Protected A

ACMT 201833815

2019 RCAD 03

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

a conduct hearing pursuant to the

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

BETWEEN:

Commanding Officer, "E" Division

Conduct Authority

and

Constable Jordan Irvine, Regimental Number 60585

Subject Member

Conduct Board Decision

John A. McKinlay (Conduct Board)

Protected A

ACMT 201833815

2019 RCAD 03

February 18, 2019

Staff Sergeant J. Hart, and Ms. Isabelle Sakkal, for the Conduct Authority (Conduct Authority Representative)

Sergeant J. Welch, for the Subject Member (Member Representative)

TABLE OF CONTENTS

SUMMARY

[This summary forms no part of this written decision.]

The Subject Member faced a single allegation of discreditable conduct for committing a sexual assault upon another member in the Subject Member’s room at an RCMP training facility. The Subject Member denied the allegation, asserting only consensual sexual activity took place.

The complainant and the Subject Member were the only witnesses, and testified under direct and cross-examination.

Rules concerning the admissibility and use of statements made prior to witness testimony were identified and applied.

Findings on witness credibility were determinative of the outcome. The allegation was not found to be established.

INTRODUCTION

[1] I was appointed as the Conduct Board for this matter on June 15, 2018. The Commanding Officer for "E" Division (Conduct Authority) signed the *Notice of Conduct Hearing* (NOCH) on June 21, 2018. The Subject Member (SM) was served with the NOCH and investigative materials on July 6, 2018. I received the NOCH and the Materials on July 10, 2018. The Member Representative (MR) was retained as counsel on July 11, 2018. After receiving a filing extension to August 30, 2018, the MR filed the SM's responses under sections 15 and 18 of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], on August 15, 2018.

[2] The NOCH sets out a single allegation of misconduct. The SM formally denies contravening section 7.1 of the RCMP Code of Conduct. More specifically, the SM denies committing the act of non-consensual vaginal penetration identified in Particular 4 of the allegation. Contrary to the account relied upon by the Conduct Authority, he submits that all sexual activity was consensual and that the allegation is false.

PRELIMINARY MOTIONS AND MATTERS

Further investigation

[3] At the request of the MR, further investigation was ordered by this Conduct Board, resulting in a statement and follow-up email being filed on September 6, 2018, from Constable (Cst.) K.B. Having received this information related to Cst. K.B., the MR then waived any request for Cst. K. B. to testify.

Approval of witnesses

[4] Through the pre-hearing conference (PHC) process, the parties confirmed that only two witnesses were requested for this conduct hearing to actually testify and be subject to direct and cross-examination. In the Minutes for PHC 2, which took place on September 7, 2018, at

paragraph 3, I formally approved these two witnesses. I consider paragraph 3 of the Minutes to satisfy the substance of subsections 18(3) and (4) of the *CSO (Conduct)*, even though no summonses were requested nor issued:

> 3. [Conduct Board] approves testimony from the [SM] and [the Complainant], given the contentious and unresolved issues/facts that remain after the [Conduct Board]'s review of the information in the record to date (specifically concerning what occurred in the hotel room where the SM and [the Complainant] were clearly located). […]

[5] One approved witness was the SM. The other approved witness shall be referred to as the Complainant, given the publication ban described below. The Complainant was identified by name in the NOCH and throughout the materials filed with the Conduct Board.

[6] It may have been more logical for the SM to have demanded the opportunity to cross-examine the Complainant as an approved witness, and the Conduct Authority Representative (CAR) to have demanded the opportunity to cross-examine the SM as an approved witness.

[7] After all, the SM provided an account that precluded any sort of non-consensual, abrupt, unanticipated, "matter of seconds" strictly vaginal penetration as described by the Complainant in her statements to the Abbotsford Police Department (APD) (taken July 28, 2017, and November 15, 2017), and the CAR clearly disputed the SM's written denial and accounts involving a fully consensual, more sexually varied and more lengthy interaction with the Complainant, as initially described in writing by the SM's private criminal counsel on October 17, 2017, as relied upon in the SM's written submission to the Professional Standards Unit investigator on March 5, 2018, and formally adopted by the SM as his own statement, with one correction articulated by his MR on August 30, 2018.

[8] However, as the Conduct Board considered it appropriate for the hearing to begin with the CAR's direct examination of the Complainant, followed by the MR's cross-examination, in the circumstances of this case little turns on the exact party seeking approval of a specific witness in a formal request under section 18 of the *CSO (Conduct)*.

[9] Ordinarily, a conduct board can expect strict compliance with subsection 18(1) of the *CSO (Conduct)*, which requires the parties to submit a **single list** of the witnesses that they want to have summoned before the board. Whatever documentary requests may have been filed, in effect, the parties here jointly stipulated at the first PHC on August 30, 2018, that only the SM and the Complainant were considered by them to be necessary witnesses.

[10] I acknowledge that the current conduct hearing system is predicated on informal, expeditious adjudication that places an onus on the parties to convince the conduct board of the necessity of witnesses. Clearly, the fact that two individuals could be approved to testify, and would likely offer conflicting accounts on one or more elements of the case, does not automatically classify them as necessary witnesses. Testimony, or cross-examination, does not become necessary every time that an issue of credibility is raised by a party. (A hypothetical example may serve to support this perspective. If a subject member were to provide a statement saying he entered an intersection only when the traffic light was green, after 50 independent witnesses provided statements saying the light was red, it is certainly doubtful that any testimony, including cross-examination, would be found necessary.) Moreover, according to a recent decision concerning a motion for summary judgment, *Ter Keurs Bros. Inc. v. Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10, at paragraph 27, it is settled law: there is no automatic or inherent right to cross-examine.

[11] However, in the particular circumstances of the present matter, considerations of procedural fairness caused me to view not only cross-examination, but also direct-examination, of the SM and the Complainant as warranted. I was influenced by the fact that the Complainant participated in two videotaped interview sessions with an investigator, whereas the SM's account was only communicated in writing through his counsel. I was not prepared to treat the relatively spontaneous interview process involving the Complainant, and the highly controlled written submission of the SM's counsel, as yielding sufficiently equivalent forms of information on which "paper" assessments of credibility could be based, and as eliminating the need for any direct-examination in a "live" hearing.

[12] It was my view that narrowing the difference between these two forms of information (recorded interview versus written statement) would promote more expeditious adjudication and hearing fairness. Therefore, I sought the SM's formal adoption of the account contained in his counsel's written submission (with one correction, considered later in these reasons), primarily to foster a fairer and more precise cross-examination of the SM on his own expected account of the events (see Transcript, November 8, 2018, at page 69).

[13] It should be noted that the potential for other witnesses did arise from the discussions that took place at PHC 2 on September 7, 2018, which is reflected in the Minutes as follows:

> 3. [Conduct Board] approves testimony from the [SM] and [the Complainant], given the contentious and unresolved issues/facts that remain after the [Conduct Board]'s review of the information in the record to date (specifically concerning what occurred in the hotel room where the SM and [the Complainant] were clearly located). MR and CAR confirm to [Conduct Board] that no testimony by any other person is requested. MR indicating that cross- examination will include putting to [the Complainant] certain of her utterances/communications that are referenced in the statements provided by other persons to investigators.
>
> (Not raised in the PHC: [Conduct Board] will seek informal submissions from MR and CAR at the next PHC on how, in the event that [the Complainant] disputes making certain utterances/communications, [the Complainant]'s testimony can be assessed by the [Conduct Board] without the makers of the statements of other persons being examined before the [Conduct Board] on their statements.)

[14] At the PHC 3, on October 29, 2018, discussion took place concerning the treatment to be given the statement of any third-party interviewee if, in the Complainant's upcoming cross-examination, the Complainant denied making a specific comment attributed to her by that third party. The MR was directed to articulate his position after confirming his client's instructions. Later on October 29, 2018, the MR indicated to the Conduct Board and the CAR:

> In response to PHC #3 and your direction to address an issue of cross-examining the main Conduct Authority witness, [the Complainant], on inconsistencies found in third party statements, I have considered the matter and received instructions from my client.

> We have no intention on cross-examining [the Complainant] on inconsistencies found in third party statements. We take the position that such questions are a form of oath helping. As will become apparent at the hearing, we believe [the Complainant] fabricated the details of the allegation early in the time line. No matter how many times she tells her story, or how many people she tells it to, it does not make it the truth. Consistency of the details told to third parties just shows she is proficient at being deceptive. Inconsistencies does not show she is not being deceptive. Please note, we are eager to cross-examine [the Complainant] on the inconsistencies found in her own statements.
>
> As you previously approved, the only witness we wish to call is the subject member himself, [SM].
>
> In argument, we intend to rely on the record before the Board as per the *Cormier* Appeal Decision, C-017, by [Chief Superintendent] Steven Dunn, at paragraphs 132-135. Although we take the position that the burden of proof remains on the Conduct Authority to establish the allegation on the balance of probabilities, as an inquisitorial board you do have available the power to call your own witnesses if you think the anticipated evidence will be insufficient to base your decision upon.
>
> [*Sic throughout*]

[15] Based on the submission provided by the MR, the Conduct Board understood that the MR did not intend to raise any "inconsistencies found in third party statements" during cross-examination of the Complainant, only "inconsistencies found in her own statements". Therefore, the potential issue noted by the Conduct Board in the Minutes of the PHC 2 was considered moot.

Publication ban

[16] Paragraph 45.1(7)(a) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*], provides:

> The conduct board may, on its own initiative, or at the request of any person, make an order directing that any of the following information shall not be published in any document or broadcast or transmitted in any way:
>
> (a) information that could identify a complainant, a witness, or a person under the age of 18;

[…]

[17] The "live" hearing for this matter began on the morning of November 6, 2018, in Vancouver. At that time, and of its own motion, the Conduct Board issued a publication ban which remains in effect now. The terms of the publication ban provide that any information arising in this proceeding that could identify the Complainant shall not be published in any document or broadcast or transmitted in any way.

ALLEGATION

[18] Subsection 20(1) of the *CSO (Conduct)* requires that a subject member be read each allegation of contravention set out in the notice, and the subject member be permitted to admit or deny each allegation. The SM faced the following allegation:

> **Allegation 1**
>
> On or about March 2, 2016, at or near Chilliwack, in the Province of British Columbia, [the SM] behaved in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.
>
> *Particulars*
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, […] detachment in British Columbia.
>
> 2. At all material times you were temporarily residing at the RCMP Pacific Region Training Centre ("PRTC") located in Chilliwack, British Columbia, as a course candidate on the Economic Crime course. [The Complainant] […] was a RCMP member posted at […] , British Columbia, who was also temporarily residing at the PRTC as a course candidate. For the purposes of attending your respective courses, both you and [the Complainant] were assigned separate hotel rooms.
>
> 3. Both you and [the Complainant] were off-duty during the evening of March 2, 2016, casually socializing with work colleagues at the Johnny Mac's Lounge located at the PRTC. It is accepted that both you and [the Complainant] consumed alcoholic beverages while socializing. Prior to meeting each other at Johnny Mac's Lounge, neither you nor [the Complainant] knew each other but very quickly you both engaged in

> friendly banter over various work related experiences and also the nature of police work at the […] RCMP. It is accepted that [the Complainant] voluntarily agreed to attend to your hotel room […] to further socialize and to also view a […] RCMP police chase video. It is further accepted that no one else was present in the hotel room.
>
> 4. When [the Complainant] attempted to leave your hotel room, you forcibly removed both her pants and underwear. You then physically forced non-consensual sexual intercourse with [the Complainant]. At no time did [the Complainant] consent to your unwanted sexual penetration of her. [The Complainant] verbalized to you that she wanted you to stop and repeated the word "no". You ignored [the Complainant]'s requests to stop sexually assaulting her. When [the Complainant] was capable of physically pushing you off, she immediately left your hotel room.
>
> [*Sic throughout*]

[19] Given the SM's denial of any misconduct in his written responses, and to expedite the adjudication of this matter, the terms of Allegation 1, but not its supporting particulars, were read to the SM on the morning of November 6, 2018. The SM confirmed both that he understood the particulars and that he denied the allegation.

[20] The SM and the Complainant testified on November 6, 2018, at a "live" hearing in Vancouver. Oral submissions from both representatives took place on November 8, 2018. Case law was filed with the Conduct Board via email in advance of oral submissions.

[21] On November 8, 2018, the Conduct Board reserved its decision on the establishment of the allegation.

[22] The Conduct Board provided an oral decision on November 28, 2018, subject to the caveat that the right was reserved to provide, expand upon, clarify and explain the Conduct Board's reasons and findings in greater detail in this final written decision. However, the Conduct Board confirmed that the oral decision was final with respect to whether the allegation of a contravention of the Code of Conduct was established.

ANALYSIS

Standard of proof

[23] Subsection 45(1) of the *RCMP Act* requires that the "balance of probabilities" standard of proof be applied in adjudicating alleged contraventions of the RCMP Code of Conduct. This requires a determination on whether it is more likely than not that the alleged acts or omissions occurred.

[24] As both parties acknowledged, primary guidance on the "balance of probabilities" standard of proof can be found in the Supreme Court of Canada's decision in *F.H. v McDougall*, [2008] 3 SCR 41 [*McDougall*]. In particular, I am guided by paragraphs 44 to 46, where the Court states:

> [44] […] In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.
>
> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. […]

Interpretation of section 7.1

[25] The allegation of misconduct in this matter is brought under section 7.1 of the RCMP Code of Conduct. This section provides that "Members behave in a manner that is not likely to discredit the Force".

