *context* of each individual case.[54] The Québec Court of Appeal has confirmed the principle that particular circumstances can constitute a neutral factor:

> 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 sanction to be imposed.[55]

9.5 The following proportionality factors – if *relevant* to the matter, as discussed below – would constitute *mitigating* or *aggravating* or *neutral* considerations in crafting a proportionate disposition following a finding of misconduct, depending on the evidence:

1. Public Interest
2. Seriousness of the Misconduct
3. Recognition of the Seriousness of the Misconduct (Remorse)
4. Disability and Other Relevant Personal Circumstances
5. Provocation
6. Procedural Fairness Considerations
7. Employment History
8. Potential to Reform or Rehabilitate the Police Officer

9. Effect on Police Officer and Police Officer's Family
10. Parity (Consistency of Disposition)
11. Specific and General Deterrence
12. Systemic Failure and Organizational/Institutional Context
13. Damage to the Reputation of the Police Force
14. Effect of Publicity
15. Loss Resulting from Unpaid Interim Administrative Suspension

9.6 The Nova Scotia Police Review Board,[56] the Ontario Police Commission[57] and adjudicators in New Brunswick,[58] Saskatchewan[59] and Newfoundland and Labrador[60] have approved this list[61] of proportionality considerations, for example.[62]

• *The Mechanics of Proportionality*:

9.7 Proportionality is the most complex of the five fundamental principles that govern the process of crafting a legally reasonable disposition, and requires three decisions:

- First, a decision-maker must *identify* the relevant proportionality considerations in the circumstances.[63]

- Second, a decision-maker must *assess* each relevant proportionality consideration as *mitigating* or *aggravating* or *neutral* in the circumstances.[64]

- Third, a decision-maker must appropriately *balance*[65] – or *weigh*[66] – those various considerations in accordance with the factual background of the matter,[67] and the four purposes of the police complaint and discipline process.[68] Thus, "a decision-maker must give proper weight to the relevant factors in a particular case", and a "proper balance" is of "utmost importance".[69]

9.8 The Conduct Measures Guide states as follows:

> Each case of misconduct comprises its own unique set of circumstances, and each conduct measure imposed must be tailored to all relevant information, including the severity of the contravention, the member's personal situation, and the impact on the Force's reputation.
>
> [S. 36.2(e)] specifically provides guidelines for a fair and appropriate measure, namely that it should be proportionate to the nature and gravity of the offence, and educative rather than punitive when possible. A conduct authority must, for each type of misconduct, consider the presence of any mitigating or aggravating factors, in order to fully appreciate the gravity of the conduct.[70]

9.9 In our opinion, this characterization accords in part with s. 36.2(e) of the *Act*, which speaks to "the imposition of conduct measures that are proportionate to the nature and circumstances of the contravention". We recommend editing some of the language in the Conduct Measures Guide. One example: "a conduct authority must, for each type of misconduct, consider the presence of any mitigating or aggravating factors, in order to fully appreciate the gravity of the conduct". However, "gravity" ("seriousness") of the conduct is one of the mitigating or aggravating or neutral factors.

9.10 Various decisions cite an External Review Committee three-step test for the imposition of conduct measures. Under that test, a decision maker must first consider the appropriate range of conduct measures applicable to the misconduct at issue. Then, it must consider the aggravating and mitigating factors. Finally, the decision maker must impose conduct measures that accurately and fairly reflect the gravity of the misconduct at issue, keeping in mind the parity principle of sanctions. We recommend editing the Conduct Measures Guide to ensure that decisions reflect the mechanics in our paragraph 9.7, above.

9.11 Court judgments consistently conclude that progressive discipline does not inevitably apply, and in appropriate cases one proportionality factor – "seriousness of the misconduct", most commonly[71] – can support high penalties, including dismissal. The Alberta Court of Appeal has concluded that, even absent a history of lesser penalties, "dismissal may sometimes be appropriate even for a 'first infraction'".[72]

9.12 Also, some circumstances do not constitute a proportionality consideration. In one example, the decision noted that the subject member "did not submit letters of reference from his family, colleagues and supervisors, but many were present throughout the conduct hearing to support him". The mere presence of supporters in a hearing room does not constitute evidence of mitigation.

9.13 The common law principle of proportionality, by its very nature, precludes *automatic* penalties, whether dismissal or otherwise.[73] This principle extends to misconduct proceedings arising out of criminal convictions: "The simple fact that a police officer may have been found guilty or convicted of one of many thousands of possible criminal offences does not automatically mean that that individual cannot continue to serve as a police officer".[74] Legislation can override this common law principle, however, and create an automatic disposition. The Québec *Police Act* contains automatic dismissal in limited cases.[75] The Conduct Measures Guide itself contains at least one example of automatic dismissal.[76]

9.14 Proportionality does not preclude a *presumptive* disposition for particular misconduct – usually very serious misconduct – subject to "exceptional" mitigation or an equivalent test:

> It recognised, correctly, that a sanction resulting in the officer concerned having to leave the force will be the usual consequence of operational dishonesty but it admitted of the possibility of exceptional cases. It is inherent in the requirement of judicial and

> quasi-judicial reasoning that where a decision-maker has to choose between the usual and the exceptional course, it is incumbent upon him, if he chooses the exceptional course, to explain why he has done so.[77]

9.15 We discuss *presumptive* conduct measures in more detail in our discussion of sexual harassment, below.

10. Proportionality Factor #1 – Public Interest

10.1 The next several sections of the report examine in some detail the various proportionality "factors" that can be mitigating, aggravating or neutral and, depending on the context of each case, may adjust a conduct measure accordingly.

10.2 As discussed in our paragraph 8.1, above, the Supreme Court of Canada has reaffirmed the principle that a higher standard applies to police officers' conduct, compared to employees generally, principally because police hold a position of trust. Two excerpts from the judgment of the Supreme Court of Canada in *Montréal (City)* v *Québec (Commission des droits de la personne et des droits de la jeunesse)*[78] illustrate:

> ... exemplary probity is an essential qualification for employment as a police officer.[79]

> Police have considerable power and discretion over matters that can affect the fundamental rights of the members of the public whom they encounter. Police work requires individuals not only to exercise a significant degree of judgment and integrity, it is also a position that requires the utmost public trust. [...] The nature of the employment requires the highest standard of moral character.[80]

10.3 Court of appeal judgments routinely cite this expectation of a higher conduct standard. The Québec Court of Appeal spoke of the "exemplary image and integrity required to perform the duties of a police officer"[81] in one judgment, and stated the following in another:

> A police officer ... belongs to a group which is held in high regard by the Canadian public. 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 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.[82]

10.4 The New Brunswick Court of Appeal has used "members of the general public" as the comparison, stating that "police officers are held to a higher standard of conduct than members of the general public, whether they are on duty or not, and whether they are in uniform or not".[83]

10.5 The Alberta Court of Appeal has stated that "[b]ecause of the extraordinary powers they have to use force and to put restraints on liberty, the misconduct of police officers is always a

matter of public interest",[84] and has also characterized this disposition factor slightly more broadly: "the consequences for the public and the administration of law that resulted" from the misconduct.[85] Thus, the respondent police officer is "subjected to public discipline for misconduct, which engages the public interest and public law, not just a private contractual relationship".[86] The Court of Appeal has also stated the following:

> [S]ervice on a police force is not an ordinary type of employment. Apart altogether from the extraordinary powers that police officers are given, their continuing service is governed by a public disciplinary regime, set out in the *Police Act* ... and the Police Service Regulation. Police officers are, in many respects, subject to different standards of conduct, and a higher level of workplace discipline than ordinary employees. This is not a situation where the [police force] was terminating a contractual relationship with an employee. The respondent was being subjected to public discipline for misconduct, which engages the public interest and public law, not just a private contractual relationship ...[87]

Most recently, the Saskatchewan Court of Appeal has approved this statement.[88]

10.6 Our review of the sample decisions revealed a chronic omission to specifically and properly assess the public interest as a proportionality consideration, which consistently led to the imposition of conduct measures that did not align with the jurisprudence of superior courts of justice. In contrast, for example, the Saskatchewan Court of Appeal has specifically assessed public interest in concluding that "it is difficult to understand how public interest is not undermined" when a police officer repeatedly misleads a complaint investigator,[89] and the Québec Court of Appeal has specifically assessed public interest in concluding that CPIC misuse is an example of misconduct that engages "public interest" as a disposition consideration.[90]

10.7 Public interest as a proportionality factor has been considered in various Conduct Board decisions, and in the "older" judgment of the Federal Court in *Rendell* v *Canada (Attorney General)*,[91] in which the court rejected the respondent police officer's argument that the RCMP Commissioner placed "undue weight on public expectations" in arriving at the decision to dismiss a police officer after his criminal conviction for assaulting his wife:

> I cannot ascertain that the Commissioner erred in law by giving undue weight to public expectations in determining the appropriate sanction to be imposed in cases of this nature. The weighing of various aggravating and mitigating factors falls within the purview of the Commissioner's expertise and discretion in disciplinary matters involving members who are criminally convicted of domestic assault. The RCMP's zero tolerance policy in domestic violence matters generally, and with respect to its members specifically, make it altogether reasonable for public expectations to have been one of the considerations taken into account by the Commissioner.[92]

10.8 The public interest may require a different outcome in matters involving misconduct by a senior officer, expressed in one court judgment as follows: "High rank and long service carry with them responsibilities ... and the maintenance of public confidence and respect in the police service may mean that a high-ranking officer must suffer a harder fall than would a junior officer in similar circumstances".[93] We did not have sufficient data to make formal conclusions about the effect of rank.

11. Proportionality Factor #2 – Seriousness

11.1 As in other regulated professions, and labour law and employment law generally, seriousness (or "gravity") of the misconduct is a fundamental proportionality consideration, and necessarily arises in every decision concerning conduct measures.

11.2 Because proportionality requires the exercise of appropriately balancing all relevant mitigating and aggravating and neutral proportionality factors, "seriousness of the offence alone may justify dismissal".[94] However, even "reprehensible" misconduct may not be decisive.[95] It is the balancing that determines the outcome.

11.3 Some decisions have favoured the view that some categories of discipline offences are intrinsically more serious. One example appears in a decision under the British Columbia *Police Act* in which the adjudicator stated that deceit is "the most serious disciplinary default that can be committed by a police officer".[96]

11.4 We urge the RCMP to avoid this approach, and rely on the five foundational principles we have identified, emphasizing proportionality and its contextual approach. We prefer the approach of the Saskatchewan Court of Appeal, in a case involving an unusual example of police misconduct. The Court of Appeal spoke of the "rather unsatisfactory exercise of characterizing the appellant's misconduct as more or less reprehensible than offences involving sexual misconduct, or substance abuse, or excessive use of force, and other transgressions of a distinctly different flavor involving offenders with singularly different characteristics".[97]

11.5 However, even if deceit or another category of misconduct *were* intrinsically more serious – and this issue remains unsettled[98] – proportionality still requires decision-makers to calibrate the seriousness of the particular, proved misconduct.[99]

11.6 In matters involving police misconduct, the law places considerable importance on assessing the degree of seriousness, and misapprehending the seriousness of the misconduct can compromise the decision-making analysis.[100] This point merits emphasis because of its considerable effect on "parity" as a proportionality consideration.[101]

11.7 Using deceit as an illustration, "[t]hough any deceit is a serious disciplinary default, some of these acts are more culpable than others".[102] As with any discipline offence, it will be more

serious if it concerns a core policing duty. Lying under oath, particularly doing so more than once,[103] predictably sits at the most serious end of the spectrum of deceit, because "it undermines the very administration of justice that a police officer is charged to uphold, and brings with it the potential for wrongful conviction, wasted resources and loss of public respect".[104] Lying under oath (especially repeatedly) is "most egregious misconduct, going to the very heart of a police officer's role and function in society".[105] Some findings of misconduct for deceit fall into the "midrange".[106] "Continued dishonesty"[107] or a "pattern of dishonesty and deceit"[108] will typically aggravate seriousness as a proportionality factor.

11.8 Various circumstances can reduce the seriousness of misconduct, thereby possibly mitigating a conduct measure. Some examples:

- inexperience in the police force, and inexperience in the function in question, will ordinarily mitigate disposition, as might misconduct arising from lack of understanding;

- behaviour motivated by good faith,[109] or involving no improper motives, such as personal gain;[110]

- misconduct involving no intention, deliberation,[111] or malice; and

- behaviour involving a single or "isolated" occurrence (even sometimes a generous interpretation of "single" incident), as distinct from multiple findings of misconduct, particularly when combined with behaviour at the low end of the misconduct spectrum, and most particularly behaviour that decision-makers have painted as a "momentary lapse", an act occurring "in the heat of the moment", or a "single act of human frailty" (especially if related to illness).

11.9 One arbitrator has offered the following analysis on the approach to "momentary-isolated-atypical" cases:

> ... the public and employers of police rightfully expect a very high standard of police officers. However, the corollary is that this in itself makes police work a stressful occupation. This does not excuse aberrant conduct, but it justifies a measure of humanity when determining whether one instance of human failing justifies ending a career.[112]

11.10 Although misconduct involving only a single occurrence may mitigate a remedy, *serious* single-occurrence misconduct can support the dismissal of a respondent police officer. The Alberta Court of Appeal, for example, has concluded that, even absent a history of lesser penalties, "dismissal may sometimes be appropriate even for a 'first infraction'".[113]

11.11 Misconduct involving multiple events, or a high degree of turpitude, will more likely aggravate a conduct measure, particularly behaviour falling at the very serious end of the spectrum of misconduct,[114] including the following:

- lying about the original misconduct;[115]
- "operational dishonesty" or lack of integrity;[116]
- retaliatory conduct, conduct intended to demean,[117] or other example of high moral culpability[118] or "morally reprehensible" behaviour, including miscarriage of justice;[119]
- behaviour (especially serious misconduct) involving more than one "isolated" event or delict;[120]
- misconduct occurring over "a significant length of time";[121]
- intent or even deliberation/premeditation;[122]
- behaviour involving a combination of volume of misconduct, intent and duration;
- significant consequences or potential consequences flowing from the misconduct; and
- historically recurring similar acts.[123]

11.12 Misconduct that affects vulnerable persons or members of communities that traditionally suffer disproportionate exposure to harassment, sexual harassment or discrimination, should be viewed as particularly aggravating. For the past several decades in the RCMP, this analysis has largely focussed on cis women (as members of the public or members of the RCMP), and members of Indigenous communities. However, as the RCMP increases the diversity of its members beyond its traditional cohort, and polices increasingly diverse communities, this factor must be expanded to include members of other communities. The reference in *Broken Dreams* to "LGBTQ2S+ women or women of Indigenous or racialized heritage were often treated even more poorly"[124] should provide decision-makers with guidance in this regard. Accordingly, any assessment of "seriousness" must involve an examination of the history of disproportionate exposure to sexual harassment, including LGBTQ2S+ women or women of First Nations, Inuit, Metis, Black or racialized heritage, or women in remote, isolated settings. This will inevitably identify specific proportionality factors for consideration, such as the effect on the complainant, recognition of the seriousness of the misconduct, and impact on the reputation of the Force.

11.12 The remarks of the Hon. Michel Bastarache concerning civilian members and public service employees are also relevant here, in conducting the assessment of seriousness as a proportionality consideration:

> When speaking with Civilian Members and Public Service Employees it became apparent that these women were doubly stigmatized: they were women, and, they were

> not Regular Members of the RCMP. Often, these women were unable to move away from negative environments and unaware or unable to access resources to assist them when they experienced sexual harassment or discrimination based on their gender or sexual orientation.[125]

12. Proportionality Factor #3 – Recognition of the Seriousness of the Misconduct ("Remorse")

12.1 Recognition of the seriousness of the misconduct – "insight, acceptance of responsibility and remorse"[126] – is a prominent component of the proportionality calculus in professional regulatory proceedings, certainly including the police complaint and discipline process.

12.2 Recognizing the seriousness of the misconduct may appear in a variety of ways, and may mitigate or aggravate a conduct measure (or may be a "neutral" factor, having no effect), depending on the context:

- a guilty plea to parallel *Criminal Code*[127] (or quasi-criminal offence) charges;
- an admission of guilt[128] to an allegation of misconduct, and admitting to an agreed statement of facts (or both), and perhaps even a qualified admission of guilt to an allegation of misconduct;[129]
- an admission of fact (meaning that the respondent police officer may elect not to enter a plea of guilty, but nonetheless admit to certain matters);
- testimony accepting full responsibility for misconduct;
- a robust and timely apology or similar expression of remorse;
- a late or qualified or hollow apology or other expression of remorse may reduce mitigation, as might expressions of remorse through counsel after a finding of misconduct;[130]
- meaningful cooperation during the misconduct investigation, although some doubt exists on this point;[131]
- restitution, or otherwise "correcting the error";[132] and
- obtaining counselling for issues such as PTSD, addiction and anger management.

12.3 An admission of guilt (or any other act of remorse) may offer only limited mitigation if a decision-maker finds that the respondent police officer did not "appreciate and acknowledge the overall seriousness" of the conduct. Because a conduct authority at first instance hears the respondent police officer's testimony, the conduct authority is in the best position to "assess the degree of remorse and the weight that it should be given".[133]

12.4 The most complex aspect of this factor involves the effect of failing to demonstrate remorse, which has generated considerable litigation, both in the police discipline process and in other professional regulatory environments, and also in other arenas, such as the grievance arbitration process and wrongful dismissal litigation.[134]

12.5 A respondent police officer who chooses to make full answer and defence will not be entitled to the mitigation that a guilty plea or apology might generate in a particular case, which could therefore materially affect the conduct measure, but the strong weight of authority supports the conclusion that absence of remorse usually[135] does not directly aggravate penalty. Thus, "[w]hile a guilty plea can be mitigating, the absence of a guilty plea is not aggravating",[136] though there is some limitation on this principle. The Law Society Appeal Panel in an Ontario decision has summarized the principle succinctly and eloquently:

> Lack of remorse is a consideration when misconduct is not disputed, as it demonstrates lack of insight into the consequences of the misconduct. However, it cannot be an aggravating factor when a person honestly believes in his or her innocence.[137]

12.6 As a general rule, therefore, a police officer making full answer and defence does not thereby fail to demonstrate remorse. However, untruthful testimony in the context of making full answer and defence may aggravate penalty, and this issue also affects the proportionality consideration of "potential to reform or rehabilitate". Recent case law has considered the effect of a finding that a respondent police officer lied in making full answer and defence.

12.7 In *Quaidoo* v *Edmonton Police Service*,[138] the Alberta Court of Appeal distinguished, for the purposes of this proportionality factor, between "between calling upon the prosecution to make its case, and actively advancing falsehoods":

> While it would, of course, be unfair to increase a criminal punishment for the mere exercise of the Constitutional right to be presumed innocent and to be tried openly in a criminal matter, it might or might not be unfair in a given situation for a Presiding Officer to see an analogy between the process history and the underlying offence or to draw inferences about the reparability of the essential relationship between the charged officer and the Service. To be sure, this would not likely be the common situation. There would be ample room in most cases to accept that the subject police officer honestly believed in the propriety of what he or she did under now impugned circumstances. To use that belief to the officer's disadvantage could very well be quite unfair. But that would not necessarily be the situation in all cases. The scope of acceptable and justifiable alternative sanctions in a given case in the face of some departure between this concept as reflected in the criminal law and how it may be reflected in this form of administrative law is not therefore reduced to a single answer, hence the wrong answer being unreasonable ...
>
> ...
>
> The appellant argues that the dissenter in the LERB came to a more realistic interpretation of the Presiding Officer's reasons. The appellant contends that the message sent by the Presiding Officer's decision is that any person facing discipline

> for deceit had better confess and throw himself on the mercy of the Presiding Officer or else his effort to defend himself and his reputation by not pleading guilty will be taken to seal his fate. This, says the appellant with some force, amounts to a statement that, unless you plead guilty, you are going to be found to be a recalcitrant and unrepentant individual not fit to carry a badge.
>
> This contention also runs aground, however, on the standard of review. The generality of the position again assumes that, in other cases, 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 the Presiding Officer found here in finding guilt, namely that the appellant started a pattern of dissembling immediately, tried to get [another police officer] to be part of it, and then sought to maintain his cover story for an extended period of time and right into the witness box. There is a difference between calling upon the prosecution to make its case, and actively advancing falsehoods.

13. Proportionality Factor #4 – Disability and Extenuating Personal Circumstances

13.1 Disability ordinarily arises as a proportionality consideration at the conduct measure stage of the process – after a finding of misconduct – and not as a substantive defence that would bar a finding of misconduct.[139]

13.2 The most prominent disabilities found in police misconduct cases include alcoholism, depression, post-traumatic stress disorder, personality disorder, drug addiction, and illness combinations.[140] Some conditions are not disabilities, such as anger management.[141] One of the early decisions in this area was the RCMP case of *Lee* v *Royal Canadian Mounted Police Commissioner*.[142] No one should attempt to minimize the challenges in this area of the law.

13.3 Disability may mitigate disposition because the police employer owes an obligation to accommodate a police officer's disability to the point of "undue hardship".[143] The law in this regard accords with principles governing the regulation of professional conduct in other sectors.[144] In both policing and other regulated professions, "undue hardship" arises when "the public interest is harmed by the accommodation".[145]

13.4 In the context of regulating the conduct of lawyers, for example, permitting a lawyer who has knowingly engaged in breaches of integrity to continue to practice harms the public interest,[146] but disability such as depression may somewhat mitigate penalty in appropriate cases.[147] In the context of other professional regulatory environments, disability can constitute exceptional mitigation that displaces a presumptive penalty.[148]

13.5 Extenuating personal circumstances (as distinct from formal, medically-diagnosed disability) may likewise mitigate a disposition.[149]

- *The Requirement of Nexus and the Burden of Proof*

13.6 Expert evidence must establish a "clear" connection, a *nexus*, between disability (or the personal circumstances) and the misconduct in question, else mitigation does not apply.[150] In *Gulick* v *Ottawa Police Service*,[151] the Ontario Divisional Court concluded as follows:

> While the incident giving rise to the disciplinary hearing did involve some consumption of alcohol and medications, the Hearing Officer found as a fact that the incident was triggered by anger management issues with which the applicant had been struggling for several years. The Hearing Officer found that alcohol was, at most, an exacerbating factor. We are not aware of any jurisprudence which has established that anger management issues will support a finding of disability.
>
> Addiction arising from alcoholism and/or drug abuse or post traumatic stress disorder may amount to a disability within the meaning of the Code. However, the onus on a person claiming a disability is to prove it. There was some evidence that the applicant was addicted to alcohol and some medically prescribed drugs. There was also some evidence that the applicant was suffering from post traumatic stress disorder. However, there was no evidence that any of those conditions rendered him unable to perform any aspect of his job description. Indeed, quite the opposite was claimed. In submitting through his counsel that the appropriate penalty was simply a demotion, the applicant took the position that he was able to perform and carry out his essential employment duties.
>
> Submissions of counsel are not evidence. Closing submissions inviting the Hearing Officer to consider an issue for which there is no supporting evidence are simply submissions. There was no evidence that the applicant was disabled. In those circumstances, the Hearing Officer had no obligation to consider a duty on the Ottawa Police Service to accommodate the applicant.[152]

13.7 In an RCMP case, the Federal Court allowed an application for judicial review of an appeal decision made by the RCMP Commissioner, on the basis that expert evidence had been improperly rejected. The expert had testified that there had been a causal link between stress and the misconduct in question, and that the employer bore an element of responsibility for the stress.[153]

13.8 The challenging nature of this issue is illustrated in *Toronto Police Service* v *Kelly*,[154] in which a police officer with an "impeccable" employment history spent several years in the drug section, during which he experienced various significant personal and professional traumas. Those events combined with his "intense" workload (including undercover work in significant investigations) resulted in him suffering from depression and PTSD. He began to associate with his undercover *persona*, use cocaine and associate with a person experiencing similar substance abuse problems. They shared cocaine, and the police officer twice bought small amounts for them to share. He was ultimately arrested, pled guilty to two counts of possessing cocaine and received a suspended sentence. At the time, the employer did not have

a program to assist undercover officers with job-related stress or substance abuse. After his arrest, the respondent readily admitted to cocaine abuse, and voluntarily entered into a rehabilitation facility. After successfully completing the initial inpatient program, he voluntarily enrolled in an aftercare program, obtained extensive treatment from psychologists and psychiatrists, and abstained from drug use. Medical evidence demonstrated that his behaviour was "secondary to undercover work", and that he had a low likelihood of reoffending.

13.9 The police officer pled guilty to two misconduct allegations. The presiding officer rejected the joint penalty submission (which provided that the respondent would remain a police officer, subject to 13 conditions, and breach of any of the conditions would result in an allegation of insubordination, with the employer seeking termination), and dismissed the respondent. The Ontario Divisional Court upheld a tribunal decision ordering reinstatement based upon the terms of the joint penalty submission, and confirmed that a presiding officer must consider the employer's duty to a disabled officer in crafting the appropriate conduct measure.[155]

13.10 *Kelly* contrasts with the approach in *Lévis (City)* v *Fraternité des policiers de Lévis*,[156] in which the Supreme Court of Canada considered the role of disability in the police discipline process. At issue was s. 119 of the Quebec *Police Act*, which provides that a police officer found guilty of certain criminal offences must be automatically dismissed, "unless the police officer ... shows that specific circumstances justify another sanction". The Supreme Court of Canada examined the ambit of "special circumstances"in a case involving the respondent police officer pleading guilty to six criminal charges relating to assault and death threats against his spouse, unsafe storage of firearms and breach of an undertaking not to approach his former spouse. The matters related to the respondent police officer's family difficulties, which had since resolved. Alcohol abuse also played a role, and he had obtained treatment. Finally, he had experienced psychological problems at the time. The Supreme Court of Canada ruled that the facts did not meet the requirement of "special circumstances", and upheld the police officer's dismissal:

> 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 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 ...[157]

13.11 One further example, lest anyone doubt the complexity of disability as a proportionality consideration: *Hall* v *Ottawa Police Service*,[158] in which a police officer, while off duty, engaged in a course of conduct lasting almost one year, involving the use of crack cocaine that he acquired on and off duty from suspects he investigated, bought from traffickers on and off duty and stole from drug exhibit envelopes. The tribunal ruled that addiction to cocaine is a

disability under the *Human Rights Code* and must be accommodated to the point of undue hardship. However, the duty to accommodate is "not bottomless or a licence to breach statutory duties". In the circumstances, it was open to the hearing officer to conclude that accommodation would cause undue hardship.[159]

13.12 All persons involving Part IV matters would do well to have knowledge of these leading judgments, access to new judgments as courts render them, and ready access to the assistance of senior counsel with deep experience in the police complaint and discipline process.

14. Proportionality Factor #5 – Provocation

14.1 Provocation is a recognized but rarely-used disposition factor after a finding of police disciplinary misconduct (in contrast to the criminal law principle of provocation, which constitutes a formal defence that, if successful, would bar a conviction).[160]

14.2 The judgment of the Ontario Court of Appeal in *Favretto* v *Ontario Provincial Police Commissioner*[161] remains the leading source of judicial guidance, confirming that provocation will attract mitigation in appropriate circumstances. The Court of Appeal restored a tribunal decision in a case where the respondent police officer pointed his gun at another police officer who engaged in horseplay by holding his baton "as one would a sword in a fencing match" and waving it around in the vicinity of the respondent's head. The tribunal allowed an appeal against a penalty of dismissal based primarily on three disposition considerations, one of which was provocation: given the workplace environment, the hearing officer failed to give provocation proper weight, and this factor was "significant and compelling when the penalty of dismissal is being reviewed".[162]

15. Proportionality Factor #6 – Denial of Procedural Fairness

15.1 Denial of procedural fairness is a recognized but also rarely-used disposition factor after a finding of police disciplinary misconduct, perhaps requiring "the clearest of grounds".[163] The leading source of judicial guidance may be a court judgment involving another regulated profession, which concluded that procedural fairness considerations can mitigate penalty. The procedural fairness issue in that case involved delay, and was sufficient to reduce penalty in that decision, given the presumptive penalty for a finding of misconduct against a lawyer for mortgage fraud.[164]

16. Proportionality Factor #7 – Employment History

16.1 Employment history represents an important disposition factor in all cases, and closely relates to the disposition consideration of rehabilitation potential.

