ANNUAL REPORT

1996-1997

ROYAL CANADIAN MOUNTED POLICE

EXTERNAL REVIEW COMMITTEE

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Royal Canadian Mounted Police
External Review Committee

CANADA

Comité externe d'examen de la
Gendarmerie royale du Canada

Chairman Président

May 12, 1997

The Honourable Herb Gray
Solicitor General of Canada
Sir Wilfrid Laurier Building
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Ottawa, Ontario
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Mr. Minister:

Pursuant to Section 30 of the *Royal Canadian Mounted Police Act*, I hereby transmit to you the Annual Report of the Royal Canadian Mounted Police External Review Committee for fiscal year 1996-97 for transmission to Parliament.

Yours sincerely,

F. Jennifer Lynch, Q.C.

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Acting Chairperson

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Chairperson (Acting) and Vice-Chairperson
F. Jennifer Lynch, QC

Member
William Millar

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INTRODUCTION

The RCMP External Review Committee is a component of a two-level redress mechanism available to members of the Royal Canadian Mounted Police who are not satisfied with disciplinary actions, discharges or demotions, or with other RCMP decisions, acts or omissions which impact upon their employee rights and in respect of which no other redress process is provided by the *RCMP Act* or its *Regulations*. The Committee independently reviews grievances and appeals referred to it and submits recommendations to the Commissioner of the RCMP who acts as the second and last level of the review process. The Commissioner of the RCMP is not required to accept the recommendations of the Committee, but when he chooses not to do so, he is required to provide his reasons. His decision is final although it is subject to judicial review by the Federal Court.

MANDATE

The RCMP External Review Committee was created by Part II of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10, as amended, as an independent and impartial, quasi-judicial body to review appeals of formal discipline, appeals of discharge or demotion, and certain types of grievances involving regular and civilian members of the RCMP. The Committee independently reviews grievances and appeals referred to it and submits recommendations to the Commissioner of the RCMP. In its review, the Committee may hold hearings, summon witnesses, administer oaths and receive and accept such evidence as it sees fit.

PROGRAM DESCRIPTION

Under the *RCMP Act*, the Commissioner of the RCMP refers all appeals of formal discipline and all discharge and demotion appeals to the Committee unless the member requests that the matter not be so referred.

In addition, pursuant to s. 33 of the *RCMP Act*, the Commissioner of the RCMP refers certain types of grievances to the Committee in accordance with regulations made by the Governor in Council. Section 36 of the *RCMP Regulations* lists the kind of grievances that the Commissioner of the RCMP must refer to the Committee. They are as follows:

a) the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members;

b) the stoppage of pay and allowances of members made pursuant to subsection 22(3) of the *RCMP Act*;

c) the Force's interpretation and application of the Isolated Posts Directive;

d) the Force's interpretation and application of the RCMP Relocation Directive; and

e) administrative discharge on the grounds of physical or mental disability, abandonment of post, or irregular appointment.

Just as with appeals of discipline cases, in grievance cases, the member may request that the matter not be referred to the Committee; however, in the grievance process, the RCMP Commissioner then has the discretion whether to refer the matter or not.

The Chairperson of the Committee makes a comprehensive review of all matters referred to it. Where the Chairperson is dissatisfied with the RCMP's disposition of the matter, he or she may:

a) issue *Findings and Recommendations* resulting from his/her review of the case, and advise the RCMP Commissioner accordingly; or

b) initiate a hearing to consider the matter. At the end of the hearing the Committee member(s) designated to conduct the hearing will advise the RCMP Commissioner and the parties of the Committee's Findings and Recommendations.

In practice, even when the Chairperson is satisfied with the original disposition, he or she provides an analysis and advises the RCMP Commissioner and the parties of the reasons by means of *Findings and Recommendations.* The RCMP Commissioner may accept or reject the Committee's recommendations but if the recommendation is rejected, written reasons must be provided to the member involved and to the Committee.

PROGRAM ORGANIZATION

The legislation provides for a full-time Chairperson, a Vice-Chairperson and three other members who can be appointed on a full-time or part-time basis, and who are available to assist with its work (e.g.: hearings). The Committee is currently operating with two members: the Vice-Chairperson who acts as Chairperson and another part-time member. The Vice-Chairperson is authorized by the Solicitor General to exercise the powers and perform the duties of Chairperson, pursuant to subsection 26(2) of the *RCMP Act.* Case review and administrative support are provided by staff who report to the Chairperson through the Executive Director. The Committee's offices are located in Ottawa.

Several activities or program components are provided in whole or in part to the Committee by the private sector and in partnership with other government agencies. For example, the Committee uses the services of partners such as the RCMP Public Complaints Commission and the Solicitor General Secretariat for the sharing of facilities and equipment, or the provision of services which would otherwise have to be obtained through Committee resources. When in need of other more specialized types of services, the Committee always looks at alternatives such as contracting with the private sector or obtaining services from another department rather than creating its own expertise in those areas.

ENVIRONMENT

A number of factors impact on how the Committee conducts its business:

Committee's lack of control on the number and nature of referrals
The Committee does not control the number or the nature of cases referred to it. The number of referrals depends, in part, on the members' decision as to whether they should submit their cases to level II, and on the Force's interpretation of the *RCMP Regulations* which establish the Committee's jurisdiction. In fact, just as the Committee is not involved in the decision as to whether a matter should be referred to it, neither is it possible for the Committee to monitor, of its own motion, whether certain grievances were not referred to it which ought to have been. Section 36 of the *RCMP Regulations* provides that grievances relating to a number of matters are to be referred to the Committee. While sub-paragraph 36(b) through (e) are specific, this is not so with sub-paragraph 36(a) - the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members of the RCMP. Whether or not a matter is referable to the Committee under this provision requires an interpretation in each case. While the vague wording of sub-paragraph 36(a) only affects this one paragraph, it has disproportionate effects given that it accounts for a large part of the Committee's grievance referrals.

Legislative and Policy changes
Any specific legislative and policy initiatives undertaken by the RCMP in the area of labour relations could potentially have a significant impact on the Committee's workload.

Ever-increasing complexity of cases referred to the Committee
Grievances involving matters such as basic policy interpretation are becoming relatively less frequent as the Committee's workload shifts to more complex and sensitive matters such as

discipline and discharge, and analysis of *Charter of Rights* issues.

Fast-changing RCMP environment

In order to adapt to a rapidly changing world, the RCMP has recently undertaken several initiatives aimed at addressing morale issues, improving internal communications, and making the grievance process more efficient and effective. One of the RCMP's major initiatives in this regard is the Alternate Dispute Resolution Project which is implementing early interest-based approaches to resolution of disputes, and a broader system of conflict management which will institutionalize this approach in all of RCMP labour relations. Such a direction should, in the long run, have a profound and positive effect on labour relations within the RCMP and eventually could have an effect on the Committee's mandate and workload.

THE YEAR UNDER REVIEW

WORKLOAD

The Committee processed 42 cases this year. This number includes 16 discipline cases, as opposed to three discipline cases per year on average for the last five years. These cases are significantly more complex than grievances.

ACTIVITIES

Another priority for the Committee is communications. Critical to the Committee performing its role efficiently and openly, is its ability to establish and maintain effective relationships with RCMP management and membership. In that respect, it continued to issue, on a bi-monthly basis, its *Communiqués*, which provide a summary of all cases completed during a given period, and which are widely distributed and read throughout the RCMP. Meeting on a regular basis with representatives of RCMP management and membership continued to also be of crucial importance for the Committee. In addition, the Committee undertook to create an computerized data base which all members of the RCMP will eventually be given access to - via the Internet or otherwise. The Committee also participated in a variety of conferences put together by organizations such as the Canadian Council for Administrative Tribunals, the Canadian Association of Chiefs of Police, the international as well as the national association of organizations responsible for civilian oversight of law enforcement, and the newly created Small Agencies Administrators Network.

The Committee's review of its Rules of Practice and Procedure undertaken during the last year is now completed. This project is currently in the hands of the Department of Justice, and new rules will soon be promulgated.

Also significant is the Committee's mandate review initiative: a joint task force composed of Committee officials and representatives of RCMP management and members, and which has reached consensus in presenting options on how the Committee may play an even more effective and efficient role.

ISSUES

The question of restricted jurisdiction referred to in previous reports also continues to be of concern to the Committee; however, the Committee is confident that the above-mentioned mandate review initiative will effectively address many of this question's related issues.

The lengthy time it takes to process a member's grievance or discipline matter, from the time it arises to the time of the Commissioner's decision, is still a

concern to the Committee. However, the Committee wishes to acknowledge the commendable efforts have been made by all players involved in the process to reduce the amount of time spent throughout the various stages of the process. The Committee has met its commitment to reduce the turnaround time at the Committee. Its plan is to ensure that cases received after April 1, 1997 are processed within 90 to 120 days, except in unusual circumstances, for instance, when one of the parties decides to make further representations, when further documentation is required, or when a case goes to mediation.

A LOOK AHEAD

Coping effectively and efficiently with its workload will continue to be a top priority for the Committee. The ever-increasing complexity of the cases referred to the Committee, and the further budget reduction of 2.5% planned by government for 1998-99, offer a particular challenge to the Committee in that respect. The Committee's commitment is to maintain its objective of completing the average case within a 90 to 120 day time frame.

The Committee supports the commendable initiative of RCMP management and membership to first consider informal alternative ways of dealing with their conflicts. The impact of this approach on the Committee's workload cannot yet be measured.

The Committee's review of its mandate should, during the coming year, produce results which will make the Committee even more efficient and responsive while ensuring full protection of members' rights.

CASES

As mentioned earlier, the Committee reviewed an extraordinarily high number of discipline cases in comparison with previous years. This is in addition to a number of grievances which, this year again, were quite varied in nature.

What follows is a short description of each of these cases. The number in bold print at the beginning of each case refers to the number in the Committee's *Findings & Recommendations* binder. At the end of each case, the Commissioner's decision is summarized, except in those cases where he has not yet issued a decision.

A) GRIEVANCES - PART III OF THE *RCMP ACT*

i) Harassment in the Workplace

G-186 A member with responsibility for a work unit wrote memos criticizing the employees working under him for certain bad habits. Public Service employees working in this unit presented a grievance requesting that these memos be withdrawn on the grounds that they were discriminatory. The employees also demanded that the employer immediately halt this type of activities. The Commanding Officer rendered a decision under the Public Service grievance procedure: he upheld the grievance and ordered that the memos be withdrawn. He indicated that they should not have been distributed.

The member presented a grievance in which he criticized the RCMP for failing to follow the harassment complaint procedure. Specifically, he cited the absence of an investigation, contrary to Chapter IX.10 of the Personnel Administration Manual - Public Service, which requires that such an investigation be held. The member explained that had this procedure been followed, he would have had an opportunity to be heard. The Level I adjudicator denied the grievance, on the grounds of absence of interest. He justified his decision by explaining that the member had not established how the Commanding Officer's decision had harmed him. According to the adjudicator, there had been no complaint of harassment and the member had not demonstrated an infringement of his rights. The member brought his grievance to the second level.

The Committee concluded that the grievance should be upheld. The member had sufficient interest to bring the grievance, having met the three conditions: 1) He contested an omission relating to the management of the Force's affairs, i.e. the fact that it failed to hold an investigation. 2) This omission caused him harm, since he wanted the right to be heard or to give his opinion. Thus, he

was directly affected by the omission. 3) No other remedy was available to him under the *RCMP Act*, its regulations or the Commissioner's Standing Orders.