[26] I am guided by the interpretation of section 7.1 outlined by the RCMP External Review Committee (ERC) in its recommendation issued on February 22, 2016, and cited as ERC C-2015- 001 (C-008), at paragraphs 92 and 93:

> What is the Test for Discreditable Conduct?
>
> [92] Section 7 of the *Code of Conduct* requires that *"*[m]*embers behave in a manner that is not likely to discredit the Force*". Section 7 differs from its predecessor provision, found in subsection 39(1) of the prior *Code of Conduct*. Subsection 39(1) required that members not engage in any disgraceful or disorderly act or conduct that could bring discredit on the Force. The ERC and the Commissioner have stated that the test under subsection 39(1) asked whether a reasonable person with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would be of the opinion that the conduct was a) disgraceful, and b) sufficiently related to the employment situation so as to warrant discipline against the member (ERC 2900-08-006 (D-123), para. 125; ERC 2400-09-002 (D-121), Commissioner, para. 100).
>
> [93] Section 7 of the *Code of Conduct* does not import the requirement of disgraceful or disorderly conduct in order to discredit the Force. However, the Force's *Code of Conduct Annotated Version (2014)* largely adopts the test under the prior *Code of Conduct* for discreditable conduct under the new section 7, noting that "*discreditable behaviour is based on a test that considers how the reasonable person in society, with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would view the behaviour*" (p. 21). The language used in the *Code of Conduct Annotated Version (2014)* is consistent with the tests established in other police jurisdictions to establish that misconduct is "*likely*" to discredit a police force. As pointed out in P. Ceyssens, *Legal Aspects of Policing*, Vol 2 (Toronto: Earlscourt, 2002, pp. 6-17, 6-18), where statutory language governing discreditable conduct addresses acting in a manner "*likely*" to discredit the reputation of a police force, actual discredit need not be established. Rather, the extent of the potential damage to the reputation and image of the service should the action become public knowledge is the measure used to assess the misconduct. In conducting this assessment, the conduct must be considered against the reasonable expectations of the community.

[27] In the present matter, I confirm that the standard of proof remains the balance of probabilities standard of proof, notwithstanding that the alleged contravention of section 7.1 of

the Code of Conduct involves an act of non-consensual vaginal penetration which constitutes a sexual assault.

Assessment of witnesses

[28] The reasons provided by Justice Watt in *R. v Clark*, 2012 CMAC 3 [*Clark*], in particular at paragraphs 40 to 42, 48 and 51, provide useful guidance concerning the assessment of witnesses:

> 40 First, witnesses are not "presumed to tell the truth". A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence: *R. v. Thain*, 2009 ONCA 223 […] (Ont. C.A.), at para 32.
>
> 41 Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense and rationality to reject uncontradicted evidence: *Aguilera v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 507 (F.C.), at para 39; *Lubana v. Canada (Minister of Citizenship & Immigration)*, 2003 FCT 116 (Fed. T.D.), at paras 9-11.
>
> 42 Third, as juries in civil and criminal cases are routinely and necessarily instructed, a trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings. Said in somewhat different terms, credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable, much less capable of sustaining the burden of proof on a specific issue or as a whole.
>
> […]
>
> 48 Testimony can raise veracity and accuracy concerns. Veracity concerns relate to a witness' sincerity, his or her willingness to speak the truth as the witness believes it to be. In a word, credibility. Accuracy concerns have to do with the actual accuracy of the witness' account. This is reliability. The testimony of a credible, in other words an honest witness, may nonetheless be unreliable: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p 205.
>
> […]

> 51 […] Several authorities have cautioned against over-reliance on demeanour as a factor in assessing the credibility of witnesses and the reliability of their evidence: *R. v. G. (M.)* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.), at pp 355-356; *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.), at pp 356-357; and *R. v. G. (G.)* (1997), 115 C.C.C. (3d) 1 (Ont. C.A.), at pp 6-8.

[29] In assessing the credibility of the SM and the Complainant, I have also been guided by often- cited authorities, provided by the MR. Relevant excerpts taken from these cases are as follows:

> *Wallace v Denis* (1926), 31 OWN 202, at page 203:
>
> The credibility of a witness in the proper sense does not depend solely upon his honesty in expressing his views. It depends also upon his opportunity for exact observation, his capacity to observe accurately, the firmness of his memory to carry in his mind the facts as observed, his ability to resist the influence, frequently unconscious, of interest to modify his recollection, his ability to reproduce in the witness-box the facts observed, the capacity to express clearly what is in his mind — all these are to be considered in determining what effect to give to the evidence of any witness.
>
> *MacDermid v Rice* (1939) R. de Jur. 2018, at page 210, per Archambault J.:
>
> When the evidence of an important fact is contradictory, [...] the Court must weigh the motives of the witnesses, their relationship or friendship with the parties, their attitude and demeanour in the box, the way in which they give evidence, the probability of the facts sworn to, and come to a conclusion regarding the version which should be taken as the true one.
>
> *Faryna v Chorney* [1952] 2 DLR 354 (BCCA) (*Faryna*), at page 357:
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick- minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a

> witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[30] I am also guided by the cautionary observations on credibility assessment that appear in a case filed by the CAR, *R. v T.B.*, 2018 PESC 3 (*T.B.*), paragraph 56:

> […] The assessment of credibility is not a science (*R. c. Gagnon*, [2006] 1 S.C.R. 621 (S.C.C.)). The law directs that I consider a variety of factors in assessing credibility including common sense and logic. Articulating and verbalizing a credibility assessment can be challenging. As the courts have made clear as well, I must be cautious in relying merely on "impressions" which I may form of a witness as this may risk placing too much emphasis on "demeanour" which appeal courts have clearly said cannot be the sole determining factor.

[31] As noted at the outset, this case involves conflicting accounts by the Complainant and the SM concerning what ended up happening in the SM's room on the night of March 2, 2016.

[32] The Supreme Court of Canada's decision in *McDougall*, at paragraph 86, makes it clear that the analytical steps to be followed in criminal trial matters, when presented with complainant-versus- accused conflicting accounts (outlined in *R. v W.(D.)*, [1991] 1 SCR 742 [*W.(D.)*]), are "not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases". As stated by the Ontario Court of Appeal, the use of the *W.(D.)* approach in civil cases requiring the assessment of conflicting evidence "was put to rest in *McDougall*" (*Law Society of Upper Canada v Neinstein* (2010), 99 OR (3d) 1 (CA), at paragraph 21).

[33] Instead, the totality of the evidence must be considered, and the totality of the evidence must be used to make credibility assessments. In the present case involving the SM, credibility findings appear to be determinative of the case's outcome. As was observed in *McDougall*, at paragraph 86, "finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party".

Findings on certain matters

[34] From the first PHC on August 30, 2018, it was apparent to the Conduct Board and agreed by the parties that on the evening of March 2, 2016, the Complainant accepted the SM's invitation to enter into his assigned sleeping quarters (closely resembling a single-occupancy hotel room) at the PRTC. In the SM's responses, he formally admitted to Particulars 1, 2 and 3.

[35] On the basis of the information filed with the Conduct Board for the allegation phase of the hearing, and the testimony of the Complainant and the SM on November 6, 2018, I find that Particulars 1, 2 and 3 of Allegation 1 are not materially in dispute in this matter. I formally confirm these particulars are found to be established. However, in my assessment of the relative credibility of the Complainant and the SM, their respective characterizations and certain attitudes concerning the events leading up to the disputed PRTC room events were certainly part of my review.

Issues involving alcohol

[36] The SM estimates that he drank no more than six 16-ounce glasses of beer, poured from pitchers shared with others at the lounge. The Complainant drank no more than three glasses of wine. I am satisfied that while the SM and the Complainant had both consumed alcohol before entering the SM's room, there is an insufficient basis to find that either person's ability to perceive or recall events was significantly affected by any degree of intoxication. For the SM, his estimated weight of 220 lbs and his attendance at the lounge for not less than four hours assist me in making this finding.

[37] Certainly, there was no persuasive evidence or information that the Complainant's consumption of three glasses of wine, over the evening period immediately before she entered the SM's room, resulted in a level of intoxication that vitiated her ability to consent to the sexual activity described by the SM.

[38] I do not consider the statement of Ms. M. H., taken on August 21, 2017 (Investigation Report, Appendix N), in which she relates her recollection of a telephone conversation with the Complainant (apparently on March 3, 2016), to make the Complainant's capacity to consent any sort of issue in this matter. It is very difficult to place any meaningful weight on Ms. M. H.'s recollections concerning the role alcohol played at the PRTC hotel room, as she herself admits to having a very poor memory generally and she was unable to provide many clear details about the call.

[39] Similarly, I place very little weight on the statement obtained from Cst. T. S., taken on August 2, 2017 (Investigation Report, Appendix O), where he recalls the Complainant indicating to him that she had two or three glasses of wine "so she's not too sure" how quickly things with the SM took place, "in terms of like her processing information" (Investigation Report, page 288 of 559).

[40] I am instead guided by the direct observations made of the Complainant's consumption of glasses of wine and degree of intoxication at the lounge as captured in the statements of Cst. L. B. (Investigation Report, Appendix Q) and Cst. D. M. (Investigation Report, Appendix R). I acknowledge that the Complainant consumed a third glass of wine after these two observers left the Complainant at the lounge, but they were consistent in their observations: the Complainant was not intoxicated and was in full control of herself when they departed. The Complainant's testimony indicates that her consumption of the third glass of wine essentially took place over her conversation in the lounge with the SM and his friend, Corporal A. E., a conversation she estimates was 20 minutes long.

[41] In coming to these conclusions concerning the insignificant role that alcohol played, I have carefully noted that, in the Complainant's first investigative interview on July 28, 2017, she stated, in part: "[…] I could walk fine. I think I was a little bit tipsy" (page 46). In her second interview of November 15, 2017, she stated, in part: "[S]o I had had two glasses of wine and a bit of the third. I wasn't drunk in the sense that I was fall over stumble down drunk but I was I

would put it tipsy maybe was would be a good word" (page 34). The Complainant did not mention any effect resulting from her consumption of wine when she testified on November 6, 2018, before the Conduct Board.

Physical layout of the SM's PRTC room

[42] I am satisfied on a balance of probabilities that the SM's hotel-style room was furnished on March 2, 2016, as it is depicted in the photographs taken sometime in October 2017 as part of the APD investigation, which occurred (see Investigation Report, Appendix L). There was no suggestion that any sort of renovation or reconfiguration of the room's design or contents had taken place over the intervening seven months.

Watching of vehicle pursuit recording

[43] Moreover, it was not in dispute, and is certainly established on a balance of probabilities, that after the SM and the Complainant entered the room, they watched a video recording (of a stolen vehicle pursuit involving the SM) on a portable device operated by the SM. The Complainant initially described the device as being an "ipad", a term that can be reasonably understood to describe a tablet device that has the capability to play video files maintained on the device. The SM indicated that the device was a laptop computer, and that the pursuit video was played from a disk that was inserted in the computer. I found his testimony on this point to be preferred to that of the Complainant, as the presence of a DVD containing the pursuit recording was, in effect, an admission by the SM that he had a recording with him at the PRTC that should have been maintained only on the investigative file to which it pertained.

[44] While the accuracy of a witness's recollection of physical features and events is certainly a feature to be considered in adjudicating an allegation, the Complainant's faulty recollection that a tablet device was used to play the pursuit video is not deemed significant in assessing her overall account of the evening.

[45] With the exception of specific information that is excluded from consideration for principled reasons concerning admissibility or appropriate use, it is necessary to consider all of the information made available to the Conduct Board, including information that goes back to the initial chance conversation earlier that evening, involving the SM and the Complainant, in the licensed lounge operated at the PRTC.

Documentary information and materials

[46] A brief chronology of certain actions taken by the Complainant, by the statutory investigators from the APD, and RCMP personnel, creates a narrative that puts the witnesses' testimony and relevant documentary information in context.

[47] Based on medical records concerning the Complainant that plainly constitute business record documentation, it is established that, on April 24, 2016, the Complainant attended a clinic for eye drops; on June 7, 2016, for an unknown issue (records vetted); on June 12, 2016, for a bacterial vaginosis related examination (records vetted) and apparently pregnancy and sexually transmitted infections tests that proved negative; and at the Vancouver Options for Sexual Health clinic, on October 31, 2016, which included the Complainant reporting she had had a diagnosis of bacterial vaginosis intermittently over the past several years, was treated for it in July 2016, and now symptoms had reoccurred in the past months, for which a prescription medication was dispensed (records vetted). There is no mention in any of these records that pertains to any sexual assault. Even when combined with the Complainant's interview and testimonial information, I do not find these records to constitute corroboration of any sexual assault involving the SM.

[48] While the Complainant mentioned her interaction with the SM, in varying degrees of detail, to a number of individuals before June 8, 2017, it was in personal text message exchanges on that date with a male RCMP member, Cst. T. S., that both the SM's specific name and an allegation of rape first surfaced (Investigation Report, Appendix P, page 266 of 559). At that

time, the Complainant was still involved in some form of personal relationship, even if no longer dating, with Cst. T. S.

[49] In the statement obtained by the APD from Cst. T. S. on August 2, 2017, he describes, in somewhat imprecise terms, certain earlier private conversations with the Complainant concerning the PRTC hotel room incident. In these conversations, Cst. T.S. recalls the Complainant providing a number of details concerning a sexual assault at the PRTC, but not yet identifying the SM by name.

[50] Cst. T. S. chose to communicate with a superior non-commissioned officer, Staff Sergeant (S/Sgt.) Paul Mulvihill, concerning the fact that the Complainant was soon to start a posting in the Surrey Drug Section where a male member was located, and it was this member whom Cst. T. S. understood to have sexually assaulted the Complainant at the PRTC a number of months earlier. The Complainant testified before the Conduct Board that she had expected Cst. T. S. to keep their communications private, and that is the overall essence of her text messages to him.

[51] For whatever reason, the message received from S/Sgt. Mulvihill, on July 4, 2017, by the Officer-in-Charge, Inspector (Insp.) Shawna Baher, was only that a male Surrey member had "got handsy" with the Complainant. On that date, and without any prior scheduling, Insp. Baher. spoke with the Complainant, and specifically told her that she had been advised of a situation sometime back at the PRTC where a member "got handsy with [the Complainant]". In a detailed, contemporaneous email, recording their conversation of July 4, 2017 (Investigation Report, Appendix D), and a later statement to the APD investigators (given August 3, 2017, Investigation Report, Appendix E, page 357 of 559, line 27), Insp. Baher recalled that the Complainant responded almost immediately that "It was a rape" and began to cry.

[52] As a result of the Complainant's conversation of July 4, 2017, with Insp. Baher, the APD was contacted to conduct an investigation. An APD investigator conducted a first videotaped interview with the Complainant on July 28, 2017. In that statement, the Complainant identified a

number of persons to whom she had made some form of disclosure of the alleged sexual assault. The APD conducted interviews, or obtained a written statement or documents, primarily based on the names provided by the Complainant.

[53] The materials filed with the Conduct Board contain a series of RCMP Briefing Notes (BN). A BN dated August 8, 2017, records in part: "On August 1, 2017, [the SM] was served notice of the mandate letter and reassigned to administrative duties." The mandate letter specified the alleged misconduct as follows: "On, about or between February 28 and March 2, 2016, at Chilliwack […] [the SM], while off duty, applied unwanted and inappropriate force to [the Complainant], contrary to Section 7.1 of the Code of Conduct."