16.2 We offer the following preliminary statements concerning the state of the law:

1. Presence of misconduct or lack of misconduct over long service is not the only source of guidance: employment history means a respondent police officer's "entire employment record". In other words, the tribunal should consider the "totality of conduct", including performance assessments, awards, letters of commendation or appreciation, community service and warnings.[165]

2. The conduct authority (or conduct board) at first instance would be in the best position to assess the quality of the respondent police officer's employment history, and its weight as a mitigating or aggravating factor.[166]

3. Employment history will aggravate a conduct measure in cases that involve a recent finding of misconduct[167] or a number of similar findings of misconduct, or a history of serious misconduct.

4. Not every previous incident of misconduct carries equal weight: as some acts of misconduct are comparatively less serious, some findings of misconduct will necessarily carry minimal weight.

5. Although the jurisprudence is not settled on the issue of whether older findings of misconduct carry a diminished role in assessing employment history, the Federal Court has ruled that the RCMP Commissioner "could reasonably consider someone's disciplinary record regardless of when the offence occurred".[168]

6. A significant period[169] of employment unblemished by misconduct constitutes a strong mitigating factor.[170]

7. A significant period of employment unblemished by misconduct will further increase mitigation if also characterized by descriptors such as "valued", "very favorable", "commendable", "impressive", "dedicated", "exemplary", "stellar" or "impeccable".[171]

8. A tribunal will sometimes combine the penalty factor of "employment history" with the factor of "seriousness of the misconduct", and conclude that the out-of-character misconduct was a "momentary lapse", further increasing mitigation.

9. In some cases, however, even an exemplary employment record may have limited or nonexistent effect as a mitigating factor:

> In a system of progressive discipline, an employer applies increasingly serious sanctions to employee misconduct in an effort to correct the employee's behaviour. Nevertheless, even in such a system, the particular misconduct of an employee may be so serious that dismissal is warranted, despite the absence of prior warnings or disciplinary action.[172]

10. The Alberta Court of Appeal has likewise concluded that, even absent a history of lesser penalties, "dismissal may sometimes be appropriate even for a 'first infraction'".[173]

11. One further point to place emphasis on the sometimes-overlooked need for decision-makers to have knowledge of technical principles: When a tribunal applies "progressive discipline", it commits an error by considering a disciplinary matter that occurs subsequent to the date of the original misconduct and is adjudicated before that original misconduct is adjudicated. In other words, the hearing officer must not increase the penalty on the original misconduct on the basis that it represents a second offence. However, a tribunal may examine findings of misconduct occurring subsequent to the original misconduct in the context of assessing the ability to reform or rehabilitate as a disposition consideration.[174]

16.3 Some jurisdictions have observed that progressive discipline is often ill-suited to the police complaint and discipline process:

> Some discussion was directed at the normal common law test on whether misconduct by an employee justifies dismissal. In general terms the test is that the conduct of the employee must be so egregious that it amounts to a breakdown in the continuing relationship between the employer and the employee. Often dismissal is not seen as appropriate for a single incident, and is only justified after progressive discipline. Those tests, at least as they are developed in the case law on wrongful dismissal, are not helpful in this context. As has been observed many times, service on a police force is not an ordinary type of employment. Apart altogether from the extraordinary powers that police officers are given, their continuing service is governed by a public disciplinary regime, set out in the *Police Act*, RSA 2000, c. P-17 and the Police Service Regulation. Police officers are, in many respects, subject to different standards of conduct, and a higher level of workplace discipline than ordinary employees. This is not a situation where the [employer] was terminating a contractual relationship with an employee. The respondent was being subjected to public discipline for misconduct, which engages the public interest and public law, not just a private contractual relationship ...[175]

17. Proportionality Factor #8 – Potential to Reform or Rehabilitate

17.1 This consideration speaks to the issue of likelihood of recurrence, and is closely connected with remorse and employment history. Potential to rehabilitate is also closely connected to the remedial philosophy of the police complaint and discipline process.[176] A decision-maker should examine rehabilitation as a disposition consideration in all matters.

17.2 In addition to the "potential" or the "ability" to rehabilitate, some decisions have examined *actual* rehabilitation: "the respondent's conduct since the incident", whether favourable or otherwise, including the fact that no allegations of misconduct have arisen since the matter in question.[177]

17.3 The most important principles governing the potential to rehabilitate:

1. Because no penalty factor is paramount,[178] potential or even actual rehabilitation is not determinative.[179]

2. A respondent police officer may provide testimony or a personal letter to the tribunal (testimony is more persuasive, because witnesses can be cross-examined),[180] or bring medical evidence, to demonstrate character evidence and likelihood of rehabilitation.[181] A decision-maker may consider evidence of the respondent's "reputation in the force" from evidence of supervisors and colleagues who support (or do not support) the respondent's return to the workplace. Some decisions have also examined whether the community supports the police officer's return to the workplace.[182]

3. The Ontario Court of Appeal, in a case involving a self-governing profession, appears to have limited the utility of a respondent's reputation for honesty and integrity supported by letters from colleagues and clients, labelling such mitigating circumstances "quite generic". As to "supportive reference letters", the court relied on other cases in the lawyer-regulation process: such mitigating circumstances, while relevant, do not touch "the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness".[183]

4. Where supervisors do not support a respondent's return to the workplace, "unproven allegations of loss of confidence" will be problematic. In a judgment under the *Royal Canadian Mounted Police Act*, a respondent police officer challenged the reliance placed (as an "important" aggravating factor) on the finding that he had lost his commanding officer's confidence.[184] The member suffered prejudice both because "there was no evidence of loss of confidence", and because he was denied "any opportunity to confront the basis for such loss". The court concluded that it should quash the decision because the inability to confront the claim of loss of confidence was legally unfair. Another case under the *Royal Canadian Mounted Police Act* had the same result.[185]

5. A decision-maker is not bound by a court decision in parallel criminal proceedings to impose a sentence that would not preclude the respondent's "continued employment as a police officer." One court judgment has rejected the argument that this aspect of the criminal sentencing decision "must be given some regard", and be "taken into account" in arriving at a proper disposition in the discipline decision, concluding that not only was the presiding officer entitled to take a fresh look at the criminal conduct, "he was required to do so; that was the essence of his task".[186]

6. A police officer whose misconduct was "clearly out of character" will have a higher potential to rehabilitate,[187] especially with the intervention of formal treatment in response to a medical condition.[188]

7. Misconduct in question occurring within a reasonably short time after other findings of misconduct "calls into question" a respondent police officer's ability to rehabilitate.[189]

8. In some cases, especially involving a "fundamental character flaw"[190] or a similar level of concern, the potential for rehabilitation is considerably reduced: "there may well be singular acts of misconduct that strike to the heart of the employment relationship and effectively exhaust an individual's potential usefulness to perform the key duties of a police officer. Such singular acts may raise obvious concerns with respect to character".[191]

9. Some court judgments have assessed the ability to rehabilitate by examining whether as a result of the misconduct, the police officer will be able to testify in court.[192]

10. Untruthful evidence by a respondent at a discipline hearing, or at related criminal proceedings, will ordinarily aggravate a disposition. Where police officers have lied, either before the hearing officer or before a court in related criminal proceedings, tribunals have often upheld dismissal. The Québec Court of Appeal has addressed this issue in the context of a respondent police officer initially criminally convicted for unauthorized use of a computer arising from various police database searches of his former spouse, and who then was dismissed in parallel discipline proceedings that survived a challenge to the Court of Appeal:

> ... the characterization of [the respondent police officer's] testimony by [the criminal court] would hardly inspire confidence in the mind of the public were [the respondent police officer] to be reinstated. The SQ disciplinary authority noted in its recommendation that the trial judge found "invraisemblable" his testimony that he was simply practising. His testimony before the arbitrator was to a completely different effect but no less exculpatory or credible: that he missed his former wife, son and former mother-in-law and accessing the CRPQ was the only way to maintain any contact with them.
>
> In such circumstances it is difficult to imagine that the public's confidence in [the respondent police officer] would not be affected, especially when it is remembered that testifying in court is among the obligations a police officer can be expected to have to perform, even if the occasions when [the respondent police officer] might be called upon to do so in the future would be few and far between. The scathing assessment of ... credibility by [the court] would make any future venture he might make into a witness box an unfruitful exercise for a prosecution service that called him as a witness when the time came for him

> to be cross-examined. His utility as a police officer would thus be significantly diminished.[193]

11. In a British Columbia example, an adjudicator made various adverse credibility findings during the hearing, painting the respondents' evidence as self-serving and unsatisfactory. He considered his credibility findings in the course of deciding penalty:

> It seems self evident that, during discipline proceedings, if an officer is not truthful when explaining his conduct, that is a matter to be taken into account when disciplinary or corrective measures are considered. That is particularly so where the untruthful testimony bears directly on the misconduct alleged.[194]

12. The approach in Ontario is inconsistent. Some decisions are similar to the British Columbia approach of considering a respondent's untruthful evidence in formulating penalty. In *Trumbley and Metropolitan Toronto Police*,[195] the hearing officer found that the respondent police officer lied under oath at the discipline hearing. The police officer argued that he could not be penalized for giving evidence in his own defence without being "charged specifically with that offence and given an opportunity to defend himself". The tribunal concluded as follows:

> There is no doubt that it is clearly improper to impose a penalty, or increase a penalty, because of the false testimony of an accused person at his own trial. Such can only be done by way of laying a charge relating to the allegedly false testimony and providing the person with an opportunity to defend. However, one of the important considerations in discipline matters is the future conduct of the employee being disciplined. In many situations the penalty of dismissal can only be justified where it is found that the employee's usefulness to the organization is lost. One of the major considerations, then, is reformation – the likelihood that the employee may continue such conduct in the future. In our view it was clearly appropriate for the presiding officer to consider the evidence of Constable Pugh on this issue of reformation or probable future conduct.

13. Other Ontario decisions have imported the criminal law principle that a trial court commits an error in principle by treating a defendant's "fabricated" evidence as an aggravating penalty factor.[196]

14. These decisions should be distinguished from those in which courts of law in related proceedings prefer the evidence of a witness over the police officer's evidence. In one case, the fact that a judge in parallel criminal proceedings accepted the evidence of the civilian victim the police officer was alleged to have assaulted over the police officer himself was "a cause for some concern, but hardly sufficient grounds to conclude that the officer's future testimony could never be credible".[197] The case law recognizes that various reasons can explain why the testimony of one witness is less credible than the testimony of another.

15. Given the principle that a respondent police officer's decision not to admit misconduct should ordinarily not aggravate penalty – a respondent should not face a more serious penalty because of a decision to exercise the legal right to make full answer and defence – a decision-maker should likewise not conclude that rehabilitation is less likely merely because a respondent did not admit misconduct.

16. In *R* v *McNeil*,[198] the Supreme Court of Canada concluded that information of misconduct by a police officer involved in a case should in two principal situations form part of the first party disclosure package provided to the Crown for its assessment of relevance in accordance with *Stinchcombe* requirements.[199] Since *McNeil*, examining the potential to rehabilitate a respondent police officer after particular findings of misconduct will involve an examination of the employer's ability to deploy the police officer in an operational setting that might require providing evidence under oath.

17. Tribunal decisions have addressed this issue, although with some divergent results. The Ontario Police Commission upheld a dismissal in circumstances in which it concluded that the respondent police officer's usefulness in the prosecution of future offences was challenged after a criminal court found him guilty of "being dishonest and breaching the public trust".[200] In another serious deceit case, however, the same tribunal concluded as follows, in revoking a dismissal and substituting a demotion:

> In varying the penalty of dismissal, we recognize that the appellant, like any other officer convicted of deceit, or any other type of misconduct, would be the subject of a McNeil report every time he is called to testify in court. He will be subject to cross-examination on his disciplinary record. However, in this case we do not see that as a basis for the dismissal.[201]

18. The Alberta Court of Appeal has concluded that "there was a risk to the administration of law in retaining a police officer who has lied under oath":

> Whether his credibility could successfully be attacked in this way would, no doubt, depend on the nature of the evidence he gave and upon whether any of it was contentious. In our view however, it was not unreasonable for the Presiding Officer to consider the potential that the EPS would be hindered in providing effective policing if one of its officers could be successfully challenged when testifying, based on a prior finding that he had lied under oath. The fact that this was a possibility and not a given, does not make negligible the risk of it arising.[202]

18. Proportionality Factor #9 – Effect on Police Officer and Police Officer's Family

18.1 Some uncertainty surrounds the effect of the conduct measure on a respondent police officer (and, perhaps, the respondent's family).

18.2 In some jurisdictions, the law requires a decision-maker to consider this factor. British Columbia legislation now specifically identifies "the impact of proposed disciplinary or corrective measures on the member and on her or his family and career" as a factor in determining "just and appropriate disciplinary or corrective measures".[203] A few Ontario decisions have also considered this factor, with some decisions examining not only the disposition, but the effect of the entire process, and some others requiring an "extenuating" economic or other impact for this disposition factor to be relevant.

18.3 In other jurisdictions, decision-makers have resisted the argument that the economic effect of the penalty should form part of the calculus. The Alberta Court of Appeal, considering an appeal concerning a decision by a presiding officer who refused to give it mitigating effect because of his concern that "economic hardship cannot logically mitigate against dismissal given the nature of that penalty". The Court of Appeal observed that "if it could, dismissal would never be imposed because economic hardship almost invariably follows job loss".[204]

19. Proportionality Factor #10 – Parity (Consistency of Disposition)

19.1 The starting point in examining parity: the principle that decisions of administrative tribunals – unlike judgments of courts of law – do not constitute legally-binding precedents ("*stare decisis*"). Court of Appeal judgments confirm that this principle applies in the context of the police complaint and discipline process.[205] Terms such as "sentencing precedents" are therefore discouraged.

19.2 However, *parity* – which addresses consistency of outcome – does apply despite the principle that decisions of administrative tribunals do not constitute legally-binding precedents. Court judgments continue to place reliance on parity as a proportionality consideration.[206] So, "a comparison of similar cases is an essential component when considering the appropriate penalty".[207] The leading court judgment concerning parity in the police complaint and discipline process is *Constable A* v *Edmonton Police Service*,[208] in which the Alberta Court of Appeal confirmed the principle:

> 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 ...

19.3 Parity flows from the philosophy that similar misconduct should be treated in similar fashion: "[l]ike instances of misconduct should attract like sanctions".[209] Consistency is "the earmark of fairness".[210]

19.4 The Alberta Court of Appeal has characterized the principle – "treating like cases alike where possible in light of all the relevant factors" – as "a statement of the need for a fair and predictable consistency of approach, not a rule in favour of regimented outcomes and without

the need to properly assess all the relevant factors in each case".[211] The Court of Appeal has distilled the principle of parity:

> At issue here is the application of parity – one of the fundamental normative values that must inform every just sanctioning exercise. Those who are similarly situated should be treated similarly. No system of discipline can be fair in the absence of consideration of parity. A system that accepts that sentencing is completely individualized overlooks the importance of confidence and respect in the system that is fostered by a consistent rather than an arbitrary approach to sanction. In other words, precedents matter. Previous decisions, particularly well-reasoned decisions from the same tribunal, provide important guide posts when determining the gravity of conduct and the degree of responsibility of the officer, and in ensuring that the disciplinary system is applied fairly and not arbitrarily.[212]

19.5 A court judgment in the comparable context of the regulation of self-governing professions has spoken of consistency as follows:

> If the comparison with other cases is not undertaken, there may well be such a wide variation in the result as to constitute not simply unfairness but injustice. Considerations of such a nature should have as great a significance for professional discipline bodies with the power to impose onerous penalties as they do for courts of appeal and of first instance dealing with sentences upon conviction of criminal offences.[213]

19.6 Various parity principles have evolved:

1. Consistency is not an "absolute" in the sense that particular findings of misconduct will generate a range of dispositions because other proportionality considerations vary considerably among cases, and each case must be judged on its context.

2. A decision-maker will commit an error if relying upon a dissimilar court judgment or tribunal decision, and dispositions "markedly out of line" with comparable decisions may well not survive appeal, absent adequate explanation.[214]

3. The legal reasonableness of a decision concerning conduct measures turns largely on "whether the decision falls within a range of possible, acceptable outcomes ... defensible in respect of the facts and law".[215] That "range" of possible, acceptable outcomes creates a "reasonable exercise of discretion in penalty"[216] which resists precise measure.

4. A decision-maker must consider any other conduct measures in the same matter, subject to the principle that a co-respondent's conduct measure is not decisive, since two police officers facing discipline arising from the same matter may raise different proportionality considerations.[217]

19.7 Our review of decisions revealed a considerable reliance on the principle of parity. Almost universally, conduct authorities recognized correctly that they should focus only on decisions after 2014, when the RCMP conduct measures changed in response to the statutory changes. We also observed a predictable hierarchy to the prior decisions, in which post-2014 decisions from higher levels of conduct authority were given greater weight. To that end, Conduct Boards were properly accorded the most influence, given the decision-making hierarchy.

19.8 Importantly, appeals from decisions enjoy, in many instances, the prior receipt of a "findings and recommendation" decision by the External Review Committee (ERC), the arms-length body created by the RCMP *Act* to proffer advice on the most serious misconduct allegations.[218]

19.9 We do not wish to comment on the outcome in any particular decision. However, in our view, this over-reliance on prior RCMP caselaw has created a barrier to properly aligning conduct measures with superior court jurisprudence. Even recent decisions, some with the assistance of the ERC's recommendations, continue to propagate several failings, each one citing the last in a series of self-reinforcing errors. By way of example, one oft-cited decision addressing several substantiated sexual assaults (touching of breast) and a substantiated sexual harassment (vulgar sexual gesture and vulgar subsequent language) continued the practice of diminishing the seriousness of the conduct by referring to it as "unwanted sexual touching", and failed to incorporate a meaningful analysis of public interest or damage to the reputation of the force. Its result appears to have propagated a continuing conduct measure "cap" on this type of behaviour that is regularly used to justify a conduct measure that is not dismissal or demotion.

19.10 Accordingly, conduct decision-makers must exercise caution when seeking guidance from RCMP caselaw that has not incorporated (and *applied*) a more modern proportionality analysis. As we emphasize, tribunal decisions are not binding precedents for other tribunals. This is especially so where the issue being addressed represents one of "changing social values".

19.11 A disposition that originated from a joint penalty submission may have less value when assessing parity, since joint penalty submissions involve a variety of considerations beyond the knowledge of the decision-maker.

19.12 Finally, we saw some evidence that joint submissions on penalty were being entered into in circumstances that are difficult to reconcile with the principles we discuss in more detail below.

20. Proportionality Factor #11 – Specific and General Deterrence

20.1 The law recognizes deterrence of the respondent police officer ("specific" deterrence) and of other police officers ("general" deterrence) as a legitimate objective of police discipline. The following basic statements provide the foundation for this proportionality consideration:

1. Some matters require general deterrence. The Alberta Court of Appeal agreed with a "need to send a message to other police officers that lying under oath bears dire consequences",[219] for example.

2. Some matters require no general deterrence, but do require specific deterrence.

3. Some matters do not require even specific deterrence, such as ones in which recurrence is unlikely.

21. Proportionality Factor #12 – Systemic Failure and Organizational/Institutional Context

21.1 This proportionality consideration is perhaps best articulated as the degree to which the employer's "policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct",[220] or the "organizational/institutional context".[221]

21.2 In an RCMP case, the Federal Court allowed an application for judicial review of an appeal decision made by the RCMP Commissioner, on the basis that expert evidence had been improperly rejected. The expert had testified that there had been a causal link between stress and the misconduct in question, and that the employer bore an element of responsibility for the stress.[222]

21.3 Other examples of this proportionality consideration appear in a tribunal decision which concluded that senior police managers had not adopted a consistent approach towards the issue of workplace harassment, and reduced the penalty accordingly,[223] and another tribunal decision concluding that the employer's lack of support, assistance or supervision during a complex investigation represented a mitigating consideration.[224]

21.4 Some limits exist to this proportionality consideration. A supervisor's failure to stop particular misconduct would ordinarily not attract mitigation.[225]

22. Proportionality Factor #13 – Damage to the Reputation of the Police Force

22.1 Damage to the reputation of the police force (or to the constabulary generally[226]) remains a standard disposition consideration. The External Review Committee has articulated the responsibility of a decision-maker to carefully consider this disposition factor:

> The assumption that the reputation of the police force is damaged by the misconduct of an individual police officer can be easily overstated. Seldom will the isolated misconduct of one police officer result in the loss or substantial lowering of a good police force's overall reputation. The public and others are normally intelligent enough to appreciate that the individual misconduct of one police officer ought not to be visited upon the reputation of the entire police department.[227]

22.2 It follows that a decision-maker should carefully calibrate this proportionality consideration in every case. Tribunals have interpreted "damage" to capture both reputational harm arising from the original misconduct, and harm that would occur to the reputation of the police force (or to the constabulary generally) if the respondent police officer were to remain a member.[228] An English judgment concisely articulated the principle:

> ... the importance of maintaining public confidence in and respect for the police service is constant, regardless of the nature of the gross misconduct under consideration. What may vary will be the extent to which the particular gross misconduct threatens the preservation of such confidence and respect. The more it does so, the less weight can be given to personal mitigation. Gross misconduct involving dishonesty or lack of integrity will by its very nature be a serious threat: save perhaps in wholly exceptional circumstances, the public could have no confidence in a police force which allowed a convicted fraudster to continue in service. Gross misconduct involving a lack of integrity will often also be a serious threat. But other forms of gross misconduct may also pose a serious threat, and breach of any of the Standards may be capable of causing great harm to the public's confidence in and respect for the police.[229]

22.3 In some cases, damage will be easily demonstrable. Public media coverage is an "appropriate consideration" when assessing the extent of damage to the reputation of the police force.[230] Tribunal decisions have considered matters involving media coverage of misconduct containing a corruption[231] or sexual component.[232] A decision maker may also lawfully infer public damage and damage to relationships with other agencies.[233]

22.4 Favourable testimony from community members may be relevant to the proportionality consideration of "damage to the reputation of the police force".[234]

22.5 The reputation of the police force requires that the employer be "mindful of its treatment of individuals with mental illness".[235]

23. Remaining Proportionality Factors

23.1 Effect of publicity surrounding a matter might be a proportionality consideration, but tribunal decisions across Canada are not consistent.[236] Loss resulting from unpaid interim administrative suspension might be a proportionality consideration, but there are only a very few decisions to provide guidance.[237] The novelty of a situation may also mitigate a remedy

after a finding of misconduct. "Novelty" constituted a mitigating consideration in one decision where the "entire situation was unprecedented" and raised serious legal issues.[238]

24. Concluding Remarks

24.1 We make conclusions regarding the application of the Conduct Measures Guide below, in our discussion of sex-related misconduct.

24.2 We will take this opportunity to make an observation concerning dismissal. Some decisions across the country have concluded that dismissal should be reserved for the most serious offences involving no hope for rehabilitation or significant mitigating factors, and where the police officer is of no further value to the employer or the community.[239] Some Conduct Board decisions contain similar language,[240] while other Conduct Board decisions do not.[241]

24.3 This test invites criticism, largely because it would appear to exclude dismissal in cases where a police officer demonstrates a long history of misconduct, but where the latest finding of misconduct falls short of the "most serious" disciplinary offence.

24.4 Some guidance may properly derive from comparable professional regulatory regimes. In the regulation of the legal profession, for example, disbarment "is the ultimate exercise of specific deterrence, but its greater value is in general deterrence, and its greatest value is in maintaining public confidence in the legal profession. It is not reserved for the worst cases, but may be imposed wherever the integrity of the legal profession is at stake".[242]

- *Joint Penalty Submissions*

24.5 Our review of the decisions revealed the use of joint "penalty" submissions: where the employer and the employee agree on a "penalty" and make a joint submission to a decision-maker accordingly. Such joint submissions are common in professional regulatory proceedings.

24.6 Negotiations leading to joint submissions are necessarily confidential, so the conduct decisions we reviewed predictably did not indicate details of the circumstances behind the prosecutorial decision to enter into a joint submission.

24.7 We would place emphasis on an appropriate level of transparency in cases where a decision-maker accepted a joint submission in a matter involving very serious misconduct, as we saw in many decisions. We have therefore articulated the governing principles as we understand them, and recommended that they appear in the Conduct Measures Guide, so that decision-makers have ready access to the legal principles. These principles, by definition, are very technical and do not lend themselves to one-paragraph summary.

24.8 The leading court judgment governing joint submissions is the criminal law judgment of the Supreme Court of Canada in *R* v *Anthony-Cook*.[243] The recent judgment of the Alberta Court of Appeal in *R* v *Naslund*[244] also contains an exhaustive analysis of the principles that govern joint penalty submissions. We have considered both judgments in detail.

24.9 Professional disciplinary bodies have applied the principles in *Anthony-Cook*[245] – an example of the proper importing of criminal law principles into professional discipline – so the references to "sentencing judge", "Crown" and "defence" below should be adopted for the Part IV process.

24.10 The starting point concerning joint sentence submissions:

> It is an accepted and entirely desirable practice for Crown and defence counsel to agree to a joint submission on sentence in exchange for a plea of guilty. Agreements of this nature are commonplace and vitally important to the well-being of our criminal justice system, as well as our justice system at large. Generally, such agreements are unexceptional and they are readily approved by trial judges without any difficulty.[246]

24.11 Despite the obvious benefits of joint submissions, a joint submission may appear to be "unduly lenient" or "unduly harsh", and a trial judge need not necessarily accept such joint submissions.[247]

24.12 In such cases, the Supreme Court of Canada has concluded that trial judges must use the "public interest" test to measure the "acceptability of the joint submission": they "should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest".[248]

24.13 The public interest test applies whether the sentencing judge is considering "jumping" or "undercutting" the joint submission.[249]

24.14 The public interest test applies even when the sentencing judge is considering *accepting* the joint submission:[250] a sentencing judge can accept a joint submission only "where the sentence is in the public interest".[251]

24.15 The Supreme Court of Canada has stated the following concerning rejection of joint sentence submissions:

> Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down."[252]

24.16 Whether a joint submission would be a "fit" sentence on the basis of conventional sentencing principles – and an "unduly lenient" or "unduly harsh" sentence is, at a minimum, "demonstrably unfit" – is a relevant consideration when deciding whether accepting the proposed sentence would bring the administration of justice into disrepute, or would otherwise not be in the public interest:[253] "ordinary sentencing principles are a starting point to judging the appropriateness of a joint sentencing submission"[254] ... they are necessary but not sufficient.[255]

24.17 In the case of a joint submission, however, a sentencing judge cannot make a decision on the basis of those conventional sentencing principles alone: the sentence must also be so unduly lenient or unduly harsh that it would also bring the administration of justice into disrepute or would otherwise be contrary to the public interest to agree to impose it.[256]

- *The Role of Counsel*

24.18 Counsel must inform the sentencing judge "why the proposed sentence would not bring the administration of justice into disrepute or otherwise be contrary to the public interest".[257]

24.19 The specific requirement that counsel must provide a "full account" of the joint submission is not limited to circumstances where the court expresses concerns: counsel should do so "without waiting for a specific request from the trial judge".[258]

24.20 The record in sentencing proceedings should always support the submissions because "there is also a public interest component in justifying the joint submission":

> A thorough justification of the joint submission also has an important public perception component. Unless counsel put the considerations underlying the joint submission on the record, "though justice may be done, it may not have the appearance of being done; the public may suspect, rightly or wrongly, that an impropriety has occurred" ...[259]

24.21 It is not sufficient to accept a joint submission because it was proposed by "experienced lawyers".[260] Instead of relying on the "experience of counsel" in accepting the joint submission, a sentencing judge must "probe the sentence sufficiently" to decide whether the joint submission met the *Anthony-Cook* standard.[261] A sentencing judge must reach an "independent conclusion, based upon an adequate record".[262]

24.22 Transparency requires that joint penalty principles should be entertained only as appropriate. When the evidence and considered analysis of a matter call for a serious conduct measure such as demotion or dismissal, then a joint submission for a lesser conduct measure should be discouraged.