As for the substance of the case, the Committee began by concluding that the employees' grievance did in fact involve a complaint of harassment. The employees had brought to the Force's attention a situation which could constitute harassment. The Force was therefore obliged to treat this as a formal complaint of harassment. Next, the Committee examined the rights that the policy confers on members against whom a complaint of harassment is lodged. Under the Personnel Administration Manual - Public Service, members or employees against whom such a complaint is directed have the right to respond to the allegations. In the case at hand, this right has not been respected. The policy also states that the officer responsible for administration and personnel must hold an investigation. This requirement was not met either. The grievance should therefore be upheld. As a remedy, the Committee recommended that an investigation be held and the member be given the opportunity to respond to the allegations.

ii) Legal Fees

G-170 A member testified at a judicial inquiry. Afterward, criminal accusations were laid against him. He was accused of perjury in relation to this testimony. He requested that the legal fees of his criminal trial be paid by the Force, since he had testified as a member. The Force accepted and paid for his fees. The member was acquitted of the charges, but the Crown appealed of this decision. Once again, the Force paid for the legal fees incurred by the member during the appeal. The Appeal Court infirmed the first decision and convicted the member. The member sought to bring his case before the Supreme Court of Canada who granted him leave to appeal. The member requested that the Force pay for his legal fees for this appeal. The Force denied his request on the basis that the member was found guilty of perjury. According to the Force, the member could not have been acting within the scope of his duties, since perjury was not a part of an RCMP member's duties. The member filed a grievance against this decision. The Grievor pleaded that he was acting within the scope of his duties when he testified and that the verdict of the Appeal Court did not change that fact.

The Committee noted that the decision to grant the reimbursement of legal fees is primarily based on the review of the circumstances surrounding the need for legal fees, in light of the "scope of duties test". In this regard, the Committee found that the conviction by the Appeal Court is of little relevance. The Committee noted that the guilt of the

member did not show with certainty that the member was on a frolic of his own; he could have acted in furtherance of Force work. In any case, the Grievor has the burden to establish that he was accused for something he did while he was acting within the scope of his duties. The Grievor did not provide any explanation on the circumstances which led to the perjury charges. Therefore, the Committee found that it was not possible to uphold the grievance on the basis of the argument made by the Grievor. Without knowing what the Grievor said or did at the judicial inquiry, the Committee could not find on the balance of probabilities that the Grievor testified in furtherance of Force work and that he was not on a frolic of his own. The Committee thus recommended that the grievance be denied.

The Commissioner accepted the Committee's recommendation and denied the grievance.

G-174 The RCMP investigated a member whom it suspected of selling information to smugglers. It assigned an "agent provocateur" to act as an informant and gather evidence that could incriminate the member. Following this investigation, the member was charged with a criminal offence (breach of trust) and subsequently acquitted. He asked to be reimbursed for his legal fees, a request that was denied. He then filed a grievance. He claimed that he was acting at all times within the scope of his duties since he was cultivating the "agent provocateur", as he would have with any other informant. Moreover, this "agent provocateur" had some authentic tips, provided by the RCMP, which enabled the member to carry out some seizures. The RCMP considered that the member was not acting within the scope of his duties and was not entitled to be reimbursed.

The Grievance Advisory Board recommended that the member's grievance be allowed. It considered that the member had not acted beyond the scope of his duties because maintaining relationships with informants lies within this scope. The Level I adjudicator saw things differently: he denied the grievance because, in his opinion, the member went beyond the scope of his duties when he accepted personal benefits from the "agent provocateur". The member then presented his grievance at the second level.

The Committee cited the test which applies to legal fees: the member must have acted within the scope of his duties. In other words, the need for legal services must have arisen from an activity in furtherance of Force work. The Committee began by concluding that cultivating informants was within the scope of the member's duties. In the course of his contacts with the "agent provocateur", the member accepted sums of money. However, the preponderance of evidence showed that the member did

not personally appropriate these sums. He spent a good portion of them during his meetings with the "agent provocateur" and kept the rest after trying to give it back to him. The Committee further concluded that the information he passed on to the "agent provocateur" was worthless, banal, without interest and of common knowledge. The RCMP did not contradict this evidence. In this grievance, the role of the Committee was not to judge the member's policing methods, but to determine whether he acted within the scope of his duties. The Committee thus found that the grievance should be allowed, that the member should be reimbursed for his legal fees and that there are no circumstances indicating that the Commissioner should use his discretion to deny such reimbursement.

The Commissioner did not accept the Committee's recommendation and denied the grievance, stating that, in his opinion, the member had not acted within the scope of his duties.

G-175 A member was called to the scene of an arrest to help other members subdue an extremely agitated, violent woman who had broken some windows and ripped a door off its hinges in a public establishment. The member brought a hog-tie restraint, since handcuffs were not enough to immobilize the offender and allow her to be led away. Because of her condition, the prisoner was placed directly in the detachment's 'drunk tank' with her handcuffs and hog-tie restraint. Some time thereafter, the member used his Oleoresin Capsicum Spray ("pepper spray") on the prisoner in an effort to calm her. He sprayed the floor in front of the cell door in the hope that the fumes released by the spray would reach the prisoner through the space between the door and the floor. A criminal investigation was launched in the aftermath of these events, but no charges were laid against the member. Nevertheless, the member submitted a claim for reimbursement of the legal fees he had incurred during the investigation. The RCMP denied the claim.

The member filed a grievance in which he contended that he was acting within the scope of his duties. He was on duty, he was in uniform and he used his pepper spray to calm the prisoner. He feared that, in her hysterical state, she might inflict injury upon herself. The RCMP felt that the member was not acting within the scope of his duties since pepper spray is not a weapon intended to immobilize prisoners and its use on a bound detainee in a cell is unacceptable on the part of a member of the RCMP. It added that the member had engaged in criminal conduct.

The Grievance Advisory Board recommended that the grievance be allowed because, in its opinion, the member had acted within the scope of his duties. The Level I adjudicator denied

the grievance, concluding that the member's action could not have been authorized by the RCMP since pepper spray is a weapon that should not be used to immobilize a prisoner.

The member presented his grievance at the second level. The Committee first considered the timeliness of the grievance. In calculating the timeliness of the Level I grievance, the Committee went by the date on which a written decision was obtained from the Appropriate Officer, and not the announcement of the denial made over the telephone a few days earlier by his subordinate. The Committee found therefore that the grievance had been presented within the legal time frame. The Committee then turned its attention to the substance of the grievance and found an error in the Level I adjudicator's analysis of the facts. The member had not used his pepper spray directly on the prisoner, but through the door, and the prisoner did not sustain any visible injury. The Committee cited the test which applies to claims for reimbursement of legal fees: the member must have acted within the scope of his duties, i.e. in furtherance of Force work (G-63). This notion is at odds with a member acting "on a frolic of his own" (G-134). The parties agree on the fact that the member was on duty when the events took place. The only point of contention centred on how to characterize the use of the pepper spray. The Committee, on the basis of the file before it, found that the member had proven, according to the balance of probabilities, that he had been acting within the scope of his duties. The Committee stated that the question of whether or not the member had committed an error in judgment was immaterial. According to the Committee, the Level I adjudicator's finding that the member's conduct had been unacceptable was not germane to the determination, based on the appropriate test, of whether the legal fees should be reimbursed. The Committee recommended that the grievance be allowed and that the member be reimbursed for his legal fees.

G-179 A civilian member approached a colleague in an attempt to resolve a dispute. The member was critical of the colleague for arriving to work late, while the colleague was critical of the member for smoking in the workplace. Their voices became raised over the course of the discussion, and the colleague came towards the member and pointed her finger at her. The member pushed or hit the colleague's hand; the colleague filed a complaint with the local police. The member was accused of assault, and has requested that the Force reimburse the legal expenses she incurred for her defence. The Force refused, contending that she had not acted within the scope of her duties. The member asked the Force to reconsider its decision, claiming that the problem was related to the

performance of her duties. When the Force again refused, the member presented a grievance, which was denied by the Level I adjudicator on the same grounds.

The Committee concluded that the member had acted within the scope of her duties and recommended that the Commissioner uphold the grievance. The grievance had been presented within the prescribed timeframe. The second decision taken by the Force could be grieved. It seems that the Force re-opened the file when the member presented her second request, and that it rendered a separate decision, containing different grounds. As for the substance of the case, the Committee explained that a proper interpretation of the policy on reimbursement of legal expenses dictates that the act which the member was accused of committing should not be considered in isolation. Rather, what needed to be examined were the tasks performed by the member when the events leading to the accusations took place. In the present grievance, the Committee concluded that the member's actions in approaching her colleague--and not just the act she committed--should be considered as the triggering element. The duties of members who are not peace officers are defined in the Commissioner's Standing Orders, in Appendix 10-3-14 of the Administration Manual. These include support duties required for the efficient operation of the Force. The Committee concluded that the member's actions in approaching her colleague to resolve a work-related dispute fall into this category of duties. These actions were aimed at serving the interests of the RCMP. This conclusion is supported by the fact that the Force now encourages its members to use more informal methods of conflict management. As part of its new vision of management, the Force is encouraging members at all levels to become involved. Thus, the member was acting within the scope of her duties when she approached her colleague. In case G-63, the Committee concluded that the manner in which a member's duties are performed is not relevant for the purposes of the policy on grievances. In the case at hand, the Committee concluded that the member did not go beyond the scope of her duties when she committed the act against her colleague. While performing a task within the scope of her duties, she felt threatened and acted to defend herself. It was more a reflex than a voluntary act committed with a purely personal goal in mind. The Committee explained that its conclusions should not be interpreted as a blanket declaration that all conflicts between members which result in accusations will lead to reimbursements under the policy on legal expenses. The facts in this matter are specific to the grievance at hand. The act committed by the member was not independent of the exercise of her duties.

G-180 A member was accused of stealing over $1,000. The sum in question had been collected by the member for the release of a vehicle seized under the *Customs Act*, but it was not deposited in the Receiver General's account. The member then tried to camouflage the problem. He ended up depositing the funds in the account after a colleague lent him the money. The member claimed that he had lost the money, and that this loss was related to the performance of his duties. He attributed this error to the stress and pressure to which he was subjected in his detachment. The member requested that he be reimbursed for the legal expenses incurred for his criminal case. The RCMP refused, contending that he had not acted within the scope of his duties. The member presented a grievance, which was denied by the Level I adjudicator.

The Committee concluded that the grievance should be upheld. To be reimbursed for their legal expenses, members must establish that they incurred these expenses as a result of the performance of their duties. It seems clear on reading the file that the criminal proceedings were launched because a sum of money lost by the member had disappeared. The member claimed that he had simply lost the money, denying that he had appropriated it. The Force did not contradict this claim, nor did it confirm it. In the related disciplinary case, the appropriate officer and the member had agreed on this version of the facts (a copy of the decision rendered by the Adjudication Board in the disciplinary case was placed in the grievance file by the member). The Committee considered that this agreement was a determining factor. In this version of the facts, there is nothing to suggest that the member appropriated the funds for personal gain. The Committee concluded that the Force had not refuted the member's version. Therefore, the Committee applied the criterion for reimbursement of legal expenses, deeming that the member had lost the money through error. Members must be protected under the policy on reimbursement of legal expenses when they commit an error, or even an inappropriate act, in the performance of their duties and when there is no evidence that they acted to further their own interests. In certain cases, the circumstances must be interpreted broadly; it is not enough to simply examine the act itself that resulted in the accusations. In the grievance at hand, the Committee concluded that the loss of the money was related to performance of the member's duties. This loss can be deemed as erroneous performance of duties. Thus, the member was acting within the scope of his duties and should be reimbursed for his legal expenses.

G-181 A member was charged with several *Criminal Code* offences in relation to a child sexual abuse case. He

was suspended from duties and was the subject of an internal investigation under Part IV of the *RCMP Act*. The criminal charges were eventually stayed and the member was reinstated to his duties. He sought reimbursement of his legal fees for his criminal defence and for representation during the internal investigation; his request was denied. He filed a grievance, claiming that he had been acting within the scope of his duties at all relevant times; he claimed that the accusations were false and that he had been accused because the complainants recognized him from his community policing and after-hours voluntary service. The Level I adjudicator denied the grievance: he determined that there was not enough of a factual basis for the member's assertion that the allegations had arisen from the discharge of his duties.

The Committee examined the two main issues in the grievance: first, whether the member should be reimbursed for his legal expenses for his criminal defence, and second, whether his legal expenses for the internal RCMP investigation were recoverable. The Committee addressed the issue of the applicable legal fees policy, in order to determine the second issue, which had not previously been considered by the Committee. The Committee found that the legal fees policy as published in the Treasury Board (TB) Manual was the one applicable to RCMP members, and that its authorization of payments in circumstances "sufficiently serious as to require legal assistance" meant that the recovery of legal fees for an internal investigation was possible under the policy.