[54] At the conduct hearing, on November 8, 2018, I asked the representatives for any timeline or chronology they could offer for these primarily "disclosure" conversations. Based on the document that I received, and my own review, an exact chronology for these conversations is not possible, given that some interviewees could only estimate when the Complainant may have first disclosed information concerning the matter.

[55] Below, beginning under the heading "Prior statements", I address what I understand to be the prohibited, limited, or appropriate use of apparent prior **consistencies** and **inconsistencies** in the Complainant's two statements to investigators, and post-event conversations with the Complainant as recollected by third parties. In my view, this analysis may also be applied to prior statements by the SM.

[56] For each person contacted by the APD investigators (on the date indicated), a form of synopsis of seemingly relevant information, drawn from their recorded statement, can be produced. Many of these statements contain elements that are consistent and, with much less prevalence, inconsistent with the Complainant's ultimate testimony before the Conduct Board:

> **August 2, 2017 – Constable T. S.**
>
> One month into a dating relationship with the Complainant (relationship began approximately mid-March, 2017, he had known her for 8 or 9 months

at that point) she is upset, distraught, crying and he asks what is going on. She asks him to promise not to say anything if she tells him and he says okay. **She says she was at PRTC doing a training course and was sexually assaulted by a guy who works at Surrey**. He had some video he really wanted to show her, she reluctantly went into his room to watch it, and that's where the sexual assault took place. She knew his name because he gave her his business card.

For two weeks after this initial conversation, she did not want to provide more information. They were then at a specific restaurant and he recalls the Complainant being emotional again talking about it, but not giving new information.

A couple of days later, he is at her place. They talk in the apartment stairwell for privacy reasons away from children. She starts to cry, says she needs to go for a drive, and that the person who sexually assaulted her works in Surrey [XXX] Section. She describes what happened, including he starts playing this video and **the next thing she knows he's got his hand down her pants and he's throwing her on to the bed or something like that and then he starts having sex with her and she's kind of trying to push him off** and then she finally is able to push him off or kick him off of her and then she says that she doesn't even really remember too much about it.

About one and a half or two months later, the relationship with the Complainant has ended but they still talk. She is showing emotional issues. It is still bothering her. He brings it up for the first time with S/Sgt Mulvihill – that there might be a bit of an issue here with the Complainant and this guy who works in the drug section, that the Complainant made allegations there might have been a criminal thing that took place and Cst. [T. S.] does not know what to do. The S/Sgt mentions either RCMP policy or a Code of Conduct duty to come forward with the information. So Cst. [T. S.] told the S/Sgt what he has just told the investigator. He did not know who the individual was at this point.

Cst. [T. S.] then performs his own analysis of who it may be, given information from the Complainant about the training course date, the transfer into the drug section of this person in the last 6 months, that he's married and got kids, "one of these guys was like really nasty [not good looking] and that she would never, ever have sex with this guy". He then puts a name to the Complainant in a text message exchange on June 8, 2017. The ensuing exchange is captured by Cst. [T. S.] and provided to investigators (Investigation Report, Appendix P, starting at page 265 of 559.)

Based on the text message exchange, Cst. [T. S.] was confident he knew the individual's name, and he spoke again with the S/Sgt. There was a time delay given [S/Sgt Mulvihill] was going on vacation, and [Insp. Baher] was on vacation. [S/Sgt Mulvihill] told [Insp. Baher]what Cst. [T. S.] had told [S/Sgt Mulvihill], and the same day [Insp. Baher] spoke with the Complainant. He was told not to have any communication or contact with the Complainant.

He is asked by the investigator to go back and provide what he remembers the Complainant said exactly at the first conversation. She said you can't tell anybody, this is really bad, I don't want anybody else to know, I haven't told anybody else about this. **They went back to the room he was staying in on base and she said that then this guy had sexually assaulted her**, she didn't provide any details the first time other than the guy works in Surrey.

In terms of his text messages, he thought if I can tell her that this isn't the first instance with this person, maybe she'll be more willing be more forthcoming with some stuff about it. He told her he had heard rumors about this guy that he's gone out to bars and he's been kind of aggressive or grabbed girls before in the past and things like that. These were all were all things Cst. [T. S.] was making up. He knew nothing about this individual.

He is asked to go back and go over again how the Complainant said the assault happened. "Yeah uhm I think she said that--**that he showed her the video and she was watching the video and then I think she said that he shut the door behind him, the door--the door locked and then he kinda pressed up against her** and I don't know whether I'm not a hundred percent but I--I think she mighta said that he kinda pressed her up against the wall and **was kissing her** and she was trying to push him off and then that's when he s--stuck his hand down her pants, down her pants and took her pants off maybe a--took her underwear off, I don't remember whether she was wearing a dress or--or not uhm basically took her--**took her pants off, her underwear off** and then--then penetrated her, she said that she k--was kinda like in shock by this and she tried to like sh--she said that sh--she was like no, no I don't wanna do this like try to force him off of and he--he says to her uhm **I remember her saying that he said to her, shhh, it's going to be okay, don't worry about it uh you'll like this** uhm and she was like no like get off me and he was kept on saying no like **shhh be quiet, it's okay, don't worry about it** and that's when she I think she said that **she kicked him** and he--he fell off the bed or he went flying into the wall and that's when she got up and she just ra--ran out of the uh ran out of the room."

And also: "**She said that she threw the clothing out uhm later on that--later on the next day or when she got home**. […] all I know is that she got rid of the clothing uhm within a couple days after."

And also: "I'm gonna say I'm like eighty percent confident in--in that part like I do remember her saying that she was watching the video, that **he was being forceful, pushing up against her** that he put his hand down her pants and took his pants o--took her pants off before she could do anything and she wasn't really uhm she wasn't really aware that like she said that it happened like really quickly and she only realized like he had--**had taken her pants off so quickly** uhm I do remember her talking to me about how her perception might be a little bit different in terms of like how f--quickly things had gone **because she said that she had a two or three glasses of wine at that time so she's not too sure like how quickly these things in terms of like her processing information** is so I do remember her saying that that she--and that's part of the reason why she f—said that she felt embarrassed and not wanting to come forward with it is that she didn't wanna be labeled as uhm saying that you know she was--she was drunk or you know she's making this up or that people wouldn't believe her and she'd be going through--through this whole process …".

And also: "[…] she told me parts of it the first time that we had the conversation where she disclosed it and then a--each follow up time there was more and more details like she told me about the--the video and **him taking off her pants and stuff like that and her forcing him off** but then the next time was when let's sa--uh--you know she provided a little bit more detail like uh now **the door was locked or being closed and he's kissing her**, pressing up against her and maybe like the third time we were talking about is when she's like oh is when she's saying uh you know **he's telling her oh shhh you know don't worry, it's okay uh just be quiet type** deal uhm so I'm gonna i--I don't remember specifically when what he--when each part took place and which conversation."

August 9, 2017 – Constable L. B.

Contacted about 10 days before this interview by the Complainant that he could be contacted by an investigator. No information concerning any sexual assault. Indicates the Complainant had two glasses of wine at the lounge as observed, and **was fine, "not intoxicated at all**."

August 21, 2017 – Constable D. M.

The Complainant drank one glass of wine with her, and had a second glass in her hand just as Cst. [D. M.] left the lounge no later than 9:30 pm. **She wouldn't say the Complainant was intoxicated at all** but it was over a

year ago, she can't say for certain but she had one not even a huge glass. She didn't stay for the Complainant to finish her second glass. She and the Complainant still communicate through online, but they haven't discussed anything that happened at PRTC. **In her mind, the Complainant was absolutely in full control of herself and her thoughts at the lounge**.

August 21, 2017 – Ms. M. H.

Ms. [M. H.] begins the interview by stating that she has the worst memory, and it is her ultimate nightmare to ever have to testify to anything because she just has such a terrible recollection.

She recalls receiving a telephone call from the Complainant, in her words, "it feels like it was a year ago, but it might have been like any time honestly." She also states: "I think it would have been April or something, March it was maybe somewhere between February and February—before June I guess cause I'm thinking of where I was living at the time. It feels like it was around then, but don't quote me on that."

In terms of whether the telephone call came very close in time to the Complainant's interaction with the SM, Ms. [M. H.] recalls: "[…] and she called and she was upset and she described—it was like a course or some sort of thing that she was on—it had to do with the RCMP uhm and or some sort of training."

Ms. [M.H.] recalls the Complainant went to the SM's room, and: "[…] then when they were there like things happened like pretty fast and **he was kissing her** and she was like I don't want this and then I think that she said that, but like I don't know like clear that sentence was like she absolutely said like what's happening, like I didn't expect this at all. Uhm and uh and **then like he was kissing her** and like, you know, doing things like (inaudible) kissing her like he was making out stuff. […] Uhm and then uh—and then he had sex with her and she absolutely didn't want it, but it was also like she was drunk and it was confusing and she didn't know how to uhm, you know, just like how to navigate things like they were just too sudden and weird and she wasn't totally out—she was aware, but not—**it was really just too fast and weird you know**. […] when we— we talked about it and, and she was definitely really upset and it was very clear that it was like, you know, unwanted and I mean the only term I can use for this is rape like obviously he raped her.

Returning to the timing of the call, she states "[…] like—I think it was like the morning after or something like that that she called me."

In terms of whether the Complainant actually used the word "rape" in the call, she states: "I think she used the word uh but I don't—like I don't think

this was comfortable like uh I think she was mostly like I wouldn't, I didn't want to do it like I think that it was mostly like her saying like I didn't want to do it and I, you know, that kind of thing like I can't—it's hard for me to explain this like— she was describing it in the moment kind of thing so it's like, but it kind of came upon her kind of fast. Uhm I don't think she said he raped me, I think she said like I—I don't know, I, I, I, I don't know if those words were—the exact term was used yeah.

With regard to what the Complainant may have said to the SM, and what he replied, she states: "[…] I think she definitely like said like tried to inject or said something that was, you know like, you know, **I don't want to do this or no and he was kind of like oh come on just—just whatever like it was some just, you know, like oh let's just do this**— you know, and I think that anything that happened was more like her like just not knowing what to do."

August 22, 2017 – Constable D. F.

He estimates sometime in the summertime of 2016, or shortly thereafter, the Complainant described having drinks with a member at the PRTC, and that she had since run into this person at Surrey Detachment. She kinda alluded that she didn't really want him to come back into her room and **she was kinda alluding to something sexual happening that she didn't consent to**. He recalls it was in her room, but he is not sure at all.

He never heard anything else about it until about two months ago, a month and a half ago. The Complainant said that another officer she told had reported this and this was going ahead.

He probably talked to her about disclosing it if she wanted to, she didn't want to at that time.

She was alluding to a non-consensual sexual act happening.

August 23, 2017 – Constable L. S.

Around April, 2017, the Complainant started taking a lot of days off, saying she was dealing with some stuff and she could not come in. He encountered her at the Detachment and asked how it was going. She started crying so they drove to a nearby donut shop. She said I'd like to tell you something, but I don't want you to tell anybody else. Cst. [L. S.] said okay. She related going on the PRTC course, having about two glasses of wine, her friends leaving and her talking with two guys she did not know from Surrey as she was headed there, one of the guys told her you should come to my room I have a video I'd like to show you about Surrey. **She watched this video with him and she wasn't too impressed and she's like okay I'm gonna**

leave and what he told her was oh I'm kind of a cuddler, so I'd like to cuddle with you before you leave.

She said that they were on the bed and he was cuddling with her and that then he molested her. He had his hand down her shirt or down her pants or something like that. Cst. [L. S.] asked her did he like go down your underwear or anything like that, she's like **no he vaginally raped me**.

The Complainant said she did not want to come forward he's a big deal around Surrey Detachment, he wears these medals on his uniform, everyone likes him he's got a lot of friends and she was afraid of what she would be labelled as.

He drove her back to the Detachment, she did her shift and he didn't really hear anything more. He just kept asking her how are you doing today and she advised she went to a psychologist, talked through some stuff and she was getting better.

Then, at a later time that Cst. [L. S.] does not fix, he had further conversation with the Complainant. It involved her acrimonious dealings with Cst. [T. S.] in which she grew uncomfortable with his efforts to have a relationship and figuratively pushed him away and he responded by saying he had heard rumours that the Complainant was not the first choice for the spot in the Drug Section she had secured. She indicated to Cst. [L. S.] she would now be working with the still unnamed member from the PRTC sexual assault, as he had moved to Drug Section already. This information permitted him to ask if it was the SM by name and she said yes. **He told her she would have to come forward and she said she was still not ready to do that**.

One week after this conversation, the Complainant texted him and asked to meet. Cst. [T. S.] had told his S/Sgt, and she got hauled into her Insp.'s office and she told her everything about how she was raped at PRTC.

August 23, 2017 – Constable L. K.

She first met the Complainant in November, 2016, at Surrey Detachment. Sometime around the [XXX] project in the [XXX] Section, maybe in December, 2016, the Complainant asked if she knew the SM by name. The Complainant told her that she and the SM were at the PRTC, and he wanted to show her a video and she wanted to see this video. Cst. [L. K.] does not recall if they were in her room or his room at PRTC. **There was unwanted sexual interaction and she was upset about this**.

August 28, 2017 – letter from Dr. Jeff Morley – Registered Psychologist

He directed a letter to the APD, dated August 28, 2017, which in full stated: "This statement will serve to confirm [the Complainant] attended my office on **June 8th, 2017, seeking counselling regarding her being the victim of sexual assault by an RCMP member at PRTC in March of 2016**. She attended for counselling due to her now being in a position where she would be working in close proximity to member who sexually assaulted her.

In disclosing the sexual assault her emotions and presentation were consistent with someone who has experienced a traumatic assault.

For her own reasons she chose not to report the assault at the time, which is not uncommon for people who have been sexually assaulted.

[The Complainant] has attended for a further six counselling sessions to cope with fallout after this incident was reported to RCMP."

August 30, 2017 – Constable E. T.