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.

PART III – SEX-RELATED MISCONDUCT

25. Sex-Related Misconduct – Best Practices – Introduction

25.1 The Contract (page 8) describes one portion of the work that the RCMP has requested:

> • Complete a review of 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.
>
> • Complete a review and analysis of conduct measures applied in cases of established conduct related to harassment and sexual misconduct by conduct authorities and Conduct Boards (see below definition).

25.2 That "review and analysis" of sex-related misconduct sits on the foundation of the previous discussion – Part II of this report – of general best practices in crafting an appropriate conduct measure, following a finding of misconduct, with its emphasis on the five foundational principles.

25.3 As noted, we reviewed all 250 sex-related misconduct decisions from 2014 to present, involving all three levels of conduct authority as well as conduct boards, and the conduct adjudicator (in an appeal function).

25.4 We did see some improvement (from 2014 - present) in the acknowledgment of the gravity of this behaviour and the application of increasingly serious measures. However, there remained an unexplained reluctance to dismiss or even demote, and over-reliance placed on transfers and forfeited pay.

25.5 Recurring flaws appear in the decisions. As discussed, one flaw involves the failure to thoroughly assess (or sometimes even discuss) the first proportionality consideration – "public interest" – which ss. 36.2(b) and (c) of the *Act* expressly articulate as among the purposes of Part IV.[263] That "public interest" proportionality consideration engages the principle that a higher conduct-expectation applies in the police workplace, which s. 36.2 also expresses. In findings of misconduct involving sexual harassment, for example, "public interest" will be

a highly aggravating proportionality consideration, even before the sexual harassment reaches the most serious end of the spectrum. Sexual harassment remains a persistent problem in workplaces generally, including the RCMP workplace, and the *Final Report* of the Hon. Michel Bastarache is evidence enough that decision makers must thoroughly assess "public interest" as a proportionality consideration in findings of misconduct involving sexual harassment (and other forms of sex-related conduct also).

Recommendation 4:

In matters involving sexual harassment, and all forms of sex-related misconduct, RCMP decision-makers should employ appropriate analysis and emphasis on the consideration of "public interest".

25.6 In preparing Part III of our report, we have considered, as "best practices", the collection of principles from superior court judgments involving sex-related misconduct in workplaces generally, not only the police workplace, because sex-related misconduct is generic, and not specific to policing.

25.7 Assessing best practices therefore involves examining the different legal processes used in other workplaces: the grievance arbitration process in unionized workplaces, the common law wrongful dismissal (breach of contract) process, and perhaps the process in the various self-governing professions. Again, we face the challenge that court judgments among jurisdictions (sometimes even *within* a jurisdiction) are never entirely consistent. Nonetheless, much can be extracted from the commonalities among these various processes and among jurisdictions across Canada to reliably support recommendations.

25.8 Examining how the superior courts of justice treat sex-related misconduct that originate in those various processes outside the police workplace constitutes the equivalent of a baseline: the standard in the police can be no less, given the expectation of a higher conduct standard discussed earlier in this report.

25.9 One question the RCMP has asked involves *consistency* of conduct measures. The short answer is that we did see what we thought was some level of inconsistency in decisions involving sex-related misconduct, but we did not feel able to reach definitive conclusions, given the comparatively short period of time since the new regime (end of 2014), and other considerations such as the rotation of conduct authorities. In our opinion, however, the test is not consistency among RCMP divisions, but consistency with all workplaces generally, given the expectation of higher conduct from the Supreme Court of Canada and courts of appeal.

25.10 We also considered decisions of human rights tribunals, and have placed particular emphasis on one recent decision of the Human Rights Tribunal of Ontario, *McWilliam* v *Toronto Police Services Board*,[264] which is likely the leading contemporary decision respecting sexual harassment in employment in the police sector.

25.11 We easily conclude that decision-makers often failed to apply measures commensurate with the seriousness of sexual misconduct, and sexual harassment in particular, measured against judgments of superior courts involving workplaces generally.

Recommendation 5:

The law governing sexual harassment should apply in the police workplace in the same way as it does in all workplaces, but combined with the expectation of a higher standard of conduct in the police, as articulated by the Supreme Court of Canada and courts of appeal. The RCMP should therefore place reliance upon judgments of superior courts concerning all workplaces, not just the police-sector, as the baseline to determine conduct measures.

25.12 Another flaw involves failure to fully apply the "mechanics" of proportionality described in Part II – "(i) *identify* the relevant proportionality considerations in the circumstances, (ii) *assess* whether each relevant proportionality consideration is *mitigating* or *aggravating* or *neutral* in the circumstances, and then (iii) appropriately *balance* (or "weigh") those various considerations" – in these cases.

25.13 Although it perhaps goes without saying, some decisions involved conduct that was extravagantly serious, often because of the extraordinary degree of harm to the particular victim. Some of these same decisions also demonstrably engaged the employer duty to provide a safe workplace, but the decisions almost invariably did not address workplace safety fully, or sometimes at all.

Recommendation 6:

Subject to the presumptive dismissal provisions in Recommendations 13, 15 and 16, in matters involving sexual harassment, and all forms of sex-related misconduct, RCMP decision-makers should fully apply the "mechanics" of proportionality described in Part II – "(i) *identify* the relevant proportionality considerations in the circumstances, (ii) *assess* whether each relevant proportionality consideration is *mitigating* or *aggravating* or *neutral* in the circumstances, and then (iii) appropriately *balance* (or "weigh") those various considerations" – and also ensure that they employ appropriate analysis and emphasis on the employer duty to provide a safe workplace.

25.14 Further, a portion of the decisions include transfer as part of the conduct measures, without recognizing or fully assessing the risk to employees in the new location. Some of these cases involve very serious misconduct, directly engaging the employer duty to provide a safe workplace. Decision makers should consider the principles (which we discuss below) from more recent superior court judgments that examine enhanced workplace safety legislation that most Canadian jurisdictions have enacted in the past half-generation.

Recommendation 7:

In any decision that involves "transfer" as a conduct measure, RCMP decision-makers should ensure that they employ appropriate analysis and emphasis on workplace safety, and fully assess the risk to employees in the new location. In particular, decision-makers should consider the current principles from superior court judgments that examine enhanced workplace safety legislation across Canada.

25.15 As noted, the RCMP has asked us to provide recommendations concerning both "achieving the consistent application of the conduct measures", and "effective ways to enhance guidance provided to conduct authorities". Apart from our recommendation that parity should mean "parity with workplaces generally", parity should also include consistency *within* the RCMP in reaching that goal, and we believe that one barrier in this regard involves the number of decision-makers who can decide matters involving sex-related misconduct and sexual harassment in particular. We believe that serious matters should be decided by a select group of decision-makers.

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.

25.16 Further, we believe that a select group of decision-makers with responsibility for serious matters should have reasonable tenure (should not quickly "rotate" to another assignment), should be highly educated in this subject-matter, and be properly funded.

25.17 Our review of the decisions provided various examples of training gaps, including one decision disagreeing that an image of male genitalia was "of a sexual nature" in the circumstances. The message that results from such decisions can only harm the RCMP and its efforts to address sexual harassment, and all forms of sex-related misconduct.

25.18 Funding is critical because of the obvious point that even the best possible process will fail if starved for funding. This issue is far too important to suffer inadequate resourcing.

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 specialized education in the principles that govern sexual harassment, and all forms of sex-related misconduct, and be properly resourced.

25.19 We believe that a select group of decision-makers with responsibility for serious matters should have highly-responsive access to highly-specialized legal advice. The police complaint and discipline process and human rights law (not just "sexual harassment") are deeply technical subspecialities, and decision-makers must have ready access to lawyers with deep experience in these two subspecialities. This consideration is critical for the obvious point that even the best possible process will fail if starved for ready access to the highest calibre of legal support.

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.

25.20 Although we did not feel able to reach definitive conclusions on the Level 3 conduct authority role, we are of the opinion that allegations of sex-related misconduct cannot 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.

25.21 Proceedings in the grievance arbitration process and wrongful dismissal litigation provide extensive opportunity for full answer and defence, given the employment risk involved. The police complaint and discipline process must provide procedural fairness for members.

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.

25.22 We turn now to a full discussion of the basis for our recommendations, beginning with a discussion of sexual harassment.

26. Sexual Harassment in Employment as a Category of Sex-Related Misconduct

> Sexual harassment or assault is intolerable. It is one of the most frightening and damaging things that one person can do to another.[265]

26.1 In this section of the report, we discuss sexual harassment as a specific component of sex-related misconduct: the prohibition against sexual harassment, its definition and how to prove it, and the very brisk evolution of the law in this area over the past generation.

26.2 Sex-related misconduct has various aspects. Our discussion begins with the perhaps-obvious statement that sexual harassment represents the largest portion of sex-related misconduct. An examination of other aspects of sex-related misconduct appears later in this Report.

26.3 The Conduct Measures Guide addresses sexual harassment as follows:

> Harassment in the RCMP has been at the forefront of a number of media reports in recent years, and the prevention, effective investigation, and successful resolution of behaviours that could be construed as harassment has become a national priority. The new Act provides for the establishment of an RCMP-specific process that will align the Treasury Board harassment policy and focuses on addressing breakdowns in workplace relations. In addition, the Code of Conduct will establish a clear expectation that members will not engage in conduct that amounts to harassment or discrimination.
>
> The severity of harassment will be dependent on a variety of factors, including, but not limited to:
>
> - frequency of the harassment;
> - harassment of a sexual nature;

- persistent harassment despite being told of the offensive nature of the conduct;
- exploitive use of position to make unwanted sexual advances; and
- effect on the complainant.

A review of the third digest demonstrates that RCMP Adjudication Boards have imposed sanctions ranging from 1-10 days in cases of harassment that have been determined to be disgraceful conduct, with an average financial penalty of 5.1 days. Harassment-related cases recorded in the fourth digest have seen an increase in the frequency of such types of misconduct, leading in turn to the creation of a higher range varying from 5-10 days, with an average of 8.4 days. OPCC data revealed a handful of harassment cases ranging from 2-5 days.

Considering the intense public scrutiny, the negative effect on employee morale and wellbeing, and the apparent increase in reported cases, a broader range of measures should be available for cases of workplace harassment that are deemed sufficiently serious to warrant conduct measures.

For clear cases of harassment that involve relatively frequent incidents, provoked the need to make administrative adjustments of the detachment/unit, impacted morale, or was repeated, a normal range of measures from 11-20 days is suggested.

Where the member's conduct was relatively isolated in nature, had little effect on the unit morale, and did not pertain to sexual harassment or racially insensitive content, a mitigated range of remedial measures to 10 days is recommended.

Where the harassment is persistent in the face of warnings or repeated requests to desist, where it involves pressuring an employee towards an intimate relationship, or where harassment is based on ethnic origin, sexual orientation, or cultural backgrounds, an aggravated range of 20 days to dismissal should be imposed.

Sexual harassment should be treated as a particularly serious form of harassment that will not be tolerated in the RCMP workplace. Any employee found to have engaged in sexual harassment should expect to face harsh conduct measures. Unless significant mitigation can be found in the fact pattern of the case, an instance of sexual harassment would justify measures in the aggravated range.[266]

26.4 Thirty years ago, in the landmark judgment of the Supreme Court of Canada in *Janzen* v *Platy Enterprises Ltd*,[267] Chief Justice Dickson articulated this definition of sexual harassment in employment:

> ... sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is [...] an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands,

> sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

26.5 The definition of harassment has evolved since *Janzen*. The *Canada Labour Code*[268] defines "harassment and violence" in s. 122 as "any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment". For comparison purposes, s. 10(1) of the Ontario *Human Rights Code*[269] defines "harassment" as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".

26.6 Despite some variation in the definition of sexual harassment among jurisdictions and over time, every Canadian jurisdiction prohibits sexual harassment in employment through a variety of statutes, beginning with human rights legislation.[270] Most police legislation also specifically provides that this behaviour constitutes misconduct,[271] and workplace safety legislation[272] has become increasingly prominent.

26.7 Despite any variation in the definition of sexual harassment, no doubt remains concerning its gravity. In *Professional Institute of the Public Service of Canada* v *Communications, Energy and Paperworkers' Union of Canada, Local 3011*,[273] the Ontario Divisional Court relied upon a 2001 arbitration decision:

> ... sexual harassment falls within the same category of serious misconduct as theft, and that discharge is *prima facie* the appropriate penalty even in the case of a first offence. This does not mean that discharge will necessarily be appropriate in every case, but the onus is on the Union and the grievor to demonstrate that it is appropriate to mitigate the penalty in a particular case.

26.8 As noted, in the police sector, the recent decision of the Human Rights Tribunal of Ontario in *McWilliam* v *Toronto Police Services Board*[274] is likely the leading decision respecting sexual harassment in employment, and it conveniently summarizes the principles that govern proof of sexual harassment in employment for the purposes of human rights legislation:

> ... an applicant must establish four conditions. First, the applicant must establish that the individual respondent was her employer, her employer's agent, or another employee. This condition is satisfied as the individual respondent was the applicant's work supervisor.
>
> Second, the applicant must establish that the individual respondent engaged in a course of vexatious comment or conduct towards her that was known or ought to be known to be unwelcome. The case law has found that one incident may amount to a course of vexatious conduct if it is sufficiently egregious. [...] [A]n incident of sexual assault such as a forced kiss is sufficiently egregious to amount to a course of vexatious conduct that ought to be known to be unwelcome. This finding of harassment is only reinforced by the addition of the other comments and actions ...

> Third, the harassment must have occurred in the "workplace", broadly defined. The courts have made clear that this may include after-work hours and it may include incidents that occurred outside the physical confines of a business. [...] [T]he gathering of work colleagues and supervisors at the bar after work in this case falls within the scope of the workplace and the comments made out in the evidence all occurred within the workplace as it is traditionally understood.
>
> Finally, the harassment must have occurred because of the applicant's sex.[275]

26.9 This broad definition of "workplace" in *McWilliam* – "may include after-work hours and it may include incidents that occurred outside the physical confines of a business" – accords with the treatment of sexual harassment in other legal processes, such as wrongful dismissal litigation. The Ontario Court of Appeal summarized the principles 20 years ago:

> It would be artificial and contrary to the purpose of controlling sexual harassment in the workplace to say that after-work interaction between a supervisor and other employees cannot constitute the workplace for the purpose of the application of the law regarding employment-related sexual harassment. The determination of whether, in any particular case, activity that occurs after hours or outside the confines of the business establishment can be the subject of complaint will be a question of fact.[276]

26.10 Further, the adjudicator in *McWilliam* concluded that the comments and conduct rose to the level of a "poisoned work environment". The tribunal summarized the principles:

> A poisoned work environment can be created in two circumstances: (i) if there has been a particularly egregious stand-alone incident or comment, or (ii) if there has been serious wrongful behaviour sufficient to create a hostile or intolerable environment that is persistent and repeated. [...] The perspective to be adopted in assessing whether a poisoned work environment was created is that of an "objective reasonable bystander". In determining whether or not a poisoned work environment exists, relevant factors include: the number of comments or incidents; their nature; their seriousness; and whether taken together, it had become a condition of the applicant's employment that she or he must endure discriminatory conduct and comments ...
>
> ... allegations of sexual harassment and poisoned work environment must be examined in context and not considered in isolation. The reason for this is that a comment or action that may not seem inappropriate on its own may become so when considered in the context of a series of comments and actions. I agree with the respondents that some of the comments above may not have been inappropriate if made in isolation. However, when considered collectively, they rise to the level of a poisoned work environment.

26.11 The adjudicator in *McWilliam* concluded as follows:

> ... the comments and conduct that the applicant has established on a balance of probabilities meet the test for a poisoned work environment in that they amounted to (i) serious wrongful behaviour sufficient to create a hostile or intolerable environment,

> and they were (ii) persistent and repeated such that they became a condition of her employment.
>
> The comments and conduct [...] amount to serious wrongful behaviour sufficient to create a hostile or intolerable environment for a number of reasons. First, almost all of the comments and conduct were made or carried out by the applicant's supervisors – that is, sergeants or staff sergeants who held a significant degree of power over the applicant and her career prospects. These were also individuals to whom she was expected to report incidents of harassment under the Board's policy on human rights.
>
> Second, even if many of the comments or actions were made jokingly, they were serious in that they were vexatious and unwelcome, often sexual in nature, about the applicant, her appearance, her sexuality and her personal life. They also included commentary in the nature of sexual advances and a sexual assault in the form of a forced kiss. Taken together, these comments and actions delivered a message to the applicant that, as a woman, she was seen as a sexual object or an object of personal interest by many of her male supervisors. This put her in a position of having to engage in various coping practices such as deflecting the comments or playing along for fear of suffering consequences due to the degree of power her sergeants and staff sergeants held over her. Third, additional supervisors and colleagues condoned or minimized the conduct by laughing along, joking about the conduct, and ignoring or failing to address the conduct. That said, there were also instances where supervisors were responsive to the applicant's concerns. For example, Sgt. Payton did remove the photos of the applicant that he had been using as wallpaper on his computer when she told him to take it down. Likewise, PC Skolly did take down the bikini photo after the applicant asked her to do so. Det. Sedore also took appropriate steps to assist the applicant after the spanking comment made by SSgt Nolan. Nevertheless, due to the number of harassing comments and actions described above, I find that there is sufficient evidence to find that it had become a condition of employment to endure such comments and conduct.[277]

26.12 For emphasis: the law places an important distinction between *consensual* conduct – where a person formally consents – and *unwelcome* conduct.

26.13 Twenty years ago, in the leading judgment in *Simpson* v *Consumers' Assn of Canada*,[278] the Ontario Court of Appeal stated that accepting that an employee did consent to a supervisor's conduct "does not answer the issue of whether that conduct was nevertheless unwelcome, and whether, in any event, it was acceptable conduct by the executive director of a small, public organization, when viewed in the context of all of the other conduct". The Court of Appeal added the following:

> Mr. Simpson may well have viewed all of his conduct as consensual and therefore as welcome. [...] Because of the power imbalance in an employee's relationship with a supervisor, and the perceived consequences to objecting to a supervisor's behaviour, particularly when the behaviour is not directed specifically at that employee (for example, making comments to or touching another employee, being nude in front of

> a group of people), an employee may go along with the conduct. In those circumstances, the employee will be effectively consenting to unwelcome conduct because she feels constrained from objecting.[279]

26.14 Some of the decisions we reviewed involved sexual assaults in circumstances involving intoxication. The distinction between consensual conduct and unwelcome conduct becomes more acute in circumstances involving intoxication. The British Columbia Supreme Court stated as follows:

> Even if the plaintiff thought that M was a willing participant, that would not preclude a finding of sexual harassment. [The plaintiff's] behaviour in fondling a female subordinate who he knew to be highly intoxicated constituted an abuse of power. In these circumstances, it would be no answer for him to contend that he thought M welcomed his attentions."[280]

26.15 Even without considerations such as power imbalance or intoxication, courts of law have concluded that, in the particular circumstances, a person ought to have known that the conduct was unwelcome.[281]

26.16 Fifteen years ago, in *Foerderer* v *Nova Chemicals Corporation*,[282] the Alberta Court of Queen's Bench stated the following:

> The Complainant could have done a better job of setting boundaries by putting her foot down with her teammates at the outset and keeping it firmly planted thereafter. She did not do so, but that does not mean that she welcomed the sexual conduct, nor does it serve to minimize the seriousness of the Plaintiff's misconduct, as he suggests. Similarly, it does not alter Nova's behavioural expectations.
>
> Much was made by the Plaintiff of the Complainant's conduct in an effort to set the "culture" or context of his misconduct and to demonstrate that she welcomed his behaviour. The Plaintiff's former colleagues commented on the Complainant's beauty, her attire (spandex workout wear worn to the gym, and a tight t-shirt), her seductiveness ("she cast a rod like a fly fisher to see what she could reel in"), and her 'unladylike' behaviour (swearing). Along with the Plaintiff, they each spoke of her telling a crude joke, participating in the Survey Game on one or two occasions, displaying images of nude men twice, and gifting the Playboy magazine.
>
> The Complainant had a number of options for dealing with the sexual conduct, including speaking or acting out against it, ignoring it, or playing along with it. Mainly, she chose to put up with it unless it was directed at her and, to a degree, she played along with it. She tried embarrassing the men, giving them a dose of their own medicine, by displaying a graphic image of a nude male. In hindsight, her choices were not the wisest but, given her youth, inexperience, and position in the team's hierarchy, they are understandable. Her response must be viewed contextually in ascertaining whether she welcomed the sexual conduct and in assessing the impact of her actions on the Plaintiff's misbehavior.

> There are many reasons why a victim of sexual harassment may not speak out or deliver a clear and consistent message that sexually charged conduct is unwelcome, particularly if the victim is vulnerable to the harasser.
> ...
> The Plaintiff did nothing to verify his perception that the Complainant welcomed the sexual conduct. He presumed that was the case, relying on her acquiescence and occasional participation in the sexual conduct as indicators of her state of mind. Presumptions that a co-worker enjoys sexual behaviour have no place in modern society or workplaces. It is incumbent on those initiating or participating in the conduct to ensure that it is welcomed by those targeted or other participants. Where mixed signals are given, red flags should go up.
>
> Even if the Plaintiff did not have a positive obligation to ensure that his conduct was welcomed, which I find he did, he ought to have known from the Complainant's rebukes that, at a minimum, he needed to broach the topic with her. Instead, he chose to ignore her messages: the Complainant no longer bringing bananas or yogurt to work; her saying "that's disgusting," "that's gross," and "whatever," in response to the sexual conduct; her telling him to "fuck off and leave me alone;" and "can't you ever say anything nice to me;" or her leaving the dining room in disgust after the lemon comment.
> ...
> The Plaintiff in the present case had a positive obligation to ensure that his conduct was welcome. He failed to do so. He relied on faulty presumptions based on outdated and stereotypical views. He failed to draw on his significant training in interpersonal skills and diversity considerations. He failed to consider the Complainant's rebukes. He used the Complainant as an easy target for sexual and gender oriented jokes to curry favour with his male colleagues, all the while abusing his power as a senior team member and team leader. His conduct detrimentally affected the Complainant's work environment.
>
> This is not a case of insidious sexual harassment. It was overt. It was so pervasive that some of the team members accepted it as normal. For a time, the Complainant too seemed to be convinced that this was to be expected if she worked in a field dominated by men. The Plaintiff's actions affected the Complainant's dignity and self-respect as an employee and as a human being.

26.17 We offer the following preliminary remarks concerning the *evolution* of relevant legal principles, and related considerations:

1. Sexual harassment has become very prominent very quickly in workplaces generally, including in the police sector. Lawyers practicing employment law spend disproportionate time on the trifecta of "respectful workplace" issues: discrimination, harassment and bullying. Lawyers who practice in the subspecialty of police law will be no different.

2. The speed with which the legal principles have evolved is noteworthy. Superior court judgments in recent years are, generally speaking, distinctly different from those of one generation ago.

3. In a recent judgment involving criminal law, the Supreme Court of Canada reconfirmed the established principle that one proper role of courts of appeal involves setting a new direction in the law when appropriate: "bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders", as societal and judicial knowledge and attitudes change.[283] (This judgment addressed the gravity of the "new" crime of wholesale fentanyl trafficking.)

4. That same principle applies in non-criminal cases. As to sexual harassment, much has evolved since the Supreme Court of Canada rendered its judgment in *Janzen* v *Platy Enterprises Ltd* more than a generation ago. Judicial acceptance that sexual harassment constitutes workplace misconduct has been "well accepted" since the 1980s, "after substantial academic commentary and dogged advocacy by those seeking to advance equality of employment opportunities including ... trade unions".[284]

5. Evidence of evolving public expectations over the past generation, both in police workplaces and non-police workplaces, appears in consistent, explicit confirmation in court judgments and tribunal decisions that "there is no place for sexual harassment".[285]

6. Two judgments of the Ontario Court of Appeal rendered on the same day in 1998 were prominent contributions to the case law, particularly concerning the important role of supervisors.[286]

7. The recent majority judgment of the Alberta Court of Appeal in *Calgary (City)* v *CUPE Local 37*[287] ("*Calgary* v *CUPE*") has become a leading contemporary court of appeal judgment that has identified the recent evolution of principles governing workplace response to sex-related misconduct. The judgment concludes as follows:

> Where sexual harassment was once primarily an issue of discrimination, its harms are now better understood and related areas of the law have evolved to ensure all employees are provided with safe and respectful workplaces:
>
> > [T]he harassing comments or conduct is unwanted, often coercive, humiliating or offensive sexual or gender-based behaviour, whether physical or verbal, directed by one or more person (the perpetrator(s)) towards a targeted person(s), that is in violation of the targeted person(s)' human rights, occupational health and safety protections, common law entitlements and/or other applicable statutory rights.[288]

8. *Calgary* v *CUPE* speaks to the "bringing the law into harmony with a new societal understanding" principle:

> Employers and unions have struggled for decades to rid workplaces of sexual harassment and sexual assault through education, training and progressive discipline. The Supreme Court of Canada has recently acknowledged that the hard-fought battle to stop sexual assault in the workplace remains ongoing: *R* v *Goldfinch*, 2019 SCC 38 at para 37.
>
> ...
>
> [S]ocial context informs the application of arbitral precedent. Arbitrators must consider whether time and changing social values reveal precedents to be based on faulty assumptions about acceptable sexual conduct in the workplace.
>
> ...
>
> A finding that sexual assault is serious misconduct is consistent with the growing concerns for safety and respect in the workplace and other policies and legislation whose goal it is to protect vulnerable groups, and it will assist employers and unions in fighting against the prevalence and damaging effect of this intolerable conduct. There is absolutely no place in the workplace for touching, rubbing, forced kissing, fondling or any other physical contact of a sexual nature where one party does not consent. It is objectively clear that sexual assault is wrong and acknowledging that sexual assault is serious misconduct sends a strong message to all employees about societal values and acceptable workplace behaviour.[289]

9. Part of "bringing the law into harmony with a new societal understanding" involves fully addressing LGBTQ+ interests.

10. One part of the "changing social values" and the "growing concerns for safety and respect in the workplace and other policies and legislation whose goal it is to protect vulnerable groups", to which the Court of Appeal in *Calgary* v *CUPE* referred, involves comparatively recent legislative amendments requiring employers to provide a safe workplace. We discuss this issue in detail, below.

11. Court judgments and tribunal decisions (and scholars) have attempted to articulate a set of workable "categories" when examining the appropriate response to sexual harassment. Given the rapid evolution of the law in this area, there is room to argue that these categories no longer have utility, and a different approach should apply. We agree, and discuss this issue in detail, immediately below.

26.18 The exercise of examining the spectrum of sexual harassment must therefore recognize the principle that standards and public expectations evolve over time (and dispositions will evolve accordingly).[290] As discussed, relying upon an approach acceptable even one generation ago (or less) involves risk, given the extent to which – and the *speed* with which – public expectations have evolved in the last generation (~25 years).