The Committee reiterated the applicable test: the member must have been acting within the scope of his duties, *i.e.* the need for legal services must have arisen from an act taken in furtherance of Force work. On the first issue, the legal fees for the member's criminal defence, the Committee found, on a balance of probabilities, that the member had not been involved in the alleged criminal acts. The Committee then found that the member had been linked to the crimes because of his activities as a police officer. Therefore, the circumstances giving rise to his need for a criminal defence arose within the scope of his duties. In light of the more detailed wording of the legal fees policy in the TB Manual, the Committee also determined that the member had carried out those duties in accordance with reasonable departmental expectations.

The Committee found that the member had also satisfied the "scope of duties" test with regard to the internal investigation, since the same acts had led to both. The circumstances were considered sufficiently serious as to require counsel, and the Committee recommended that the member be reimbursed for all of his legal fees for

both the internal investigation and the criminal defence.

iii) Stoppage of Pay and Allowances

G-177 A member was caught by RCMP investigators stealing merchandise from a seized goods warehouse at which he worked. He was accused of offences under the *Criminal Code* and the *Customs Act*. The member was suspended from his duties, and his Commanding Officer recommended to the Director of Personnel that the member's pay and allowances be stopped–the applicable procedure provided that a notice of intention to recommend stoppage of pay signed by the Commanding Officer be served on the member so that he might comment on the notice; if the Commanding Officer still wishes that the member's pay be stopped, he presents a recommendation to the Director of Personnel, who decides whether or not to stop the member's pay. In the present case, the Director of Personnel's superior, in the absence of the former, made a decision on the Commanding Officer's recommendation and decided to reject it.

Several months later, the member underwent the preliminary hearing in his criminal case and was committed to stand trial. In light of the committal to trial, his Commanding Officer (different from the one mentioned above) recommended that the Director of Personnel order the stoppage of the member's pay. The Director of Personnel considered the recommendation and accepted it.

The member filed a grievance against the decision to stop his pay. He contended, first, that in his case the stoppage of pay process was flawed. Among other things, he contended that the Director of Personnel was biased because he had previously worked in management in the member's division and had had knowledge of his personnel files. The member also contended that the process was flawed because, although he had had the opportunity to respond to a notice of intention to recommend the stoppage of his pay, he had not been able to examine and respond to the recommendation sent to the Director of Personnel. The member also contended that the decision to stop his pay was unjustified under the criteria of the applicable policy. According to the member, there was no new fact that the Force was not already aware of which now justified the stoppage of his pay.

In response, the Force contended that the member had not shown that there existed a reasonable apprehension of bias. According to the Force, any knowledge that the Director of Personnel would have acquired about the member when he was working in the same division would have been acquired in the normal exercise of his duties. The Force also contended that the member had had the opportunity to examine and comment on all pertinent documentation. As for

the grounds for the stoppage, the Force replied that the applicable policy stated specifically that the preliminary hearing was a stage at which stoppage of pay could be considered.

Meanwhile, the member was given a medical discharge. Some time later, the member pleaded guilty to one of the criminal offences with which he was charged and was acquitted of the others. The member received a suspended sentence with an order to do community work. One of the factors cited by the judge in sentencing the member was the psychological problems from which the member was suffering before and at the time of the acts in question.

The Level I adjudicator denied the grievance. According to the adjudicator, all indications were that the member was clearly involved in the commission of an offence so outrageous as to significantly affect the proper performance of his duties. The adjudicator also concluded that the criterion that suspension of pay be used only in extreme circumstances when it would be inappropriate to pay a member had been met.

The Committee first considered the member's arguments regarding the process. The Committee pointed out that a member must be treated fairly in the course of the stoppage of pay process. This means that the decision must be impartial and that the member must have the opportunity to be heard. The Committee examined the issue of bias in the context of the decision in question. According to the Committee, the fact that the Director of Personnel had, several years earlier, seen the member's personnel files did not lead to a reasonable apprehension of bias.

The Committee then examined the question of the right to be heard. It first found that the member should in fact have been provided with a copy of the recommendation to stop his pay before the Director of Personnel decided on the matter. The Committee first concluded that not affording the member the opportunity to examine and comment on the recommendation constituted an error of procedural fairness. However, the Committee concluded that, in this case, the opportunity that the member had had to challenge the decision of the Director of Personnel by presenting a grievance–a procedure in the course of which he obtained the document in question and was able to present arguments–eliminated any prejudicial effect that the error had had on the member. The Committee noted, however, that the grievance procedure will not necessarily allow rectification of an error in procedural fairness in every case.

The Committee then ruled on the merits of the stoppage of the member's pay. It first noted that the stoppage of pay process is an ongoing one: a new decision on the advisability of stopping payment can be taken as the circumstances of a case develop and new

information becomes known. In the present case, the Force did not become acquainted with any new information or evidence linking the member to the theft which it was not already aware of when the initial decision not to stop his pay was taken. All the evidence was already known and had already been considered when the initial decision not to stop the member's pay was taken. The committal to trial could thus not, in itself, be grounds for justifying a stoppage of pay. The Committee also concluded that the Force had to take into account the mental health problems from which the member was suffering at the time of his acts. Although the conduct in itself was serious, the member's state of health had a mitigating effect such that there were not, as required by the applicable policy, "extreme circumstances when it would be inappropriate to pay a member." The Committee therefore concluded that the grievance should be upheld, the Director of Personnel's decision should be reversed and the member's pay and allowances for the period in question should be reimbursed.

The Committee also pointed out that, if the Commissioner was not of the opinion that there were sufficient grounds to cancel the Director of Personnel's decision, the file contained new information that showed even more clearly the member's poor state of health at the time of the acts in question. If the Director of Personnel's decision were not to be reversed, there are therefore grounds, now, for taking a new decision and reimbursing the member's pay and allowances.

The Commissioner disagreed with the Committee's conclusion that the Director of Personnel had erred in deciding to order the stoppage of pay and allowances. On that basis, the Commissioner denied the grievance. However, he agreed with the Committee's finding that new information which had since come to light now justified taking a new decision and reimbursing the member's pay and allowances. The Commissioner ordered this reimbursement.

iv) Same-sex Benefits

G-184 A member sought two days of compassionate leave to care for her common-law partner, who was of the same sex as the member. The relevant provision of the Administration Manual allowed for such leave for the care of a "spouse/common-law partner". The request was denied on the basis that the RCMP did not recognize same-sex conjugal relationships; the phrase "spouse/common-law partner" was interpreted to be limited to couples of the opposite sex. The member grieved this decision, submitting that it was discriminatory on the basis of sexual orientation, contrary to the *Canadian Human Rights Act* (*CHRA*) and the

Charter. The Level I adjudicator denied the grievance, finding that there was no prohibition in the *CHRA* against discrimination on the basis of sexual orientation.

The Committee began by analyzing whether the decision had been one made "in the administration of the affairs of the Force". It found that the RCMP had put its own interpretation on a phrase ("spouse/common-law partner") that was not defined in the relevant leave provision, so that the decision had been made by the RCMP in the administration of its own affairs.

The Committee then examined the case law regarding discrimination on the basis of sexual orientation; it found that, on the basis of Haig. v. Canada (1992) 9 O.R. (3d) 495 (C.A.), sexual orientation was a prohibited ground of discrimination under the *CHRA*, and that the RCMP had discriminated against the member on that ground in ascribing to the phrase "spouse/common-law partner" a meaning that could only cover opposite-sex couples. The Committee found that the RCMP could have interpreted the leave provision in a non-discriminatory fashion, but that it had chosen not to do so. It recommended that the grievance be allowed.

v) Medical Discharge

G-173 A civilian member had been off-duty sick for extended lengths of time over a period of years and the RCMP eventually instituted medical discharge proceedings. A medical board was appointed and issued a report setting out certain work restrictions with respect to the member. Based on the report, the Appropriate Officer ordered the member to be discharged. The member grieved the discharge, alleging that it amounted to discrimination based on physical disability. In this regard, the member argued that the Force had failed in its duty to accommodate the member's disability. The member also asserted that the medical board report upon which the discharge was based contained work limitations which were not relevant to the member's job description. The member also made allegations concerning a lack of procedural fairness in the medical discharge process and in the grievance process, as well as referring to harassment by workplace colleagues and to the alleged improper elimination of the member's position through workforce adjustment.

The Committee found that the procedural flaws in the medical discharge process to which the member referred did not deprive the member of procedural fairness. In particular, it found that the participation of the Health Services Officer (HSO) on the medical board created no appearance of bias since the member had nominated the HSO to the board after being sufficiently aware of his role in the medical discharge process.

The Committee further found that the Medical Board report was not fatally lacking in recommendations. Finally it found that, although the Appropriate Officer should not have solicited the opinion of an officer who did not sit on the Board to assist him in interpreting the Board's report, this exchange caused the member no prejudice since the solicited opinion merely reiterated the Board's views. With regard to alleged procedural flaws in the grievance process, the Committee found that these flaws did not prejudice the member.

In examining the member's claim that the work restrictions outlined in the medical board report were irrelevant and ill-defined, the Committee acknowledged that the Force should have more thoroughly documented the relationship between the member's medical condition and the job description. Nonetheless, in the Committee's opinion, the report's restrictions were relevant to the member's duties. Moreover, without accommodation, the member's duties were causing the member significant pain resulting in lengthy absences. The Committee thus concluded that the real question at hand was not whether the members' work restrictions were relevant to present duties (in fact they were), but whether the Force should be obliged to accommodate the member's disability.

With respect to the central allegation of the grievance, discrimination and the duty to accommodate, the Committee found that the member's medical discharge amounted to *prima facie* discrimination on the basis of physical disability. However, upon review of the applicable law, it was the Committee's opinion that the discrimination in question was direct discrimination, and that in cases of this type of discrimination, an employer had no duty to accommodate a disabled employee, but merely had to establish that the conditions of employment motivating the discharge constituted a *bona fide* occupational requirement. In applying this principle to the member's case, the Committee found that the conditions of the member's employment which the member could not satisfy had been imposed in good faith and were reasonably necessary to assure the efficient, safe and economical performance of the member's job. The Committee thus concluded that the member's medical discharge was not contrary to the law against workplace discrimination.

The allegations of harassment and improper workplace adjustment were dealt with briefly. The Committee found that the harassment issue was a separated grievable matter that had been raised outside of the time limit applicable to this issue. The Committee found that the workforce adjustment issue was also a separate matter and it observed that it had, in fact, been the subject of a separate grievance by the member; this issue

therefore was not dealt with by the Committee in this grievance. For the above reasons, the Committee recommended that the grievance be denied.

The Commissioner accepted the Committee's recommendation and denied the grievance.

vi) Language Requirements in Staffing Actions

G-189 A member presented a grievance against a decision to preclude him from a staffing action, on the basis that he did not meet the required CCC/CCC linguistic profile. The staffing action was for the supervisory position in a two-person unit. This unit was a centralized unit, coordinating the implementation of specific programs by the divisions. The unit was composed of one supervisory position and one non-supervisory position. The Unit Bilingual Complement (UBC) in effect at the time of the staffing action consisted of one bilingual member at the non-supervisory level. Thus, the CCC/CCC language requirements set out in the staffing action, which was for the supervisory position, were not in accordance with the UBC. Some six months after the initiation of the staffing action, but before any candidate was chosen, the Force noticed this discrepancy and decided to redetermine the UBC. The result of the redetermination was that the bilingual requirements of the unit were changed in that the non-supervisory level no longer required a bilingual member, but the supervisory level did.

In his grievance, the member argued that the process by which the language requirements for the unit had been determined was flawed. The member requested that the redetermination be rescinded and that the language requirements of the staffing action be changed in accordance with the UBC in effect at the time of the said action. In response to the grievance, the Force argued that the new UBC it had identified was not flawed in that there existed a need for a bilingual capability at the supervisory level of the unit. The Force explained that the unit supervisor was required to communicate with all divisions. Statistical data was provided, demonstrating that one of the bilingual divisions, "C" Division, spent an important amount of time and resources, in comparison to other divisions, on the programs managed by the unit. In light of this data, the Force argued that there existed a need for a bilingual member at the supervisory level of the unit.