Maybe a few months before this interview, at least two or three months ago, she had a conversation with the Complainant about being on a course in Chilliwack (i.e. PRTC), drinking wine with her group, that group leaving and her talking with some other guys, one of whom wanted to show her a video, he ends up opening the door to his room and though she is wary she ended up going inside. **The Complainant didn't give her any detail as to what happened other than like that she was like on his bed**. She was crying so Cst. [E. T.] didn't really want to push the conversation with her, so Cst. [E. T.] doesn't know what happened exactly but the Complainant said **that he was on top of her or something**. She does not know any details of anything like that. She assumed the individual referenced by the Complainant worked in Surrey because she said she still sees him. The Complainant was really upset and Cst. [E. T.] assumed it was like a sexual assault but the Complainant never said those words.

August 30, 2017 – Constable C. W.

He had no knowledge of anything concerning the SM and the Complainant until the allegation was made. He asked the SM about it and the SM said that they had had consensual sex a few years back. He said it was completely consensual. He asked the SM if it was a one night stand or if they had a relationship after that and the SM said it was a one night stand. He said that they didn't continue any relationship after that.

This conversation with the SM was in early August, 2017, the day that the SM was told about the allegation. The SM was understandably distraught and not sure what was going on. He asked the SM about it and he said I didn't do this, I don't know where this is coming from. He asked the SM

> about who she was **and he said we had a one night stand way back at PRTC and it was completely consensual** and I don't know what's going on.
>
> **October 10, 2017 – Corporal A. E.**
>
> He advised the investigator that he had received a phone call from the SM about 4 or 5 days ago. All the SM said was he was involved in some investigation. The SM didn't divulge any details at all, just about a night a year ago at PRTC at the pub there. He does not remember leaving the pub that night, or with whom he left. He may have left with the SM but he does not remember. He does not remember walking with the SM and another person. He has no recollection of any conversation with a woman from Prince George. He takes six or seven courses a year there, he honestly does not know.
>
> **October 19, 2017 – Constable J. B.**
>
> She recalls being at the pub on wing night with the SM and another member from Richmond.
>
> **October 19, 2017 – B. P. P.**
>
> [B. P. P.] was identified by the SM as being a person that the Complainant was supposed to meet the day after the alleged offence. [B. P. P.] confirmed that he had a Sushi lunch with [the Complainant] on March 3, 2017. The meeting was social in nature, and [B. P. P.] cannot remember specifically what they spoke about, however [B. P. P.] does not recall anything specific about the Complainant or her behaviour being different than normal. **Throughout their encounter [B. P. P.] does not recall anything standing out, nor did he notice if the Complainant was in any form of distress or danger**. [B. P. P.] stated that he believed the conversation surrounded his child custody issues, and there were no disclosures made by the Complainant. They met from [1:10 p.m.] until [2:10 p.m.].
>
> [*Sic throughout*]

[57] As mentioned briefly earlier, by letter dated October 17, 2017, the SM's private legal counsel submitted a four-page account, which his counsel described as containing "the anticipated evidence at a trial of [the SM] should he be charged with an offence" (the Klein letter). As an attachment (marked as Exhibit CAR-2 for cross-examination of the SM at the conduct hearing), the SM's legal counsel provided a printout of a text message exchange between the SM and Corporal A. E., that began around the time that the SM, the Complainant

and Corporal A. E. were leaving the PRTC lounge, and walking back to their rooms, on March 2, 2016:

> [March 2, 2016]
>
> [SM:] If I can get her back to watch this movie … You can watch it another time. 22:55
>
> [Corporal A. E.:] Hhaa k. 23:06
>
> [Corporal A. E.:] I hope u deliver tonight. 23:12
>
> [March 3, 2016]
>
> [SM:] And 67. But yes. 10:00

[58] It was the account attached to the Klein letter, dated October 17, 2017, that the SM personally adopted on August 30, 2018, with one correction. Instead of a belt buckle on a belt, the MR advised that the SM and the Complainant had encountered difficulty undoing a length of knotted string that was serving the function of a belt to hold up the Complainant's jeans.

[59] The last paragraph of Exhibit CAR-2 explained that in answer to Corporal A. E.'s text message, the SM confirmed that he did have sex with the Complainant, but he indicated by the use of the "common police term (67)" that it needed to be kept quiet.

[60] A second videotaped statement was obtained from the Complainant by the APD on November 15, 2017. Audio recordings and typed transcripts for both of the Complainant's statements were also filed with the Conduct Board as part of the Materials.

[61] By written submission dated March 5, 2018, with attachments, the SM provided the RCMP internal investigator with materials he indicated were obtained from open source queries, including online court registry documents. This submission put forward the SM's belief that the Complainant was "in significant personal debt and the possibility of financial gain through the Merlo Davidson settlement was her motivation for putting forward this false allegation." The

submission also repeated his denial of any misconduct, and described personal impacts from the ongoing matter.

[62] A BN dated March 19, 2018, records, in part: "Crown Counsel advised [the APD] they did not approve criminal charges." While procedurally improper, the MR advised in his oral submissions on November 8, 2018, that the SM had received a letter "within the last day or two" advising that the Crown had determined that the matter did not meet its charge screening standard, and no sexual assault charge would be filed.

[63] To be clear, in my view the absence of any criminal charge against the SM does not constitute any form of exculpatory information or evidence with respect to the allegation of misconduct brought under the RCMP Code of Conduct. Equally, a **pending** criminal charge deserves to be assigned the same non-existent probative value in terms of establishing a parallel allegation of misconduct. As succinctly stated by the Federal Court of Canada in *Thuraisingam v Canada (Minister of Citizenship & Immigration)*, 2004 FC 607, at paragraph 35, "[…] The fact that someone has been charged with an offense proves nothing: it is simply an allegation."

Complainant's account

[64] The Complainant's direct examination by the CAR was completed by 10:50 a.m. on November 6, 2018.

[65] In the course of her direct examination, the Complainant provided:

- Her 2012 graduation date from the Training Academy at "Depot", her subsequent postings in "E" Division, the preceding courses she had taken at the PRTC, the general accommodation and classroom building layout at PRTC, the location and layout of the Johnny Mac lounge;

- Her account of events on the night of March 2, 2016, from her initial attendance at the lounge with friends, to her conversation with the SM at the lounge, to her interaction with

the SM and lighting conditions before entering his room, to the interactions that took place inside the SM's room—in part, employing the room photos contained in Exhibit CAR-1 (Investigation Report, Appendix L, pages 189 to 207), to describe the positions within the room where she and the SM were located when the pursuit video was observed, and the alleged sexual assault took place—to her return to her own room in another building at the PRTC;

- A description of the jeans (which did not require a belt and could be readily pulled down while fastened) and other clothing she was wearing that night;
- A description of the cause, location, and appearance of her abdominal scar;
- Her feelings of disgust and the wish to throw away her clothes (which she did not do. She testified she had the specific jeans with her at the hearing);
- Numerous considerations that contributed to her reluctance to report the sexual assault, her disclosure to a female friend, M. H., including discussion of medical testing given no condom was used by the SM, and her disclosures to Cst. T. S. which were not meant to get out to anyone else;
- Her efforts to present as "normal" during the pre-arranged lunch conversation the next day with B. P. P.;
- Her very limited but upsetting on-duty contact with the SM after the night in question;
- The surrounding circumstances and nature of her eventual disclosure to Insp. Baher;
- The personal issues she has encountered as a result of the sexual assault, including problems staying overnight at the PRTC for subsequent training, the inability to orgasm due to trust issues, and treatment from a counsellor and two psychologists.

[66] The Complainant's testimony obviously included her account of the sexual assault described in Particular 4. She described the dialogue and actions that took place after the pursuit video had been watched. When the video ended, "to be polite" she complimented the SM's video ("that was really cool" or "cool video") and offered that it was nice meeting the SM and maybe they would run into each other in Surrey.

[67] At this point, with the SM lying on the left side of the bed, arms behind his head, she recalled the SM stating: "I am a bit of a cuddler." He then tapped the open mattress space to his left and invited her to sit down beside him: "I thought maybe if I sit down for a second, we'll be done. I'll sit down. We'll talk a minute and we'll go." She did not lie down beside the SM, but sat upright on the opposite side of the bed.

[68] Almost immediately, she felt it was wrong to sit down on the bed, it would give the wrong idea. So she stood up and said: "I really got to go." She was standing facing the door, between the right edge of the bed and the desk. The SM came to stand on the same side of the bed, between the Complainant and the door. She said: "Yeah, I got to go." The SM responded: "Wait. Can I get a hug before you go?" The Complainant testified "this was getting annoying", and feeling frustrated she "went in to give him a hug".

[69] The Complainant described the hug as a "tense hug" for her, "awkward". The SM held her "way tighter than a normal hug", "stronger than a normal hug that you just give someone that you just met", and the hug "was going on too long".

[70] She then described how the SM's hands started to grope her buttocks and were used to touch between her upper thighs, and she used her hands to try to move his hands away. She said, "Whoa, wait. Whoa." The SM then twisted her body so that she was facing the mattress, and she "felt this thing" between her legs, which she thought was his hand. She thought he was trying to put his fingers inside of her vagina. When she used her hand to try to push his away, she realized it was not his hand, but instead the SM's erect penis that was between her legs.

[71] She stated that she said, “Whoa, whoa. Stop. You got to stop.” And the SM replied, “Shh, I just want to feel it one time.” The SM then pushed her toward the mattress and she felt him go inside her. She said, “Stop. Stop. I don’t want to do this.” And the SM replied, “It just feels so good.” And she said stop again. She recalled thinking that, in terms of the SM and a condom, “you’re not even wearing anything” and “get off of me”. The SM thrust again. Later in her direct examination, she indicated that she was pretty sure she actually said to the SM, “Stop … You’re not even wearing anything. Get off of me.”

[72] At this juncture, the Complainant was either being held up by the SM from behind at her hips, or pushed onto the mattress. She was able to twist and managed to change her position. She is unsure what happened in terms of the change of position, but she was able to push the SM off and she ran out the door.

[73] The Complainant then added: “So to be clear on that, when he twisted me, he yanked my jeans down and that’s how that happened.” She recalled three thrusts taking place very quickly: “Seconds. It was enough to penetrate and come out.” She indicated that she pulled up her pants as she was running out the door.

[74] Later in her direct examination, the Complainant indicated that, while it was hard to say, from the time the SM first twisted her around until she left his room, took “a minute, maybe two” but that it was “hard to compute the time when you’re going through those feelings”.

[75] The CAR asked the Complainant, with varying degrees of directness, about certain items that were raised in the Klein letter, and the SM’s correction of August 30, 2018, including:

- What was she wearing?
- Did she take off her shirt?
- Did she have any discussion with [the SM] with respect to what was going to occur in terms of the sexual acts?

- […] The SM said it felt so good or something along those lines, was there anything else expressed by the SM during that time?
- Was there any discussion with respect to oral sex?
- Was there any discussion with respect to the Complainant enjoying the moment?
- Did she ever perform oral sex on the SM?

[76] By 12:25 p.m., on November 6, 2018, the MR advised that he had completed his cross-examination.

Rule in Browne v Dunn

[77] Having excluded the Complainant from the hearing room, the Conduct Board identified a concern arising from the principle enunciated by the British House of Lords in *Browne v Dunn*, (1893), 6 R. 67 [*Browne v Dunn*]. While the Complainant's account essentially precluded the version of events contained in the Klein letter adopted by the SM, and while some elements of the SM's account had been raised with the Complainant in cross-examination, the SM's actual account had not, in any meaningful detail, been put to her on cross-examination.

[78] The appropriateness of what might seem pointless confrontation during cross-examination was confirmed in the case of *R. v Podolski*, 2018 BCCA 96, at paragraph 174, where due consideration of the fact finder's needs was also identified.

[79] The Conduct Board identified possible remedies that could be used to address the shortcomings of the MR's cross-examination, one of which was to recall the Complainant to the stand after the testimony of the SM. However, the Conduct Board wished to have the Complainant complete her testimony on November 6, 2018, to avoid any need for her to be recalled to testify further, later in the hearing.

[80] The Conduct Board asked the MR if there were any other specifics that he wished to put to the Complainant regarding the SM's version of events. Before he could respond, the CAR interjected that he would not make the MR's further examination, identifying to the Complainant the specifics of the SM's account, an issue, if the MR wished to proceed in that fashion.

[81] The MR and Conduct Board then had the following exchange (Transcript, November 6, 2018, at page 141):

> **MR:** Yes. And I certainly will like to get into this conversation and to say that in a [preponderance of, I don't know] caution, because I did ask the key questions. You know, did she have consensual sex, yes or no, and she says no. That's the discreditable conduct right there. But if you wanted to go into the weeds and ask about all the specific details in [the SM]'s fairly short statement -- I believe it was only four pages or five pages long, I think the best thing I can do is to ask it line-by-line any of the contentious points to the witness, which I foresee lasting maybe 15 minutes.
>
> **CONDUCT BOARD:** Well, I think that that is prudent. […]

[82] The MR, using the Klein letter (and correction of August 30, 2018) as a basis for his questions, then performed further cross-examination of the Complainant. To suggestions advanced by the MR, the Complainant denied the following:

- They were lying down on the bed to watch the pursuit video.
- She had a "good, long talk" with the SM after the video was finished.
- While in the room, they discussed her transfer to Surrey, and the type of files in Surrey (this only occurred at the lounge according to the Complainant).
- The SM asked her if she was going to her hotel room or if she wanted to stay the night.
- The Complainant responding to this question, "That's depends. Are you discreet?"

- The Complainant further responding, “Well, I am very discreet. Are you the kind of guy that is going to tell all your friends that we had sex if I spend the night or are you going to keep that to yourself and be discreet about it?”

- The SM stated that he doesn’t usually talk about his business and doesn’t share other people’s businesses and that he wouldn’t tell anyone that they had slept together.

- She kissed the SM, or that they were ever kissing each other, or that they embraced for a couple of minutes, or that the SM touched her breasts from outside of her clothing, or that the SM kissed her stomach and jeans, or that she told the SM she was enjoying herself, or that, while lying on the bed with the SM, she tried to take off her belt or a “a lacy, stringy type contraption to hold [her] pants up”.

- She was wearing anything to hold up her pants (as, according to the Complainant, she did not need anything to hold up her pants).

- She could not get her belt off or pants off, and asked the SM for help.

- With respect to the difficulty removing her pants, she laughed and said that maybe it “was a sign”.

- There was any laughter.

- When the “belt or the stringy --belt, device came off”, she put her hands up near the sides of her head, and smiled when the SM removed her jeans.

- She removed her shirt.

- After a few more minutes of embracing and kissing, she and the SM undressed each other and started to have intercourse.