- *"Categories" of Sexual Harassment*

26.19 Regarding "sexual harassment", legal advice once placed enormous reliance on the distraction of particular "categories" of sexual harassment. The Alberta Court of Appeal has recently cautioned against the use of the categories of "sexual coercion" and "sexual annoyance" from Aggarwal and Gupta, *Sexual Harassment in the Workplace*:[291]

> According to these definitions, sexual coercion is sexual harassment that results in some direct consequences to the worker's employment status or some gain or loss of tangible job benefits. Sexual annoyance is sexually related conduct that is hostile, intimidating or offensive to the employee but nonetheless has no direct link to any tangible job benefit or harm. Rather, this annoying conduct creates a bothersome work environment and effectively makes the worker's willingness to endure that environment a term or condition of employment. Sexual annoyance includes two subgroups: persistent requests for sexual favours that are persistently refused, and all other conduct of a sexual nature that demeans or humiliates the person, creating an offensive work environment. This would include sexual taunts, lewd or provocative comments and gestures and sexually offensive physical contact.
> ...
> The excerpt from Professor Aggarwal's textbook has been frequently cited in the awards as establishing a spectrum of sexual harassment with sexual coercion at the high end and sexual annoyance at the other. However, the excerpt proposes categories in an attempt to simplify certain definitions of sexual harassment in the human rights context. There is no express statement by Professor Aggarwal that the categories reflect a hierarchy of sexual harassment or value judgment about which type of conduct is worse.[292]

26.20 The majority of the Court of Appeal in *Calgary* v *CUPE* referred to other categorizations – "*quid pro quo* harassment versus poisoned or hostile environment harassment" – which "appear to turn on whether the behaviour had any link to a tangible job benefit". The Court of Appeal relied upon the judgment of Chief Justice Dickson in *Janzen* about the utility of these categorizations:

> The American courts have tended to divide sexual harassment into two categories: the "*quid pro quo*" variety in which tangible employment related benefits are made contingent upon participation in sexual activity, and conduct which creates a "hostile environment" by requiring employees to endure sexual gestures and posturing in the workplace. [...] I do not find this categorization particularly helpful. While the distinction may have been important to illustrate forcefully the range of behaviour that constitutes harassment at a time before sexual harassment was widely viewed as actionable, in my view there is no longer any need to characterize harassment as one of these forms.[293]

26.21 As the Alberta Court of Appeal has stated:

> ... whether the misconduct is sexual annoyance or sexual coercion provides little guidance to arbitrators about whether the misconduct is serious or not. Whether the misconduct has any link to a tangible job benefit is aggravating, but it is not the only type of aggravating behaviour. Continuing to rely upon these categories, which emphasize this one distinction, is inconsistent with the contextual analysis required under this part of the analysis.[294]

27. Sexual Harassment – The Employer's Enhanced Obligation to Provide a Safe Workplace

27.1 In this section, we discuss the evolution of principles governing sexual harassment in the specific context of *workplace safety*: the employer duty to provide a safe workplace.

27.2 Various court of appeal judgments have addressed the employer duty to provide a safe workplace in the context of sexual harassment. The Ontario Court of Appeal, for example, reaffirmed 25 years ago that the employer "has a duty to all the employees both to end the abuse and to alleviate its impact upon the employment environment",[295] and other courts of appeal have reached the same conclusion.[296] This point is unremarkable: this employer duty to provide a safe workplace has long existed, from the combination of common law,[297] human rights law, and other sources.

27.3 However, one aspect of the "changing social values" and the "growing concerns for safety and respect in the workplace and other policies and legislation whose goal it is to protect vulnerable groups" involves more recent amendments to workplace safety legislation across Canada to enhance and elevate protection from the harm of sexual harassment. The majority judgment of the Alberta Court of Appeal in *Calgary* v *CUPE* placed emphasis on this issue.

27.4 For the RCMP, this legislation appears in Part II of the *Canada Labour Code*,[298] which governs "Occupational Health and Safety", the prominent portions of which summarize as follows:

- s 122.1 provides that the purpose of Part II: "to prevent accidents, occurrences of harassment and violence and physical or psychological injuries and illnesses arising out of, linked with or occurring in the course of employment to which this Part applies"
- s 122(1) defines "harassment and violence" as "any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment"
- s 125(1) imposes the employer duty concerning "harassment and violence": the employer shall, "in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not

controlled by the employer, to the extent that the employer controls the activity", do the following:

> (c) except as provided for in the regulations, investigate, record and report, in accordance with the regulations, all accidents, occurrences of harassment and violence, occupational illnesses and other hazardous occurrences known to the employer;
> ...
> (z.16) take the prescribed measures to prevent and protect against harassment and violence in the work place, respond to occurrences of harassment and violence in the work place and offer support to employees affected by harassment and violence in the work place;
>
> (z.161) ensure that employees, including those who have supervisory or managerial responsibilities, receive training in the prevention of harassment and violence in the work place and are informed of their rights and obligations under this Part in relation to harassment and violence;
>
> (z.162) undergo training in the prevention of harassment and violence in the work place;
>
> (z.163) ensure that the person designated by the employer to receive complaints relating to occurrences of harassment and violence has knowledge, training and experience in issues relating to harassment and violence and has knowledge of relevant legislation ...[299]

27.5 Two instructive court judgments illustrate the role of these elevated workplace safety obligations, the first of which involved dismissal after an extended course of serious misconduct. In *Professional Institute of the Public Service of Canada* v *Communications, Energy and Paperworkers' Union of Canada, Local 3011*,[300] the employee worked as a clerk in the employer's mailroom, and a woman employed by the building's cleaning contractor complained that he entered an elevator with her and attempted to kiss her. After she pushed him away, he "grabbed her buttocks". She reported the incident, and also that he had behaved similarly for "4 [to] 5 years", despite her telling him to stop.

27.6 In quashing a grievance arbitrator's decision to reinstate the fired mailroom clerk, the Ontario Divisional Court relied upon the following excerpt from another decision:

> Nor should I disregard the likely consequences for the morale of the complainant and her co-workers, and for the Company's ability to carry out its obligations with respect to workplace violence and harassment under the *Occupational Health and Safety Act* and sexual harassment under the *Ontario Human Rights Code* [...], were I to return the grievor to the workplace notwithstanding his failure to admit to what he did and that it was wrong.[301]

27.7 The Divisional Court noted the basis upon which the arbitrator ordered the employer to reinstate the employee: (i) "another cleaner was able to get [him] to stop sexually harassing

her when she threatened him with violence by showing him her fist, and the same cleaner also testified that the Complainant was a strong woman who could stand up for herself"; and (ii) the complainant did not want the employee fired. The court judgment offered this criticism:

> Both these considerations were irrelevant and represent a dangerous step backwards in the law surrounding the treatment of sexual misconduct in the workplace. It is not the responsibility of employees to protect themselves from being sexually harassed or assaulted by being strong or threatening violence. Employees are entitled to a workplace that is free from sexual harassment, and employers have a responsibility to ensure that their employees are not exposed to this type of behaviour.[302]

27.8 In the second case upon which we rely, the Alberta Court of Appeal in *Calgary* v *CUPE* addressed the effect of the employer's duty to provide a safe workplace under Alberta's version of the relevant *Canada Labour Code* provisions, in a case involving one act of misconduct. The language of the Court of Appeal on this issue is firm in its tone, and worth reproducing here:

> The City relied upon the breakdown in trust, which was caused by the grievor's dishonesty and refusal to acknowledge and apologize for grabbing and squeezing the complainant's breast without her consent. This in turn created further concerns for the City regarding safety. The City concluded that it was not safe to return the grievor to the workplace because it could not trust him to be honest about his conduct, which, if repeated, would compromise the City's ability to provide a safe workplace for its employees.
>
> ... [T]he 2017 overhaul of Alberta's health and safety legislation resulted in a completely new piece of legislation. The introduction of provisions directed at sexual harassment and violence in the workplace speaks to the changing culture and social expectations in the workplace ...
>
> The City's duty to provide a safe work place arises both from the common law and from legislation. The duty under the [Alberta legislation] is more robust than the common law duty, and sets out specific instances where the duty is clearly owed, for example, sexual harassment [...]. Arbitral jurisprudence extends this duty to require that the employer terminate an accused employee from the workplace, if necessary, to satisfy the employer's obligations to protect its employees from sexual harassment in the workplace ...
>
> In our view, the arbitrator focused on the interests of the complainant and the grievor without adequately considering the interests of *all* employees. The evidence that the arbitrator considered to have minimized the risks of returning the grievor to the workplace focused on the risks of future harm *to the complainant*: whether they had contact in the past, whether they would have contact in the future, and their different types of work and work locations. While she recognized that the City is legally obligated to protect its employees and maintain safe and respectful workplaces, she failed to weigh this onerous obligation in her analysis. [...] The fact that there was no pattern of misconduct or that this was an isolated incident does not lead to the

> conclusion that future co-workers could be confident or assured of a workplace free of such incidents in the future. Nor does the Union's evidence from one of the grievor's former supervisors, that she had no concerns about the grievor's conduct and would be willing to work with him again.
> ...
> [S]exual assault is serious misconduct and there was a breakdown in trust arising from the grievor's dishonesty and real concerns about the ability of the City to provide a safe and respectful workplace.[303]

27.9 Perhaps the most important point from this excerpt involves the criticism that the arbitrator had "focused on the interests of the complainant and the grievor without adequately considering the interests of *all* employees". Safe-workplace legislation applies to the workplace generally, of course, and that quoted sentence is the basis for standard legal advice that any private resolution between a complainant and respondent is relevant, but for the (police) employer it remains only one consideration among others. Put another way, these matters have a private component, but also a significant broader, public aspect.

27.10 The second important point from the above excerpt involves braiding the breakdown in trust – "caused by the grievor's dishonesty and refusal to acknowledge and apologize for grabbing and squeezing the complainant's breast without her consent" – with "further concerns for the City regarding safety": the employer concluded that it was "not safe to return the grievor to the workplace" because "it could not trust him to be honest about his conduct, which, if repeated, would compromise the City's ability to provide a safe workplace for its employees".

27.11 The Court of Appeal noted that arbitral jurisprudence "extends this duty to require that the employer terminate an accused employee from the workplace, if necessary, to satisfy the employer's obligations to protect its employees from sexual harassment in the workplace ...".

27.12 Even before enhanced workplace safety legislation, courts of appeal have concluded that employers have had "no choice" other than dismissal for sexual harassment that constitutes a criminal offence. One example appears in the 1998 judgment in *Bannister* v *General Motors of Canada Ltd*:[304]

> The trial judge, no doubt, formed the view, from listening to the witnesses, that this plant was a rough environment with abuse and sexual innuendo flowing freely in all directions, and the female employees strong enough to handle the exchanges. This is probably an apt description of many industrial environments of the past but cannot be tolerated in today's cultural acceptance of gender equality. It is not a question of the strength or mettle of female employees, or their willingness to do battle. No female should be called upon to defend her dignity or to resist or turn away from unwanted approaches or comments which are gender or sexually oriented. It is an abuse of power for a supervisor to condone or participate in such conduct.
>
> [...]
>
> At p. 298, he states:

> I have found that the every day interaction of the majority of the employees in the security department, both male and female, created an atmosphere where inappropriate language and jokes of a sexual nature were the order of the day.

And at pp. 299-300, he states:

> I find that the plaintiff's behaviour and language in the workplace was no more and no less than that of the majority of the employees in the security department. I further find that profane language and slurs and jokes of a sexual nature which might in other circumstances be considered sexual harassment were common place occurrences in the security department, so much so that they were the norm rather than the exception.

In light of the respondent's general denial of the events complained of, these findings carry an implicit acceptance of the substance of the complainant's evidence and that of the other employee witnesses, coupled with a finding that the respondent was entitled to act as he did because everyone else conducted themselves in a similar fashion. A supervisor who permits such an atmosphere as the trial judge describes to develop, and then participates in the exchanges as much as anyone else, is a supervisor who is not performing his duties.

In an industrial plant, no one expects profanity or vulgarity to be eliminated, but unwelcome conduct or expressions based upon gender or race cannot be tolerated. Management was entitled to have a supervisor who would do his best to assure that the environment was clear of racist or sexist slurs or objectionable conduct. In respect of gender issues, the respondent failed management. Given the finding that he joined in these activities without later apology or acknowledgment, it is hard to imagine an alternative to termination which would not perpetuate the harassment which management was obligated to eliminate. In my view, the termination was fully justified.

27.13 In other examples, the Ontario Court of Appeal judgment in *Simpson* v *Consumers' Assn of Canada*[305] cited the statement in *Bannister* that "it is hard to imagine an alternative to termination which would not perpetuate the harassment which management was obligated to eliminate", and in *Gonsalves* v *Catholic Church Extension Society of Canada*[306] concluded that the employer had "no option" in the circumstances but to terminate the employment,[307] after the evidence proved "very serious" allegations, "including the criminal act of sexual assault".

28. Tests in the Grievance Arbitration Process and Wrongful Dismissal

28.1 We have discussed judgments from courts of appeal and other superior courts that flow from two principles sources: the grievance arbitration process and the common law wrongful dismissal process. In this section, we propose to examine the (higher) standard that applies in the police workplace by first examining the general principles that superior courts of justice have applied to workplaces generally, to establish a "baseline". We conduct a survey of basic principles extracted from prominent court judgments in both the grievance arbitration process and the common law wrongful dismissal process.

28.2 If you conclude, as we do, that a higher standard applies to police officers' conduct, compared to employees generally, principally because police hold a position of trust[308] – so, "the distinction between police officers, who are in a unique position with respect to public trust and confidence in their ability to discharge their duties, and the expectations which fall on other ... employees"[309] – then offering appropriate recommendations requires an examination of how the law treats non-police employees.

28.3 We begin with the recent evolution of how superior courts of justice treat sexual harassment through the vehicle of the grievance arbitration process, and also through the common law wrongful dismissal process.

28.4 Since the law is clear that "not every case of sexual harassment or assault demands a discharge",[310] the task is to identify, in non-police workplaces, how the grievance arbitration process and the wrongful dismissal process determine the equivalent of a proper conduct measure.

28.5 Arbitrators consistently follow the "*William Scott*" principles[311] that govern assessment of penalty in grievance arbitration proceedings:

> 1. Has the employee given reasonable and just cause for some form of discipline by the employer?
>
> 2. If so, was the employer's decision to dismiss the employee an excessive response in all the circumstances of the case?
>
> 3. If the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

28.6 As a recent example, the Federal Court of Appeal has succinctly confirmed these principles:

> It is a well-settled labour law principle that an adjudicator in a discipline case must assess whether disciplinable conduct occurred, whether the penalty levied was appropriate and, if not, what the appropriate penalty is ...[312]

28.7 In common law wrongful dismissal civil actions, superior court judgments now typically begin with the threshold issues: what misconduct did the employer prove, and does that misconduct warrant dismissal without notice (or "whether just cause exists for termination").

28.8 This approach follows from the leading common law wrongful dismissal judgment of *McKinley* v *BC Tel*,[313] in which the Supreme Court of Canada set two initial issues:

> 1. "whether the evidence established the employee's ... conduct on a balance of probabilities"; and

2. "if so, whether the nature and degree of the dishonesty warranted dismissal".

28.9 On that second issue, the *McKinley* judgment concluded that whether an employer is justified in dismissing an employee (in that case, based on dishonesty) "is a question that requires an assessment of the *context* of the alleged misconduct" (our emphasis).[314]

28.10 Underlying this contextual approach is "the principle of proportionality": an "effective balance must be struck between the severity of an employee's misconduct and the sanction imposed".[315] In other words, "assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced".[316]

28.11 Thus, the test is contextual and proportional: "an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship".[317]

28.12 Courts of law have applied the *McKinley* "contextual and proportional" principles to wrongful dismissal matters involving sexual harassment.[318]

28.13 This second part of the *McKinley* test that governs wrongful dismissal ("whether that misconduct warranted dismissal") roughly corresponds to the second and third of the "*William Scott*" principles that govern grievance arbitration proceedings, and also roughly corresponds to the proportionality assessment, which is the primary focus of analysis at the "penalty stage" in a misconduct hearing in the police complaint and discipline process.

29. The Application of the "Contextual and Proportional" Analysis

29.1 In this section, we discuss how court judgments in both the grievance arbitration process and the common law wrongful dismissal process have approached the proportionality assessment.

- *Seriousness*

29.2 Much of the "contextual and proportional" analysis necessarily involves an assessment of the "seriousness" of proved misconduct. This statement applies whether the matter occurs in the grievance arbitration process, the common law wrongful dismissal process, the complaints and discipline process in self-governing professions, or (as discussed in Part II, above) the police complaint and discipline process.

29.3 One succinct example appears in the recent judgment of the Alberta Court of Queen's Bench in *AG Growth International Inc* v *Dupont*, a sexual harassment matter that arose in the arena of common law wrongful dismissal:[319]

> Determination as to whether summary dismissal is justified requires an analysis of the proportionality of the employer's response to the misconduct. That analysis begins with a determination of the seriousness of the misconduct.

29.4 "Seriousness" alone is sufficient to undermine the old categories of sexual harassment, since seriousness is a complex calculus that turns not solely on the quality of the act, but combines that consideration with other factors, such as the number of occurrences, the workplace position of the person who committed the misconduct, and other relevant factors arising from the "particular facts and circumstances" of each case.

29.5 Although it perhaps goes without saying, courts of law have concluded that sexual harassment constituting sexual assault is the highest level of seriousness, particularly involving more than one incident.[320] Cases that involve "the unwanted imposition of sexual requirements in the context of a relationship of unequal power"[321] are also intrinsically serious.[322]

29.6 In assessing "seriousness" in sexual harassment cases that do *not* involve assault, for example, a court considers factors that include the number of occurrences, the frequency, duration and persistence of the misconduct, the "tenor of communications", and the presence of "coercive, intrusive or aggressive" behaviour.[323] In cases that do not involve a physical component, a court can still find seriousness "on the high-middle to low-upper end of the spectrum of seriousness".[324]

29.7 As a further example, the Alberta Court of Appeal has illustrated the calibrated nature of assessing "seriousness" of misconduct in a case not involving assaultive behaviour (distribution of inappropriate emails):

> Further, instead of considering the nature of the e-mails sent and received by [the employee] and the context in which they were circulated, the chambers judge appears to have focussed only on the number of inappropriate e-mails that [he] forwarded on. In fact, the chambers judge stated that [the employer] "bears the burden of showing that [he] did so [passed on the pornographic material] with any frequency, and they have not" [...]. In taking this approach, the chambers judge erred in law. A contextual approach involves more than looking at the number of instances in which an employee generated or forwarded on pornographic images. It also requires a consideration of the duration of this activity, the extent of the employee's involvement, the nature of the role held by the employee in the company, the employee's level of seniority, the employer's reasonable expectations, including whether the impugned conduct has been expressly prohibited by the employer, and all other relevant information informing the degree of seriousness of the impugned conduct.[325]

29.8 The contextual analysis requires an analysis of any cumulative misconduct,[326] including whether the cumulative conduct shared "some common element".[327]

• *Effect on the Complainant*

29.9 Certainly since the enhanced focus on workplace safety legislation as a tool to govern workplace sexual harassment, the law is placing less emphasis on characterizing the matter as a dispute between the employer and the employee only (or the employer and the employee and the complainant), and now places more emphasis on the interests of *all* employees.

29.10 The Alberta Court of Appeal has recently concluded that in assessing the risk of returning a grievor to the workplace, the arbitrator made an error by "[focusing] on the risks of future harm *to the complainant*"; the arbitrator "focused on the interests of the complainant and the grievor without adequately considering the interests of *all* employees".[328] The duty to protect its employees and maintain safe and respectful workplaces "is a proper contextual factor" in assessing penalty.

29.11 The Court of Appeal added the following in this same case, which involved a sexual assault:

> The fact that there was no pattern of misconduct or that this was an isolated incident does not lead to the conclusion that future co-workers could be confident or assured of a workplace free of such incidents in the future. Nor does the Union's evidence from one of the grievor's former supervisors, that she had no concerns about the grievor's conduct and would be willing to work with him again.[329]

29.12 Some court judgments have concluded that the wishes of a complainant may be less relevant, characterizing the matter as a dispute between the employer and the employee, so "whether a complainant is of a forgiving nature is not the issue".[330]

29.13 The judgment of the Ontario Divisional Court in *Professional Institute of the Public Service of Canada* v *Communications, Energy and Paperworkers' Union of Canada, Local 3011*[331] is instructive. The judgment stated that it was "inappropriate" to imply that the decision as to whether the employee should be fired was "in any way" the complainant's decision. First, it was not her decision to make ("she is neither the employer nor even an employee"). Second, whether she can cope with his return to the workplace "says nothing about the risk he poses to other contract cleaners or other female employees he may be exposed to as he performs his duties". The judgment added a third reason:

> ... the pressure on complainants in these situations is intense: they fear repercussions, both from their employer and from other employees. It is not easy to come forward. In this case, no one did for five years. Once they do come forward, it is often difficult for complainants to live with the fact that they might cost someone their job. Thus, the Complainant may have had any number of reasons for saying that she did not want [the employee] to be discharged – reasons that have no bearing on the issue of whether he should in fact be discharged.

29.14 In assessing "seriousness" in sexual harassment cases, courts of law do consider the effect of the behaviour on the complainant.[332]

29.15 The law has for many years emphasized the need to exclude any consideration of factors "not current with present day analysis of sexual assault and ... inconsistent with the social context and the evolving attitudes of what is acceptable in the workplace".[333]

29.16 Court of appeal jurisprudence has relied upon the principle that, in criminal matters, "it is an error to rely on what is presumed to be the expected conduct of a victim of sexual assault",[334] and imported this principle into workplace litigation involving sexual assaults (for example: "the caution about these types of errors should apply equally to arbitrators adjudicating sexual assault grievances").[335]

29.17 One court of appeal judgment, for example, concluded that a grievance arbitrator made an error in crafting a fit penalty when she relied upon her finding that the complainant "does not appear to have been traumatized in any significant way by the contact", which was a sexual assault.[336]

29.18 Court of appeal jurisprudence has concluded that in the proportionality component of the penalty calculus in grievance arbitration cases, the following principle applies:

> [T]he presence of significant harm or distress to the complainant may be an aggravating factor. However, the converse line of reasoning, that the absence of distress on behalf of the complainant is a mitigating factor, is impermissible.[337]

- *Position of the Respondent*

29.19 In grievance arbitration and wrongful dismissal cases in workplaces generally, one consideration that will render misconduct more serious arises where the employee ("respondent") has a supervisory or managerial position.

29.20 More than a generation ago, the Supreme Court of Canada confirmed that supervisors owe a duty to ensure a safe and productive workplace:

> A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive, workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.[338]

29.21 Excerpts from three prominent wrongful dismissal court judgments over the past generation have addressed sexual harassment by a supervisor:

> The trial judge appears to have considered the matter as a contest between the supervisor and management, a simple matter of discipline. ... In doing so, the trial judge failed to recognize that management [has] two positive duties: first, to members of the workforce who are entitled to protection from offensive conduct, and second, to the corporation, to protect it against civil suits at the hands of individual complainants.[339]

> [I]t is an error for the trial judge to ignore the supervisory role of the respondent and to treat him as one of the employees. ... Furthermore, as a supervisor, the respondent had obligations to his employer. ... It is the job of senior employees to ensure that the employer's duties to its workforce and to its shareholders, in this case, effectively the public, are carried out so that the employer is protected. If the supervisor creates the problem, he is in breach of that duty. ... [B]ecause the respondent was the executive director of the Association and the supervisor to whom the employees reported, his obligation to the Association was to ensure that sexual harassment did not occur, and to set the standard of a workplace which protected both the employees and his employer from complaints of offensive conduct.[340]

> ... as a senior manager the plaintiff had positive duties to protect members of the workforce from offensive conduct and to protect his employer from exposure to civil claims by individual claimants. A manager who engages in offensive or demeaning conduct of a sexual nature toward a subordinate employee breaches those duties ...[341]

29.22 The Alberta Court of Queen's Bench, in rejecting the suggestion that "a culture of sexually charged conduct at the plant and within the team precludes a finding of harassment", confirmed that the team's administrative leader owed a duty "to set an appropriate standard of behaviour for the team":

> [Since] part of the Plaintiff's job as a team leader was to ensure that his colleagues knew about [the employer's] policies prohibiting such conduct, he ought to have led by example and warded against such conduct. He cannot now seek refuge behind a culture of inappropriate behaviour for which he is largely responsible.[342]

29.23 In a case involving an employee who received pornographic and racist emails and forwarded some of those emails, the court rejected the argument that most of the emails were sent "to him" and not "by him": he had received "a steady stream of pornographic material over the course of a year prior to his termination" often from many of the same employees and business contacts, "and yet did nothing to stop it", despite his position as a long-serving senior supervisor and "role model for other ... employees".[343]

29.24 In *Menagh* v *Hamilton (City)*,[344] a prominent wrongful dismissal matter involving sexual harassment, the Ontario Court of Appeal resolved the issue of whether the nature and degree

of that misconduct warranted dismissal, and using the "contextual approach to determine whether just cause exists for termination", concluded that "the character of the appellant's employment is a key factor" because he was responsible for labour relations for the city:

> As such, he was in a senior position that required him to be familiar with all workplace policies (including policies relating to harassment). His misconduct is therefore more serious in light of his particular employment responsibilities. As the trial judge concluded, the cumulative effect of the appellant's misconduct was not reconcilable with sustaining his employment relationship with the City.[345]

29.25 This consideration may apply even if the employee does not have a supervisory or managerial position, but is a "senior team member". In one wrongful dismissal judgment, the court described such a situation:

> Although the Plaintiff was neither the Complainant's formal supervisor nor mentor, nevertheless he was a senior employee on whom she relied. Like other members of the team, he was responsible for her general training and annual performance review. Her ultimate success at Nova was in large part dependant on her relationship with senior team members. This created a power imbalance.[346]

29.26 In the police context, this point would be relevant in cases involving field training officers.

- *Whether the Employer Must Provide a Warning*

29.27 The contextual and proportional analysis also examines the circumstances in which the employer must provide a warning. Depending on the circumstances, absence of a warning will not be a factor in the proportionality analysis. The following excerpts capture much of the governing principles:

> Whether an employer is obliged to provide an employee with a clear and unequivocal warning and opportunity to improve depends on the circumstances and the quality of the misconduct.[347]

> The greater the wrong, the less likely it is that an employer will be required to first put the employee on notice that such misconduct is not acceptable to the employer.[348]

> ... serious misconduct, which is manifestly inexcusable, may make a warning totally inappropriate to an employer who is satisfied that the misconduct has occurred.[349]

29.28 Where a warning is provided, disregarding it is an aggravating consideration.[350]

29.29 One factor that many courts have considered involves whether the employee showed "remorse for or insight into" the behaviour.[351] One recent judgment provides an illustration:

> Mr. Haniff showed no remorse for or insight into his behaviour. He insisted to his employer that the Complainant had consented to his actions. When it was made clear to him that she had not, he did not accept that this was the case. Instead, he continued to take the view that it was too bad that she had a different perspective on events than he did.
> ...
> The arbitrator found that Mr. Haniff was deluded and that he ought to have known that his actions were improper. Nowhere in this [apology] letter does Mr. Haniff acknowledge his delusions or the improper nature of his conduct. He did not testify before the arbitrator nor was there any evidence of any kind that Mr. Haniff had learned from this experience, had some insight into his behaviour and had taken or was willing to take steps to ensure that it did not happen again. Without this evidence, neither the employer nor the arbitrator could have any assurance that, if Mr. Haniff were reinstated, he would not continue to pose a threat to the Complainant and other employees.[352]

29.30 All other proportionality factors apply, such as employment history,[353] though "public interest" will rarely arise to the extent it does in the police complaint and discipline process, or at all.