The Level I adjudicator denied the grievance, finding that the language requirements had been objectively identified and supported and that the decision to require a bilingual candidate for the supervisory level of the unit fell within management discretion.

The Committee found that there were several problems in the

identification of the language requirements at issue. The Committee first pointed out that the staffing action was undertaken, setting language requirements which were not supported by the UBC in effect at that time, as required by policy. The Committee noted that this, in itself, might not have been fatal and it might have been possible to correct the flaw. Although not procedurally perfect, the Force could probably have subsequently either simply deleted the language requirements from the staffing action, or have cancelled the staffing action, redetermined the UBC upon conducting an analysis of the language needs of the unit, and initiating a new staffing action in accordance with the new UBC. Instead, the Force directly changed the UBC and proceeded with the original staffing action. The new UBC was identified without there having been any documented analysis of the true language needs of the unit. The Committee emphasized that the determination of language requirements is not an *ad hoc* process. Although some statistical data was provided by the Force, this data was provided after the fact, once the language requirements were challenged. There was nothing to indicate that it was obtained by the Force and considered prior to the redetermination; in fact, the evidence showed that the data was obtained after the redetermination. In addition to finding that there had been no true analysis of the language needs of the unit prior to the redetermination, the Committee found that what statistical data and information which had been provided were inherently inconclusive of the true language needs of the unit.

The Committee noted that the Force has adopted a process for the determination of language requirements and has created a legitimate expectation that it would be followed. Although the Committee recognized that it was quite possible that the language requirements at issue might turn out to be justifiable, the Committee felt that this had never been determined by a proper administrative process and was, in fact, not apparent from the record. The Committee found that the language requirements in this case had clearly been determined in an *ad hoc* fashion and appeared to have been predetermined, as opposed to having been identified in an objective manner. The Committee reiterated its view, as expressed in previous cases, that a UBC determination which is the result of a "guesstimate" or a "prejudgment" cannot stand. The Committee concluded that the language requirements for the staffing action and the redetermination of the UBC were invalid. It was thus recommended that the grievance be upheld. In terms of the applicable redress, the Committee felt that, in light of the amount of time which had elapsed since the staffing action, the member's file should be compared to that of the successful candidate's and, if more

meritorious, the member should be awarded a future promotional opportunity with a retroactive effect to the date on which the position was filled.

vii) Travel Policy

G-169 A member made a meal claim. Before the claim was approved, the member was requested to provide receipts as it was not believed that the member had actually spent the amount of money he was claiming. The member answered that the relevant policy exempts him from having to file in receipts (Treasury Board Minute 704761). The claim was denied. In light of the refusal, the member filed a grievance. Beside his policy-based argument, the member argued that he was the subject of discrimination since he was the only member of his section from which receipts were requested. As previously found by the Committee, the Treasury Board's general policy applies to members of the Force only in matters that are not covered by Treasury Board's specific decisions made for the Force. In the present case, the Committee found that such a specific decision exists for the meal claims: Treasury Board Minute 704761 ("TB 704761") which applies in this case. In the current matter, the parties did not provide the details of the circumstances that led to the claim. However, the Committee was able to determine that the meals were taken outside the vicinity of the worksite. This fact was not contested and only the duty to file receipts was in dispute.

After reviewing the wording of TB 704761, the Committee found that it provides for the reimbursement of meal claims generally according to a pre-established rate. That is, a flat rate which is the same for all the claims. In this policy, the reimbursement according to real cost is an exception and the use of this method of reimbursement must be clearly expressed or has to be implicitly referred to in the provision. The Committee mentioned that it is difficult to come to a satisfying interpretation of this policy because of its lack of clarity. However, the Committee believed that its interpretation is the most logical one, considering the way this policy is built.

The Committee found that the relevant provision of TB 704761 does not create an exception for the type of reimbursement requested by the Grievor. Therefore, the pre-established rate should be used. The Committee added that this finding makes the receipts useless, since the amount of money that the Grievor actually spent becomes irrelevant. TB 704761 provides that, in general, members do not have to include receipts with their meal claims. It would not be fair if the Force could ask for them after the claim is filed. The Committee therefore recommended that the Commissioner uphold the grievance and authorize the reimbursement of the grievor's meals. The Committee also

found that the facts provided in the file are not sufficient to make any finding on the discrimination allegation.

The Commissioner did not accept the Committee's recommendation and denied the grievance. The Commissioner felt that it would be unreasonable and unjustifiable for a member to expect a reimbursement greater than the actual cost of the meal.

G-171 A member who had been on patrol in the vicinity of his worksite filed a meal claim. The Force denied the claim and the member filed a grievance against this decision. He argued that he was entitled to the reimbursement of his meal costs according to chapter 370 of the Treasury Board personnel management manual. The level I adjudicator denied the grievance because the member did not establish any exceptional circumstance to support his claim. In his level II presentation, the member explained that the officer in charge had forbidden the members from eating at the detachment. He wanted them to stay near their patrol area for security reasons. The Grievor added that he did not have access to a refrigerator, nor a stove or a micro-wave oven.

Since this grievance was filed, the Committee has examined the matter of meals consumed during a patrol in G-128, the findings and recommendations of which are relevant to this case. In G-128, the Committee found that the Force had not considered the proper policy when the member's claim was initially denied. The Committee found that the same conclusion could be drawn in the present case, since the Force used the same policy to decide upon the grievor's claim. The applicable policy is chapter 370 of the personnel management manual, for matters that are not covered by the exceptions in two Minutes from Treasury Board: TB 704761 and TB 710531. In G-128, the relevant provision was subparagraph 4(3)(iii)c) of TB 704761, which deals specifically with meals consumed during a patrol. The Committee found that this provision should also be applied in the present case. In G-128, the Committee found that this provision allows a member on patrol to claim his legal fees if his duties preclude him from taking his meal at the normal place and time; that is, at a regular hour and at his worksite (headquarters) or at any other place equipped with appropriate installations to keep and consume a meal. The Commissioner agreed with this interpretation in the decision he rendered in G-128.

In the present case, the arguments submitted by the Grievor in his level II presentation were not contradicted by the Force. The Committee accepted that the Grievor could not return to his detachment to take his meal at the normal place and time and that, in any event, at the time of the grievance, the detachment

did not have the appropriate facilities for members to keep and consume a meal prepared in advance by them. The Committee felt that the member should have had his meal costs reimbursed to him under subparagraph 4(3)(iii)c) of TB 704761. The Committee therefore recommended that the grievance be upheld and that the Grievor be reimbursed his meal costs according to the pre-established rate used by the RCMP.

G-172 A member made a meal claim after a one-day trip that he went on as part of his duties. The member explained that he had accomplished certain duties which had precluded him from taking his meal at the usual place and time. The Force denied the claim on the basis that the member had not established any exceptional circumstance to justify such a reimbursement and had not provided a receipt with his claim. The member grieved.

In light of its findings and recommendations in G-167, the Committee found that the Grievor made a trip of less than one day and that he was entitled to the reimbursement of his meal costs pursuant to subsection 4(2) of TB 704761; indeed, the Grievor was outside the vicinity of his worksite according to the test described by the Committee in G-167. The Grievor established that he was on a trip of less than one day and that it was not reasonable, because of the nature of his duties, to expect that he would return to his usual worksite for his meal. In this case, the Force applied the wrong policy. The Committee recommended that the Grievance be upheld and that the Grievor be reimbursed his meal expenses.

This left the matter of the receipts. In a more recent case, G-169, the Committee found that the policy on meal expenses does not require receipts in support of meal claims. The Committee found that members have to produce receipts only when the policy requires it. In the present case, the Committee found that the applicable provision did not carry such a requirement so the Grievor did not have to produce receipts.

G-176 A member was transferred. Finding it impossible to sell his residence, he stayed temporarily at his former position as surplus to establishment. While waiting for his transfer to take effect, he agreed to work at another detachment 115 km away. He agreed to travel mornings and evenings to this location during his working hours, using an RCMP vehicle. After approximately three months, the member's transfer was completed and he took up his new duties. The member claimed expenses for 55 meals taken during his temporary assignment. He believed that the travel policy entitled him to this reimbursement, since he was on travel status of less than one day.

The Force refused to reimburse this claim. It explained that the member's

place of temporary assignment became his new place of work and that he was responsible for his meals. The member presented a grievance, which was denied by the Level I adjudicator. The latter concluded that the member's place of temporary assignment became his place of work and that he was not on travel status. The member brought his grievance to the second level.

The Committee disagreed with the conclusion of the Level I adjudicator that the place of the temporary assignment had become the member's place of work. The applicable policy defines place of work as the location where the member regularly performs his duties. In this instance, there was a temporary arrangement. The member's place of work had not changed. The member therefore made a series of trips of less than one day as part of a temporary assignment. The Committee therefore recommended that the grievance be upheld and that the member receive reimbursement for his meal expenses.

G-178 A member was transferred and sold his house. Later, he decided to purchase a house close to his former place of work so that his family could continue to live there. The purchase of this house resulted in a dispute between the vendor and the real estate agent. The member received a *subpoena* ordering him to appear in small claims court at his former place of work. He claimed the travel expenses occasioned by his testimony. He was denied these expenses and he presented a grievance. He contended that he had to respond to the *subpoena* or else he would have been found guilty of contempt and the RCMP would have been discredited. The member added that his testimony was designed to resolve a conflict and that the resolution of such a conflict is the concept that underlies the community policing program.

The Level I adjudicator denied the grievance. He found that the testimony had nothing to do with an RCMP investigation and because the expenses were not related to the member's transfer. The grievance was presented to the second level and was reviewed by the Committee.

In the Committee's opinion, the grievance should be denied. The applicable travel policy provides that members can be reimbursed for travel expenses when they testify for work-related purposes. The Committee concluded that the member did not testify for work-related purposes in this matter because he testified in connection with a dispute in which he was involved as a private citizen. The obligation to comply with a *subpoena* did not arise from his status as a member of the RCMP, but from his status as a citizen. The Committee considered that the argument based on the community policing program could not be accepted. The member did not intervene in the dispute as a neutral member of the RCMP who

was patrolling the area, but as a private witness involved in a dispute. The member was involved in the dispute as a private party. The policy on testimony by members in civil cases does not apply. This policy applies to civil cases involving operational RCMP matters, which is not the case in this instance. The Committee therefore recommended that the grievance be denied.

viii) Relocation Directive

G-185 A member, who had been relocated to a new post, retained a residence at the old-post under the terms of RCMP Relocation Directive 4.4.4 ("section 4.4.4"). Retention under section 4.4.4 maintains a member's eligibility for reimbursement of costs associated with the eventual disposal of an old-post residence; however, costs associated with the disposal of a residence at the new post may only be reimbursed if the member first sells or gives up the section 4.4.4 option for the old-post residence. In the present case, when relocating to the new post, the member moved into a residence already owned by the member's common-law spouse; this became the member's new-post residence. When, at a later date, the member began the process of a pre-retirement relocation, the member gave up the section 4.4.4 option on the old-post residence; the member then sold the new-post residence and relocated to a retirement residence.

When the member claimed relocation reimbursement for the move from the new-post residence to the retirement residence, the portion of the claim relating to the Home Equity Assistance Plan (HEAP) was denied. HEAP allows partial reimbursement of an equity loss due to relocation, provided that the market has declined at least 10% from the date of purchase to the date of sale. The Force found that, where a residence is retained under section 4.4.4, a member may have only one residence at a time eligible for reimbursement under the Relocation Directive. It found that the deemed date of purchase for the new-post residence in the present case was therefore the date the member gave up the option under section 4.4.4. Reimbursement under HEAP was denied because the market had not declined at least 10% between the deemed date of purchase and the date of sale of the new-post residence. In the course of considering the member's claim, the Force also raised questions on i) the date at which the member's common-law spouse could be deemed to be a spouse under the Relocation Directive, and ii) whether HEAP reimbursement for this type of residence—an expensive residence in which the member had acquired an interest through the relationship with the member's common-law spouse—was within the purposes of the Relocation Directive.