- After less than a minute of the missionary sex position, the SM moved into a position behind her. (The Complainant's full response on this point: "No, the only time he moved behind me was when he twisted my body on the bed, yanked my pants down and then proceeded to enter into me while I was telling him to stop. That's the only time he was behind me.")

- After about two or three more minutes, the SM's back was starting to hurt and he asked the Complainant if she gave oral sex.

- She replied that she did, and asked if the SM wanted a "blow job".

- The SM said yes, the Complainant moved down to his penis and started to perform oral sex.

- After about two minutes, she asked the SM if he wanted her to "finish him off" with a "blow job".

- The SM replied, "Yes, please", and the Complainant laughed and continued to perform oral sex.

- During oral sex, the SM told her numerous times how good she was and how good it felt. (The Complainant's full response on this point: "No. He said, 'It just feels so good' when I had told him to stop the first time and he thrusted in again. That was during the penetration that -- when we were twisted on the bed and he had yanked my pants down he said that.")

- She told the SM that he was good at showing gratitude.

- The SM asked what she meant, and she said he was really good at telling her how much he was enjoying himself.

- The SM asked her if she wanted him to ejaculate when it was time and she said she "didn't swallow for guys that she didn't know".

- The SM asked her what she wanted to do, and she told him to warn her before he was about to ejaculate.

- About five minutes later, the SM told her he was about to ejaculate, she continued to perform oral sex, he told her two more times in quick succession that he was about to ejaculate, and seconds later he ejaculated.

- She laughed and said, "That was close. I think I might have got a bit on my face." (The Complainant's full response on this point: "That's disgusting. It's false. And that never happened. And like I said, I never laughed ever during that whole entire interaction. There was no laughter.")

- The SM laughed as well, asked the Complainant if she was good and she said, "Yes."

- The SM asked her if he could get her a towel as he walked into the bathroom, grabbed a towel to wipe down his stomach, and gave her a towel.

- The SM then put on his underwear and the Complainant slowly got dressed and they had a conversation about the sex they just had.

- They also discussed common interests and about what a transition to life in the lower mainland would be like.

- The SM told her he would like to hear from her when she got her transfer to Surrey, and whether she wanted to spend the night in the hotel room.

- At this point, she told the SM that she had a meeting with B. P. P. in the morning and that she should go. (The Complainant's response: "No, that was in the lounge when I said I was leaving, I had to go.")

- The SM walked her to his hotel room door and they said goodbye to each other.

- The SM confirmed that she had his business card and told her to email him and let him know when the transfer happens and if she had any questions.

- She wanted this consensual sex with the SM to be kept quiet. (The Complainant's response included: "There was no consensual sex with [the SM].")

SM's account

[83] The SM's direct examination provided:

- An overview of his upbringing, high school education, abbreviated criminology studies that ended in 2007, volunteer work with the Coast Guard, involvement in the army as a part-time reservist infantry soldier that began in 2003, and his present status as an infantry section and occasional platoon commander at the rank of Sergeant;

- The details of his full-time military duties starting in 2007, his nine-month deployment in 2008 to Afghanistan at the rank of Corporal, providing security for convoys, a second eight-month deployment at the rank of Master Corporal commanding an armoured vehicle and associated crew of 11 soldiers, and the combat operations that arose involving improvised explosive devices along the Hyena highway;

- His lack of psychological help upon his return to Canada after his first deployment, and after his second deployment, his decision to begin periodic "checking in" with all soldiers from his unit who had deployed, a volunteer effort that involved his obtaining crisis de-escalation training and making mental health related referrals;

- The development of the "Send up the Count" program, to promote military leaders reaching out to their former deployed subordinates to check on their condition, directed to reducing self-harm and other negative outcomes;

- His withdrawal from this program as a lot of affected soldiers were victims of sexual assault, and he did not want to compromise the program's integrity given his present RCMP conduct allegation;

- His receipt of an army commander commendation, Queen's Jubilee Medal, and an award in Vancouver (soon after his interaction with the Complainant) of the Meritorious Service Medal (MSM) from the Governor General for his efforts to maintain soldier welfare, reintegration, and in particular his work establishing the "Send up the Count" organization;

- His graduation from the RCMP Training Academy at "Depot" Division in October 2013, and posting to a traffic enforcement section in Fort St. John, in northern British Columbia, his involvement assisting with the significant mental health issues of a close family member on trips and special leave while in southern British Columbia; his compassionate transfer to Surrey Detachment in June 2014, and his gratitude to the RCMP for how well he was treated over this transfer;

- His receipt of extensive RCMP training through courses administered at the PRTC, including the economic crime course that brought him there for the period of February 28 through March 4, 2016;

- His interactions on the evening of March 2, 2016, with policing friends at the PRTC lounge, before and after he came to speak with the Complainant there, his consumption of alcohol, specific items discussed in his conversation with the Complainant primarily before their departure on foot from the lounge, the residence building configuration and lighting conditions upon their arrival at his room, and the actions and dialogue that took place once they were inside his room;

- His relationship problems as they existed on the night of March 2, 2016, involving the ending of a relationship and, in effect, his lack of belief that a "pretty attractive woman"

like the Complainant would be "chatting him up" and would be interested in coming back to his room to watch the pursuit video.

- The setting up of his laptop to play the DVD containing the pursuit video, and where he and the Complainant were positioned while it played (Transcript, November 6, 2018, pages 207-208), and after he had put the laptop away.

[84] The SM went on to describe how he and the Complainant spoke for approximately 10 to 15 minutes after the video ended, and while he was lying on the left side of the bed with his head and torso at the headboard end of the bed, and the Complainant was seated on the right edge of the bed angled back to speak to him, he said: "So are you going to go back to your room tonight or did you want to spend the night?"

[85] He testified that he would always remember her reply, as "it was an unusual choice of words". He recalls she replied: "It depends. Are you discreet?" The following, according to the SM, then took place (Transcript, November 6, 2018, pages 211-212):

> And I asked her, "Well, what do you mean by discreet?" She said, "Are you the kind of guy that's going to tell all your friends we had sex tonight if I spend the night?" And I told her that's not -- I don't generally tell people other people's business, so, yeah, I'm discreet. She said, "Okay."

[86] The SM testified that the Complainant then moved her way up the bed so that she was on the SM's left side, and they began kissing and embracing on the bed. He rolled on top of her and she "scooched over to the left at the same time". He described how he felt her breasts outside her shirt and bra, and worked his way down, complimenting her appearance and asking "how she was doing". She replied that "she was good, things were going well".

[87] As he was "working my way down", he described feeling the Complainant placing her hands between them toward "a string going around her pants, like a belt". With respect to this string and the removal of her jeans, he testified (Transcript, November 6, 2018, at pages 213-214):

> […] And this string that was -- I want to call it a rope, for lack of better terms, because it was thicker than what I'd call a string, like, a drawstring, but it was thicker and it was double knotted. So she was reaching down below and I looked down below and was undoing kind of these two knots.
>
> And she asked for help. She's, like, "I'm having trouble getting this." So I went down. I started trying to untie it. And then we're going back and forth and she laughed. She's, like, "Oh, I think that's a sign." And I laughed and eventually one of us -- like, she said it jokingly. I did not take that as an issue with consent. She was laughing about it and continued working at the knot.
>
> Then at some point one of us, I don't know who, untied the knot or the double knot. But when -- once that happened, she laid back with her head on the -- it was mainly her head, not her upper torso, on the headboard and the pillow and put her hands kind of out to her side, but upper and I pulled off her jeans and her underwear at the same time. And then continued to make out, kiss her, embrace. And she took off my shirt and then I took off her top and then she undid my belt and slid my pants down and my underwear and then I kicked off my jeans. I think I was wearing jeans at the time. And then we started having missionary sex from that position.

[88] He described how vaginal sexual intercourse then took place in the missionary position, and "after a minute or so" they rolled to the right side of the bed, and the Complainant "went in a doggy- style position where I was behind her". Intercourse in this second position continued for about two or three minutes. The SM testified that, six weeks prior, he was involved in a double impact police vehicle accident that jarred his lower back, resulting in continuing back and neck issues. After about three minutes of the second sexual position, his back "was starting to have a lot of trouble", so he asked the Complainant if she gave oral sex, she replied, "Yeah, do you want a blow job?" and he replied, "Sure".

[89] The SM then described the Complainant's performance of oral sex on him, during which he told her that he was enjoying it. She asked if he wanted her to "finish him off" and in a very light, jovial tone he indicated, "Yes, please".

[90] He asked her "What do you want me to do when I'm ready to orgasm?" She said, "I don't swallow for guys I don't know." He said, "Well, then what do you want me to do?" She replied, "Just tell me before you're going to cum."

[91] After about five more minutes of oral sex, and appreciative comments by the SM, he recalled that the Complainant said: "You're great at showing gratitude."

[92] The SM testified that he did tell the Complainant, "Okay, I'm about to cum", that she continued to perform oral sex, so he told her "two more times in quick succession because I know that can be an issue for some women". He ejaculated, and felt his ejaculate on his stomach.

[93] The SM then described the dialogue and actions that followed (Transcript, November 6, 2018, pages 216-217):

> […] [S]he laughed and said, "Whoa, that was close. I think I got -- I might have got some in my face." So I asked, like, "Are you okay?" Because that can be another level of -- for – not disrespect, but, like, a lot of women don't like that, so I wanted to make sure she was okay. And she was laughing, so I kind of chuckled and I wanted to clean my stomach off. I said, "Did you want a towel?" I don't remember what she said, but I grabbed her a towel anyways because I went to the bathroom and I came back with a towel. And we cleaned ourselves up and slowly started to change.

[94] He testified that he noticed a "small couple inch scar just below her waistline". This aspect of his testimony is closely reviewed later in these written reasons.

[95] The SM recounted their discussions while dressing after completion of the oral sex, the "very light hearted" tone which existed throughout the night, his belief that the Complainant was consenting throughout their interaction, and the absence of any expression of concern or resistance by the Complainant to anything that was going on. He denied forcing himself on the Complainant, having non-consensual sex with her in any way, and raping her. He denied that he could have misinterpreted her intentions about sex.

[96] March 2, 2016, was a Wednesday. The SM's course continued into the Friday. He went to class on the Thursday, but he testified that he had to leave early in order to receive the MSM on the Friday in Vancouver.

[97] The SM explained how, given that his friend, Corporal A. E. was present on the night of March 2, 2016, and knew of the SM hoping that the Complainant would come to his room to view the pursuit video, he messaged Corporal A. E. that they had sex, but using a police term "67" that directed Corporal A. E. to keep it to himself. Concerning his assurance to the Complainant about being discreet, he testified: "I'm not going to go around and tell everybody else, but [Corporal A. E.] being there earlier in the night, I felt it was okay to disclose that to him."

[98] Without objection by the CAR, the SM provided extensive testimony concerning the status, on March 2, 2016, and in the months that followed, of his uncertain relationship with his then girlfriend. Ultimately, I understood this portion of the SM's testimony to provide context for his not contacting the Complainant as personal follow-up after their encounter on March 2, 2016, and for their face-to-face workplace interactions on a few occasions later in 2016 and in 2017.

[99] The Complainant described this female friend as being in a "dynamic" situation, and while they dated for a period of four months beginning early in 2015, by August of 2015 he felt that he was "out of her life". He was "thrown for a loop" and had to "really struggle to deal" with her pursuit of a relationship with another man. By January 2016, however, this woman texted him indicating that her other relationship was failing, and the SM had been right when he told her this other man, […], would not change.

[100] By February 2016, he and this woman were "hanging out" again, but the SM felt she was "on the rebound". Later in February 2016, he asked that they go their separate ways, to rule out her return to him on the rebound, and she agreed.

[101] For the MSM ceremony, the award organizers allowed him four guests (and provided them free transportation) to the event. The SM thought that he would hear from this woman, wanting to be part of this moment in his life, but he did not. He did not designate her as one of his guests.

[102] Therefore, at the time of his sexual encounter with the Complainant, he remained estranged from this woman. However, shortly after the ceremony, a letter was found from this woman at his door, indicating that she had watched the ceremony online with pride and had figured out what she wanted in life. This caused the SM to curse himself, "She's only been gone for a couple weeks and now she's likely coming back and you've just slept with another woman." Until his receipt of the woman's letter after the MSM ceremony, he had intended to "call or reach out" to the Complainant, but his eventual reconciliation with this woman apparently complicated his interactions with the Complainant. The woman's employment involved contact with RCMP members in Surrey, and while the Complainant had spoken of being discreet, the SM was trying to determine how quickly he had to tell the woman of his sexual encounter with the Complainant.

[103] The SM described his first work encounter with the Complainant after March 2, 2016, in which he was introduced to her by his old RCMP trainer, who was speaking to her. The three of them were standing, having exited their police vehicles. He described how the Complainant walked up to him "with a big grin on her face", with her hand out, and said, "Hi, I'm [first name of the Complainant]." He took this to be the Complainant being discreet and so they "played dumb" and talked back and forth about how she had just come from [location of the Complainant's previous posting]. Based on this conversation, the SM believed that he had some time to tell the other woman of his encounter with the Complainant.

[104] The SM described a second work encounter with the Complainant in October or November 2016, during an operation known as Dialer Days. This involved the participating officers, including both the Complainant and the SM, dressing up to resemble persons living on

the street. He recalled that the Complainant was wearing clothes similar to those of a street level sex trade worker, and makeup was applied to give participants bloodshot eyes and blackened or chipped teeth. The SM testified that he briefly spoke with the Complainant when he was asked to tell her that it was her turn to get her makeup applied by Insp. Baher.

[105] The next time the SM recalled seeing the Complainant was later in November or December 2016, when the Complainant walked over with Insp. Baher. to meet with Cst. K. B. at her office "pit area" desk, a desk only feet from the desk in use by the SM. Insp. Baher., according to the SM, indicated that the Complainant was looking for a mentor in the Under Cover (UC) program, and was seeking information on the program. The Complainant and Cst. K. B. discussed aspects of the UC program for 30 to 45 minutes. The SM recalled another unescorted visit by the Complainant, involving a similar conversation with Cst. K. B. about UC work. The SM testified that the Complainant knew he was there given only a four-foot wall served to separate the desks. They made eye contact but did not communicate verbally. The SM indicated that he had yet to advise the other woman of his sexual encounter with the Complainant, and so he "didn't want to bring anything up" with the Complainant. He recalled one additional time when he saw the Complainant at a briefing in July (presumably of 2017). On the day that the SM was given notice that he was under investigation for sexual assault, August 1, 2017, he went home and told the other woman about his sexual encounter with the Complainant.