30. Sexual Harassment in the Police Complaint and Discipline Process: The Division Between Cases Involving Assaultive Behaviour and Other Cases

30.1 One important initial question concerning the treatment of sexual harassment in the police complaint and discipline process involves organizing the analysis of such misconduct.

30.2 Sexual harassment is intrinsically serious misconduct, but the law consistently recognizes that sexual harassment, like most misconduct, involves a spectrum of seriousness: some forms of it are intrinsically *more* serious.

30.3 Justice Bastarache has made the distinction: The 2020 report of the Independent Assessors for the Merlo-Davidson Settlement made several recommendations related to discipline, including the following:

> • Sanctions for those found to have been harassing in the workplace must be effective and include suspensions without pay for longer periods, demotions, removal of supervisory responsibilities for an extended period of time; ban applying for promotions with no discretionary override. Dismissal should be the sanction for serious or repeated offences. Victims should not be transferred unless they request it.
>
> • Those accused of sexual harassment (including assaults) should not be allowed to retire before the conclusion of an investigation and conduct process.
>
> • A system to monitor those who have been found to have harassed members in the workplace should be implemented. A second finding of harassment should result in automatic dismissal.

30.4 In our opinion, the primary and critical decision in sexual harassment involves distinguishing cases that involve assaultive behaviour from those that do not, so we address these two categories separately. Sexual harassment is a never-event: it should never occur. That statement applies acutely to sexual harassment that constitutes sexual assault.

31. Sexual Harassment in the Police Complaint and Discipline Process: Cases Involving Assaultive Behaviour

31.1 The law would appear to be settled that decision-makers in civil proceedings (which would include civil courts in wrongful dismissal matters, grievance arbitrators and courts considering judicial review of arbitral decisions, and tribunals such as human rights tribunals and hearing officers and appeal bodies in the police complaint and discipline process) can make a conclusion concerning whether particular behaviour meets the definition of a criminal offence. The majority of the Alberta Court of Appeal in *Calgary* v *CUPE* did so, for example, observing that "harassment with a physical component constitutes a form of sexual assault" and that "[t]here can be no doubt that the grabbing and squeezing of another's breast without consent is sexual *assault*".[354] The Ontario Court of Appeal has also done so in a wrongful dismissal case ("the criminal act of sexual assault"),[355] and another recent Ontario judgment has done so in a judicial review of a grievance arbitrator's decision ("the gravity of [the employee's] action that constituted sexual assault").[356] The Hon. Michel Bastarache does so in *Broken Dreams*:

> Outright sexual assaults, that would qualify as criminal conduct, were more frequent than the Assessors could have imagined. These ranged from grabbing breasts and unwanted kissing and touching right up to penetrative sexual assaults.[357]

31.2 In the RCMP case of *Laroche* v *Beirsdorfer*,[358] the Federal Court of Appeal rejected the argument that only a judge had constitutionally valid authority to determine whether a criminal offence had been committed. The RCMP had discharged a member for unsuitability, and the Court of Appeal concluded that the commissioner had authority to consider whether the applicant's conduct was sufficiently serious to constitute a criminal offence:

> The Commissioner has authority to discharge on the ground of unsuitability. In making that decision he has the right to consider whether the conduct complained of is serious enough to constitute a criminal offence. He is not determining criminal responsibility, nor is he imposing criminal law consequences. He is considering and characterizing the relative seriousness of conduct from the point of view of unsuitability. That is an authority that is necessarily implied in the authority to discharge on the ground of unsuitability.[359]

31.3 As the Supreme Court of Canada has recently stated, "[e]ven hard-fought battles to stop sexual assault in the workplace remain ongoing".[360]

31.4 The recent judgment of the Alberta Court of Appeal in *Calgary* v *CUPE*[361] has emerged as a prominent court judgment, containing an exhaustive review of the principles that govern employer response to the class of sexual harassment that constitutes assaultive behaviour.

31.5 *Calgary* v *CUPE* involved a non-police workplace in which the employer fired the grievor after investigating and substantiating a complaint that he "grabbed and squeezed the complainant's breast without her consent". The employer viewed the misconduct as a "very serious" breach of its respectful workplace policy, and noted in its termination letter that initially the grievor denied any physical contact with the complainant, but after discussions with the union representative, he admitted to "touching of an innocent nature".[362]

31.6 An arbitrator allowed the grievance against the dismissal. After concluding that misconduct occurred, the arbitrator considered the next issue – whether the employer's decision to dismiss the employee an excessive response in all the circumstances – and decided that dismissal was excessive, principally because of the weight of mitigating penalty factors:

1. As to seriousness of the misconduct, the arbitrator concluded that the misconduct fell "at the lower end of the sexual harassment spectrum: (i) it involved a "single incident" (no evidence that the incident was other than "an impulsive, ill-thought out, isolated incident", nor evidence of "persistent conduct that would be properly considered as creating a hostile or unsafe environment"); and (ii) the complainant "did not appear to be traumatized in any significant way".

2. The arbitrator considered other mitigating factors: "the grievor's long service record, his clean disciplinary record, the economic hardship imposed on him and his family, and the reasons the City gave for departing from progressive discipline". (The City departed from implementing progressive discipline because "the grievor failed to acknowledge any inappropriate behaviour or apologize for his conduct" and the employer concluded that "it was not safe to return the grievor to the workplace because it could not trust him to be honest about his conduct".)

3. The arbitrator found the grievor's failure to admit the misconduct "troubling" but concluded that the risks of returning him to the workplace were "minimal", absent evidence of a pattern of conduct suggesting that employees were at risk. Also, the grievor and complainant had little contact because of their duties and locations, which was unlikely to change. Finally, "the grievor, without admitting it occurred, acknowledged that the conduct he was accused of was wrong and that he would never have any physical contact with other employees if he returned to the worksite".[363]

31.7 The Court of Appeal used the following undeniably-firm language criticizing the arbitrator for not painting what occurred as a criminal act:

> The arbitrator did not specifically call the misconduct a sexual assault, preferring instead to call it a "personal assault" or "incident" or "contact" or "conduct". [T]his choice of language is not without consequence as the words chosen suggest an attempt to minimize the type of misconduct. There can be no doubt that the grabbing and squeezing of another's breast without consent is a sexual assault. Even using the umbrella term of "sexual harassment" to describe what happened downplays the significance of the arbitrator's finding, since "sexual harassment" is an all-encompassing term that includes a broad range of conduct, some of which is very serious (like sexual assault) and other conduct less so. It was unreasonable for the arbitrator to use ambiguous and vague language to analyze the misconduct [...]. Since a sexual *assault* is what occurred, the whole analysis ought to have been conducted with that finding in mind.[364]

31.8 Some court judgments use old language that avoids identifying "sexual assault" when it occurs: "engaged in physical conduct of a sexual nature with a female subordinate",[365] "serious sexual harassment",[366] and other dated terminology. Characterizing behaviour that constitutes sexual assault as "unwanted sexual touching" should not occur. This language also occurs in various post-2014 Part IV decisions.[367]

Recommendation 12:

Part IV decision-makers should not use ambiguous or vague language if a sexual assault is what occurred. The continued use of terms such as "unwanted sexual touching" is inaccurate and unhelpful.

31.9 The Court of Appeal in *Calgary* v *CUPE* continued:

> A finding that sexual assault is serious misconduct is consistent with the growing concerns for safety and respect in the workplace and other policies and legislation whose goal it is to protect vulnerable groups, and it will assist employers and unions in fighting against the prevalence and damaging effect of this intolerable conduct. There is absolutely no place in the workplace for touching, rubbing, forced kissing, fondling or any other physical contact of a sexual nature where one party does not consent. It is objectively clear that sexual assault is wrong and acknowledging that sexual assault is serious misconduct sends a strong message to all employees about societal values and acceptable workplace behaviour.[368]

31.10 The principles that the Court of Appeal articulates in *Calgary* must be read together with the principle that a higher standard of conduct applies in the police workplace.

31.11 Even one generation ago, in the leading judgment of *Gonsalves* v *Catholic Church Extension Society of Canada*,[369] the Ontario Court of Appeal concluded that the employer had "no

option" in the circumstances but to terminate the employment,[370] after the evidence proved "very serious" allegations, "including the criminal act of sexual assault". The Court of Appeal stated that the employer had no obligation to provide a warning, citing a variety of what we would now consider "older" court judgments upholding dismissals without warnings in cases of "fondling of breasts or something equally serious by supervisors".[371]

31.12 On the basis of these court judgments, and certainly since *Calgary* v *CUPE*, an employer (certainly a police employer) should care principally about the first decision: between sexual harassment cases that involve sexual assault, and those that do not.

31.13 Lest there be any misunderstanding, recent superior court judgments have confirmed that sexual assault includes a variety of circumstances, and decision makers in this day must be aware of these court judgments. Justice Bastarache's words in *Broken Dreams* – "... many cases of sexual assault that could be considered less serious, for example touching or kissing (although I am of the view that all forms of sexual assault are serious)" – are apt.[372]

31.14 The very recent judgment of the Alberta Court of Queen's Bench in *AG Growth International Inc* v *Dupont*[373] involved a comparatively less-serious sexual assault, in the context of an employer's successful appeal against a finding of wrongful dismissal for what the lower court perhaps charitably had described as follows:

> ... a single, brief and isolated incident of unwanted touching of [the complainant], for the purpose of flirting with [her] in order to pursue a romantic relationship with her. Upon realizing that his advances were not welcome he did not persist, but immediately desisted and walked away.

31.15 The case involved more detail, including the following findings of fact:

1. Mr. Dupont approached the complainant in the workplace, asked her to go on a date and she said "maybe" (they were workplace acquaintances, though not "good friends");

2. Mr. Dupont approached her in the workplace a short while later, asked her if she was chilly and said "now that you're single we can go on a date". He then reached over and lifted her hoodie and T-shirt, "exposing the area of her body extending from her belly-button to her bra, including her bra", because "he wanted to flirt with and 'hit on' [her], and he wanted to show her that he 'liked her a lot'";

3. He "did not intend to expose [her] body, though that may be considered a foreseeable consequence of lifting a shirt".

4. The matter was a "single incident" and the employee had a nine-year incident-free history.[374]

31.16 The Court of Queen's Bench allowed the employer's appeal solely on one ground of appeal:

> Even though [...] Mr. Dupont's assault may not have risen to the level of seriousness as was found in *Calgary* v *CUPE*, the starting point for the analysis must be that this was a serious form of workplace misconduct:
>
> Since a sexual assault is what occurred, the whole analysis ought to have been conducted with that finding in mind: *Calgary* v *CUPE* para 33[375]

31.17 The Court of Queen's Bench did not agree that characterizing the incident as a sexual assault "confuses the criminal definition of sexual assault with the civil definition of sexual harassment":

1. the "unwanted touching for a sexual purpose" that occurred "is the definition of sexual assault, whether on a criminal or civil level"

2. "varying degrees" of sexual assault exist, but (following the *Calgary* judgment) "sexual harassment with a physical component is among the most serious forms of workplace misconduct".

31.18 The court judgment also made the following basic observations:

1. Dupont was aware of the employer's "reasonable, clear, and unambiguous" policy respecting sexual harassment, and that termination was "a possible outcome of a serious breach including sexual or unwanted harassment"

2. Dupont did not receive a warning, but "the existence of a policy may be a warning, and no warning is required that employees not commit criminal offences"

3. A court must "assess the effect of the misconduct on the workplace as a whole, not just its effect on the offender", and in this case the policy referred to zero tolerance towards harassment, including a single incident ("the reason may be presumed to be because even a single incident can leave other employees in [the complainant's] position 'anxious, distressed and embarrassed', as she was and cause them to fear Mr. Dupont, as did [the complainant]").

31.19 The Ontario Court of Appeal concluded – 25 years ago – that a case involving a combination of (i) a supervisory employee, (ii) "attempted" kissing of a woman, and (iii) other harassing conduct ("directed sexual innuendoes at her" and "told sexually explicit stories in her presence") justified dismissal in a non-police workplace.[376]

31.20 As discussed, the Human Rights Tribunal of Ontario in *McWilliam* v *Toronto Police Services Board*[377] referred to "an incident of sexual assault such as a forced kiss".

31.21 The RCMP has asked us to provide recommendations concerning "the appropriate range of measures for harassment and sexual misconduct".

31.22 In 2000, Québec formally codified *presumptive* dismissal in s 119 of the *Police Act*, providing for automatic dismissal when a police officer is found guilty of certain criminal offences, "unless the police officer ... shows that specific circumstances justify another sanction".

31.23 In *Lévis (City)* v *Fraternité des policiers de Lévis*,[378] the Supreme Court of Canada examined the meaning of "special circumstances" for the purposes of s. 119, beginning with this statement of principle:

> 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 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 ...[379]

31.24 Jurisprudence governing other professional regulatory processes has also endorsed the principle of presumptive dispositions for the most serious disciplinary misconduct.[380] The presumptive disposition for lawyers who "knowingly engage in dishonest or fraudulent conduct", for example, is disbarment.[381] In a judgment concerning the regulation of lawyer conduct, the Ontario Divisional Court has articulated the principle governing presumptive dispositions and exceptional mitigation:

> ... there is nothing *per se* objectionable to a profession setting out presumptive penalties for breaches of different types of professional obligations. It is no different than appellate courts setting out presumptive penalties for certain types of offences. Moreover, it is not accurate to characterize such presumptive penalties as "mandatory minimums" with all of the attendant concerns that may accompany statutorily mandated sentences. Rather, presumptive penalties act as a guide, both for the entity imposing the penalty and for the persons who may be subject to such penalties.[382]

31.25 This same judgment also addressed mitigating considerations that would constitute "exceptional circumstances" in matters involving presumptive penalties:

> [M]itigating factors that will amount to exceptional circumstances in any given case are not restricted to only certain types or forms. Medical reasons or financial desperation or situations of duress serve as examples of the type of mitigating factors that may amount to exceptional circumstances but those situations are not exhaustive of such factors. That said, it remains the case that any such factors will normally have to be ones that would rise to the level where it would be obvious to other members of the profession, and to the public, that the underlying circumstances of the individual clearly obviated the need to provide reassurance to them of the integrity of the

> profession. I would add, on that point, that factors that provide an explanation for the conduct of the lawyer will generally be ones that would most likely reach that requisite level of mitigation but they are not the only ones that may achieve that result.[383]

31.26 The Conduct Measures Guide addresses sexual activity with detainees with automatic dismissal:

> **31. Sexual activity with detainee**
> No consent is possible between a police officer and a detained person in police custody. Such cases usually result in lengthy prison sentences for the member involved, and as a result have seldom reached adjudication. Dismissal is the only possible outcome if the member does not resign beforehand.[384]

31.27 We are of the view that presumptive dismissal should be the conduct measure for sexual harassment that also meets the definition of sexual assault, whether on a criminal or civil level. We would endorse the language in s. 119 of the Québec *Police Act* (described above) that has applied for the past generation when a police officer is found guilty of certain criminal offences. Relying upon the language in s. 119 brings the advantage that the Supreme Court of Canada in *Lévis (City)* v *Fraternité des policiers de Lévis*[385] has already provided guidance in interpreting the meaning of the "special circumstances" exception to the presumption of dismissal.

Recommendation 13:

The RCMP should amend the Conduct Measures Guide to provide that presumptive dismissal should be the conduct measure for sexual harassment that also meets the definition of sexual assault, whether on a criminal or civil level. For clarity, presumptive dismissal means that in such a case, the conduct measure of dismissal must be imposed, unless the subject member shows that specific circumstances justify another conduct measure.

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32. Sexual Harassment in the Police Complaint and Discipline Process: Behaviour that is Non-Criminal

32.1 In this section, we discuss sexual harassment that does not involve sexual assault (and have, for convenience, addressed behaviour involving both co-workers and members of the public).

- *Where Harassment Primarily Involves Remarks*

32.2 Case law in the police complaint and discipline process across Canada contains various examples of sexual harassment that exclusively or primarily involves "remarks", involving both co-workers and members of the public.[386] These decisions have some historical value,

but – as we have discussed – the speed with which the law has evolved should motivate the RCMP to place reliance on the latest case law in workplaces generally. Courts of law appear to have become less tolerant of the kind of sexual harassment that primarily involves inappropriate sexual remarks.

32.3 The latest example appears in the very recent judgment of the Ontario Court of Appeal in *Hucsko* v *AO Smith Enterprises Limited*.[387] The Court of Appeal rendered its judgment while we were writing our report. *Hucsko* involved a case in which an investigation substantiated 4 offensive comments against an employee with 20 years of service. One of the comments involved "hip thrusting", and both the complainant and a supervisor told the employee that his comments were offensive. The penalty involved a "final warning", training, and "make a direct apology to the complainant". After the employee's lawyer sent a letter refusing an apology, the employer fired Mr. Hucsko. The Court of Appeal concluded that the employer had just cause for dismissal.

32.4 The Court of Appeal criticized the trial court for its failure to consider "the senior position the respondent held and the degree of trust that arose from that in the employer-employee relationship", and concluded that the comments "created a poisoned atmosphere for the complainant in her workplace". One excerpt from the Court of Appeal judgment indicates the development of the law governing sexual harassment:

> In those circumstances, the only conclusion the appellant could reach was that there was a complete breakdown in the employment relationship as (i) he was either unwilling or unable to understand the purpose and effect of the Workplace Harassment Policy and to take its requirements seriously and (ii) he was unwilling to accept the discipline imposed on him as a consequence of his misconduct of sexually harassing a co-worker. As a result, the appellant could have no confidence that the respondent would not continue with the same type of misconduct in the future.
>
> Faced with the respondent's lack of contrition, lack of understanding of the seriousness of his conduct, and his refusal to comply with the reasonable and essential requirement of an apology to the complainant and target of his comments, the appellant's decision to terminate the respondent's employment was a proportional and wholly warranted response.[388]

- *Where Harassment Extends Beyond Remarks*

32.5 In *Menagh* v *Hamilton (City)*,[389] a prominent wrongful dismissal matter involving sexual harassment, the Ontario Court of Appeal provided an example of more serious sexual harassment:

> The evidence is overwhelming that the appellant did engage in both personal and sexual harassment of Ms. Wilson. He persisted in trying to be in a romantic relationship with Ms. Wilson after she repeatedly told him that she was no longer

> interested. In order to achieve this end, the appellant communicated with Ms. Wilson's colleagues, superiors (he tried to have her employment terminated) and family members, as well as with Ms. Wilson directly. He also harassed her by going to her home, watching her in her office and parking beside her car.
>
> The trial judge did not err in finding that [...] the City had established misconduct consisting of harassment, harassment in the workplace and sexual harassment in the workplace in violation of the City's harassment policies. Critical to the trial judge's decision, the City had also established misconduct involving retaliation, conflicts of interest, abuse of authority and insubordination that were disruptive of the workplace.

32.6 We struggled with the proper recommendation for conduct measure in findings of misconduct that do not involve sexual assault. We are mindful of the reminders from superior courts that not all sexual harassment justifies dismissal, so cannot recommend presumptive dismissal. However, we do emphasize the need for all decision-makers to be aware of, and apply, the principles from the latest court judgments in what is a rapidly-expanding area of the law.

Recommendation 14:

The RCMP should amend the Conduct Measures Guide to provide that, in findings of sexual harassment that do not involve sexual assault, the "aggravated range" would include dismissal, in order to accord with superior court judgments, but would not include "presumptive" dismissal. The "normal" range should also be significantly increased, because the top of the present "normal" range is forfeiture of 1 day of pay.

PART IV – SEX-RELATED MISCONDUCT: OTHER ISSUES

33. "Non-harassment" Sex-related Misconduct: Improper Relationships with Co-workers

33.1 The Conduct Measures Guide addresses situations involving a supervisor abusing a position of authority with a subordinate:

> Interpersonal workplace relationships between persons in authority and subordinates are a high-risk sphere of activity, and particular attention should be given when imposing an appropriate conduct measure in situations where a supervisor abuses his position of authority with a subordinate.
> ...
> Abusing one's position of authority to engage in a personal relationship should be treated with the utmost seriousness, given that improper relationships have the potential to place the Force at risk of civil liability and of damaging its reputation in the public forum, the impact on the subordinate and workplace, and that clear unequivocal direction was provided to the entire membership in 2012 through the Conflict of Interest Directive on how to deal with interpersonal workplace relationships.[390]

33.2 We agree with this language.

33.3 The Conduct Measures Guide then sets the ranges of penalty for the normal range, the mitigated range and the aggravated range:

> For situations where the inappropriate relationship is a direct conflict of interest, where the member attempted to conceal his or her involvement in the relationship, or where the member was deemed to have relied upon or exploited the difference in rank to initiate the relationship, a proposed normal range of conduct measures would consist of dismissal.
>
> For situations where the relationship, while improper, was clearly consensual, but was not disclosed, where the relationship had little to no effect on morale or RCMP operations, and essentially was considered a "lower" risk to the Force, a mitigated range of measures consisting of 20-30 days forfeiture of pay is proposed.
>
> For situations where the member clearly abused his or her position of authority to pressure/coerce a subordinate into engaging in a sexual relationship, where the member's conduct borders on sexual assault, where the conduct causes significant damage to the Force's reputation or public perception, or where the conduct places the Force at risk of significant civil liability, an aggravated range of dismissal is proposed.[391]

33.4 We found various decisions that do not accord with optimal practices in workplaces generally.

33.5 In particular, *Broken Dreams* places emphasis on concerns surrounding sexualized conduct, drinking and abusive relationships between instructors and cadets at Depot.[392] We would endorse Justice Bastarache's words regarding the particular importance of Depot.

33.6 In this day, we would conclude that "where the inappropriate relationship is a direct conflict of interest, or involved exploitation", the conduct measure should be presumptive dismissal, and related untruthfulness (or "attempts to conceal involvement in the relationship") would be a highly aggravating factor.

Recommendation 15:

The RCMP should amend the Conduct Measures Guide to provide that "where an inappropriate relationship is a direct conflict of interest, or involves exploitation", the conduct measure should be presumptive dismissal, and related untruthfulness (or "attempts to conceal involvement in the relationship") will be a highly aggravating factor.

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34. "Non-harassment" Sex-related Misconduct: Improper Relationships with Members of the Public

34.1 This aspect of sex-related misconduct involves sexual relationships between police officers and members of the community where those relationships involve an abuse of professional trust. This aspect would also include sexual involvement with citizens or analogous behaviour that is otherwise inappropriate, or personal associations likely to discredit the police force.[393]

34.2 We rely on three court judgments to conduct our assessment. The first is a judgment of the Federal Court involving the pre-2014 *Royal Canadian Mounted Police Act*. In *Gordon* v *Canada (Solicitor General)*,[394] the police officer "had engaged in disgraceful conduct when he had sexual intercourse with a member of the public ... inside a relationship of professional trust that had been established". That case resulted in dismissal, and the Federal Court dismissed the member's application for judicial review.

34.3 The judgment of the Québec Court of Appeal in *Fraternité des policiers et policières de Saint-Jean-sur-Richelieu inc* c *St-Jean-sur-Richelieu (Ville de)*[395] involved the following behaviour, among other misconducts:

1. The police officer went to meet a woman he had met socially a week before. He arrived in a police vehicle and "showed her a photo of herself that was taken upon her arrest for impairment a few years earlier". He had obtained the photo from the police station archives. The Court of Appeal stated the following:

> We can only imagine Madam Massé's utter astonishment when [he] 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. ... in light of all of the evidence, it is obvious that his goal was to begin a romantic relationship with her.

2. As second woman did not know [him] but had "smiled at him during a softball game". A few days later, knowing that her husband would be absent, [he] called her at home to ask her what her smile meant, having obtained her phone number from the CRPQ (police database). The Court of Appeal concluded that "he had the same objective" with the second woman.

34.4 This matter involved a variety of other misconduct, but Court of Appeal was harshly critical of his conduct in these two matters, and concluded that "ample grounds" existed to dismiss, "even if the arbitrator accepted only a few of the allegations".

34.5 The third relevant court judgment is *Armstrong* v *Peel Regional Police Service*,[396] in which the Ontario Divisional Court upheld the conduct measure of dismissal in a case that the following excerpt captures:

> Clearly, it is unacceptable for a 34 year-old man to direct unwanted attention of a sexual nature to a 16-year old girl. This is particularly so in the face of a clear and blunt warning from a teacher that such conduct must stop. This is made all the worse when the attention comes from a man who was a known police officer who appears to have established trust by offering to provide police paraphernalia. In this respect, it makes no difference that the conduct in question was off-duty.

34.6 One noteworthy decision of a tribunal appears in *Siguenza and Regina Police*,[397] involving graphic sexual communications with a girl after the respondent police officer arrested her for shoplifting and took her into custody. The hearing officer found that the communication occurred "with the intent to pursue a sexual involvement", over 8 days and included two "discreet highly sexualized conversations" separated by 24 hours. The police officer attended at an arranged place expecting to find a face-to-face meeting with the woman, drove within sight of her house when she failed to attend, and then sought to arrange a further meeting. The hearing officer upheld dismissal for unsuitability.[398]

34.7 Most RCMP decisions appear to accord with decisions elsewhere, with one notable exception. We think that the RCMP would do well in its decisions to refer to and rely upon the leading cases. We reviewed decisions involving police officers texting young women in circumstances involving (at least) power imbalance and adverse consequences on the young woman. One involved use of information from police sources, and other very serious behaviour. These decisions accorded with decisions elsewhere.

34.8 To obtain parity within the RCMP in responding to sexual harassment, and all forms of sex-related misconduct, these types of cases are an example of the serious matters that should be decided by a select group of specialized decision-makers.

Recommendation 16:

The RCMP should amend the Conduct Measures Guide to provide that presumptive dismissal should be the conduct measure for improper relationships with members of the public, which means sexual relationships (or attempts) between police officers and members of the community where those relationships involve an abuse of professional trust, including sexual involvement (or attempts) with citizens or analogous behaviour that is otherwise inappropriate.

34.9 One remaining issue involves unusual cases. One example appears in *Abbotsford Police Board and Abbotsford Police Association*,[399] in which a long-serving police officer with exemplary service wished to pursue a long-term personal relationship with a man recently released from prison in the United States after serving his sentence for serious crime. Such cases ordinarily require legal advice.

35. "Non-harassment" Sex-related Misconduct: Inappropriate but Fully Consensual/welcome Sexual Activity – (in Workplace or Involving Members of the Public)

35.1 Our review of decisions identified this issue as less prominent. We would advise adjusting the Conduct Measures Guide, but see no need to offer a formal recommendation.

PART V – RECOMMENDATIONS OF THE HON. MICHEL BASTARACHE

36. Recommendations of the Hon. Michel Bastarache

36.1 The contract also asks us to address the specific recommendations of the Hon. Michel Bastarache in the Independent Assessors report, released as part of the Merlo Davidson Settlement Agreement).

36.2 The three recommendations relevant to conduct measures appear in section "J" of the *Final Report*, titled "Grievances and Discipline". The first recommendation is as follows:

> Sanctions for those found to have been harassing in the workplace must be effective and include suspensions without pay for longer periods, demotions, removal of supervisory responsibilities for an extended period; ban applying for promotions with no discretionary override. Dismissal should be the sanction for serious or repeated offences. Victims should not be transferred unless they request it.

36.3 We endorse these recommendations, and have provided our recommendations in sections 31 and 32.

36.4 The second recommendation is as follows:

> Those accused of sexual harassment (including assaults) should not be allowed to retire before the conclusion of an investigation and conduct process.