The member grieved. The member argued that the deemed date of purchase should be the date on which the member began cohabiting with the member's common-law spouse at the new-post residence; a 10% market decline was indicated between this date and the date of sale. At Level I, the grievance was denied on the basis that HEAP reimbursement for such a residence was not within the purposes of the Relocation Directive. In addition, the Level I adjudicator agreed with the Force's position that the deemed date of purchase should be the date on which the section 4.4.4 option on the old-post residence was relinquished.

The Committee found that the record of the grievance raised issues with respect to the deemed date of purchase under section 4.4.4; the date at which a common-law spouse is deemed to be a spouse under the Relocation Directive; and the general purposes of HEAP reimbursement under the Relocation Directive. The Committee agreed with the Force's interpretation of the deemed date of purchase. It found that the interpretation offered by the member would result in the Force providing HEAP guarantees on two residences simultaneously; this would be contrary to the underlying intention of section 4.4.4. As no 10% market decline was indicated between the deemed date of purchase, properly interpreted, and the date of sale, the member was ineligible for HEAP. It was not necessary for the Committee to address the other issues raised in the record.

The Committee observed that there was another potential issue not explicitly raised in the record of the grievance: whether the member had been misled by incorrect advice originally given by the Force regarding the deemed date of purchase. However, as it was not indicated that the member had relied to the member's detriment on this advice, the Committee found that the member had no claim on this basis. In additional comments, the Committee expressed caution about an extrapolation of its interpretation of section 4.4.4 in this grievance to all possible fact situations.

G-187 A member had claimed reimbursement of the cost of maintaining a residence at his place of duty. The member and his spouse were both members and were posted to the same location. The member's spouse was transferring to a new place of duty and the member requested a similar transfer. He was offered a transfer to a detachment neighbouring his spouse's new place of duty, subject to a residency requirement. The member accepted the transfer. Before transferring, the member requested an exemption from the residency requirement. His request was denied. He and his spouse travelled to his new place of duty and found no available accommodation suitable to the

needs of their family. As a result, they bought a house at the member's spouse's place of duty, and rented an apartment for him at his new place of duty. After his transfer, the member again requested an exemption from the residency requirement. This request was denied. The member grieved this decision and the RCMP granted him the exemption he was seeking, stressing that no relocation expenses would be paid.

This last decision, that no relocation expenses would be paid, gave rise to a second grievance, which was resolved informally, except for the member's claim for reimbursement of the cost of maintaining a residence at his place of duty. The parties agreed that this single unresolved issue would be proceeded with independently. The Level I adjudicator found in favour of the Force on this issue, and the matter came before the Committee.

The Committee found that the member had standing to pursue the issue because the effect of the agreement between the parties to the second grievance was to continue that grievance with respect to the unresolved issue. As the member had had standing for his second grievance, the Committee found he also had standing for pursuing the unresolved issue. The Committee further found that the statutory limitations periods had been respected.

The member had based his grievance on the provisions of the RCMP Relocation Directive applying to "Newly Engaged Members and Special Circumstances". The Committee found that these provisions did not give rise to the entitlement claimed by the member because his situation did not fall within those for which the provisions had been designed.

The member also submitted that he was entitled to Temporary Dual Residency Assistance (TDRA). The Committee found that this argument had not been established as the member did not maintain at the same time a residence at his old place of duty and another one at his new place of duty, which is a prerequisite to any TDRA entitlement.

The member finally alleged the existence of exceptional circumstances. This allegation had not been contradicted by the Force and was supported by information on the record before the Committee. The Committee analyzed the circumstances of the case and found that the reimbursement the member was seeking was not covered by the RCMP Relocation Directive. The Committee also found that the member had acted in a fiscally responsible manner and in good faith. The Committee further found that the cost of maintaining a distinct residence for himself at his new place of duty fell within the purpose and scope of the RCMP Relocation Directive. The Committee therefore recommended that the Commissioner seek authorization

from the Treasury Board to reimburse the member.

G-188 Eight months after listing his house for sale, a transferred member received an offer which was 10 % lower than the price he had originally paid for it. He accepted the offer subject to his obtaining prompt Force pre-approval for reimbursement under the Home Equity Assistance Plan (HEAP). When the member applied for pre-approval however, the OIC Finance denied his request, stating that before the fact approval for HEAP was not possible and indicating that the Divisions had no authority to grant such approval in any event. The offer subsequently collapsed; however, the member was nonetheless able to sell his house two weeks later for a higher price which was still inferior to the purchase price. The member grieved the OIC Finance's decision not to consider him for HEAP pre-approval with respect to the collapsed offer.

At this point, the Force decided to order appraisals to determine whether the member had complied with the market decline criterion of HEAP. The appraisers reported that the member had not fulfilled this criterion; market prices between the acquisition and disposal of the residence had not declined at all, let alone by the requisite 10 % mandated by HEAP. The Level I adjudicator acknowledged that the Force had erred in not promptly assessing the member's eligibility for HEAP but concluded that since appraisers opinions had subsequently been obtained, and since they indicated non-compliance with the market decline criterion, the member was owed no further remedy.

The Committee noted that the member's HEAP eligibility should have been assessed for pre-approval during the life of the earlier offer. With respect to formal compliance with the market decline criterion, however, the Committee found that neither appraiser had concluded that market prices had really declined at all. As for compliance in an inactive market where an offer is made which is 10 % lower than the acquisition price, the Committee found that there was no evidence on record that the market was in fact inactive during the time the member's house was for sale: The house was shown over 30 times during the 8 month selling period and the later offer which resulted in the actual sale of the house followed the collapsed offer by only two weeks. Though the appraisers spoke of a "slow" or "soft" market, statistics demonstrated that even at its lowest point, about 20 sales a month had taken place. The Committee thus concluded that the market decline criterion had not been satisfied and recommended denying the grievance.

ix) Living Accommodation Charges Directive

G-182 In the absence of available RCMP-owned accommodation at a member's posting, a member purchased a home from the private market. Two years later, he applied for a housing subsidy to compensate for the fact that he had been unable to occupy RCMP-owned accommodation, which he submitted was significantly less expensive. His request was denied. The member filed a grievance against this decision, stating that the RCMP had violated its obligation under the Living Accommodation Charges Directive (LACD). The LACD states that accommodation is to be provided where no "suitable living accommodation" exists in the locality; the member argued that since private accommodation was much more expensive than the government housing, there was therefore an obligation on the RCMP to either provide suitable housing or compensate him for the failure to do so. The Level I adjudicator denied the grievance because he saw no violation of the LACD or other policies. The adjudicator relied on a previous decision of the Commissioner (G-64), where it had been found that "suitable living accommodation" did not mean *affordable* accommodation.

The Committee found that "suitable living accommodation" within the meaning of the relevant chapter of the LACD could include considerations of whether the accommodation was financially suitable, and compared the prices of private accommodation in the locality to the base shelter value of the RCMP-owned accommodation, to determine the extent of the discrepancy between them. The Committee found that there was not enough of a discrepancy to render the private accommodation unsuitable, and therefore found that there was no lack of suitable living accommodation for which the member had to be compensated. The Committee recommended that the grievance be denied, but made additional comments about the possible financial disadvantage suffered by members who are unable to occupy RCMP-owned accommodation; the Committee suggested that the Commissioner investigate possible ways of alleviating and addressing discrepancies between the housing opportunities of members.

x) Dental Care Plan

G-183 A member and her husband, both automatic participants in the RCMP Dental Care Plan as civilian members, sought to "coordinate" their benefits by claiming the unrecovered portion of their own dental expenses as dependents under each other's coverage; their claims were denied by the administrator of the Plan. After receiving confirmation that the policy did not allow for such coverage

where both spouses were employed by the federal government, the member submitted a grievance against the policy, stating that it was discriminatory and that it denied her the coverage that others received.

The Grievance Advisory Board obtained information regarding the source of the policy at issue, and found that the RCMP had no control over the Dental Care Plan because the Treasury Board determined the coverage. It found that the decision had not been made "in the administration of the affairs of the Force" within the meaning of subs.31(1) of the *RCMP Act*, and recommended that the grievance be denied for lack of standing. The Level I adjudicator agreed and denied the grievance.

The Committee found that the approach taken by the Level I adjudicator had been correct, that the source of the policy the member sought to grieve was the Treasury Board and not the RCMP; therefore, the member could not use the grievance process to attack the policy because she lacked standing. However, the Committee suggested that the RCMP ought to provide some forum in which members could express their concerns about their dental coverage, and that in some circumstances the RCMP should engage in discussions with the Treasury Board regarding members' concerns. The Committee noted finally that a recent change in the policy had allowed for the coordination of benefits that the member sought.

V) DISCIPLINE - PART IV OF THE *RCMP ACT*

D-37 A member faced a disciplinary allegation of disgraceful conduct bringing discredit on the RCMP. The allegation was that, on a number of occasions, the member wrongfully took money from an RCMP mess. After hearing oral evidence and observing videotape of the alleged incidents, the Adjudication Board found that the allegation was established. The Board found the member's explanations for the incidents to be improbable in view of the evidence before it. As a sanction, the Board directed the member to resign, failing which he would be discharged. On appeal the member argued that the Board had violated principles of natural justice and fairness in finding that hearsay evidence was admissible. The Committee extensively reviewed the admissibility of hearsay evidence in such proceedings and, in particular, examined the scope of paragraph 24.1(3) of the *RCMP Act*. The Committee found that the effect of a broad evidentiary provision such as paragraph 24.1(3) was to make strict application of the rule against hearsay inapplicable. Examining the Board's actual ruling, the Committee found that, while the Board perhaps was overly categorical in its comments on the admissibility of hearsay, the Board

showed that it recognized the appropriate rules with respect to this type of evidence, including certain restrictions on its use. Furthermore, the Committee found that the Board's application of the rules on hearsay evidence led to no unfairness at the hearing.

A further ground of appeal concerned a ruling by the Board on the *Canada Evidence Act* (*CEA*). The member won the motion, on other grounds, in which the *CEA* ruling was made. The Committee thus found that no unfairness to the member arose from the *CEA* ruling and that this issue would not justify allowing the appeal.

The final ground of appeal concerned the Board's treatment of expert psychiatric evidence. The member argued that the Board misdirected itself as to the way in which the expert evidence should be dealt with in its decision. The member also submitted that the Board had not adequately considered this expert evidence for the purpose of sanctioning. On review, the Committee found that certain questions dealt with by the Board with respect to the expert evidence—whether this evidence disclosed a lack of operating mind on the part of the member and whether it explained an inability to recall—were raised in the member's submissions and evidence. It was therefore not an error for the Board to deal with these questions. The Committee also found that while the Board had not specifically mentioned the expert evidence in dealing with sanction, the entirety of its decision showed sufficient consideration of the essence of this evidence for this purpose. For the above reasons, the Committee recommended that the appeal be denied.

The Commissioner accepted the Committee's recommendation and denied the appeal.

D-38 One allegation of disgraceful conduct and one allegation of violation of the oath of secrecy were brought against a member. In brief, the particulars of both allegations were that the member queried the licence plate number of a motor vehicle on a Canadian Police Information Centre terminal and passed on the information she received to her spouse, a person who was not entitled to that information. The Adjudication Board found that the particulars, which were identical in both allegations, the disgraceful conduct and all the required elements to support a breach of the Oath of Secrecy had been established. However, the Board went on to find that, because of the method of investigation used in this case, it would be a denial of natural justice to issue a sanction. The Board compared the approach taken in the investigation to the criminal law concept of "Entrapment". In particular, its concern was with the undercover operation of which the member was the subject and with the fact that her spouse was used as an "agent provocateur"

without his being aware of it. The Board determined, on the basis of the evidence before it, that the member was placed in an untenable position by the actions of both the investigating officers and her supervisor. The Board found that she was induced to carry out the actions under question, and further determined that, as a result, it would be an abuse of process to issue a sanction in this case. The Appropriate Officer appealed the Board's decision, arguing that the Board erred in both fact and law in regard to procedural issues and in its findings.