[106] In cross-examination:

- The SM confirmed that the only time he had any sort of conversation with the Complainant after March 2, 2016, was when he first talked to her after being introduced by his old trainer. On this occasion, he took the Complainant to be pretending she did not know him. He, the Complainant and his old trainer had all exited their vehicles to talk.

- The SM explained that not only did the other woman work for a local police employer, but she had previously worked for the RCMP in Surrey; therefore, she had lots of RCMP

friends. He was going to tell her about his interaction with the Complainant once some personal issues with the other woman had been smoothed over, but he did not want her learning about it through the rumour mill. He did not know if the Complainant was going to tell a friend, who in turn would tell the other woman.

- The SM acknowledged that in fact he told a friend, Corporal A. E., that he was intimate with the Complainant (as per the text messages contained in Exhibit CAR-2, page 3 of 7, or 525 of 559), but he added that when he did that, he did not know that the other woman "was actually coming back into my life".

- The SM was asked whether the text message he sent to Corporal A. E. on the morning of March 3, 2016, was being discreet. The SM testified that as A. E. knew that he and the Complainant were going back to his room, it was acceptable to tell him.

- The SM confirmed that the pursuit video originated from a self-generated file where an individual took a private ambulance. He could not recall why he had the pursuit video with him at the PRTC. He acknowledged that the video constituted evidence respecting the taking of a vehicle without lawful consent. He confirmed it was recorded on a DVD, but he could not recall who made the DVD.

- The SM was asked whether he took issue with anything contained in the four-page account submitted by his counsel (under cover of the Klein letter, Exhibit CAR-3), and responded that the only issue he had was with the description of the belt, it was a rope not a belt, a rope with knots. He acknowledged that he prepared the account with his criminal counsel, and allowed the account to refer to a belt and not a rope belt.

- The SM's explanation for the inaccuracy in the Klein letter's account was as follows (Transcript, November 6, 2018, pages 253-254):

> My recollection, I was having trouble with -- I was focussed on the trouble I had removing or trying to remove the buckle at the time and I was focussed

on it being a buckle. And then it didn't occur to me until long after, until recently that it was actually rope with knots in it. And that was the difficulty and not some sort of weird buckle.

- The CAR's exploration of this point continued with the SM (Transcript, November 6, 2018, pages 256-259):

> **CAR:** How is it you can misconstrue a belt or a buckle for a rope with knots in it?
>
> **SM:** My definition of a belt is anything that's holding up or used by a person in conjunction with pants or jeans to assist in holding those up. So I described -- when I used the word "belt", that's what I'm referencing to. With reference to the "buckle", I thought in my first recollection it was a buckle and was having trouble remembering exactly like how -- why I had so much trouble with this buckle and then I remember well later it was knots, at least one, I believe two sets of knots.
>
> **CAR:** And when [the Complainant] says that she wasn't wearing anything, any belt whatsoever, and she certainly -- we didn't hear of the string or the -- sorry, you -- I'm drawing a blank there. Did you call it a string or a rope? Which -- what exactly?
>
> **SM:** Rope.
>
> **CAR:** A rope. Okay. So, like, is it a -- I'm trying to picture this. So it's like a piece of rope around a woman's jeans; is that what it is?
>
> **SM:** It's thicker than a drawstring, like, on pyjama pants or on sports shorts. I don't have the clearest recollection of the -- like, enough to describe it, but I remember it having several knots and that's how it was - --
>
> **CAR:** Well, you say you don't have a clear recollection, but when my friend was posing questions to you, you had no problem recalling this rope and you had no problem recalling that there were knots that you had to undo.
>
> **SM:** Correct.
>
> **CAR:** So how is it that you can't describe it if you -- I fail to understand that, Constable. When -- how can you not describe it if you had no problem describing it when my friend was posing questions to you and now I'm asking you what it is and you're saying, well, it's kind of like a drawstring. What exactly is it? What colour of rope was it?

> **SM:** I don't recall what colour it was. My focus when I was looking at it was on the knots and not on the size, length, shape of the rope as it extended behind her. It was just on the knots and undoing them.
>
> **CAR:** So these -- this rope extended behind [the Complainant]?
>
> **SM:** I could see it go off to the side and I would assume that it went behind her. I couldn't fully see. I wasn't concentrating on the rest of the belt, just the knots.
>
> **CAR:** So the rope goes behind. Where are the knots then, behind her? **SM:** At the front of her.
>
> **CAR:** So there's knots tied at the front, but the rope extends to the posterior of [the Complainant]?
>
> **SM:** I can only assume, because there's the knots and then like a belt. I couldn't see behind her. She was laying on her back at the time, so I could only see that the rope went out of my visual range where it then started to go behind her, so I'd assume they went all the way behind, but that could be an incorrect assumption on my part.
>
> **CAR:** So when do you recall first seeing any ropes or any belts or anything holding up her pants? When do you recall that?
>
> **SM:** When I was kissing her stomach and working my way down from kissing her on the mouth to kissing her stomach and her chest.

[107] With respect to the level of illumination in the room, the SM testified that the main light in the room was off, and the only light came from the lamp on the bedside table, shown in the APD photographs as located to the left of the bed.

[108] The SM confirmed the location of the Complainant, the laptop used to play the DVD, and himself, on the bed. In particular, he confirmed his earlier testimony that the laptop was on the corner of the bed nearest the door, but pointed to the dead centre of the bed. He further confirmed that the Complainant was lying with her feet pointing toward the pillows while watching the video. The SM responded to the CAR's questions seeking to fix the length of the bed itself, and the SM's distance from the laptop as the SM had located it. The SM indicated that the video was set up when he had the laptop at the desk to the right of the bed, and he hit start as he placed it on the corner of the bed. He could not recall if he was sitting or standing over the desk getting the video set up to play. While the set up of the video was taking place, the SM

testified that the Complainant was sitting on the bed talking to him. He stated that he had no difficulty viewing the video, which in terms of its resolution was "clear", from a distance of six to eight feet away. After the video ended, he described taking the laptop off the bed, putting it back on the desk, and resuming his position on the left side of the bed. During the 15-minute conversation immediately after the video, he described the Complainant changing her position from lying with her feet toward the pillows to sitting on the right edge of the bed facing the SM and conversing. He answered that it was the Complainant who "initiated contact" when the topic of being discreet arose, and she moved from the edge of the bed to a position lying with him on the left half of the bed.

[109] He testified that he asked her "what her plan was for – her intent for the night" and she then raised the question of whether he was discreet or not. He testified that the Complainant mentioned meeting with B. P. P. on two occasions—at the lounge, and after their sexual interaction when he asked if the Complainant wanted to stay the night.

[110] He estimated that it was close to midnight, or sometime just after midnight, when the Complainant left his room.

[111] He admitted having problems recalling what the Complainant's rope belt looked like. He was questioned about the meaning of the quotation marks used at page 3 of the Klein four-page attachment (CAR-3), and responded: "I can't answer the stylistic typings of my lawyer. I can only speak to the content of the discussion we had." He confirmed that while he recalled the comments attributed to the Complainant, he had difficulty recalling what the rope looked like around her waist. He denied fabricating the statement attributed to the Complainant about being discreet. He provided a guess that it took two minutes for him to deal with the laptop once the video ended, but that depends on whether he removed the DVD and returned it to its case.

[112] The SM was asked if, when the Complainant came to his room, it was his belief that they would "get together". He testified that he was not sure what was going to happen. He was having a lot of "internal conflict" whether somebody would be interested in him. He acknowledged that,

by his text message, Corporal A. E. had got a sense that "maybe something was going to happen".

[113] Questioned why he would ask the Complainant if she was enjoying herself, he testified that this occurred when he began moving down the Complainant's body, stating: "[…] some women don't like their breasts being touched and some don't like their stomach being touched because of certain sensitivities". He indicated that he did not specifically ask if the Complainant liked her breasts or stomach being touched, it was a more general comment about what they were doing.

[114] The SM confirmed that when he was kissing the Complainant's stomach outside her clothing she first tried to take off her belt, and it was as he was removing her jeans and underwear that he observed her scar on the lower part of her stomach. He stated that her shirt was not removed until after he had taken her pants off. While making a gesture with his hand that signalled a scar that was horizontal, he initially described the scar as "a couple inches vertical", but he corrected himself when asked to repeat this answer. He did not recall touching the scar. When the CAR put to the SM the Complainant's description of his hands "going to the front of her towards her genitalia", he replied: "I can't comment on something that didn't happen in a way it didn't happen." He did not specifically recall touching the scar, but he knew he saw it. His kissing did not go as far as the scar, as the removal of her shirt brought them back face to face.

[115] The SM remained firm in his recollection: he took off her pants first and took her shirt off after. He had no recollection of kissing or touching the scar directly. In totality, it took one to two minutes for him to remove her pants, including the untying of the knot and conversation back and forth. The knot was at the very front, and he did not observe the rope behind the Complainant, he "just assumed that the rope was continuous. Once you untie the knot it seemed to loosen." With the knot untied, he testified it nevertheless "took a bit to pull [the Complainant's jeans] off" as "they would stick to her". He did not recall if there was a button on the jeans that

he undid. He confirmed that he had to exert force to pull the jeans down: “Because they were very tight on the legs, so it took a bit to get the legs completely off.”

[116] The SM agreed that the Complainant’s “stature in terms of body” when she testified earlier on November 6, 2018, was about the same on March 2, 2016. He agreed that she was not a heavy-set person, but he maintained that he had to use force to pull her jeans down: “They didn’t just drop or slide off. They -- the jeans -- they were some sort of material that they were not spongy, but form- fitting. So they weren’t like sweatpants that would just slide off.” He stated that they were not loose pants.

[117] With respect to the juncture where he and the Complainant were having difficulty untying the knot, he confirmed, “[…] that’s when she said, ‘Maybe it’s a sign.’ As in we’re not meant to have sex tonight.” This comment was said with a laugh, a jovial tone. They both tried to undo the knot, and he does not recall who eventually succeeded. He testified that he was the one who removed the Complainant’s jeans.

[118] The SM testified that, after he took off the Complainant’s jeans, she took off his shirt. He could not recall the shirt he was wearing. He could not recall if her shirt or his jeans were removed after his shirt was removed. He did not recall where her clothes went after they were removed.

[119] The SM was asked why, if he knew that his back was hurting from the motor vehicle accident before March 2, 2016, was he having sex if it hurt his back. The SM responded, “It doesn’t preclude me from having sex”, and he went on to add, “It can limit how long I can be in a certain position for.” He testified that it was after two to three minutes of sexual intercourse from a position to the Complainant’s rear that his back was starting to get sore. He did not recall why he switched from missionary position to the position from the rear. He did not recall if he told the Complainant that his back was getting sore.

[120] The SM confirmed that the Complainant then performed oral sex on him, while he was lying on his back. He repeated that, after about two minutes of oral sex, the Complainant asked him, "how I wanted to finish, essentially how I wanted to have an orgasm". He recalled specifically responding, "Yes. Please." He confirmed that the whole night had "some sort of kind of jokiness to it". He confirmed that he told the Complainant "how good she was" while the oral sex was performed, and that she indicated he was "good at showing gratitude".

[121] The SM confirmed that, at one point, the Complainant said that she "didn't swallow for guys she didn't know" and he should warn her before he ejaculated.

[122] The SM confirmed that he was not wearing a condom, but denied the Complainant ever stated any concern when he had her bent over, because "that's not what happened". He denied that the Complainant ever asked him if he was wearing protection.

[123] The SM testified that most of his ejaculate went on his stomach, but, though he did not observe any on the Complainant's face, some might have got on her face. At no time did he have any concern that she was not consenting to oral sex on him.

[124] The SM had no recollection concerning any purse belonging to the Complainant while she was in his room, and he found no purse after the Complainant's departure.

[125] The SM testified that after the oral sex, he and the Complainant "complimented each other on our different parts in it", though he could not recall more specifics, and he did not know if the Complainant had an orgasm. He agreed that the vaginal intercourse was only a couple of minutes, yet it was followed by a discussion about the sex and how good it was. There was no discussion about getting together again after this intimate interaction.

[126] Asked why then did he ask the Complainant if she wanted to spend the night, he replied: "Because we just had sex. It seems more appropriate thing than just leave." He confirmed that it was when he asked the Complainant (after their sexual interaction) if she wanted to stay that she again mentioned a meal the next day with B. P. P. He confirmed that he did state to the

Complainant that she could email him as he was interested in hearing from her whether she got the transfer to Surrey she was seeking, and to answer any process-related questions.

[127] The SM was asked to review the NOCH (Exhibit CAR-4), and his response filed under subsection 15(3) of the *CSO (Conduct)* (Exhibit CAR-5). He confirmed his admission of Particulars 1, 2 and 3.

[128] The SM confirmed his denial of Particular 4, and specifically denied forcibly removing the Complainant's pants and underwear, and physically forcing sexual intercourse upon her. He did not deny that his penis went inside the Complainant at one point, but it was consensual. He denied that the Complainant did not consent to his unwanted sexual penetration. He denied that the Complainant verbalized that she wanted him to "Stop", and repeated the word "No". He denied ignoring the Complainant's request that he stop sexually assaulting her. He denied that, when the Complainant was capable of physically pushing him off, she immediately left his room. He later stated: "That did not happen." The SM denied committing "some sort of sex assault act" as that act was described by the Complainant in her testimony.

[129] The SM did not recall saying to the Complainant that he was a "cuddler", admitted that he can be a bit of a cuddler at times, denied cuddling with the Complainant, and denied requesting a cuddle from the Complainant.

Interpretation of "forcibly removed"

[130] It is noted that while the Complainant's account, including a brief demonstration during her testimony using her hands, describes the sexual assault as being immediately preceded by the SM's groping of both of her buttocks with his hands, outside her jeans, and of the inner crotch area of her thighs, outside her jeans; these actions are not particularized as part of the allegation. However, as these elements were mentioned in the investigative materials provided to the SM in advance of the Complainant's testimony, and were considered by the Conduct Board to simply

form part of the narrative for her account of the sexual assault that is detailed in Particular 4, no hearing unfairness to the SM results from this information.