36.5 We agree with the spirit behind this recommendation. We cannot fully assess whether the authority to do so exists in present legislation or regulations. We would observe as well that in some cases other employer options may be available.

36.6 The third recommendation is as follows:

> A system to monitor those who have been found to have harassed members in the workplace should be implemented. A second finding of harassment should result in automatic dismissal.

36.7 We considered recommending "automatic dismissal", but the "special circumstances" exception to *presumptive* dismissal is sufficiently precise that presumptive dismissal for

sexual harassment in cases involving assaultive behaviour meets the five principles that we believe provide the foundation for effective conduct measures.

36.8 We would certainly support the recommendation to implement a system "to monitor those who have been found to have harassed members in the workplace", although this issue falls outside the scope of our work.

ADDENDUM

Addendum/Recommendation 17:

We are grateful for the time, energy and thought donated by the various stakeholders with whom we consulted. Their insights and advice on how best to update the Conduct Measures guide were invaluable to our work. Many of their comments, however, extended beyond merely amending the Guide. It became clear that there still remains a well-reasoned desire to review the process by which the Guide's conduct measures are applied, including the organization and selection of appropriate conduct authorities, the nature and type of conduct hearings, the appellate process, and the relationship of the RCMP to its oversight bodies.

These matters fall outside the remit of the contract and our mandate. Some of the issues in the process can be instituted only with the benefit of statutory amendments to the *RCMP Act* or the Commissioner's Standing Orders. Nonetheless, we see our work here as only the first step in an improvement to the RCMP discipline scheme. Accordingly, we recommend and encourage the RCMP to undertake a review of the remaining processes in their current discipline framework to address these concerns.

ENDNOTES

1. Conduct Measures Guide, at 3.

2. An example appears on p 4 of the Conduct Measures Guide (annual reports of the British Columbia Police Complaint Commissioner).

3. Decisions of the Comité de déontologie policière appear at https://www.canlii.org/fr/qc/qccdp/, beginning with 1991 decisions.

4. Decisions of the Commission appear at https://www.canlii.org/en/on/oncpc/ beginning with 2012 decisions (with some earlier decisions). Paper versions of earlier Commission decisions are also available.

5. Decisions of the Board appear at https://www.canlii.org/en/ab/ablerb/ beginning with 2002 decisions. Paper versions of earlier Board decisions are also available.

6. Decisions of the Board appear at https://www.canlii.org/en/ns/nsprb/ beginning with 2005 decisions.

7. Conduct Measures Guide, at 4.

8. *Ibid* ("Since the OCPC is an appellate authority, the cases presented before it typically revolve around more egregious variations of any given type of misconduct, and contain a disproportionately high ratio of dismissal cases").

9. See, for example, Segment 38, "Failing to report interpersonal workplace relationship", at 71-72.

10. *Robin* v *Saskatchewan Police Commission* 2016 SKCA 159 at para 78 https://canlii.ca/t/gw1p2.

11. *Ibid* at paras 125-30.

12. See, for example, *Bonner* v *Campbell* (sub nom *Re Rutherford*) 2017 CanLII 74692 (NS PRB), throughout.

13. The term the Ontario Police Commission uses in *Markham and Waterloo Regional Police* 2015 ONCPC 4 at para 71, though in the same paragraph as "sentencing". The *Police Act*, RSBC 1996, c 367, s. 126, uses the term "disciplinary or corrective measures".

14. The distinction between the two philosophies is discussed in *Legal Aspects of Policing*, *supra*, at §5.5(a) The term "penalty" remains in many statutory schemes, however. See, for example, *Police Services Act*, RSO 1990, c P.15, s. 85(4).

15. Examples: *Constable A* v *Edmonton Police Service* 2017 ABCA 38; *Royal Newfoundland Constabulary Chief of Police* v *Roche* 2010 CanLII 19315 (NL PC) ("sentencing precedents"); *Hall* v *Ottawa Police Service* 2008 CanLII 65766 at paras 1, 30, 74, 83 (ON SCDC).

16. Example: *Constable A and Edmonton Police Service* 2018 ABLERB 3 at paras 54, 70 ("sentencing"); *Kenney and Ontario Provincial Police* 2004 CanLII 77203 (ON CPC) ("punish").

17. In Alta Reg 356/1990, s. 17(1), after a finding of misconduct, the presiding officer shall impose one or more of the listed "punishments", and s. 17(1)(a.1) considers "a course of treatment or participation in a rehabilitation program" as one of the available "punishments".

18. NB Reg 2007-81, s. 3.

19. *Re Hill* 2011 LSBC 16 at para 3, for example. *Hill* confirmed that the object of disciplinary proceedings in the legal profession "is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice" and, if applicable, to decide upon "sanctions" that best protect the public, maintain high professional standards and preserve public confidence in the legal profession. *Ibid*.

20. *Thow* v *British Columbia Securities Commission* 2009 BCCA 46 at para 38 https://canlii.ca/t/22gkh.

21. 2017 ABCA 38 at paras 54, 57.

22. See also *Quaidoo* v *Edmonton Police Service* 2015 ABCA 381 at para 33. Some guidance appears in the case law in other professional regulation environments, which has rejected the view that the disposition stage in a professional misconduct proceeding is akin to the sentencing process in a criminal proceeding, despite the fact that the remedy stage in the misconduct process in some ways resembles the criminal sentencing process. See *McKee* v *College of Psychologists of British Columbia* 1994 CanLII 1404 at para 7 (BC CA), for example (disagreeing with the lower court that "likened the imposition of a penalty to a sentencing process").

23. Commissioner's Standing Orders (Conduct), SOR/2014-291, s. 2(1)(a) https://canlii.ca/t/52chk.

24. *Ibid*, s. 3(1).

25. *Ibid*, s. 3(2).

26. *Ibid*, s. 2(1)(b).

27. *Ibid*, s. 4.

28. *Ibid*, s. 2(1)(c).

29. *Ibid*, s. 5(1).

30. *Ibid*, s. 5(3).

31. See s. 45.11 *et seq*, and s. 45.16(11) (delegation). See also Commissioner's Standing Orders (Grievances and Appeals), SOR/2014-289, Part 2 https://canlii.ca/t/52chm. As to the (high) standard that governs appeals, see *Kalkat* v *Canada (Attorney General)* 2017 FC 794 at para 62 https://canlii.ca/t/h5tr0.

32. The Nova Scotia Police Review Board has specifically adopted the list of principles that follows: *Bonner* v *Campbell* (sub nom *Re Rutherford*) 2017 CanLII 74692 (NS PRB) at paras 5-7; *Bishop* v *Gilbert* 2012 CanLII 100594 at para 8. See also *Harris* v *Royal Newfoundland Constabulary Public Complaints Commission* 2017 CanLII 46340 at para 110, referring to the first four of the five principles.

33. A detailed examination of the purposes of the police complaint and discipline process appears in *Legal Aspects of Policing*, *supra*, at§5.2(a).

34. Conduct Measures Guide, at 5, 8.

35. Leading court judgments: *Coady* v *Ryan* (1992) 103 Nfld & PEIR 155 at 160 (NL TD) (in which the court referred to the "broad public purpose" served by the police discipline process: "to ensure high standards of conduct within the Royal Newfoundland Constabulary"); *White* v *Dartmouth (City)* (1991) 106 NSR (2d) 45 at 51 (TD) (the purposes of the *Police Act* include "public protection from abuse of police power"); *Symington* v *Nova Scotia Police Review Board* (2002) 202 NSR (2d) 296 at 301-02 (SC); *Kelly* v *Nova Scotia Police Commission* 2005 NSSC 142 at para 78, revd on other grounds 2006 NSCA 27.

36. Leading court judgments: *Halifax Regional Police Service* v *Wilms* (1999) 177 NSR (2d) 320 at 320 (SC) (one of the purposes of the Nova Scotia *Police Act* is "to maintain public confidence in the police force and its reputation through a disciplinary process that imposes sanctions against those members of the police force who engage in discreditable conduct"; *Symington*, *ibid*. See also the important judgment of the England and Wales High Court in *R (*ex parte *Williams)* v *Police Appeals Tribunal* [2016] EWHC 2708 at para 66 (QB) ("maintain public confidence in and respect for the police service").

37. *Figueiras* v *York Region Police Services Board* 2013 ONSC 7419 at para 45.

38. *Lévis (City)* v *Fraternité des policiers de Lévis* 2007 SCC 14 at para 24. See also *R* v *Wigglesworth* [1987] 2 SCR 541 at 562 ("maintenance of discipline and integrity within the force"). The Alberta Court of Appeal has concluded, in determining a fit disposition after a finding of misconduct, that the calculus includes the impact that the misconduct had on the relationship between the respondent police officer and the police force: *Edmonton Police Service* v *Furlong* 2013 ABCA 121 at para 36.

39. *Lévis (City)* v *Fraternité des policiers de Lévis* 2007 SCC 14 at para 24.

40. See *Turbucz and Wallaceburg Police* (1976) 1 OPR 283 at 287 (OPC) (the disciplinary framework is protective rather than punitive, since a police officer could otherwise be dismissed at pleasure). See also *White* v *Dartmouth (City)* (1991) 106 NSR (2d) 45 at 51 (TD) ("protection of police officers from unwarranted disciplinary action" as one of the purposes of the Nova Scotia process); *Kelly* v *Nova Scotia Police Commission* 2005 NSSC 142 at para 78, revd on other grounds 2006 NSCA 27.

41. *Lévis (City)* v *Fraternité des policiers de Lévis* 2007 SCC 14 at para 24. See also *Plimmer* v *Calgary Police Service* 2004 ABCA 178 at para 20, in which the Alberta Court of Appeal framed the purposes of the police discipline process as "balancing the need for public confidence with the employment rights of the officer in the context of the safe, efficient and effective operation of the police service"); *Blair* v *Soltys* (1999) 141 Man R (2d) 319 at 320 (QB) (articulating that the Manitoba *Law Enforcement Review Act* was "more than a disciplinary statute", and its processes could result in recommendations for systemic changes as well as the discipline of the respondent police officer; ultimately, the complainant, the respondent police officer, the police force, and the province "all have an interest"; "From the individual police officer's perspective, the *Act* may appear to be purely disciplinary in nature, but it has a much broader public purpose as well. It is designed to promote both respect for the police and respect for the individual").

42. Ottawa: Information Canada, 1976, at 134-35, 140. See also the discussion in Royal Canadian Mounted Police External Review Committee, *Sanctioning Police Misconduct – General Principles* (Discussion Paper #8) at 3-8.

43. RSBC 1996, c 367, s. 126(3).

44. Code of Professional Conduct Regulation, NB Reg 2007-81, s. 3.

45. *Toy* v *Edmonton Police Service* 2018 ABCA 37 at paras 48, 57-58, 64 (findings of misconduct for deceit; respondent police officer "no longer fit for duty").

46. *Campbell* v *Fredericton Police Force* 2018 NBCA 45 at para 20 (considering Code of Professional Conduct Regulation, NB Reg 2007-81, s. 3).

47. *Gemmell and Vancouver Police*, BC Adj, 15 June and 27 July 2005, at p 10 of the 27 July 2005 disposition decision. The adjudicator considered the Code of Professional Conduct Regulation, BC Reg 205/98, s. 19(2), which contained nearly identical language to the present s. 126(3), *ibid*.

48. BC Reg 205/98 (repealed on March 31, 2010). Although the former s. 19(3) was not imported into the current *Police Act* provisions governing disposition (*Police Act*, RSBC 1996, c 367, s. 126), we reproduce it here only because it efficiently expresses the principle.

49. *Montréal (City)* v *Quebec (Commission des droits de la personne et des droits de la jeunesse)* 2008 SCC 48 at para 33, *per* Deschamps, J, writing for the majority.

50. *Ibid* at para 86, *per* Charron, J, in dissent. See also *Lévis (City)* v *Fraternité des policiers de Lévis* 2007 SCC 14 at paras 42-45; *Klonteig* v *West Kelowna (District)* 2018 BCSC 124 at para 71 (referring to "the distinction between police officers, who are in a unique position with respect to public trust and confidence in their ability to discharge their duties, and the expectations which fall on other municipal employees", and citing *Fraternité des policiers de Lévis*).

51. The Commissioner's Standing Orders (Conduct), SOR/2014-291, s. 24(2), also address the proportionality requirement: "A Conduct Board must impose conduct measures that are proportionate to the nature and circumstances of the contravention of the Code of Conduct".

52. *Constable A* v *Edmonton Police Service* 2017 ABCA 38 at para 53.

53. See Conduct Measures Guide (Supp. 2019), at 5-6.

54. The employer (or regulator) has the legal burden (or "persuasive" or "overall" burden) to prove an allegation of professional misconduct, and the respondent police officer bears the burden of proving mitigating circumstances that could reduce penalty: *Braile* v *Calgary Police Service* 2018 ABCA 109 at paras 16, 19, 26. The obligation of the employer in this regard would obviously become the obligation of the regulatory body, in the event that the regulatory body and not the employer had carriage of the matter under the legislative framework. *Ibid* at paras 24-28. The judgment contains an instructive review of the principles governing burden of proof. The Court of Appeal cited a consistent conclusion of the Ontario Divisional Court judgment in *Gulick* v *Ottawa Police Service* 2012 ONSC 5536 at para 16. – "the onus on a person claiming a disability is to prove it" – in this regard. *Ibid* at para 27.

55. *Fraternité des policiers et policières de Saint-Jean-sur-Richelieu inc* c *St-Jean-sur-Richelieu (Ville de)* 2016 QCCA 1086 at para 79 https://canlii.ca/t/h39tw. The Conduct Measures Guide (p. 9) properly recognizes that a mitigating factor is not a defence: it "is not a justification or excuse that would absolve the member from all responsibility", but is "a factor that can help explain or lessen the gravity of a given contravention". It offers the example of a diagnosis of alcoholism that might explain the arrest of a member for impaired driving, "while his attending a rehabilitation clinic after the fact may help lessen the gravity of his actions". It states (correctly) that "neither of these considerations excuses the misconduct".

56. *Bishop* v *Gilbert* 2012 CanLII 100594 (NSPRB) at para 9, for example.

57. *Reeves and London Police* 2021 ONCPC 3 at paras 11-12, for example.

58. *Saint John Police and Messer* [2013] NBLAA 9 at para 115 (QL), for example.

59. *Blampied and Regina Police*, Sask Hearing Officer, 24 February 2012 at 7, for example.

60. *Harris* v *Royal Newfoundland Constabulary Public Complaints Commission* 2017 CanLII 46340 at para 110.

61. Some of the decisions approved a slightly different earlier version. The current version of the list added "provocation" and "denial of procedural fairness" as disposition considerations, and reordered the list. Consideration #12 has changed from "employer approach to misconduct in question" to "systemic failure and organizational/institutional context". Courts of law and tribunals have relied upon many of these considerations without referring to this list. See *Edmonton Police Service* v *Furlong* 2013 ABCA 121 at para 36, for example.

62. British Columbia legislation requires that decision-makers consider specified aggravating and mitigating factors in determining disciplinary or corrective measures: *Police Act*, RSBC 1996, c 367, ss. 126(2), 141(10), 143(9)(c).

63. *Reeves and London Police* 2021 ONCPC 3 at para 11, for example, citing this section of P Ceyssens and WS Childs, *Ontario Police Services Act, Fully Annotated* (2017 ed).

64. *Ibid*.

65. *Toy* v *Edmonton Police Service* 2018 ABCA 37 at para 56; *R (*ex parte *Williams)* v *Police Appeals Tribunal* [2016] EWHC 2708 at para 71 (QB); *Elhatton* v *Canada (Attorney General)* 2014 FC 67 at para 62.

66. *Constable A* v *Edmonton Police Service* 2017 ABCA 38 at para 60, for example ("a careful weighing of all the circumstances of the offender and the offence in arriving at a just and appropriate sanction").

67. Court judgments: *Favretto* v *Ontario Provincial Police Commissioner* 2004 CanLII 34173 at para 37 (ON CA), leave to appeal refused [2005] 1 SCR xiii (Court of Appeal restored a commission decision that had allowed an appeal against a penalty of dismissal based primarily on three disposition considerations, one of which was provocation; the commission concluded that the hearing officer had failed to give provocation proper weight, and this factor was "significant and compelling when the penalty of dismissal is being reviewed"); *Blakely* v *Quinte West Police Service* [2007] OJ 3109 at para 14 (QL) (Div Ct) (tribunal had overemphasized general deterrence).

68. Recall the discussion of the four purposes (interests) in the police complaint and discipline process, as expressed in *Lévis (City)* v *Fraternité des policiers de Lévis* 2007 SCC 14 at para 24, where Bastarache, J spoke of interpreting the presumptive dismissal requirement in s. 119 of the Quebec *Police Act* as "a decision that requires the 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".

69. *Pinto and Toronto Police* 2011 ONCPC 6 at para 55.

70. Conduct Measures Guide, p 8.

71. *Galassi* v *Hamilton Police Service* 2005 CanLII 20789 at para 32 (ON SCDC).

72. *Edmonton Police Service* v *Furlong* 2013 ABCA 121 at para 38, for example.

73. *Camrose Chief of Police* v *MacDonald* 2013 ABCA 422 at paras 12, 28(d), 46(b) (in ordering the dismissal of the respondent police officer, the hearing officer had stated, incorrectly, that "deceit must be a career-ender" and "termination must be a certainty for deceits that arise in the execution of police officers' duties"). See now *MacDonald and Camrose Police* 2014 ABLERB 55 at paras 63-71, 73.

74. *Groot and Peel Regional Police* 2002 CanLII 63879 at para 49 (OCCPS) https://canlii.ca/t/gtwcg.

75. *Police Act*, CQLR, c. P-13.1 https://canlii.ca/t/557g6 ("Any police officer or special constable who is found guilty, in any place, of an act or omission referred to in subparagraph 3 of the first paragraph of section 115 that is triable only on indictment, shall, once the judgment has become res judicata, be automatically dismissed").

76. Conduct Measures Guide, at 60, addressing "sexual activity with detainee": "No consent is possible between a police officer and a detained person in police custody. Such cases usually result in lengthy prison sentences for the member involved, and as a result have seldom reached adjudication. Dismissal is the only possible outcome if the member does not resign beforehand."

77. *Salter* v *Chief Constable of Dorset* [2012] EWCA Civ 1047 at para 19 (English case law cited here because it has most efficiently explained the principle). See also *R (*ex parte *Williams)* v *Police Appeals Tribunal* [2016] EWHC 2708 at para 67 (QB).

78. 2008 SCC 48.

79. *Montréal (City)* v *Quebec (Commission des droits de la personne et des droits de la jeunesse)* 2008 SCC 48 at para 33, *per* Deschamps, J, writing for the majority.

80. *Ibid* at para 86, *per* Charron, J, in dissent. See also *Lévis (City)* v *Fraternité des policiers de Lévis* 2007 SCC 14 at paras 42-45; *Klonteig* v *West Kelowna (District)* 2018 BCSC 124 at para 71 (referring to "the distinction between police officers, who are in a unique position with respect to public trust and confidence in their ability to discharge their duties, and the expectations which fall on other municipal employees", and citing *Fraternité des policiers de Lévis*).

81. *Fraternité des policiers et policières de Saint-Jean-sur-Richelieu inc* c *St-Jean-sur-Richelieu (Ville de)* 2016 QCCA 1086 at para 86 https://canlii.ca/t/h39tw.

82. *Fraternité des policières et policiers de Montréal* c *Sûreté du Québec* 2007 QCCA 1086 at para 51 (*per* Nuss, JA, writing for the majority) https://canlii.ca/t/1sgz6.

83. *Campbell* v *Fredericton Police Force* 2018 NBCA 45 at para 22, affg 2016 NBQB 225 at para 37, further reasons 2018 NBCA 54, leave to appeal dismissed 2019 CanLII 18833 (SCC).

84. *Newton* v *Criminal Trial Lawyers' Association* 2010 ABCA 399 at para 59. Various tribunal decisions also support this principle. See, for example, *Bishop* v *Gilbert* 2012 CanLII 100594 (NSPRB) at para 11 ("[t]he public has an interest in the behaviour of police offices in carrying out their duties and in the manner in which they are disciplined for any transgressions").

85. *Edmonton Police Service* v *Furlong* 2013 ABCA 121 at para 36.

86. *Ibid* at para 37.

87. *Edmonton Police Service* v *Furlong* 2013 ABCA 121 at para 37. See also *Quaidoo* v *Edmonton Police Service* 2015 ABCA 381 at para 51 ("the position of public trust held by a police officer is not the same thing as membership in a union involving other types of employment where it is reasonable to expect that transgressions will be related to the relationship between the worker and employer, and have no larger implications"); *Buckle and Ontario Provincial Police* 2006 CanLII 3963 at para 7 (ON SCDC).

88. *Robin* v *Saskatchewan Police Commission* 2016 SKCA 159 at para 114.

89. *Ibid* at para 117.

90. *Association des policiers provinciaux du Québec* c *Sûreté du Québec* 2010 QCCA 2053 at para 72, leave to appeal dismissed 2011 CanLII 29803 (SCC). In an Ontario case involving findings of misconduct against a senior officer arising from mass unlawful arrests (one involving approximately 250 people and the other involving approximately 200), the tribunal quoted the presiding officer's conclusion that unlawful arrests on such a large scale "strike at the heart of public interest and the public trust placed in police and enshrined in the principles underlying the [*Police Services Act*]". See *Fenton and Toronto Police* 2017 ONCPC 15 at para 141.

91. 2001 FCT 710.

92. *Ibid* at para 20. Public interest arises as a factor in three principal situations: (i) where the misconduct has offended or undermined the public interest or public confidence, or would do so; (ii) where the misconduct has generated a demonstrable risk; and (iii) where there is a need to demonstrate confidence in the police force, its members or its discipline process. See *Legal Aspects of Policing*, *supra*, at §5.10(e)(ii).

93. *R (ex parte Williams)* v *Police Appeals Tribunal* [2016] EWHC 2708 at paras 70-73 (QB) http://www.bailii.org/ew/cases/EWHC/QB/2016/2708.html (five allegations against borough commander, four of which concerned gender harassment; dismissal).

94. This principle appears routinely in decisions. See *Shorey and Belleville Police* 2017 CanLII 53072 at paras 51-52 (ON CPC), for example.

95. *Toronto Police Service* v *Kelly* 2006 CanLII 14403 (ON SCDC) (respondent police officer used and supplied cocaine; mitigating considerations of remorse and disability justified significant demotion with strict conditions in place of dismissal); *Petropoulos* v *Edmonton Police Service* 2015 ABLERB 6, affd 2016 ABCA 216 (*sub nom Rogers* v *Edmonton Police Service*) (no dismissal for "egregious" misconduct, given mitigating considerations).

96. *Page and Abbotsford Police*, BC Adj, 17 April 2013 at paras 11-12, for example.

97. *Robin* v *Saskatchewan Police Commission* 2016 SKCA 159 at para 120 https://canlii.ca/t/gw1p2.

98. See *Davis and South Simcoe Police*, OCPC, 8 September 2011 at para 58 (commission "strongly" disagreed with the view that neglect of duty "is not as morally reprehensible or as serious as the other misconduct offences". Ranking the gravity of the different discipline offences and gauging and comparing the seriousness of disparate cases of misconduct within other discipline offences remains fraught with difficulty. See *Constable A* v *Edmonton Police Service* 2017 ABCA 38 at para 61; *Toy* v *Edmonton Police Service* 2018 ABCA 37 at para 62.

99. See *Salter* v *Chief Constable of Dorset* [2012] EWCA Civ 1047 (instructive illustration of gauging the seriousness factor in all the circumstances, in contrast to more serious and less serious points on the spectrum).

100. See, for example, *Blakely* v *Quinte West Police Service* 2007 CanLII 33123 at para 19 (ON SCDC) (appeal tribunal considered penalty in the context of an arbitrary violation of s 10(b) of the *Charter*; the hearing officer found that the denial of the right to counsel was done in good faith, lawful apart from the fact that it continued after the justification expired, and not arbitrary; appeal tribunal erred in approaching this case as if the respondent police officer behaved arbitrarily; penalty reduced).

101. A full discussion of parity appears *supra*.

102. *Jansen and Transit Police*, BC Adj, 13 February 2014 at 4.

103. *Toy* v *Edmonton Police Service* 2018 ABCA 37 at paras 48, 57.

104. *Ibid* at para 40.

105. *Ibid* at para 48.

106. *Jansen and Transit Police*, BC Adj, 13 February 2014 at 4 ("compared with the misconduct described in the reported cases the seriousness of [the respondent police officer's] deceit is in the midrange").

107. *Clough and Peel Regional Police* 2014 ONCPC 12 at para 105; *Page and Abbotsford Police*, BC Adj, 17 April 2013, at para 18 ("deceit of any kind is serious and the seriousness is compounded by the repetition of false or misleading statements on successive occasions").

108. See *Jansen and Transit Police*, BC Adj, 13 February 2014, for example (several findings of deceit).

109. *Salter* v *Chief Constable of Dorset* [2012] EWCA Civ 1047 at para 22 (serious misconduct but motives "well-intentioned"). Note that good faith operates in this context as a mitigating consideration upon penalty (as part of the analysis of the "seriousness of the misconduct") after a finding of misconduct, as distinct from good faith operating as a formal defence that, if successful, would bar a finding of misconduct. The discussion of good faith as a formal defence appears at §6.14(a), *infra*.

110. *Constable A* v *Edmonton Police Service* 2017 ABCA 38 at para 60 ("underlying intention of the officer at the outset was laudable rather than self-serving"); *Salter*, *ibid* (misconduct not characterized by "self-interest or corruption"); *Read* v *Canada (Attorney General)* 2005 FC 798 at para 138, affd on other grounds 2006 FCA 283.

111. *Salter* v *Chief Constable of Dorset* [2012] EWCA Civ 1047 at para 22 (serious misconduct but not the subject of careful planning).

112. *Canadian National Railway Company and Canadian National Railways Police Association (Telcs Grievance)* 2012 CanLII 97614 (Sims).

113. *Edmonton Police Service* v *Furlong* 2013 ABCA 121 at para 38. See also *Furlong and Edmonton Police Service* 2013 CanLII 96216 at para 44 (AB LERB), affd 2014 ABCA 119; *Galassi* v *Hamilton Police Service* 2005 CanLII 20789 at para 32.

114. *Lévis (City)* v *Fraternité des policiers de Lévis* 2007 SCC 14 esp at para 77 (breach of an undertaking by a police officer is especially serious "given the role that police officers play in the administration of justice"; behaviour "suggests a lack of respect for the judicial system of which he forms an integral part"). See also *Husseini* v *York Regional Police Service* 2018 ONSC 283 at para 42 (submitting fraudulent benefit claims each month for 11 months; behaviour "antithetical to what is expected of a police officer" and misconduct constituted a "flagrant abuse of her position oath of office and duties as a police officer"; actions were "character defining"); *Toy* v *Edmonton Police Service* 2018 ABCA 37 at paras 56-57 ("misconduct was particularly egregious as it concerned dishonest behaviour with respect to a core policing duty"); *Shorey and Belleville Police* 2017 CanLII 53072 (ON CPC) (convictions for criminal harassment and breach of trust; dismissal); *Robin* v *Saskatchewan Police Commission* 2016 SKCA 159 (multiple serious misconducts; dismissal).