The Committee reviewed the appeal and found that the Board did not err as argued by the Appropriate Officer. The Committee supported the decision of the Board not to issue a sanction, but found that the Board did not have the jurisdiction to conclude that the particulars and the allegations were established. The Committee found that the circumstances of the investigation were analogous to the criminal law concept of entrapment, and that such an approach is contrary to the rules of natural justice. As a consequence, the Committee found that the proceedings before the Board were void *ab initio*, with the result that the Board did not have jurisdiction to issue findings in regard to the allegations. The Committee recommended that the appeal be dismissed.

The Commissioner accepted the Committee's recommendation and denied the Appropriate Officer's appeal.

D-39 A member faced a disciplinary allegation of disgraceful conduct. It was alleged that he had made two telephone calls of an aggressive nature to the spouse of a woman with whom he had formerly had a relationship. One of these calls, the second, led to a criminal conviction for having uttered a threat to cause death. At the RCMP adjudication board hearing, the Board heard evidence concerning various incidents which occurred from the time of the member's breakup with his former girlfriend to the time of the phone calls. The evidence against the member concerning the calls principally rested on the testimony of the former girlfriend and her spouse as well as on a tape recording from the former girlfriend's answering machine which had accidentally recorded the first call in its entirety. The former girlfriend's spouse gave evidence as to the contents of the conversations and testified that the voice of the caller in the second call was the same as that in the first call, which had been recorded; the former girlfriend identified the voice of the caller in the first call as that of the member. The member testified and denied making the phone calls. He asserted that at the time of the first call, he would have been at home sleeping and that, at the time of the second call, on the following morning, he

was at work, although alone on patrol. Three people who often spoke with the member on the telephone testified in his favour to the effect that the voice on the recording was not the member's.

The Adjudication Board first considered the evidentiary effect of the criminal conviction which had been registered in relation to the facts of the second call. The Board's interpretation of the law was that a conviction constituted *prima facie* proof of the alleged facts in a subsequent non-criminal proceeding and that the effect of the conviction could only be rebutted through the presentation of fresh evidence or if it were shown that the conviction had been obtained by fraud or collusion. The Board found no proof of fraud or collusion and rejected the voice identification evidence presented by the member on the principal basis that it had been available at the criminal trial. The Board thus found that the facts concerning the second telephone call had been established. The Board then went on to find that the facts relating to the first telephone call had also been established, finding the Appropriate Officer's evidence to be more reliable than that presented by the member. The Board found the member's conduct disgraceful and concluded that it brought discredit on the RCMP. The Board then heard evidence on sanction and dismissed the member.

The member appealed the Board's decision on the allegation and on sanction. A first ground of appeal concerned a motion which had been denied and in which the member had argued that the disciplinary proceedings against him had been initiated outside the one-year limitation period which, under the *RCMP Act*, begins to run from the time the alleged misconduct became known to the "Appropriate Officer". What had occurred was that the divisional Commanding Officer had signed the Notice of Hearing within a year of his knowledge of the misconduct but not within a year of the knowledge of the misconduct by other representatives of Force management. The Committee found that the term "Appropriate Officer" in the provision setting out the time limit refers to the position of the Commanding Officer and not other representatives of Force management. As such, the disciplinary proceedings had been initiated in time. Another of the principal grounds of appeal concerned the Board's admission of evidence of incidents between the member and his former girlfriend from the time that their relationship ended to the time of the calls. The member argued that this evidence should not have been allowed on the basis that its highly prejudicial effect outweighed its relevance. The Committee observed that the guiding criteria for the admissibility of evidence before adjudication boards are the relevance and the fitness of the evidence. In this case, the evidence in question essentially indicated that despite their

breakup, the member still had a strong interest in his former girlfriend. The evidence was thus relevant to establishing a motive for threatening the girlfriend's spouse and was therefore admissible. In another ground of appeal, the member questioned the Board's finding that the former girlfriend's testimony had been more credible than that of the member. The Committee concluded that there was no patently obvious error in the Board's evaluation of credibility. The Board's decision on the facts was supported by evidence and was not unreasonable. Another ground of appeal concerned the Board's decision with respect to the effect which the prior criminal conviction had on the establishment of the facts relating to the second phone call. The Committee found that the Board had in fact erred in its interpretation of the law in finding that the *prima facie* effect of a criminal conviction can only be rebutted through the presentation of fresh evidence or a demonstration that the conviction was obtained through fraud or collusion. As explained by the Committee in a previous matter, D-34, a full range of rebuttal evidence should be allowed to the defendant in a subsequent non-criminal proceeding. The Board should therefore have considered all of the member's evidence in light of determining whether it rebutted the effects of the conviction in relation to the second call. However, this error was not fatal to the Board's decision. As the Board had examined and weighed the evidence in question in determining whether the facts in relation to the first call were established, the Committee was satisfied that an application of the proper considerations in determining whether the second call occurred would not have resulted in a separate outcome. Based on the above reasons, the Committee recommended that the member's appeal on the allegation should fail.

The Committee then examined the member's grounds of appeal on sanction. A first ground challenged the Board's decision to have allowed two members of Force management to provide opinion evidence as to why the member should not remain in the Force. The member argued that the brief synopsis of their intended testimonies was insufficient in terms of disclosure. The Committee considered the manner in which the proceedings were carried out, the limited testimony provided, the fact that the evidence carried no weight and did not appear to have been relied upon by the Board in its decision; the Committee found that although a more detailed synopsis should have been provided, the member had not been denied fairness and the Board's decision should not be overturned on this ground.

In another ground, the member argued that the Board should have given more weight to the fact that throughout the criminal and disciplinary process, the Force had assigned the member certain tasks which demonstrated that he still

held the Force's confidence. The member had been removed from general duties and re-assigned to administrative duties in his detachment and at his subdivision. In the course of his re-assignment he had acted as vault custodian, was assigned protective duties at a major event and also assisted in crowd-control on another occasion. Although the Force's actions demonstrated a certain level of confidence in the member, the Committee felt that they did not result in a condonation of the serious character flaw revealed by the member's actions. The Committee noted that the member had clearly been removed from the types of duties which he normally held. Although the member was assigned certain important tasks, these appeared to be assignments which either enjoyed a greater level of supervision or presence of other members than the general policing duties performed before the re-assignment. The Committee therefore felt that this ground did not independently justify upholding the appeal.

A further ground of appeal concerned the weight to be given to expert evidence presented by a psychologist who had treated the member for stress and depression resulting from the criminal and internal processes. The Committee found that the Board had not erred in finding that the evidence had a limited bearing on sanction. The Committee reiterated its comments in D-25 to the effect that the fact that a member has overcome the stress caused by the disciplinary process does not mitigate the misconduct. Here, the member denied having made the phone calls and the expert's evaluation of the member was based on this premise. As such, the expert opinion could not provide any indication of the progression of the member's behaviour since the threats: had the opinion provided that the threats in question were the result of an unusual mental state or behavioral problem and that his problem was either treated or being treated, it would have held more relevance. The Board had thus not erred in its appreciation of the expert evidence.

Based on the above, the Committee recommended that the grounds of appeal on sanction be denied to the extent that the employment relationship would be continued. However, upon consideration of all the circumstances in this case, the Committee did not agree that this was one of those few cases where the actions were so reprehensible as to require a direct discharge. The Committee recommended that the appeal on sanction be upheld in part and that the discharge be substituted for a direction to resign.

Although he did not agree with all the Committee's conclusions in this matter, the Commissioner was in agreement with the result. The Commissioner reduced the dismissal to a direction to resign.

D-40 A member was alleged to have engaged in disgraceful conduct over a certain period of time. The particulars of the allegation set out no explicit conduct but stated merely that the member was convicted of an offence committed over another period of time. In its decision, the Adjudication Board found that the member's proven conviction for this offence had created a presumption of disgraceful conduct which the member's evidence was unable to refute. Having found that the member had committed the acts alleged, however, the Board noted that there was a discrepancy between the time periods set out in the allegation and the time period mentioned in the particulars; in this regard it observed that while conduct occurring in the time frame set out in the particulars had been proven, no evidence had been led which established that the member had committed these acts within the time frame set referred to in the allegation. It thus concluded that the allegation, as worded in the Notice of Hearing, had not been established.

On appeal, the Appropriate Officer contested the Board's finding that the particulars disclosed no reference to actual conduct on the part of the member. The Committee, however, observed that the Board's finding in this regard was correct; no conduct had been set out in the particulars. The Committee also noted that, in any case, this finding by the Board had played no determinative role in the Board's overall decision against the Appropriate Officer; although the Board had (correctly) held that the particulars disclosed no explicit reference to conduct, the Board was willing to infer such a reference given that the particulars mentioned that the member was convicted of having committed an offence.

Secondly, it was argued that since the member had known the case to be met, the Board had erred in questioning the sufficiency of the particulars. The Committee analysed the sufficiency of the particulars from two perspectives: (i) the fact that they referred to the member's conviction without explicitly mentioning the conduct which led to this conviction and, (ii) the fact that they set out a different time frame from that mentioned in the allegation. In each instance, the Committee noted that although the Board had found the particulars to be wanting, in the end the Board did not consider either deficiency to be determinative in its disposition of the matter. This ground could therefore not succeed.

On the third ground, it was argued that the Board erred in finding that no evidence was led of conduct occurring within the time frame set out in the allegation. At the outset, the Committee noted that the Board was entitled to infer an implicit reference to conduct in particulars which only mentioned conviction for this conduct. It then found

that although the allegation time frame and the particulars time frame did not perfectly coincide, they did overlap; in this regard it was apparent that there was at least some evidence that an essential portion of the implicitly particularized conduct for which the Respondent had been convicted had occurred during the period covered by the allegation. The Committee therefore concluded that the appeal should be upheld on this ground and recommended to the Commissioner to order a new hearing, as this was the only remedy.

With regard to the remaining grounds of appeal the Committee concluded that (I) the Board's finding with respect to the evidential effect of a member's conviction had not played a role in its decision (ii) the Board committed no determinative error in its assessment of the credibility of witnesses.

D-41 While on duty and seated in their respective police vehicles, which were parked side-by-side, a member and his colleague were approached by a woman who reported that her friend had been assaulted by a man who grabbed her breasts before running off. The victim, in a state of shock, was standing off to the side. The member in question glanced briefly at her. The member's colleague told the victim's friend that it would be preferable for her to call the local police herself, since the local police is the designated authority for this type of investigation. At this point, the friend hastily left the scene with the victim. The colleague of the member in question explained that he had acted in this way because, normally, when members call the local police directly, the latter requests that the complainants make the call themselves. He therefore wanted to save time.

An allegation of disgraceful conduct bringing discredit on the RCMP was made against the member, as well as an allegation of having knowingly neglected his duties. Essentially, he was accused of having lacked consideration for the victim, of not having shown more concern for her condition and of not having called the local police himself. The member claimed that this was a performance-related problem which, if founded, would be attributable to incompetence, for which he cannot be disciplined. The member contended that he had not had the time to check whether the victim required assistance because everything had happened so quickly.

The Adjudication Board found that the allegations were established. In its opinion, the member had the obligation to provide the victim with all necessary assistance. The Board issued a finding of disgraceful conduct bringing discredit on the RCMP. It dismissed the second allegation, finding it to be repetitive. The Board reprimanded the member and fined him two days' pay. Before these measures were imposed on the member,

his colleague underwent a similar disciplinary procedure during which an agreement with the Appropriate Officer led to his being reprimanded and fined one day's pay.

The member appealed his case, arguing that he had committed an involuntary error which constituted a performance-related problem and did not warrant a disciplinary measure. He added that the victim had not appeared to require immediate assistance and that, contrary to the Board's finding, he had had only a general overview of the situation. He also appealed the decision to dismiss the second allegation. He felt that the Board should have found that this allegation was not established, since there had been no element of intent. The member also disputed the sanction, deeming it unjust in view of the secondary role he had played in this affair (he was not the member who spoke to the complainant's friend), his lack of experience in the field of sexual crimes and the absence of clear directives on how to deal with victims of such crimes. He also argued that the sanction was unjust in relation to that of his colleague, who, despite having played a larger role in the affair, had received a lesser sanction. The Appropriate Officer argued that the Adjudication Board had not erred and that the principle of a binding effect of previous decisions does not apply in administrative law.