[131] Moreover, it should be noted that while Particular 4 states that the SM "forcibly removed" both the Complainant's pants and underwear, the account provided by the Complainant indicates that these garments were pushed down by the SM's hands from their normal position, in order for the SM to enter the Complainant's vagina with his penis from behind her. Therefore, the pants and underwear were not **removed** from the Complainant's person, but were, by her account, **lowered** by the SM to expose her vaginal area from behind. When the presence of the SM's penis in her vagina ended, as a result of some sort of twisting and change of relative positions of the SM and the Complainant, the Complainant maintains that she was able to pull up her underwear and pants and immediately flee the SM's room.

[132] Particulars are intended to sufficiently identify the acts or omissions alleged to constitute the allegation to permit the subject member to fairly know and answer the allegation. While the Conduct Authority's evidential case does not suggest that any garment was outright removed from the Complainant's person, no procedural unfairness to the SM results from the term "removed" being understood here to mean "lowered".

Excluded considerations – sexual assault complainants

[133] I confirm that, just as in the criminal law in Canada, corroboration of a complainant's account is not legally required where the underlying contravention of the RCMP Code of Conduct involves an allegation of sexual assault.

[134] I further confirm that certain mythologies, misconceptions, presumptive adverse inferences, expected behaviours, and erroneous factors and assumptions, now formally rejected by the courts when assessing a complainant in a sexual assault criminal prosecution, have played no part in my adjudication of this matter. The cases provided by the CAR identify and condemn these discarded notions in strong language. In the present conduct hearing matter, for example, I

draw no adverse inference from the timing of the Complainant's report of sexual assault, from any element of her behaviour post-incident that might be characterized as showing a lack of avoidant behaviour, or from the "normal" presentation or affect observed by B. P. P. when the Complainant shared a lunch meal with him on March 3, 2016. The Complainant's failure to make a timely complaint does not give rise to any presumptive adverse inference. Any lack of avoidant behaviour by the Complainant is of no significance in assessing credibility and in adjudicating the allegation.

[135] In her testimony, the Complainant agreed that sexual assault is a crime, that police officers are held to a higher standard in terms of reporting criminal behaviour, and that she had an obligation to report. She further agreed that she may have failed in her duties as a police officer. I do not consider these admissions by the Complainant to reinvigorate or permit application of any of the mythologies that judicial authorities direct should not be applied, including those concerning the timing of a sexual assault complaint.

[136] In addition, the fact that the Complainant voluntarily entered the SM's room, voluntarily observed the pursuit video recording while positioned on the bed, and (in her account) voluntarily hugged the Complainant after his request that she do so, do not constitute consent to the sexual act described in Particular 4, nor do they affect the likelihood that the Complainant consented to that sexual act. In terms of consent, all that matter is what happened at the time of the activity in question. Whatever the Complainant said or did earlier that night does not mean she consented later. I am guided by the CAR's list of matters that should **not** be taken into account, including as detailed in *R v Nyznik,* 2017 ONSC 4392 [*Nyznik*], at paragraphs 192 to 194, under the heading, "Irrelevant Evidence and Things I Have Not Taken Into Account", and in *R. v T.B.*, 2018 PESC 3, at paragraphs 75 to 91, under "Backdrop – Stereotypes and Myths".

[137] In the *Nyznik* decision at paragraph 194, it is noted that the emotional state of the alleged victim of sexual assault post-incident, or immediately before her formal complaint, should not be considered in the trial judge's consideration of the case, as this would permit consistent

behaviour to be treated as corroboration. My more detailed review of the law underlying this approach is provided later in these written reasons. I do not consider the observations and quotations captured by Insp. Baher of her July 4, 2017, conversation with the Complainant to constitute corroboration or otherwise augment the credibility of the Complainant. While the conversation was unscheduled, I also do not view Insp. Baher's observations and quotations to have captured any form of *res gestae* utterance by the Complainant. To the extent that other third parties described their perceptions of the Complainant's emotional state, I apply the same treatment, and assign the observations no significance in my assessment of credibility nor of the truthfulness of the Complainant's account.

[138] In the present matter, the one-page letter of Dr. Morley (Investigation Report, Appendix "I") is given no weight in terms of the opinions it contains, given its presence in the investigation materials did not eliminate the need for proper qualification of Dr. J. M. as an expert, and did not overcome the letter's clear non-compliance with the standards and procedures set out in the *CSO (Conduct).* I must also note that while the cited judicial authorities expressly state that there is no type of post-incident behaviour that is typical or normal for a sexual assault victim, Dr. Morley nevertheless states, in part: "In disclosing the sexual assault, her emotions and presentation were consistent with someone who's experienced a traumatic assault." The Complainant seeking counselling, and the initial date on which the Complainant saw Dr. Morley are facts fairly established by the letter, as is the number of subsequent treatment sessions, but the letter's content is otherwise excluded in my adjudication of this matter. It may have been a matter of semantics when the CAR stated: "[A]s conduct board you have no opportunity to disregard anything in the record." I have not ignored Dr. Morley's letter, but I have excluded major aspects of it from my consideration of this matter for the reasons stated.

[139] In his closing submissions, the MR admitted that he could not point to a clear motive for the Complainant to make a false allegation of sexual assault, but he went on to correctly point out that the SM was under no obligation to identify one. The MR then argued that perhaps the Complainant was "embarrassed because she had a one-night stand with someone she considered

to be ugly, in hindsight, and she has buyer's remorse". He speculated that maybe she was engaged in "payback because of how [the SM] treated her after the fact by pretending not to know her." These speculative submissions appear to reflect stereotypical thinking, and together with other speculated motives (including financial motives associated with the Complainant's foreclosed property and potential awards identified as part of the Merlo Davidson Settlement), were not considered persuasive.

Good character evidence

[140] To the extent that this Conduct Board heard, without objection by the CAR, what the CAR characterized as good character evidence about the SM, out of the mouth of the SM in his testimony, and as articulated by him in his written submission dated March 5, 2018, I do not view this information as serving any meaningful exculpatory function or enhancing the degree of credibility that I should apply to the SM's denial of misconduct and to his testimony.

Characterizations and attitudes

[141] The Complainant presented in her testimony as an articulate, confident individual whose characterizations of events and expressed attitudes were sometimes frank to the point of being abrupt or judgmental. In my view, the Complainant's testimony was punctuated by moments where her deeper, slightly abrasive personality, and not simply her demeanour as a witness, could be meaningfully assessed. For example, she described growing "bored" with the conversation at the lounge involving the SM (Transcript, November 6, 2018, page 32, lines 12-13), viewed the disappearance of the SM's friend on the walk from the lounge as "odd or kind of rude" (Transcript, November 6, 2018, page 34, line 25), and indicated she agreed (when near the SM's housing building) to view the pursuit video because she did not want to "come across as a bitch" (Transcript, November 6, 2018, page 39, line 23). On the totality of the information presented to me, including the Complainant's testimony, I do not believe the Complainant suffers fools gladly, nor is she the type of person who is easily manipulated or influenced. This assessment necessarily contributes to my overall assessment of credibility.

[142] I acknowledge that a victim of misconduct, including, of course, a victim who has suffered a sexual assault, may harbour a deep anger or other powerful negative feelings toward their attacker. But to support the Complainant's position that she did not consent to any of the sexual actions perpetrated by the SM, she made a point of stating in her first APD interview that when she first saw the SM at the lounge, all she could think was "ugh that guy is really ugly" (Investigation Report, Appendix G, page 16 of 48, lines 6-7. See also page 2 of 48, lines 45-46, "really ugly"; page 31 of 48, line 10, "super ugly"). This observation by the Complainant may only constitute a collateral matter, but it must be considered in my overall assessment of the case. The Complainant repeats what she recollected thinking of the SM's appearance in her second APD interview (Investigation Report, Appendix H, page 4 of 39, lines 1-2): "[…] and the first thought I had about him was oh my god that guy is very ugly […]."

[143] In cross-examination, the following exchange took place on this point (Transcript, November 6, 2018, page 122):

> **MR:** You've repeatedly used the word "ugly" to describe him in your statements.
>
> **COMPLAINANT:** That's right.
>
> **MR:** Do you think [the SM] is ugly?
>
> **COMPLAINANT:** Yeah, I do. I'm going to be completely honest. And I don't -- I'm not saying that to be petty or to be -- I do. That's my -- that was my honest observation. I'm being completely truthful here.

[144] Overall, I find the Complainant to have a high opinion of her own personal appearance, and that she sought to bolster the truthfulness of her account simply by denigrating the SM's personal appearance. I find it part of an unsettling strategy that the Complainant would invite the inference that given the SM's "ugly" appearance, only non-consensual acts could have taken place with him. I do not view her unfortunate characterization of the SM to be the result of some sort of involuntary post-traumatic behaviour or compromised good judgment, I find that it was quite calculated.

[145] The SM also presented in his testimony as an articulate, confident individual. Later in these written reasons I address qualities of the SM's testimony that were identified when assessing the credibility of his testimony on specific disputed matters. As an individual accused by the Complainant of committing sexual assault, one might have expected the SM to exhibit greater indignation when he testified, including when he was responding to questions put to him on cross- examination. I acknowledge that the use of witness demeanour in assessing the credibility of both the SM and the Complainant must be approached with restraint and great care, as guided by the reasoning found in *Faryna* and *T.B.* The SM's measured demeanour was not inconsistent with the content of his testimony, which included frank admissions and careful qualifications.

Prior statements

[146] Under subsection 15(2) of the *CSO (Conduct)*, the Conduct Authority in this matter was required to provide this Conduct Board with the NOCH, and also the report resulting from the investigation of the SM's alleged misconduct, including supporting material. The contents of the investigative report included transcripts, audio recordings, and (in the case of the Complainant) video recordings, capturing the statements obtained by the APD. Therefore, the filing of these statements with the Conduct Board was in compliance with the pre-hearing procedure set out in the *CSO (Conduct).*

[147] None of the statements filed with the Conduct Board was made under oath or solemn affirmation, and there is no expectation or requirement in the *CSO (Conduct*) that the report filed with a conduct board shall only contain information or evidence submitted by affidavit or otherwise under oath or affirmation.

[148] Moreover, under subsection 45(2) of the *RCMP Act*, the Conduct Board is granted certain specific powers that are granted a "board of inquiry".

[149] Therefore, in respect of the evidence and information that may be received and accepted by a conduct board "as the board sees fit", paragraph 24.1(3)(c) of the *RCMP Act* implicitly removes any **requirement** that the evidence and information considered by a conduct board must be admissible in a court of law.

[150] However, the fact that information or evidence is filed in compliance with subsection 15(2) of the *CSO (Conduct*) does not, in my opinion, preclude this Conduct Board from assessing the nature of the supporting investigative materials that have been filed, and using applicable rules or principles of evidence when assessing that information. In my view, the application of certain evidentiary principles to the materials constitutes a necessary component of a sound adjudication of the specific allegation faced by the SM, an adjudication that may certainly be informal and expeditious, but which must always be conducted fairly.

[151] The discretion to decide issues of evidence admissibility must be exercised in a manner consistent with the overarching obligation to conduct a fair adjudicative hearing. A succinct description of this obligation can be found in Arbitrator Veniot's decision in *Strait Regional School Board v CUPE, Local 955*, 2000 Carswell NS 499, at paragraph 73:

> In arbitration, concerns about admissibility of evidence and its use after admissibility are centred upon the requirement that the arbitrator provide a fair hearing. Fairness includes appropriate attention to the nature of the process, and always requires respect for the rules of procedural fairness and of natural justice. The exercise of the discretion must serve these goals.

[152] In the present case, unlike the conduct board decision raised by the parties (*Conduct Authority for "E" and Constable Goodyer* (2018), 2018 RCAD 13 Corrected [*Goodyer*]), two witnesses were approved to testify under direct and cross-examinations, and adjudication of the merit did not rely solely on an assessment of the documentary and other materials that were filed. For the reasons explored further in my decision, I believe that the receipt of testimony from an approved witness obliges a conduct board to assess how, if at all, any prior statements obtained from that witness may be used in the adjudication of the allegation. A conduct board's obligation may involve more than simply assigning "weight" to any prior statement, it may require making

decisions about the possible complete exclusion of the prior statement from consideration, or the use of the statement for a specific, limited purpose where it is not excluded.

[153] The exclusion of information from consideration, and not merely assigning it negligible weight, arose in the appeal argued in *Conduct Authority for "J" Division and Constable Cormier* [*Cormier*]. [See 2012 RCAD 2 Corrected (Conduct Board); C-2016-005 (C-017) (ERC), issued June 28, 2017); and C-2016-005 (C-017) (level II, issued November 20, 2017).] It was argued by the appellant that the conduct board's decision concerning proportionate conduct measures should be invalidated given that the board had considered "double hearsay" evidence when assessing an aggravating factor.

[154] The ERC, at paragraph 114 of its decision, stated:

> It is arguable that the hearsay evidence should have been fully disregarded by the Board. However, I find that the Board's reference to the evidence was not a determinative error and did not render the decision unreasonable as the Board clearly placed little weight on the evidence.

[155] The level II adjudicator agreed that the conduct board "committed no manifest or determinative error in weighing the impact of *McNeil* disclosure obligations on the Respondent's continued employment […]" (paragraph 85). It is not an express finding, but the implication of both the ERC and level II decisions is that the exclusion of "double hearsay" would have been correct, but failing to perform this exclusion was not determinative of the appeal issue being asserted.

[156] While it arose with respect to the treatment of hearsay, the appellate perspective found in *Cormier* seems to support the appropriate use of some evidentiary rules and principles. I find that it is necessary to address how the apparent **consistencies** and **inconsistencies** in the Complainant's statements made prior to her testimony on November 6, 2018, may be used in adjudicating the contested allegation. These may be found in not only the Complainant's statements to the APD recorded on July 28, 2017, and November 15, 2017, but in her accounts of the alleged sexual assault as purportedly captured in the statements of third-party interviewees. I

believe the same analysis applied to the Complainant's prior statements should be applied to those of the SM.

[157] The representatives in this matter did not address this area in depth in their submissions, including in their replies to questions from the Conduct Board. While my analysis below clearly does not bind any other conduct board, it does examine the evidential principles that arise when there is both a prior statement and later hearing testimony from the same conduct board-approved witness.

Consistent statements

[158] The admissibility and appropriate use of prior consistent statements have been closely examined by Justice David M. Paciocco in his article, "The Perils and Potential of Prior Consistent Statements: Let's Get It Right", (2012) 17 Can. Crim. L. Rev. 181. (Please note that all page references that follow for this article are taken from the WestlawNext Canada off print).