115. Examples: *Constable A and Edmonton Police Service* 2018 ABLERB 3 (attempting to protect the identity of a confidential informant, respondent inserted incorrect information in an information to obtain a search warrant (ITO), obtained a false statement from the informant, and prepared a police report containing that false information; after charges laid against the suspect, respondent disclosed the false information in the ITO and police report to the assigned Crown prosecutor; "in an effort to explain the circumstances giving rise to the original falsehood", respondent denied to professional standards investigators having wilfully included false information in the ITO, and maintained that position in testimony at her disciplinary hearing; presiding officer made three findings of deceit, one of discreditable conduct and one of insubordination, and described misconduct as "a list of irreparable and inexcusable egregious conduct" and ordered dismissal, which decision the LERB upheld; Court of Appeal allowed judicial review; on reconsideration, LERB imposed demotion, short suspension and ethical training; respondent had 15 years of service and an unblemished employment history and capable of rehabilitation); *Husseini* v *York Regional Police Service* 2018 ONSC 283 (benefits fraud); *Toy*, *ibid*; *Robin*, *ibid*.

116. *Constable A*, *ibid*; *Toy*, *ibid* 2018 ABCA 38 at paras 56-57 (misconduct "particularly egregious as it concerned dishonest behaviour with respect to a core policing duty").

117. *Furlong and Edmonton Police Service* 2013 CanLII 96216 at paras 42-44 (AB LERB), affd 2014 ABCA 119 (conduct intended to "degrade and dehumanize").

118. *Toy* v *Edmonton Police Service* 2018 ABCA 38 at para 67, for example.

119. *Karklins* v *Toronto Police Service* 2010 ONSC 747 at para 21 (Div Ct) (miscarriage of justice; respondent police officer gave misleading testimony after filing charges based on false information; innocent person convicted of offences and incarcerated for five days; misconduct deliberate and continuing and not a spontaneous act).

120. *Husseini* v *York Regional Police Service* 2018 ONSC 283 at para 42; *New Brunswick Police Commission* v *Smiley* 2017 NBCA 58; *Robin* v *Saskatchewan Police Commission* 2016 SKCA 159; *Carson* v *Pembroke Police Service* [2007] OJ 5392 (QL) (Div Ct) (while facing prosecution for an earlier charge – "[w]hile in uniform, wearing his service revolver, driving a marked police cruiser, he went to his former domestic partner's residence and uttered a death threat to her partner" – he assaulted his new domestic partner in her home, resulting in charges of assault, forcible entry, and forcible confinement; approximately a month later, he breached the terms of his recognizance by speaking with the complainant when he encountered her on the street, and shortly thereafter he breached his recognizance again by phoning her at work).

121. *Hussein*, *ibid* at para 42 (submitting fraudulent benefit claims each month for 11 months); *Robin* v *Saskatchewan Police Commission* 2016 SKCA 159; *Association des policiers provinciaux du Québec* c *Sûreté du Québec* 2010 QCCA 2053 at para 61, leave to appeal dismissed 2011 CanLII 29803 (SCC).

122. *Toy* v *Edmonton Police Service* 2018 ABCA 37 at para 56 (wilful and premeditated manner over a significant period of time); *Robin* v *Saskatchewan Police Commission* 2016 SKCA 159 at para 78 https://canlii.ca/t/gw1p2; *Buckle and Ontario Provincial Police* [2006] OJ 554 (QL) (Div Ct) (some of respondent's schemes "quite complex" and none were "singular or stupid acts of human frailty" akin to impulsive acts of shoplifting.

123. Historically recurring similar acts implicate not only "seriousness of the misconduct" but also other disposition factors, such as potential to reform or rehabilitate".

124. At 47. See generally the discussion under heading "B. Sexual Misconduct", at 46-48.

125. Executive Summary, at vii.

126. *Quaidoo* v *Edmonton Police Service* 2015 ABCA 381 at para 43. In British Columbia, the *Police Act*, RSBC 1996, c 367, s. 126(2)(e), specifically identifies "whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence" as a factor in determining a disposition.

127. Perhaps the one exception in this regard involves an admission of guilt to an allegation of misconduct for having been found guilty of a criminal offence.

128. Since the police complaint and discipline process is part of the civil law process, not the criminal law (or quasi-criminal law) process, "admission of guilt" in place of the criminal law term "guilty plea" is used to avoid criminal law principles and terminology.

129. A qualified admission of guilt (sometimes referred to as a "partial plea") occurs when a respondent police officer enters an admission of guilt, but admits only some of the particulars in the notice of hearing. Certainly a qualified admission of guilt that is accepted cannot aggravate a penalty: *Pierce and Ontario Provincial Police* 2018 ONCPC 4 at para 31.

130. *Karklins* v *Toronto Police Service* 2010 ONSC 747 (Div Ct).

131. See *Gauthier and Timmins Police* 2015 ONCPC 19 at para 27 (cooperation with the investigation mitigated penalty). The Ontario Court of Appeal, however, in a case involving a self-governing profession, appears to have limited the utility of a respondent testifying "willingly and honestly", labeling such mitigating circumstances "quite generic": *Law Society of Upper Canada* v *Abbott* 2017 ONCA 525 at para 72.

132. *Foley and Sterling-Rawdon Police*, OCPC, 21 August 2012 at para 62 (chief of police improperly supplied pepper spray to a woman at demonstrable risk; "motivated out of a concern for the safety of a person whom he had sworn [duty] to protect"; aware of a credible threat to the safety of a woman and did not have sufficient resources to adequately respond; "he knew what he was doing was wrong, but he did it with the best intentions"; chief corrected the error shortly after the incident, not "in the midst of a conduct investigation or potential disciplinary matter", but "because that was the appropriate thing to do".

133. *Galassi* v *Hamilton Police Service* [2005] OJ 2301 at para 36 (QL) (Div Ct).

134. As an illustration, recognizing the seriousness of the misconduct formed an important part of the contrasting results in two superior court judgments involving findings of serious misconduct: *Toronto Police Service* v *Kelly* 2006 CanLII 14403 at para 77 (ON SCDC), aff'g 2005 ONCPC 3 (respondent police officer appeared to have done "everything in his power to make things right", pleading guilty to charges, accepting responsibility and taking "meaningful" steps to address medical issues; significant demotion and stringent conditions replaced dismissal); *Buckle and Ontario Provincial Police* 2005 ONCPC 2, affd 2006 CanLII 3963 (ON SCDC) (no "meaningful" cooperation with investigators; no "acceptance of responsibility"; no restitution even several years after the events).

135. Some decisions have considered lack of remorse even when a respondent police officer makes full answer and defence. In *Karklins* v *Toronto Police Service* 2010 ONSC 747 (Div Ct), displaying a "remarkable lack of empathy" aggravated penalty ("unconscionable" behaviour constituting misconduct "at the highest end of the spectrum" that generated a miscarriage of justice; respondent police officer gave misleading testimony after filing charges based on false information; innocent person convicted of offences and incarcerated for five days; hearing officer could properly find "a remarkable lack of empathy" toward the person).

136. *Quaidoo* v *Edmonton Police Service* 2015 ABCA 381 at para 43.

137. *Armstrong* v *Law Society of Upper Canada* 2011 ONLSAP 1 at para 27.

138. 2015 ABCA 381 at paras 47, 49-50 <https://canlii.ca/t/gmf6n. The Court of Appeal added that "it is not *per se* evidence of unreasonableness on the part of the Presiding Officer or the LERB majority merely because it may be that their approach to acknowledgment of responsibility, guilty plea and remorse may not be exactly the same as those which may apply in the regular criminal courts". *Ibid* at para 45. See also *Toy* v *Edmonton Police Service* 2018 ABCA 37 at paras 68-69.

139. In rare cases disability might operate as a substantive defence, by negating a mental element required to prove a particular category of misconduct.

140. *Purbrick and Ontario Provincial Police*, OCPC, 25 May 2011, affd 2013 ONSC 2276 (Div Ct) (PTSD, depression, anxiety and alcoholism; discussed *infra*); *Malish* v *Edmonton Police Service* 2005 ABCA 361 (bipolar mood disorder and alcohol addiction).

141. *Gulick* v *Ottawa Police Service* 2012 ONSC 5536 at para 15 https://canlii.ca/t/ft16b ("We are not aware of any jurisprudence which has established that anger management issues will support a finding of disability").

142. 2000 CanLII 15441 (FC) https://canlii.ca/t/447h ("at the time of his conduct he was suffering from post-traumatic stress disorder ("PTSD") stemming from his service in a United Nations policing contingent deployed to Croatia and Bosnia-Herzegovina in 1992-1993, and subsequent traumatic incidents experienced as an undercover drug enforcement officer").

143. See s. 15(1)(a) of the *Canadian Human Rights Act*, RSC 1985, c H-6 https://canlii.ca/t/555n8: it is not a discriminatory practice if "any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement". Under s. 15(2), for any practice mentioned in s. 15(1)(a) to be considered to be based on a *bona fide* occupational requirement, "it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost". The Ontario Police Commission has stated that "dismissal of an individual who contracted a mental illness during the course of his employment must be undertaken with extreme care, and only in circumstances which clearly warrant such action": *Moraru and Ottawa Police* 2008 ONCPC 1 https://canlii.ca/t/gt4tn.

144. In *Guttman* v *Law Society of Manitoba* 2010 MBCA 66 at para 71, for example, the Court of Appeal quoted with approval from G MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters, 1993) at para 26-44, where the author recognized that various forms of mental illness and stress arise commonly in lawyer discipline cases, and are material to formulating penalty where a causal relationship exists between the disability or stress and the misconduct.

145. *Law Society of Ontario* v *Yantha* 2018 ONLSTH 94 at para 10, for example. As to the policing context, see *Lévis (City)* v *Fraternité des policiers de Lévis* 2007 SCC 14. See also *Hall* v *Ottawa Police Service* (2008) 93 OR (3d) 675 at para 80 (Div Ct) (reliance upon the "nature of police work" and damage to employer's reputation).

146. *Yantha*, *ibid*.

147. *Law Society of Upper Canada* v *Flumian* 2013 ONLSHP 92, for example.

148. *Law Society of Ontario* v *Yantha* 2018 ONLSTH 94 at para 28, for example.

149. Various court judgments support the principle that, subject to the discussion below regarding evidence, extenuating personal circumstances short of formal diagnosed disability may mitigate a remedy: *Camrose Chief of Police* v *MacDonald* 2013 ABCA 422 at para 32 ("emotional stress"); *Gulick* v *Ottawa Police Service* 2012 ONSC 5536 (Div Ct); *Association des policiers provinciaux du Québec* c *Sûreté du Québec* 2010 QCCA 2053 at para 62, leave to appeal dismissed 2011 CanLII 29803 (SCC).

150. *Braile* v *Calgary Police Service* 2018 ABCA 109 at para 4; *Camrose Chief of Police* v *MacDonald* 2013 ABCA 422 at para 32.

151. 2012 ONSC 5536 at paras 15-17.

152. The conclusion of the Divisional Court in *Gulick* that "the onus on a person claiming a disability is to prove it" clarifies the burden of proof. The Alberta Court of Appeal has followed this judgment in *Braile* v *Calgary Police Service* 2018 ABCA 109 at paras 24-28, confirming that the respondent police officer has the burden of proof on the issue of mitigation. The burden of proof in establishing disability as a mitigating factor is a part of the broader discussion of burden of proof in establishing mitigating factors generally. See also *Malish* v *Edmonton Police Service* 2005 ABCA 361 at para 11.

153. *Pizarro* v *Canada (Attorney General)* 2010 FC 20 at paras 31, 52. The court also addressed the treatment of expert evidence. *Ibid* at paras 56 *et seq*. See also *Camrose Chief of Police* v *MacDonald* 2013 ABCA 422 at paras 31-33 (presiding officer erred in assessing expert medical evidence); *MacDonald and Camrose Police* 2014 ABLERB 055, at paras 33-62, 74-76 (concerning the issue of disability).

154. 2006 CanLII 14403 (ON SCDC).

155. *Ibid* at para 74. The court concluded that the commission was reasonable to implement the joint penalty submission, which constituted both an accommodation plan and acknowledgment that the employer could accommodate the respondent without undue hardship.

156. 2007 SCC 14.

157. *Ibid* at para 70.

158. (2008) 93 OR (3d) 675 (Div Ct).

159. See also *Purbrick and Ontario Provincial Police* 2013 ONSC 2276 (Div Ct) in which the respondent police officer, post-misconduct, received a diagnosis of PTSD, depression, anxiety and alcoholism. He undertook a comprehensive course of treatment with favourable results, which strongly mitigated disposition.

160. *Criminal Code*, RSC 1985, c C-46, ss. 232(1)-(2).

161. 2004 CanLII 34173, leave to appeal refused [2005] 1 SCR xiii.

162. *Ibid* at para 37.

163. *Byrne and Ontario Provincial Police (No 2)* 2007 ONCPC 15.

164. *Law Society of Upper Canada* v *Abbott* 2017 ONCA 525 at paras 88-90.

165. *Karklins* v *Toronto Police Service* 2010 ONSC 747 at para 12 (Div Ct), as an example (critical comments over a series of performance assessments aggravated disposition).

166. The leading court judgment concerning this point is *Husseini* v *York Regional Police Service* 2018 ONSC 283 at para 40. This principle corresponds to its equivalent in remorse as a disposition factor: the conduct authority (or conduct board) at first instance is in the best position to "assess the degree of remorse and the weight that it should be given", following *Galassi* v *Hamilton Police Service* [2005] OJ 2301 at para 36 (QL) (Div Ct).

167. *Campbell* v *Fredericton Police Force* 2016 NBQB 225 at para 36, affd 2018 NBCA 45 (dismissal upheld after findings of misconduct for theft and attempting to use position for personal gain, in case involving two previous finding of misconduct).

168. *Boogaard* v *Canada (Attorney General)* 2014 FC 1113 at para 77, revd on other grounds 2015 FCA 150. As a comparison, Ontario case law has favoured the view that the "weight to be given to a prior disciplinary conviction lessens with the passing of time" (*Dempsey and Waterloo Regional Police* 1991 CanLII 11278 at para 22 (OCCPS) https://canlii.ca/t/h52tw), although a tribunal has dismissed an appeal against a disposition where the hearing officer relied upon 12-year-old and 13-year-old findings of misconduct (*Aguiar and Toronto Police* 2010 ONCPC 5 https://canlii.ca/t/gt4q1).

169. For clarity: an employment history need not be entirely favourable to mitigate a disposition, and a "significant period" is sufficient. As an example, *Aguiar*, *ibid*, involved 12 years since previous findings of misconduct.

170. *Husseini and York Regional Police* 2017 CanLII 4791 at para 54 (ON CPC), affd 2018 ONSC 283 (Div Ct), quoting this statement from *Legal Aspects of Policing*.

171. As in *Toronto Police Service* v *Kelly* 2006 CanLII 14403 (ON SCDC).

172. *Galassi* v *Hamilton Police Service* 2005 CanLII 20789 at para 32 (ON SCDC).

173. *Edmonton Police Service* v *Furlong* 2013 ABCA 121 at para 38; *Furlong and Edmonton Police Service* 2013 CanLII 96216 at para 44 (AB LERB), affd 2014 ABCA 119.

174. *Galassi* v *Hamilton Police Service* 2005 CanLII 20789 (ON SCDC).

175. *Edmonton Police Service* v *Furlong* 2013 ABCA 121 at para 37. The Saskatchewan Court of Appeal cited this portion of the judgment with approval in *Robin* v *Saskatchewan Police Commission* 2016 SKCA 159 at para 114.

176. See *Favretto* v *Ontario Provincial Police Commissioner* 2004 CanLII 34173 (ON CA), leave to appeal dismissed [2004] SCCA 562 (QL).

177. *Galassi* v *Hamilton Police Service* [2005] OJ 2301 at para 35 (QL) (Div Ct).

178. *Husseini* v *York Regional Police Service* 2018 ONSC 283 at para 36, among many examples.

179. *Groot and Peel Regional Police* 2002 CanLII 63879 at paras 54-56 (OCCPS) https://canlii.ca/t/gtwcg (respondent had not worked as a police officer for almost a decade, so it was not possible to determine how he might have continued to perform police duties; while on suspension, he obtained two university degrees, wrote a book and became a lawyer; the judge in parallel criminal proceedings described him as "a person of present good character"; this consideration, in the absence of other significant mitigating factors, did not justify a remedy other than dismissal).

180. Witnesses and individuals writing character references should be familiar with the details of the allegations.

181. Example of tribunal decision: *Kobayashi and Waterloo Regional Police* 2015 ONCPC 12 at para 28 (medical evidence concluded that recurrence extremely unlikely).

182. *Purbrick and Ontario Provincial Police* 2011 ONCPC 7 at paras 45-53 https://canlii.ca/t/gt4pf, affd 2013 ONSC 2276 (Div Ct) (favourable evidence from prominent community members; complete lack of reference to character evidence constituted error of law).

183. *Law Society of Upper Canada* v *Abbott* 2017 ONCA 525 at para 72.

184. *Pizarro* v *Canada (Attorney General)* 2010 FC 20 at paras 74-77.

185. *Kinsey* v *Canada (Attorney General)* 2007 FC 543 at paras 54-61. The presenting officer during his closing submissions conveyed the divisional commanding officer's personal views, indicating that the commanding officer had lost confidence in the respondent police officers and telling a board comprised of the commanding officer's subordinates of her wishes concerning penalty. The Federal Court found these comments "most inappropriate": the commanding officer did not testify, and so committed a "flagrant breach of procedural fairness to introduce her views in the representative's closing submissions, without any possibility for the applicants to cross-examine her". The comments also "had the effect of raising a reasonable apprehension of bias".

186. *Carson* v *Pembroke Police Service* [2007] OJ 5392 at paras 24-29 (QL) (Div Ct) ("The Court of Appeal did not have all of the evidence before it that was before the Hearing Officer. It did not consider all of the factors relevant to a proper discipline penalty. It did not hear submissions from the Pembroke Police Service, the employer.")

187. The issue of "out of character" conduct, sometimes referred to as "a single act of human frailty", is braided with two other penalty considerations (seriousness, employment history).

188. One prominent example in which "potential to reform or rehabilitate" was a strongly mitigating disposition factor appears in *Purbrick and Ontario Provincial Police* 2013 ONSC 2276 (Div Ct), in which the respondent police officer, post-misconduct, received a diagnosis of PTSD, depression, anxiety and alcoholism, and undertook a comprehensive course of treatment with favourable results.

189. *McPhee and Brantford Police* 2012 ONCPC 12 at paras 110, 117 https://canlii.ca/t/gt4jc.

190. See the reference to "fundamental character flaw" in *Kobayashi and Waterloo Regional Police* 2015 ONCPC 12 at paras 45-47.

191. *Karklins* v *Toronto Police Service* 2010 ONSC 747 at para 16 (Div Ct). On the "character flaw" issue, see also *Brudlo and Toronto Police*, OCCPS, 23 November 2005 (employment history reflected serious problem concerning treatment of women; indication of character flaw that rendered any possible rehabilitation unlikely and nullified potential future usefulness).

192. *Carson* v *Pembroke Police Service* [2007] OJ 5392 at para 22 (QL) (Div Ct).

193. *Association des policiers provinciaux du Québec* c *Sûreté du Québec* 2010 QCCA 2053, at paras 70-71, leave to appeal dismissed 2011 CanLII 29803 (SCC).

194. *Gemmell and Vancouver Police*, BC Adj, 15 June and 27 July 2005, at p 3 of the 27 July 2005 decision.

195. (1991) 2 OPR 894 at 904 (OCCPS).

196. *R* v *Bradley* 2008 ONCA 179 at paras 15-16, relying on *R* v *Kozy* (1990) 58 CCC (3d) 500 at 506 ("Just as an accused should never apprehend that a penalty will flow from a plea of not guilty, there should also be no perceived impingement upon the manner of presenting the defence. This is so whether it be counsel's viciousness in attacking a complainant or lies told by the accused. The latter may lead to its own penalty on a trial and conviction for perjury, but within the trial for the offence of sexual assault both rank as tactics for the defence, however ill-conceived, and they are embraced within the right to full answer and defence ...). In *Mitchell* v *Rose* 2016 CanLII 84144 at paras 64-66 (ON CPC) https://canlii.ca/t/gvxbf, for example, the commission relied upon *R* v *Bradley* in concluding that an error in principle occurred when the hearing officer's penalty decision referred to the untruthfulness of the respondent police officer on five occasions, and increased the penalty accordingly. The decision did not refer to *Trumbley and Metropolitan Toronto Police*, *ibid*.

197. *Vos and Peel Regional Police* (1993) 2 OPR 963 at 966 (OCCPS).

198. 2009 SCC 3 at para 54.

199. The first occurs where police misconduct concerns "the same incident that forms the subject-matter of the charge against the accused", in which case the police obligation to disclose information concerning disciplinary action taken concerning that misconduct is "self-evident". The second situation is "[w]here the misconduct of a police witness is not directly related to the investigation eagainst the accused, it may nonetheless be relevant to the accused's case, in which case it should also be disclosed".

200. *Markham and Waterloo Regional Police* 2015 ONCPC 4 at para 55. See also *Husseini and York Regional Police* 2017 CanLII 4791 at para 33 (ON CPC), affd 2018 ONSC 283 (Div Ct).

201. *Costa and Toronto Police Service* 2017 ONCPC 14 at para 72.

202. *Toy* v *Edmonton Police Service* 2018 ABCA 37 at paras 59-60, 67.

203. *Police Act*, RSBC 1996, c 367, s. 126(2)(c).

204. *Toy* v *Edmonton Police Service* 2018 ABCA 37 at para 55.

205. *Favretto* v *Ontario Provincial Police Commissioner* 2004 CanLII 34173 at para 48 (ON CA) https://canlii.ca/t/1j0l4, leave to appeal dismissed [2004] SCCA 562 (QL). The Federal Court has affirmed the same principle: *Elhatton* v *Canada (Attorney General)* 2014 FC 67 at para 70 https://canlii.ca/t/g2rl1; *Rendell* v *Canada (Attorney General)* 2001 FCT 710 at paras 13, 17 https://canlii.ca/t/njh.

206. *Galassi* v *Hamilton Police Service* 2005 CanLII 20789 at para 39 (ON SCDC), among many examples.

207. *Law Society of Upper Canada* v *Neinstein* 2007 CanLII 8001 at para 103 (Ont Div Ct) https://canlii.ca/t/1qw1g, revd on other grounds 2010 ONCA 193. Although the Court of Appeal reversed the judgment of the Divisional Court, it did endorse the analysis of penalty in that judgment ("As I would allow the appellant's appeal, it is not necessary to consider the question of penalty raised in the Law Society's cross-appeal. For the sake of completeness, however, I do indicate that had I reached the cross-appeal I would have dismissed it and adopted the reasons of the Divisional Court on the question of penalty.").

208. 2017 ABCA 38 at para 52.

209. *Amery* v *Young* (1993) 2 ALERBJ 20 at 28, 1 PLR 336 at 341.

210. *Schofield and Metropolitan Toronto Police* 1984 CanLII 3101 at para 9 (OPC) https://canlii.ca/t/h56cr.

211. *Camrose Chief of Police* v *MacDonald* 2013 ABCA 422 at para 28(d) https://canlii.ca/t/g26s4.

212. *Constable A* v *Edmonton Police Service* 2017 ABCA 38 at para 58 https://canlii.ca/t/gx79l.

213. *Stevens* v *Law Society of Upper Canada* (1979) 55 OR (2d) 405 at 411 (Div Ct) https://canlii.ca/t/g1fng.

214. In *Constable A* v *Edmonton Police Service* 2017 ABCA 38 at para 61, the Alberta Court of Appeal concluded that the presiding officer's reasons "would have benefitted from a more robust consideration as to why this particular police officer was not amenable to rehabilitation even though other serious, even egregious, misconduct can be rehabilitated, as illustrated by the cases cited by Constable A's counsel".

215. *Canada (Minister of Citizenship and Immigration)* v *Vavilov* 2019 SCC 65 at para 86 https://canlii.ca/t/j46kb.

216. *Husseini* v *York Regional Police Service* 2018 ONSC 283 at para 44 https://canlii.ca/t/hq3bp.

217. Example: *Buckle and Ontario Provincial Police* [2006] OJ 554 (QL) (Div Ct).

218. *Act*, ss. 25(1), 28(1), 45.15.

219. *Toy* v *Edmonton Police Service* 2018 ABCA 37 at para 67.

220. *Police Act*, RSBC 1996, c 367, s 126(2)(f).

221. *Dinsdale and Ontario Provincial Police* 2004 CanLII 77196 at para 23 (OCCPS) https://canlii.ca/t/gtnx6.

222. *Pizarro* v *Canada (Attorney General)* 2010 FC 20 at paras 31, 52 https://canlii.ca/t/27dgl.

223. *Drennan and Hamilton-Wentworth Regional Police* 1996 CanLII 17298 (OCCPS) https://canlii.ca/t/h5247.

224. *Dinsdale*, *supra* at paras 22-23 (disposition must consider "systemic failure" that occurred during investigation and the "organizational/institutional context" in which misconduct occurred). See also *Fenton and Toronto Police* 2017 ONCPC 15 at paras 151, 154 https://canlii.ca/t/hn9hr.

225. *Gemmell and Vancouver Police*, BC Adj, 15 June and 27 July 2005, at p 7 of the 27 July 2005 decision https://bit.ly/3rcfYeh.

226. *R (*ex parte *Williams)* v *Police Appeals Tribunal* [2016] EWHC 2708 at para 64 (QB), for example.

227. Royal Canadian Mounted Police External Review Committee, *Sanctioning Police Misconduct – General Principles* (Ottawa: Supply and Services, 1991) at 45, followed in *Canadian National Railway Company and Canadian National Railways Police Association (Telcs Grievance)* 2012 CanLII 97614 (Sims) ("embarrassment police officials experience over the misconduct of a member should not too readily be equated with proof of harm to the force's reputation with the public").

228. *Hall* v *Ottawa Police Service*, OCCPS, 5 December 2007, at 19, affd on other grounds [2008] OJ 5061 (QL) (Div Ct) (respondent police officer, while off duty, engaged in a course of conduct lasting almost one year, involving the use of crack cocaine that he acquired on and off duty from suspects he investigated, bought from traffickers on and off duty and stole from drug exhibit envelopes); *Karklins* v *Toronto Police Service* 2010 ONSC 747 (Div Ct) (police officer gave misleading testimony after filing charges based on false information, resulting in the conviction of an innocent person and his incarceration for five days; the miscarriage of justice arose from "unconscionable" behaviour constituting misconduct "at the highest end of the spectrum"; victim of misconduct brought civil claim that was settled).

229. *R (*ex parte *Williams)* v *Police Appeals Tribunal* [2016] EWHC 2708 at para 64 (QB).

230. See *McPhee and Brantford Police* 2012 ONCPC 12 at para 126 https://canlii.ca/t/gt4jc (damage to the reputation of the police force was significant in part because the misconduct occurred in a smaller community with a greater public awareness of local news).

231. *Stone and Toronto Police* 2008 CanLII 50515 (Ont Div Ct) (engaging in preferential treatment in a criminal matter and accepting a benefit; such conduct "goes to the heart of public confidence in the integrity of policing"; "actions and the subsequent attention that they had received" resulted in significant damage to the reputation of the police force).

232. *Nelles and Cobourg Police* 2007 ONCPC 4 https://canlii.ca/t/gt4vb ("having oral sex with an eighteen year old who had consumed alcohol, on an isolated country lane, in the headlights of police cruiser" and "sexual activity in a police cruiser on two occasions with another woman on an isolated country road"; actions of respondent police officer attracted "much local media attention and clearly brought great discredit to his employer").

233. *Hassan and Peel Regional Police* 2006 ONCPC 7 https://canlii.ca/t/gt585. See also *Karklins and Toronto Police* 2010 ONSC 747 (Div Ct) (the appeal decision identified the potential for "significant" adverse impact on the police force, and suggested that a parallel civil claim was settled).