The Committee began by observing that the good faith of the member is but one element for consideration when determining whether or not his conduct had been disgraceful. A member may be disciplined for misconduct if, by virtue of this misconduct, he or she has violated a provision of the Code of Conduct. The real question which needs to be asked is whether or not the Code has been breached. The Committee had already found, in previous cases, that intent must be established only if it is an essential component of the disciplinary allegation. This was not the case in the matter at hand.

Since the facts had been proven and this finding had not been disputed on appeal, all that remained was to determine whether or not the member's conduct had been disgraceful. The Committee found that the member had met the minimum standard in carrying out his duties, but that the manner in which he had carried them out was unacceptable: the member should have gotten out of his vehicle to approach and pay more attention to the victim. The member also should have tried to call the local police, given the gravity of the situation. However, the Appropriate Officer did not show that the member had erred in concluding that the victim did not require immediate, emergency attention.

The Committee found that the member's conduct had not been

disgraceful. The member, who did not have any training or experience in assisting sexual assault victims, had deemed that the victim did not require his assistance on the basis of what he had been able to observe on the evening in question. The Committee found that the member's conduct had not been morally or ethically offensive, as it would have had it truly been disgraceful. A reasonable person would surely find that the members of the RCMP are human beings who can make mistakes without their conducts being considered disgraceful. Thus, the member's performance was unacceptable, but not disgraceful. Consequently, the Committee found that the first allegation had not been proven and recommended that the appeal be upheld.

The Committee found that the ground of appeal relating to the Adjudication Board's decision to dismiss the second allegation was academic, since this decision was in no way prejudicial to the member. Should the Commissioner arrive at a different conclusion regarding the allegations, the Committee explained that, in its opinion, the Adjudication Board-in imposing the sanction-had not committed an error warranting the intervention of an appeal tribunal.

D-42 A member was accused of disgraceful conduct bringing discredit on the RCMP. On several occasions he had used, for his own personal use, a government calling card authorization number which had not been assigned to him. He had also written this number in his personal telephone book at home. Unbeknownst to him, members of his family had obtained the number, used it and distributed it to others. The Force accused the member of having used the number for upwards of a year, having been negligent and having lost control of the number, the result being that thousands of dollars in long distance charges were incurred. The Force sought to have the member dismissed. Three other members of the same unit had also been accused of having used the same authorization number. In two of those cases, the Force had taken informal disciplinary action, while in the third, it had launched a process aimed at formal disciplinary action and concluded an agreement under which the member would forfeit eight days' pay.

The member responded to the allegation by stating that he had thought that there was a flat rate for long distance calls on the government telephone system, regardless of usage, and that RCMP employees were entitled to use this system. The Adjudication Board did not accept this explanation and found that the allegation was established. In its decision on a penalty, the Board stated that the member's actions reveal a dishonest character. The Board also drew a distinction between the member's case and that of the three other members,

explaining that the three other members had not shown negligence or carelessness in handling the number. The Board ordered the member's dismissal.

The member appealed the decision regarding the penalty. His objection centred primarily on the finding that his actions revealed a dishonest character and on the Board's assessment of the aggravating and mitigating factors.

The Committee began by reviewing the Adjudication Board's finding that the member's misconduct revealed a dishonest character trait. The Committee felt that it was inappropriate to revisit this finding, since it grew out of an evaluation of the credibility of the explanation provided by the member in his testimony, and there was no evidence that the Board had committed a palpable error in its evaluation. Indeed, there were certain elements in the file that could substantiate the Board's finding.

The Committee then turned its attention to the ground of appeal in relation to the factors which the Adjudication Board had taken into account. The Committee found that the Board failed to consider two important factors. It explained that in general, even though adjudication boards are not bound by the sanctions imposed previously in similar cases, the principle of parity as it applies to sanctions remains an important factor which adjudication boards must take into account in determining an appropriate sanction. The Committee reviewed the cases of the three other members accused of having used the authorization number in question and found that the Adjudication Board had erred in dismissing them from consideration. There were factual differences between these cases, but these differences did not involve the most serious aspects of the misconduct. The Board failed to take into account the fact that the elements on which it based its decision to reject the member's explanation had been present in the cases of the three other members.

Another important factor which the Adjudication Board had failed to take into account, according to the Committee, was that there seemed to have been a certain passive tolerance or acceptance, not only of the member's actions but also of the use of the government telephone system by RCMP employees in general. First, despite the Force's knowledge of the member's actions, he remained in his regular position for over two years, after which he was suspended. According to the Committee, this fact seriously undermined the Force's argument that it no longer trusted the member. Secondly, the file contained two memos addressed to all members, warning them against the use of the government telephone system. These memos had been distributed two and three years, respectively, after the incidents for which the member was disciplined. The Committee reviewed the

wording of these memos and found nothing in their tone to suggest that the consequences which a member could expect, in the event of an infraction, would be as serious as those which befell the member. According to the Committee, these warnings showed not only that, even three years after the incidents described in the file, the RCMP still had problems concerning personal use of the government telephone system, but that there was a certain passive tolerance on the part of management with regard to this practice.

After finding that the Adjudication Board had failed to take into account these important factors, the Committee concluded that a review of the sanction was warranted. Thus, the Committee set out to determine what would have been an appropriate sanction. It looked at aggravating factors such as the duration and gravity of the misconduct and the appellant's lack of integrity. The Committee indicated, however, that a lack of integrity can carry various degrees of seriousness and does not automatically warrant a dismissal in each case. The Committee found that in this case, the member's lack of integrity was serious but was not of the grossest kind. Taking into account certain mitigating factors as well, the Committee found that dismissing the member would be unjust. It considered that forfeiture of 10 days' pay, along with a warning, would constitute an appropriate sanction in light of all the circumstances surrounding this case. It therefore recommended that the appeal be upheld and that this sanction be substituted for the dismissal.

The Commissioner did not accept the Committee's recommendation. According to the Commissioner, a lack of integrity cannot carry various degrees of seriousness. The Commissioner denied the member's appeal, but reduced the sanction of dismissal to a direction to resign.

D-43 A member faced an allegation of disgraceful conduct for an incident of driving while under the influence of alcohol. The incident occurred after the member was injured while off-duty. The injury required medical attention and the member ingested painkillers on a doctor's recommendation. The member then visited a restaurant with friends and had a number of alcoholic drinks to help reduce the continuing pain. Knowing his faculties were impaired, he let another person drive when they left the restaurant. He and others proceeded to a private residence where the member had a number of additional drinks, as well as ingesting two more painkillers. At the end of the evening, after unsuccessfully attempting to obtain a ride, the member proceeded to drive himself home. The member went through a red light, narrowly avoiding an accident. He was apprehended by local police, provided a breath sample, and was charged with the

criminal offence of impaired driving. At trial, he pleaded guilty. He received a fine and was prohibited from driving for one year.

At the RCMP disciplinary hearing the member admitted the allegation. The allegation was found to be established and the proceedings turned to the issue of sanction. The Appropriate Officer submitted for consideration a previous established disciplinary incident involving unsafe storage of firearms by a member; the member had also pleaded guilty to a criminal offence in relation to that matter. Although not mentioned in the text of the previous disciplinary allegation, alcohol had been a factor as disclosed in the agreed facts for the previous disciplinary hearing. In the current case, on the member's behalf, evidence was tendered of his realization and acceptance of his problem with alcohol and his steps toward rehabilitation. Additional evidence was tendered concerning generalized stress suffered by the member arising from legal battles in which he was engaged in an attempt to maintain access to his child who lived in another division. Evidence was also led concerning stress due to denials of a rotational transfer. Despite numerous recommendations by his superior, the Force did not transfer the member to other duties to allow him to better deal with the access litigation, to be closer to the child, and to relieve him from the extended posting. The member, nevertheless, had maintained above-average performance and dedication to his duties.

In its decision, the RCMP Adjudication Board spoke of the remedial nature of discipline, but also emphasized the high standards which RCMP members must maintain. As mitigating factors the Board recognized that the member was remorseful and had taken steps to deal with the source of his problems, that there had been no accident, that the member had the full support of his superior, and that the member had been a good performer. As aggravating factors, the Board observed that the member had driven despite knowing that his faculties were impaired, that another police force had been involved, that the member had twice pleaded guilty to criminal offences in a short period of time, and that he had been awaiting disposition of the previous disciplinary matter when this incident occurred. The Board found the member's conduct to be completely incompatible with his duties. Furthermore, the Board observed that the Force's disciplinary system, as reflected in previous sanctions for drinking and driving, had not adjusted to the increased seriousness with which this conduct is viewed. The Board directed the member to resign, failing which he would be discharged.

The member appealed on a number of issues. He argued that the proceedings were subject to a reasonable

apprehension of bias due to the fact that the Chairman at the hearing in the current matter had been the Chairman of the Adjudication Board in the previous disciplinary matter involving the member and was aware of allegations that had been withdrawn prior to those earlier proceedings. The Committee rejected this argument, finding that the member had waived his right to object to most of the alleged points of apprehended bias because he had not raised his objections until the appeal. The Committee acknowledged that other, related arguments of apprehended bias had not been waived by the member, but nevertheless found that these other grounds did not give rise to a reasonable apprehension of bias.

The Committee also rejected a number of arguments by the member in which he contended that the Board had mischaracterized and misapplied the previous disciplinary incident. Among the arguments dealt with, the Committee found that the Board had not given the alcohol factor from the previous disciplinary matter any more than its due and that it was not wrong for the Board to consider the previous disciplinary matter as an aggravating factor although the subject matter of the allegations were somewhat different.

Furthermore, the Committee did not accept the member's arguments that the Board erroneously considered, as aggravating circumstances, the member's awareness of impairment and the involvement of another police force. It also found that the Board did not err in failing to deal with the submitted mitigating circumstances of "off-duty conduct" and "private vehicle" and found that the Board adequately considered the member's acknowledgement of misconduct as a mitigating factor.

On the other hand, the Committee found that the Board did not adequately deal with the mitigating circumstances of pain and stress. Furthermore, without downplaying the importance of deterrence, it found that the Board did not adequately deal with the evidence of rehabilitation in its analysis.

The Committee also found that the Board erred by ordering the member to resign without carefully considering the fairness of this sanction in light of other sanctions that recently had been imposed for similar misconduct. The Committee noted that this was the first reported case where a member had been dismissed for impaired driving, that the conduct here had occurred prior to the warning given in Bulletin AM-2060 (October 3, 1994) of the seriousness with which the Force views such misconduct and that the other cases from that period for which a lesser sanction had been imposed had aggravating circumstances as bad as or worse than those of the current case, together with mitigating circumstances no more compelling or less compelling.

The Committee was extremely disturbed by the conduct in this case and shocked by the record of drinking and driving cases within the Force. It acknowledged that a message of individual and general deterrence was necessary. On the other hand, the Committee observed that the errors made by the Board had significantly affected the fairness of the sanction given to this individual member. The Committee recommended that the appeal be allowed and that the sanction of forfeiture of pay for 10 days be imposed, together with a reprimand and continued professional counselling. With respect to general deterrence against similar misconduct in the future, the Committee observed that the result of this particular case may well have been different if the misconduct had occurred after Bulletin AM-2060 was issued. The Committee finally observed that this is not a blanket comment that impaired driving by a member occurring after the date of the Bulletin automatically should equal dismissal; each case must be considered on its own merits and a sanction in the most serious range, up to and including the possibility of discharge, can be appropriate.

The Commissioner did not accept the Committee's recommendation. Instead, he emphasized the aggravating factors in this case and questioned the member's commitment to rehabilitation. He stated that he would have accepted the Committee's recommendation had the member not previously been given an opportunity to rehabilitate. The Commissioner dismissed the appeal and ordered the member to resign.