234. *Purbrick and Ontario Provincial Police*, OCPC, 25 May 2011, at paras 83-84, affd 2013 ONSC 2276 (Div Ct) (tribunal concluded that a hearing officer committed a legal error by concluding, despite the favourable testimony from various prominent community members, that the damage to the reputation of the police force would be high if the respondent police officer were to remain a member).

235. *Moraru and Ottawa Police*, OCCPS, 22 April 2008, at 16. A detailed examination of medical conditions in the context of dispositions appears *supra* ("Factor #4 – Disability and Other Relevant Personal Circumstances").

236. *Legal Aspects of Policing*, *supra*, at §5.10(e)(xv).

237. *Legal Aspects of Policing*, *supra*, at §5.10(e)(xvi).

238. *Abbotsford Police Board and Abbotsford Police Association* 2016 CanLII 62695 (BC LA) (propriety of a no-contact order).

239. *Favretto* v *Ontario Provincial Police Commissioner* (2002) 3 OPR 1540 at 1549 (OCCPS), revd (2003) 179 OAC 262 (Div Ct), revd 2004 CanLII 34173 (ON CA), leave to appeal dismissed [2004] SCCA 562 (QL).

240. *See Ennis* v *Canadian Imperial Bank of Commerce* 1986 CanLII 1208 (BC SC).

241. "Loss of employment may be proportionate even where a case does not involve the worst type of employee or an employee committing the worst type of misconduct".

242. *Law Society of Upper Canada* v *Kazman* 2008 ONLSAP \7 at para 76, affd 2010 ONSC 3008 (Div Ct), quoting from G MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Carswell, loose-leaf service) at 26-46, in which the author rejects the view that disbarment is a penalty reserved for cases combining the worst imaginable offence with the worst imaginable offender.

243. *R* v *Anthony-Cook* 2016 SCC 43 https://canlii.ca/t/gv7bk.

244. 2022 ABCA 6 https://canlii.ca/t/jlpbr.

245. *Bradley* v *Ontario College of Teachers* 2021 ONSC 2303 at paras 13-14, 17. See also *Case #3* at para 96.

246. *Anthony-Cook* at para 25.

247. *R* v *Anthony-Cook*, *ibid* ; *R* v *Naslund*, *ibid* at para 68.

248. *Anthony-Cook*, *ibid* at paras 29, 31 (quoting the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) (the "Martin Committee Report")); *Naslund*, *ibid* at para 57.

249. *Anthony-Cook*, *ibid* at para 52; *Naslund*, *ibid* at para 59.

250. *Anthony-Cook*, *ibid* at paras 61-67; *Naslund*, *ibid* at paras 61-62.

251. *Naslund*, *ibid* at para 61.

252. *Anthony-Cook*, *ibid* at para 34; *Naslund*, *ibid* at para 58.

253. *Naslund*, *ibid* at paras 65-74.

254. *Naslund*, *ibid* at para 70.

255. *Naslund*, *ibid* at para 94.

256. *Naslund*, *ibid* at paras 65-68.

257. *Anthony-Cook*, *ibid* at para 55; *Naslund*, *ibid* at para 62.

258. *Anthony-Cook*, *ibid* at para 54; *Naslund*, *ibid* at para 63.

259. *Anthony-Cook*, *ibid* at paras 54, 57 (quoting CC Ruby, GJ Chan and NR Hasan, *Sentencing* (8th ed, 2012), at 73); *Naslund*, *ibid* at para 64.

260. *Naslund*, *ibid* at para 88.

261. *Ibid*.

262. *Ibid* at para 89.

263. These provisions: "provide for the establishment of a Code of Conduct that emphasizes the importance of maintaining the public trust and reinforces the high standard of conduct expected of members"; "ensure that members are responsible and accountable for the promotion and maintenance of good conduct in the Force".

264. 2020 HRTO 574 https://canlii.ca/t/j8hsx.

265. *Trillium Health Centre and CUPE Local 4191 (Borgona Grievance)* (2001) 102 LAC (4th) 48 at 57 (Arbitrator Surdykowski), cited in *Professional Institute of the Public Service of Canada* v *Communications, Energy and Paperworkers' Union of Canada, Loc 3011* 2013 ONSC 2725 at para 24, *per* Sachs, J. https://canlii.ca/t/fxkwh.

266. Conduct Measures Guide, at 13-14.

267. [1989] 1 SCR 1252 at 1284 https://canlii.ca/t/1ft74. Court judgments continue to rely upon this definition. See, for example, *Calgary (City)* v *CUPE Local 37* 2019 ABCA 388 at para 30 https://canlii.ca/t/j2vgc. The judgment of the Federal Court Trial Division in *Canadian Human Rights Commission* v *Canada (Armed Forces) and Franke* 1999 CanLII 7907 (FC) https://canlii.ca/t/47rq is also cited for its examination of the definition of sexual harassment.

268. RSC 1985, c L-2 https://canlii.ca/t/556xx.

269. RSO 1990, c H.19 https://canlii.ca/t/5574j.

270. In the case of the RCMP, see *Canadian Human Rights Act*, RSC 1985, c H-6 https://canlii.ca/t/555n8, s. 14(1), providing that it is a "discriminatory practice" in the provision of services "customarily available to the general public", and also in matters related to employment, "to harass an individual on a prohibited ground of discrimination. (Section 14(2) further provides that, for the purposes of s. 14(1), sexual harassment shall "be deemed to be harassment on a prohibited ground of discrimination".)

271. In the case of the RCMP, see Royal Canadian Mounted Police Regulations, 2014, SOR/2014-281 https://canlii.ca/t/552dn, s. 18 ("All members must conduct themselves in accordance with the Code of Conduct set out in the schedule"). Section 2.1 of the Schedule provides that "Members treat every person with respect and courtesy and do not engage in discrimination or harassment".

272. In the case of the RCMP, this legislation appears in Part II of the *Canada Labour Code*, RSC 1985, c L-2 https://canlii.ca/t/5560w, which governs "Occupational Health and Safety".

273. 2013 ONSC 2725 at para 24 https://canlii.ca/t/fxkwh, citing *Trillium Health Centre and CUPE Local 4191 (Borgona Grievance)* (2001) 102 LAC (4th) 48 at 57 (Surdykowski).

274. 2020 HRTO 574 https://canlii.ca/t/j8hsx.

275. *Ibid* at paras 263-66.

276. *Simpson* v *Consumers' Assn of Canada* 2001 CanLII 23994 at para 61 (ON CA) https://canlii.ca/t/1f84x, leave to appeal refused [2002] SCCA 83 (SCC) (events occurred at employer meetings or retreats at hotels, or at the supervisor's cottage where staff attended because he was on vacation). Other examples: *van Woerkens* v *Marriott Hotels of Canada Ltd* 2009 BCSC 73 at para 170 https://canlii.ca/t/22b2j (work social event). See also, in particular, the majority judgment in *British Columbia Human Rights Tribunal* v *Schrenk* 2017 SCC 62 at para 67 https://canlii.ca/t/hpb2k, considering s. 13(1)(b) of the *Human Rights Code*, RSBC 1996, c. 210, prohibiting discrimination against a person "regarding employment or any term or condition of employment" based on listed prohibited grounds (s. 13(1)(b) "prohibits discrimination against employees whenever that discrimination has a sufficient nexus with the employment context"; determination of "nexus" requires "a *contextual* analysis that considers all relevant circumstances", including "(1) whether the respondent was integral to the complainant's workplace; (2) whether the impugned conduct occurred in the complainant's workplace; and (3) whether the complainant's work performance or work environment was negatively affected"; these "not exhaustive" factors, and their relative importance, will depend on the circumstances). This contextual interpretation "furthers the purposes of the Code by recognizing how employee vulnerability stems not only from economic subordination to their employers but also from being a captive audience to other perpetrators of discrimination, such as a harassing co-worker".

277. *McWilliam*, *supra* at paras 270-72.

278. 2001 CanLII 23994 at para 61 (ON CA) https://canlii.ca/t/1f84x, leave to appeal refused [2002] SCCA 83 (SCC).

279. *Ibid* at para 64.

280. *van Woerkens* v *Marriott Hotels of Canada Ltd* 2009 BCSC 73 at para 174 https://canlii.ca/t/22b2j.

281. *Professional Institute of the Public Service of Canada* v *Communications, Energy and Paperworkers' Union of Canada, Local 3011* 2013 ONSC 2725 at para 24 https://canlii.ca/t/fxkwh.

282. 2007 ABQB 349 at paras 96-99, 108-09, 113-14 https://canlii.ca/t/1s1bd. See *Bannister* v *General Motors of Canada Ltd* 1998 CanLII 7151 (ON CA) https://canlii.ca/t/6gbh; *Alleyne* v *Gateway Cooperative Homes Inc* 2001 CanLII 28308 at paras 51-52 (ON SC) https://canlii.ca/t/1wc4j (supervisor "apparently was of the view that his conduct did not appear to be 'unwelcome'"; explanation "not an adequate response or excuse for his clearly inappropriate and unacceptable behaviour, particularly for an office administrator with female subordinates, even if other employees or observers felt that his conduct was not inappropriate"); *Leach* v *Canadian Blood Services* 2001 ABQB 54 at paras 112-12 https://canlii.ca/t/h2qq3 ("the onus should not be on victims or potential victims to police the work environment").

283. *R* v *Parranto* 2021 SCC 46 at para 22 https://canlii.ca/t/jkcl4.

284. *Brazeau* v *IBEW* 2004 BCCA 645 at para 31 (Saunders, JA, dissenting).

285. Various authorities support this principle.

286. *Bannister* v *General Motors of Canada Ltd* 1998 CanLII 7151 (ON CA) https://canlii.ca/t/6gbh; *Gonsalves* v *Catholic Church Extension Society of Canada* 1998 CanLII 7152 (ON CA) https://canlii.ca/t/6gbg.

287. 2019 ABCA 388 https://canlii.ca/t/j2vgc.

288. *Ibid* at para 27, quoting the leading author SL Johnson, *Sexual Harassment in Canada: A Guide for Understanding and Prevention* (LexisNexis Canada, 2017) at 7.

289. *Ibid* at paras 45, 47, 52.

290. *Shorey and Belleville Police* 2017 CanLII 53072 at paras 69-70 (ON CPC) (referring to "growing understanding that harassment is a serious crime, with significant and sometimes devastating impacts on victims" and "heightened concern with privacy rights and decreased public tolerance for database misuse, cyber-stalking and other privacy breaches").

291. 3d ed (Toronto and Vancouver: Butterworths Canada Ltd, 2000).

292. *Calgary (City)* v *CUPE Loc 37* 2019 ABCA 388 at paras 36, 38 https://canlii.ca/t/j2vgc. The majority judgment observed the erroneous result that can occur from reliance upon these categories: "It is implicit in the reasoning that the arbitrator concluded the grievor's misconduct fell into the category of "sexual annoyance" harassment and as a result, according to this categorization, she was compelled to assess whether the conduct rendered the workplace hostile or unsafe. From this, she considered whether the conduct was persistent and what effect this sexual harassment had on this complainant. After finding that it was an impulsive, ill-thought out, isolated incident and the complaint was not traumatized, her conclusion followed that it was lower end sexual harassment". *Ibid* at para 37.

293. *Ibid* at para 39.

294. *Ibid* at para 40.

295. *Gonsalves* v *Catholic Church Extension Society of Canada* 1998 CanLII 7152 at para 10 (ON CA) https://canlii.ca/t/6gbg. See also the reference (paras 20-21) to the employer's "obligations to the work force", such that the employer "had no option in all the circumstances but to terminate the employment", since the "conduct of the respondent was so serious, and the impact upon [the complainant] so manifest".

296. *Poliquin* v *Devon Canada Corporation* 2009 ABCA 216 at para 16 https://canlii.ca/t/240h2 ("an employer owes obligations to all employees in its organization"), following *Gonsalves*.

297. *Calgary (City)* v *CUPE Loc 37* 2019 ABCA 388 at para 55 https://canlii.ca/t/j2vgc (the employer's duty to provide a safe workplace "arises both from the common law and from legislation"), for example.

298. RSC 1985, c L-2 https://canlii.ca/t/5560w.

299. See also s. 125(4): the obligations in ss. 125(1)(c) and 125(z.16) "apply to an employer in respect of a former employee in relation to an occurrence of harassment and violence in the work place if the occurrence becomes known to the employer within three months after the day on which the former employee ceases to be employed by the employer" (and s. 125(5) conditionally authorizes an extension of that time period).

300. 2013 ONSC 2725 at para 26 https://canlii.ca/t/fxkwh.

301. The Divisional Court accepted the employer's argument that reinstating the employee "could potentially put it, as the employer, in breach of its obligations to provide a workplace free from violence and harassment for its other employees, obligations that have been reinforced by the amendments to the *Occupational Health and Safety Act*".

302. *Ibid* at paras 25-26.

303. *Supra* 2019 ABCA 388 at paras 53-56, 61 (emphasis from the court judgment).

304. (1998) 40 OR (3d) 577 at 587 (CA) https://canlii.ca/t/6gbh.

305. 2001 CanLII 23994 at para 84 (ON CA) https://canlii.ca/t/1f84x, leave to appeal refused [2002] SCCA 83 (SCC).

306. 1998 CanLII 7152 at paras 15-17 (ON CA) https://canlii.ca/t/6gbg.

307. *Ibid* at para 21.

308. *Montréal (City)* v *Quebec (Commission des droits de la personne et des droits de la jeunesse)* 2008 SCC 48 at para 33 (*per* Deschamps, J, writing for the majority), and at para 86 (*per* Charron, J, in dissent): "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"). See also *Lévis (City)* v *Fraternité des policiers de Lévis* 2007 SCC 14 at paras 42-45).

309. *Klonteig* v *West Kelowna (District)* 2018 BCSC 124 at para 71 (comparing other employees to police officers).

310. *Professional Institute of the Public Service of Canada* v *Communications, Energy and Paperworkers' Union of Canada, Local 3011* 2013 ONSC 2725 at para 21 https://canlii.ca/t/fxkwh ("There are cases where it is appropriate to substitute a lesser penalty, particularly where the conduct falls on the less serious end of the continuum and the employee has demonstrated remorse for his behaviour").

311. *William Scott & Co and CFAW Local P-162* [1977] 1 CLRBR 1 at paras 13-14.

312. *Walker* v *Canada (Attorney General)* 2020 FCA 44 at para 4 https://canlii.ca/t/j57l9, citing *William Scott*, *ibid*. See also *Calgary (City)* v *CUPE Local 37* 2019 ABCA 388 at para 4 https://canlii.ca/t/j2vgc.

313. 2001 SCC 38 https://canlii.ca/t/521q.

314. *Ibid* at para 48.

315. *Ibid* at para 53 (and "the importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment").

316. *Ibid* at para 49.

317. *Ibid* at para 57.

318. Although the Supreme Court of Canada in *McKinley* framed the test for cause in a case involving dishonesty, the test is equally applicable to other forms of employee misconduct, including sexual harassment: *Menagh* v *Hamilton (City)* 2007 ONCA 244 at para 2 https://canlii.ca/t/1r3cc; *Brazeau* v *IBEW* 2004 BCCA 645; *Hodgins* v *St John Council for Alberta* 2008 ABCA 173 https://canlii.ca/t/1wszx.

319. 2021 ABQB 663 at para 8 https://canlii.ca/t/jhltp.

320. *Professional Institute of the Public Service of Canada* v *Communications, Energy and Paperworkers' Union of Canada, Local 3011* 2013 ONSC 2725 at paras 16-19, 22 https://canlii.ca/t/fxkwh. The judgment concluded that for approximately five years of his six-year employment, the employee engaged in a variety of harassing behaviour, "sometimes grabbing the Complainant's buttocks". This behaviour "includes what would constitute sexual assault (the grabbing of the buttocks)". Further, he ignored requests to stop the behaviour, and has harassed other women.

321. See *Janzen* v *Platy Enterprises Ltd* [1989] 1 SCR 1252 https://canlii.ca/t/1ft74, in which Chief Justice Dickson imports this term.

322. *Simpson* v *Consumers' Assn of Canada* 2001 CanLII 23994 at paras 69-70 (ON CA) https://canlii.ca/t/1f84x, leave to appeal refused [2002] SCCA 83 (SCC).

323. *Foerderer* v *Nova Chemicals Corporation* 2007 ABQB 349 at para 191 https://canlii.ca/t/1s1bd.

324. *Foerderer*, *ibid* at para 193 (the case also involved retaliation and dishonesty). See also *Brazeau* v *IBEW* 2004 BCSC 251 at para 219, affd 2004 BCCA 645.

325. *Poliquin* v *Devon Canada Corporation* 2009 ABCA 216 at para 51 https://canlii.ca/t/240h2.

326. *Ibid* at paras 73-74.

327. *Ibid* at paras 75-76.

328. *Calgary (City)* v *CUPE Local 37* 2019 ABCA 388 at para 56 https://canlii.ca/t/j2vgc (emphasis in the original).

329. *Ibid*.

330. *Foerderer*, *ibid* at para 185, referring to the dissenting judgment of Saunders JA in *Brazeau* v *IBEW* 2004 BCCA 645 at para 53: "Nor would I put weight [...] upon the views of the complainant on dismissal of Mr. Brazeau. The issue was the relationship between Mr. Brazeau and the union corporate, not Mr. Brazeau and the complainant. Whether a complainant is of a forgiving nature is not the issue." The judgment in *Foerderer* concluded as follows:

> In a sharp and compelling dissent on the appeal, Saunders J.A. found the nature of the plaintiff's work, his leadership role as a trainer on the anti-harassment policy, and his retaliatory conduct significant. She was satisfied that there was a power imbalance and abuse of power. In my view, Madam Justice Saunders correctly identified that no weight ought to have been placed on the complainant's views about whether the plaintiff should be dismissed since the issue was the relationship between the plaintiff and his employer. Consequently, whether a complainant is of a forgiving nature is not the issue.

331. 2013 ONSC 2725 at para 24 https://canlii.ca/t/fxkwh.

332. *Foerderer* v *Nova Chemicals Corporation* 2007 ABQB 349 at para 192(v) https://canlii.ca/t/1s1bd (emotional toll on the complainant from the harassment "severe"); *Gonsalves* v *Catholic Church Extension Society of Canada* 1998 CanLII 7152 at para 21 (ON CA) https://canlii.ca/t/6gbg ("the conduct of the respondent was so serious, and the impact upon [the complainant] so manifest, that the employer had no option in all the circumstances but to terminate the employment").

333. *Calgary (City)* v *CUPE Local 37* 2019 ABCA 388 at para 41 https://canlii.ca/t/j2vgc.

334. *Ibid* at para 42, citing *R* v *DD*, 2000 SCC 43 at para 63, and *R* v *ARD* 2017 ABCA 237 at paras 8, 28.

335. *Ibid*.

336. *Ibid* at para 44.

337. *Ibid* at paras 43-44.

338. *Robichaud* v *Canada (Treasury Board)* [1987] 2 SCR 84 at para 17 https://canlii.ca/t/1ftl5 (following United States Supreme Court jurisprudence).

339. *Bannister* v *General Motors of Canada Ltd* 40 OR (3d) 577 at 587 (CA) https://canlii.ca/t/6gbh.

340. *Simpson* v *Consumers' Assn of Canada* 2001 CanLII 23994 at paras 63, 66, 83 (ON CA) https://canlii.ca/t/1f84x, leave to appeal refused [2002] SCCA 83 (QL) (SCC). The Court of Appeal relied upon the *Bannister* judgment.

341. *van Woerkens* v *Marriott Hotels of Canada Ltd* 2009 BCSC 73 at para 175 https://canlii.ca/t/22b2j.

342. *Foerderer* v *Nova Chemicals Corporation* 2007 ABQB 349 at para 117-18 https://canlii.ca/t/1s1bd.

343. *Poliquin* v *Devon Canada Corporation* 2009 ABCA 216 at paras 52-53 https://canlii.ca/t/240h2.

344. 2007 ONCA 244 at paras 4-5 https://canlii.ca/t/1r3cc.

345. *Ibid* at para 6.

346. *Foerderer* v *Nova Chemicals Corporation* 2007 ABQB 349 at para 92 https://canlii.ca/t/1s1bd.

347. *Foerderer*, *ibid* at paras 63(d), 153-60. See *Brazeau* v *IBEW* 2004 BCCA 645 at para 21, concluding that a "proper warning" involves "more than an admonishment": it should indicate "the nature of the impugned conduct and its wrongfulness and it should include a statement that disciplinary consequences may be expected to follow if the impugned conduct continues").

348. *Leach* v *Canadian Blood Services* 2001 ABQB 54 at para 117 https://canlii.ca/t/h2qq3.

349. *Gonsalves* v *Catholic Church Extension Society of Canada* 1998 CanLII 7152 at para 17 (ON CA) https://canlii.ca/t/6gbg. The Court of Appeal characterized the allegations, which "includ[ed] the criminal act of sexual assault", as "very serious": "As a generality, it seems no more appropriate to address sexual assault by a warning than to issue a warning to an employee caught stealing money, even if seven months ago". The employee was a supervisor "who by his own admission knew the conduct complained of was unacceptable and conceded that he didn't need to be told so". *Ibid* at para 15.

350. See *Poliquin* v *Devon Canada Corporation* 2009 ABCA 216 at paras 62-65 https://canlii.ca/t/240h2, in which a senior supervisor knew that using his workplace computer for pornographic purposes violated employer policy, following a written warning when the employer's random computer check discovered his use of the workplace computer to access pornographic material online ("If it was you who accessed this material, you are advised to cease this practice immediately as the use of company equipment for this purpose is not permitted. This would be particularly inappropriate for someone in a supervisory role. Failure to do so may lead to disciplinary action"). Although he admitted to the behaviour and undertook in writing that it would not reoccur, "he participated in its continued misuse over a period of months". The warning "underlines the seriousness"

of the subsequent misconduct. The existence of the warning and the continuation of the prohibited conduct despite that warning formed part of the contextual analysis.

351. *Professional Institute of the Public Service of Canada* v *Communications, Energy and Paperworkers' Union of Canada, Local 3011* 2013 ONSC 2725 at para 23 https://canlii.ca/t/fxkwh.

352. *Ibid*.

353. *AG Growth International Inc* v *Dupont* 2021 ABQB 663 at paras 2, 13§3 https://canlii.ca/t/jhltp, for example.

354. 2019 ABCA 388 at paras 11, 31 (and throughout) https://canlii.ca/t/j2vgc.

355. *Gonsalves* v *Catholic Church Extension Society of Canada* 1998 CanLII 7152 at para 15 (ON CA) https://canlii.ca/t/6gbg (see the reference to the plaintiff "coming up behind her and grabbing her in a hug while he fondled her breasts").

356. *Professional Institute of the Public Service of Canada* v *Communications, Energy and Paperworkers' Union of Canada, Local 3011* 2013 ONSC 2725 at paras 16, 18, 20 https://canlii.ca/t/fxkwh.

357. At 48.

358. (1981) 131 DLR (3d) 152 (FCA).

359. *Ibid* at para 35.

360. *R* v *Goldfinch* 2019 SCC 38 at para 37.

361. 2019 ABCA 388.

362. *Ibid* at para 2.

363. *Ibid* at paras 6-9. The arbitrator concluded that the circumstances justified a lesser disciplinary response, and ordered reinstatement without a loss of seniority, following a 9-month unpaid suspension, and ordered training.

364. *Ibid* at para 33, emphasis in the original court judgment.

365. *van Woerkens* v *Marriott Hotels of Canada Ltd* 2009 BCSC 73 at para 170 https://canlii.ca/t/22b2j.

366. *Ibid* at para 197.

367. Various decision use "unwanted sexual touching".

368. *Ibid* at para 52.

369. 1998 CanLII 7152 at paras 15-17 (ON CA) https://canlii.ca/t/6gbg.

370. *Ibid* at para 21.

371. "As a generality, it seems no more appropriate to address sexual assault by a warning than to issue a warning to an employee caught stealing money, even if seven months ago. And here, the employee was a supervisor who by his own admission knew the conduct complained of was unacceptable and conceded that he didn't need to

be told so." *Ibid* at paras 15-16.

372. At 48.

373. 2021 ABQB 663 https://canlii.ca/t/jhltp.

374. 2021 ABQB 663 at paras 2, 13§3.

375. 2021 ABQB 663 at paras 14-15.

376. *Bannister* v *General Motors of Canada Ltd* 1998 CanLII 7151 (ON CA) https://canlii.ca/t/6gbh.

377. 2020 HRTO 574 at para 264 https://canlii.ca/t/j8hsx.

378. 2007 SCC 14.

379. *Ibid* at para 70.

380. *Law Society of Upper Canada* v *Abbott* 2017 ONCA 525 at para 17 *et seq*; *Bishop* v *Law Society of Upper Canada* 2014 ONSC 5057 at para 30. See also the judgment of the England and Wales Court of Appeal in *Bolton* v *Law Society* [1993] EWCA Civ 32 at para 14: "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors."

381. *Abbott*, *supra*; *Bishop*, *supra*. See also *Law Society of Ontario* v *Yantha* 2018 ONLSTH 94 at para 5.

382. *Bishop*, *ibid* at para 30.

383. *Ibid* at para 31.

384. Conduct Measures Guide, at 60.

385. 2007 SCC 14.

386. See, for example, *Lewin and Toronto Police* 2001 CanLII 56739 at paras 2-3, 8, 50 (OCCPS) https://canlii.ca/t/h4tcw, involving a sergeant who made various offensive comments about women, in the presence of a woman probationary officer. The sergeant was her supervisor and training officer. She was not personally offended, but "it makes no difference whether or not the remarks or actions were found to be immediately offensive to the person who may have received them". Given the sergeant's fine employment history, one recent finding of misconduct, his position as a "leader, guide, instructor and example" to younger and probationary police officers and "especially" to women, the Ontario Police Commission concluded that forfeiture of 15 days off was appropriate. *Drennan and Hamilton-Wentworth Regional Police* 1996 CanLII 17298 (OCCPS) https://canlii.ca/t/h5247 provides another example, involving a finding of misconduct for one remark by a constable to another (woman) constable. *Brennan* provides a useful example of an early decision in this area that contains thorough analysis. However, both are more than 20 years old, and their utility has not survived the intervening evolution of the law in this area.

387. 2021 ONCA 728 https://canlii.ca/t/jldv2.

388. *Ibid* at paras 59-60.

389. 2007 ONCA 244 at paras 4-5 https://canlii.ca/t/1r3cc.

390. Conduct Measures Guide, at 56-58.

391. *Ibid* at 58.

392. See the discussion under the heading "C) Training at Depot", at 66-69.

393. Personal associations likely to discredit the police force typically constitute either general discreditable conduct (where no specific order exists prohibiting this behaviour), or discreditable conduct, insubordination or neglect of duty by breaching a standing order or by-law (where a specific order exists prohibiting this behaviour). "Improper associations" also captures police officers associating with criminals.

394. 2003 FC 1250.

395. 2016 QCCA 1086 https://canlii.ca/t/h39tw.

396. 2003 CanLII 37924 (ON SCDC).

397. Sask Hearing Officer, 30 July 2007.

398. See also *Nelles and Cobourg Police* 2007 ONCPC 4 (police officer on duty and in uniform together with his partner drove an 18-year old woman who had been drinking to an isolated location outside of the jurisdiction of the police force, where the police officer received oral sex; approximately one year later, on two occasions while on duty, police officer drove another woman in his police vehicle to an isolated location for the purposes of sex; dismissal; disposition includes one finding of neglect of duty for leaving his assignment and one finding of for misrepresenting his activities in a duty report and his notebook); *X* v *Y* (1994) 2 PLR 285 (ON Bd Inq) (inappropriate personal relationship with woman arising from on-duty contact; demotion from sergeant to first-class constable for 9 months minimum).

399. 2016 BCCAAA 80 (QL) (BC LA).