D-44 The Force alleged that a member had engaged in disgraceful conduct bringing discredit on the RCMP. Specifically, it was alleged that the member had accepted, from an "agent provocateur" who had been introduced to him as a source, a leather coat which he thought had been stolen. It was also alleged that the member had directly and indirectly accepted money from the "agent provocateur" in exchange for information. The Adjudication Board found that the allegations were established, issued a reprimand and dismissed the member.

The member appealed the decision that the allegations were established, as well as the sanction. He contended that the investigative method used, i.e. the use of an "agent provocateur", had violated his constitutional rights to security and liberty, rights which are protected in article 7 of the *Canadian Charter of Rights and Freedoms*. The Committee found that the member had not established how these rights had been affected, nor had he established that use of an "agent provocateur" had violated the rules of fundamental justice. Furthermore, the Committee found that article 7 of the *Canadian Charter of*

Rights and Freedoms did not guarantee the member's economic rights.

The member was also maintaining that the Adjudication Board had incorrectly assessed the evidence presented at the hearing. The Committee found that the member had provided no evidence of any palpable error in this regard on the part of the Adjudication Board.

The member further argued that the sanction imposed by the Adjudication Board was unreasonable under the circumstances. The Committee found that the member had failed to establish this argument.

Finally, the member sought to present new evidence at the appeal in order to discredit the testimony of the "agent provocateur". The Committee found that this evidence was inadmissible on appeal because it did not concern a decisive aspect of the case and because it could not be reasonably expected that the evidence might affect the outcome of the procedure, since the member himself admitted, on cross-examination, most of the facts for which he was taken to task.

For these reasons, the Committee recommended that the member's appeal be dismissed.

The member subsequently withdrew his appeal, before the Commissioner decided on the matter.

D-45 The Force alleged that a member had a disgraceful conduct by having incurred debts he was unable to discharge, providing misleading and/or false information to financial institutions and providing misleading and/or false information when he filed for bankruptcy. An adjudication board decided that the first two allegations were established, that the third one was not established and directed the member to resign.

The member appealed the sanction only. He alleged that the Adjudication Board erred in not adhering to the principles of positive discipline. The Committee found that this allegation was not supported by the evidence on file and that the sanction was appropriate in this regard.

The member also alleged that the Adjudication Board erred in imposing an unfit sanction. The Committee found that, in that case, demotion was not an option. It further concluded that, the parties having taken the position that forfeiture of pay would be inappropriate in the circumstances, and the Adjudication Board having accepted this joint representation, the only remaining sanction was termination of employment, by way of dismissal or resignation. In this light, and because the member's conduct was of a willful nature, the Committee found that the sanction was not unfit.

The member further alleged that the Adjudication Board erred in not balancing appropriately the mitigating

and aggravating factors of the case. The Committee found that the member did not establish this allegation.

The member finally argued that the adjudication board erred in not considering properly the cases he had submitted. The Committee considered these cases and concluded that they did not apply to this case and that this argument had not been established.

For these reasons, it was recommended that this appeal be denied.

The Commissioner accepted the Committee's recommendation and denied the member's appeal, confirming the direction to resign.

D-46 A member assisted his colleagues in subduing an intoxicated woman who was extremely agitated and had caused damage to a bowling alley. Once subdued, the offender was transported to the detachment and placed in a "drunk tank" cell. The member then used his Oleoresin Capsicum Spray ("pepper spray") against the offender, sending a jet of this product against the threshold of the cell door. At this time the offender was lying near the door inside the cell. She was handcuffed and wearing a hogtie restraint.

A disciplinary allegation of disgraceful conduct was brought against the member. The Force alleged that the member inflicted ill-treatment on the prisoner by subjecting her to the pepper spray without justification. The Adjudication Board concluded that the allegations were founded and imposed on the member forfeiture of seven days' pay and a reprimand.

The member appealed the Board's conclusions on the allegation and the sanction. The member contended that he was justified in using pepper spray because the prisoner, although fully immobilized, might have inflicted head injuries on herself if her hysterical behaviour was not stopped. The member explained that the Adjudication Board gave too much weight to testimony that lacked credibility and that it erroneously concluded that his action was unjustified. The member also stated that the Adjudication Board allowed the witness to refresh her memory by means of a statement that was not contemporaneous with the events.

The Committee did not allow the first point of appeal, concerning the weight given to testimony. Evaluation of the credibility of witnesses is a task that belongs exclusively to the tribunal hearing the evidence; an appellate body can intervene only if that tribunal committed a manifest and determinative error. In light of the file before it, the Committee concluded that the Adjudication Board did not commit such an error. It added that adjudication boards have the right to choose certain parts of testimony and reject others. The Committee acknowledged that a court of law might have denied the use of the

statement used by the witness to refresh her memory. However, the Adjudication Board is not bound by the rules of evidence that govern courts of law, under section 45 of the *RCMP Act*. The use of this statement was not dangerous to the point of compromising the fairness of the adjudication. The Adjudication Board therefore did not err on this point.

Regarding the sanction, the member stated that the sanction he received was unreasonable considering sanctions that have been imposed in other cases where members were disciplined for having used excessive violence against members of the public. The member contended that the Adjudication Board erred in concluding that the circumstances in the member's case were more serious than those of the precedents cited by the latter, where members had been assessed forfeiture of two or three days' pay. Imposition of a sanction is a task that involves subjective elements. Appellate tribunals must respect the judgment of tribunals of first instance, which are in a better position to perform this subjective task. However, appellate tribunals must intervene when the sanction imposed is disproportionate. In the present case, there was a discrepancy of three to five days' forfeiture of pay between the sanction imposed on the member and those that had been imposed in similar cases. The Committee concluded that the facts in this case did not justify such a sanction, which is unfair and unreasonable. The Committee therefore recommended that the appeal be allowed in respect of the sanction and that the forfeiture of pay be reduced from seven to three days.

D-47 A member faced an allegation of disgraceful conduct bringing discredit upon the Force. It was alleged that he had committed an indecent act in a place where he could be observed by the public. During the hearing before an adjudication board the member denied the allegation, claiming that the eyewitness who thought she had identified him was honestly mistaken. The Adjudication Board, however, found the eye-witness to be reliable and, after considering certain circumstantial evidence also led at the hearing, it decided that the allegation had been established and ordered the member to resign on pain of dismissal.

The member appealed the Board's decision on numerous grounds. In reviewing the appeal, the Committee found that the Adjudication Board had committed no reviewable error in its elaboration of the proper standard and burden of proof to be applied. It further found that the Board had not confused the issue of the accuracy of the eyewitness with that of her sincerity.

Nonetheless, the Committee took issue with the identification procedures used in determining whether the member was the person observed by the eyewitness. In the first place, it noted

that the initial identification of the member had taken place on the night of the incident when he had been accosted by municipal police officers and presented to the eyewitness at the scene as the only candidate for identification. This procedure, referred to as a show-up or confrontation, was viewed by the Committee as being highly suggestive. Secondly, the Committee expressed concerns about the Force's identification procedure which involved a photo-lineup containing the member's picture being shown to the eyewitness; although the eyewitness appeared to have picked out the member's picture, this procedure occurred after the eyewitness had had the member's appearance imprinted on her memory during the show-up. Finally the Committee objected to the third identification attempt which occurred during the hearing (after two previous viewings of the member) and consisted of the eyewitness identifying the member in the "dock" as the man she claimed to have seen a year and a half earlier. The Committee regarded each of these identifications to have been made in conditions of dubious reliability, especially in light of the fact that during the show-up on the night of the incident, the eyewitness was unable to indicate to the local police with certainty that the member was the person she had observed earlier that night committing an indecent act. In the Committee's view, although the Board had acknowledged that the identification was "not procedurally perfect", it had not fully considered the legally recognized impact that such irregularities would have on the cogency of this already frail class of evidence. Moreover, the Committee noted that the Board did not appear to have fully taken into account that descriptions given by the eyewitness of the man she claimed to have seen committing the indecent act were quite general in nature and yet still differed significantly from the member's appearance on the night in question.

The Committee also examined the circumstantial evidence heard by the Board, which essentially consisted of the member having been observed by local police to be walking in the general area of the incident a short time after it had been committed. While accepting that the Board could draw a certain inference from these facts, the Committee disagreed with the Board's conclusion that there was a low likelihood of any other suspect being found in the area at the relevant time who would have corresponded to the general description given by the eyewitness. In the Committee's view, given the time lapse between the sighting of the perpetrator and the arrival of the local police, and given the population density and traffic of the neighbourhood, the Board's conclusion was unfounded.

Finally, the Committee addressed comments made in the Board's decision to the effect that the member's testimony

had been contradicted in part by information garnered by the Board on a view of the scene. In the Committee's opinion, if a Board is to contradict testimony in this manner, fairness dictates that the view observations be put to the party and that the party be given an opportunity to respond. In light of all of the above, the Committee concluded that a manifest error in evidentiary assessment had been committed by the Board and recommended that the appeal be upheld and that the allegation against the member be dismissed.

The Commissioner did not accept the Committee's recommendation. He concluded that, overall, the Board had not erred in its assessment of the evidence. The Commissioner denied the member's appeal and confirmed the order to resign.

D-48 An RCMP member faced an allegation of disgraceful conduct bringing discredit on the Force and an allegation of accepting special privilege in the performance of RCMP duties. It was alleged that, while on duty, the member engaged in sexual conduct with a member of the public whom the member had detained and whom the member knew or should have known was under the influence of alcohol. It was further alleged that, after the sexual encounter, the member discontinued the detention of this person and falsely identified himself to her.

At the adjudication board hearing, the member admitted the first allegation, but made a motion for the dismissal of the second allegation on the ground of multiplicity, maintaining that it was essentially the same as the first allegation. The Adjudication Board reserved its ruling on the motion until it heard the evidence. The member then admitted the second allegation and an agreed statement of facts was entered. The Board found that it was possible to proceed with both allegations and that both allegations were established.

On sanction, the member provided evidence and submissions with respect to numerous mitigating factors. The Board accepted some of these factors, but rejected others. It then found that the established mitigating factors did not justify a sanction less than dismissal when weighed against the gravity of the misconduct. It found that the member's future performance of duties was irrevocably prejudiced and it ordered the member to resign.

The member appealed the sanction, arguing that the Board had erred in assessing multiplicity, that certain information relevant to the case had not been disclosed to him, that the Board had failed to give proper weight to certain mitigating factors, and that the sanction was excessive in light of these errors.

The Committee found that the two allegations were not multiplicitous. Although the facts supporting the two

allegations were essentially the same, the basic nature of the two allegations were sufficiently separate such as to avoid violating the rule against 'multiple convictions'. The member was legitimately answering to the Force for his conduct on two separate grounds.

The ground of inadequate disclosure concerned the member's assertion that a witness appearing for the Force had given a similar type of testimony—concerning the damaging effects of a member's misconduct—in another disciplinary matter. The Committee found that it was not clear that the witness had given such previous testimony. It further found that, even if such testimony had been given, the submissions of the member did not convince the Committee that the Force had been obliged to discover this and disclose it. Finally on this point, the Committee found that even if such a duty of disclosure were to exist, the member could not argue on appeal that he had suffered any prejudice from any lack of disclosure, having failed to take the step of asking for an adjournment of the proceedings in order to deal with the possible new information when the issue was raised by the Force at the hearing.

With regard to mitigating factors on sanction, the Committee found that while the Board had accepted some mitigating factors, the Board had erred when it refused to take into account the member's previous good work record. The Committee also found that the Board ought to have dealt specifically in its analysis with the substantial evidence of good character put forward by members of the Force who appeared as character witnesses on the member's behalf. On the whole, the Committee found that the Board had somewhat downplayed mitigating factors relevant to sanction.

Assessing the appeal as a whole, the Committee found that, although there had been certain errors in the Board's analysis, the errors did not justify a recommendation to uphold the appeal. Even weighing in the member's favour the elements which had not been adequately assessed by the Board, the sanction remained appropriate and fair given the extremely grave nature of the misconduct. The breach of trust represented by the misconduct in this case went to the heart of the employer-employee relationship, as well as the heart of the public expectations of police officers in their dealings with vulnerable members of the public.

The Commissioner accepted the Committee's recommendation and denied the member's appeal.