[159] From this article, a number of helpful statements of the law can be extracted and paraphrased. The statements below are not exact quotations. To help organize them, I have inserted my own paragraph numbers and sub-headings. Given that one representative, in answer to a question from the Conduct Board, was unable to offer meaningful submissions on the permitted use of prior consistent statements, my summary of Justice Paciocco's statements may also serve an educative purpose:

> **1. General inadmissibility of prior consistent statements**
>
> Prior consistent statements are declarations made by witnesses before they take the stand that are consistent with the testimony they give while on the stand. […] The basic rule relating to prior consistent statements holds that "prior consistent statements are generally inadmissible." […] Not only is it ordinarily impermissible for litigants to call evidence proving directly that their witnesses gave prior consistent statements, it is generally improper for lawyers to offer evidence that is relevant only because it indirectly discloses that a witness has previously made the same claim. [page 1]
>
> **2. Admissibility rules may appear counterintuitive**

"Restricted admissibility rules" create difficulty because where, logically, evidence is capable of serving more than one purpose when reasoning through to a decision, rules of restricted admissibility operate by preventing one or more of those purposes. Since evidence cannot be used to draw conclusions it logically seems to support, the law operates counterintuitively. Rules of restricted admissibility are therefore something of a legal trap in which relying on logic rather than law can lead to error. For example, the recent fabrication rule permits a prior consistent statement to be used to rebut the "recent fabrication" challenge, but the factual claim that the prior consistent statement contains cannot be used as evidence proving that claim. [page 2]

3. Rules protect the accuracy of factual findings

The prior consistent statement rules are exclusionary. They either prohibit or restrict admissibility. Unlike many exclusionary rules that exist to accomplish priorities unrelated to the trial process--things such as granting privileges to protect confidential relationships, or excluding illegally obtained evidence to express revulsion for police illegality—the prior consistent statement rules are entirely about the integrity of the trial itself. These rules exist ostensibly to protect the accuracy of factual findings and to keep the trial process efficient. [page 3]

4. Consistency supports lies *and* truths, and is not corroboration

The most common explanation for the general exclusion of the "declaration part" of prior consistent statements is that prior consistent statements lack probative value. […] The theory is that "consistency is a quality just as agreeable to lies as to the truth." […] Corroboration requires support from an independent source, [not where] the declarant and the witness are the same source. It would be "selfserving" to permit a witness to attempt to buttress their evidence with their own prior factual claims. [page 4]

5. Two rules governing use of prior consistent statements

[…] [T]wo important rules […] apply even where prior consistent statements are admissible pursuant to exceptions. The first is the "prohibited inference." Even where a prior consistent statement is admitted, "it is impermissible to assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth." […] The second is the "rule against corroboration." Even where a prior consistent statement is admitted, it is an error to treat the prior consistent statement as corroborating the in-court testimony. [page 4]

6. Exclusion for trial efficiency

Excluding the declaration part of the prior consistent statements is also believed to improve the efficiency of the trial. […] This is because where a prior consistent statement is being offered, the witness will have already furnished the same information by way of admissible testimony. As is often said, prior consistent statements are excluded because they are "superfluous." (page 4)

7. Rebuttal of "recent fabrication" challenge

Simply put, while prior consistent statements are *not* admissible to counter the simple challenge that testimony is false, where the testimony of a witness is challenged on the specific basis that it has been "recently" fabricated, a prior consistent statement that logically rebuts that challenge can be […] admitted. [page 5] It is important to recognize the logic that supports this exception. If opposing counsel is challenging testimony by suggesting that an account was created or new details were added at some point in time after the alleged event, evidence showing these challenges to be wrong is admissible. [page 6]

What is the effect where a challenge is made but met by credited evidence of a "prior consistent statement?" All that happens is that the challenge is neutralized. The fact that the witness made a prior consistent statement does not add to the credibility of the witness in any other way. [page 6]

In *R. c. Dinardo*, the Supreme Court of Canada emphasized that it is a fatal error to treat a prior consistent statement as corroborating the testimony of […] the witness. […] And the *Dinardo* Court cautioned that judges have to avoid using prior consistent statements for the truth of their contents.

8. Exceptions for reliable hearsay

There are times, however, when hearsay evidence is expressed under circumstances that yield tremendously […] helpful criteria for evaluating the reliability or credibility of a factual claim. […] Business records are admitted primarily because individuals who, as a matter of duty, promptly make records that are relied upon in a business or undertaking tend to take care to ensure that those records are accurate. […] Together these factors satisfy the reliability principle by providing sufficient *indicia* of reliability to permit the records to be admitted. […] The *res gestae* exceptions do not have a necessity requirement either, arguably for similar reasons. In-court testimony may not be better evidence than "excited utterances" […] because in-court testimony is not uttered in the pressure of the moment before an opportunity to concoct has arisen, or during an event with a factual setting that will permit the accuracy of the statement to be evaluated in context. […] [page 8]

9. Appropriate party to use prior statement

Ordinarily, only the opposing party can prove the statements of the other party. This typically permits prosecutors to prove inculpatory statements made by accused persons, but prevents accused persons from proving their own exculpatory or "self-serving" statements. If a statement is "mixed" however, and the prosecutor proves its incriminating elements, the "entire statement rule" or "mixed statement rule" permits the associated exculpatory statements to be proved as well. [page 9]

Where exculpatory evidence gains admission under the "mixed statement rule," ordinarily "the exculpatory portions [of such statements] are substantively admissible in favour of the accused." [page 9]

[…] In effect, if the accused does testify and the exculpatory portions of the mixed statement become prior consistent statements, the hearsay part of the prior consistent statement block should notionally be removed from the scale, permitting the incourt testimony to stand in its place. [page 9]

[…] The consistencies are relevant solely to enable the decision-maker to judge whether the relevant statement is really materially inconsistent when looked at as a whole, and to gauge the impact that any differences in detail should have on the overall credibility and reliability of the witness. [page 10]

10. Admissible for "narrative" purpose

Where disclosing prior consistent statements is necessary to unfold the "narrative" and make material events comprehensible, those prior consistent statements can be admitted, within limits [page 11]

This doctrine of "pure narrative" is typically used to offer proof relating to how a complaint got before the criminal courts. Even though the manner in which a matter got into the criminal system is not one of the material facts that are relevant in proving the offence or establishing a defence, courts accept that it is appropriate to educate decision-makers about the chronological and causal path a prosecution has taken. [page 11]

When evidence of a prior consistent statement comes in as "pure narrative," it does not have "weight," and therefore does not affect the balance of the scales. The statement is not being used to prove the truth of what is said, nor are there any inferences arising that would make the case of the litigant more compelling. The evidence comes in merely to aid in understanding the case as a whole. […] [page 11]

[160] The treatment of prior consistent statements has been examined by the Supreme Court of Canada fairly recently, but in cases that involved appeals arising from criminal trials, where the

application of formal evidential protections is routinely observed. (See *R. v Stirling* (2008), 2008 SCC 10; *R v Dinardo* (2008), 2008 SCC 24.)

[161] Whether this same treatment may be applied in non-criminal matters, and in particular in professional disciplinary matters, was recently considered by the Manitoba Court of Appeal in *Ahmed v College of Registered Nurses of Manitoba* (2017), 2017 MBCA 121 [*Ahmed*], at paragraph 51:

> While the strict rules of evidence do not apply to administrative tribunals, **the rules relating to prior consistent statements have been routinely applied in disciplinary proceedings**. See K. v. College of Physicians & Surgeons (Saskatchewan) (1970), 13 D.L.R. (3d) 453 (Sask. Q.B.); College of Physicians & Surgeons (Ontario) v. K. (1987), 36 D.L.R. (4th) 707 (Ont. C.A.); C. (J.); and Hanif v. College of Veterinarians of Ontario, 2017 ONSC 497 (Ont. Div. Ct.).
>
> [Emphasis added]

[162] In *Ahmed*, at paragraphs 53 and 56, the Court of Appeal found the initial Discipline Committee erred when it used the complainant's report to her friend and her later telephone call to the hospital "[i]n considering [...] the probability that the alleged assault actually occurred". Accordingly, the Committee used these statements "for an impermissible purpose, namely as evidence of the truth of the complainant's in-hearing testimony".

[163] Furthermore, in the case of *Hanif v College of Veterinarians of Ontario*, 2017 ONSC 497 (Div. Ct.), at paragraph 118, it was considered a significant error for the Discipline Committee to have used the consistency of the complainant's testimony with the contents of her prior letter of complaint as corroboration of her testimony. The letter, essentially a prior consistent statement, was used to improperly bolster the complainant's credibility.

[164] I accept that, in principle, the rules or principles that are identified by Justice Paciocco, in his article, as supporting the inadmissibility of prior consistent statement may appear counterintuitive. I accept that hearing efficiency considerations do not arise in the present case, as the statements were contained in the investigative materials required to be filed with the

Conduct Board. But even in this conduct hearing process involving the SM, these rules or principles serve to protect the accuracy of my factual findings. Consistency supports lies **and** truths, and is not corroboration. Therefore, it is unprincipled, and undermines accurate assessment of appropriate evidence and information, to treat prior consistent statements as supporting the truth of the Complainant's account, the truth of the SM's conflicting account, or as corroboration of an account. Having approved direct and cross- examination for the Complainant and the SM, the potentially more expeditious adjudication of this matter on a "paper record only" must be supplanted by an adjudication based on their live testimony, testimony that provides their conflicting accounts. More expeditious adjudication cannot be the only goal, in particular when it undermines hearing fairness.

[165] The Complainant's two statements to an APD investigator, her non-recorded, informal, and imprecisely recollected private conversations with friends and RCMP colleagues, and her eventual conversation with Insp. Baher on July 4, 2017, may be viewed as containing prior consistent statements concerning a sexual assault perpetrated by the SM.

[166] In my view, the SM's written submission of March 8, 2018, referencing financial information involving the Complainant and asserting an incentive for her to seek compensation under the RCMP class action settlement, does not constitute a "recent fabrication" allegation. It seeks to identify a motive. I find Justice Paciocco's analysis on this point persuasive. Even if I consider it to raise a "recent fabrication" allegation, the use of the Complainant's prior statements to rebut an allegation of recent fabrication does not support the truth of the Complainant's account of sexual assault itself.

[167] The Complainant's prior, apparently consistent statements do not bolster the Complainant's credibility because they do not remove a motive to fabricate, which could have arisen at any time after March 2, 2016. Admission of these prior consistent statements strictly under the "recent fabrication" exception would, as Justice Paciocco's analytical framework explains, only serve to remove any alleged motive for fabrication. The removal of the alleged

motive does not mean one may conclude that the Complainant is telling the truth. At most, the absence of motive may be treated as a factor to be taken into account as part of the larger assessment of credibility. (See *Silverhill Homes Ltd. v Borowski*, 2018 BCSC 630, at paragraph 184.)

[168] I have carefully considered whether the text message entries involving the Complainant and Cst. T. S. on June 8, 2017, constitute a form of reliable hearsay, permitting their exceptional admission and consideration. I am not satisfied that the Complainant's apparent expectation that these messages would remain confidential between Cst. T. S. and the Complainant makes these messages admissible for the truth of their contents. The text messages from Cst. T.S. deliberately included fictitious negative information about the SM intended, in effect, to enrage the Complainant concerning the SM, which I find significantly undermines the reliability of her text messages in response.

[169] I am prepared to consider the prior consistent statements of the Complainant and the SM solely for the purpose of forming a "narrative" concerning the development of this case up to its adjudication by this Conduct Board. As emphasized by Justice Paciocco, permitting their limited use to produce a helpful narrative does not mean permitting their use in assessing the truth of the allegations made along the path leading from the PRTC encounter to this adjudication.

[170] The decision in *Goodyer* was referenced in the parties' closing submissions. This decision, at paragraph 103, makes the point that the *Conduct Board Guidebook (2017)* emphasizes a number of the policy and legislative reforms made to formal hearing proceedings. But in my view, as the Conduct Board adjudicating in the present specific circumstances, no element of the *Guidebook*, including sections 2.6 and 2.7, directs the wholesale elimination of well-established legal principles that govern the admissibility of certain information filed with a conduct board, and that delineate the appropriate, restricted uses of certain types of information (including video recordings) placed before a conduct board.

[171] Accordingly, in general, the use of prior consistent statements played no meaningful role in my adjudication of the establishment of Allegation 1. This includes the SM's denial of misconduct, and assertion of solely consensual activity, as recollected by Cst. C. W. in his APD interview.

[172] It should be noted that to confirm the precise point being advanced by the MR when he wrote on October 29, 2018, "Inconsistencies does [sic] not show she is not being deceptive [emphasis added]", this phrase was raised by the Conduct Board at the MR's closing oral submissions concerning the establishment of the allegation. (See Transcript, November 8, 2018, at pages 95-97.) The MR appears at times to have continued to treat "inconsistencies" as "consistencies", for example when he summarized his position by stating, "[…] [Y]ou can be inconsistent [sic] in your story telling and still out trying to deceive people." (See Transcript, November 8, 2018, at page 97, lines 13-14.)

[173] Notwithstanding the somewhat confusing wording used by the MR, I understood his ultimate position to be that "[…] [T]his notion that just because someone tells a version of events to several parties and that somehow lends credibility is a fallacy". (See Transcript, November 8, 2018, at page 98, lines 6-8.) While the MR filed no authorities to support this submission, it does accord with the pithy statement found in *R. v Divitaris* (2004), 188 CCC (3d) 390 (Ont. C.A.), paragraph 28: "a concocted statement, repeated on more than one occasion, remains concocted."

Inconsistent statements

Information in third party statements

[174] As outlined earlier in this written decision, in the PHC process, the MR formally advised that he would not be raising with the Complainant in cross-examination any inconsistencies that might be found in the statements obtained from third party interviewees.

[175] It must be emphasized that the conversations that took place between the Complainant and these third parties were not recorded at the time they took place (with the exception of the

text message exchange involving Cst. T. S.) and the statements later attributed to the Complainant, as a practical matter, obviously cannot be assumed to carry anything like a level of verbatim accuracy. Moreover, in some interviews, hesitations and certain turn of phrases appear before the interviewee offers what are plainly incomplete or ambiguous recollections on certain points. In some cases, interviewees admit that they no longer recall the precise words used by the Complainant, but describe the image or impression they formed from speaking with the Complainant.

[176] Nevertheless, a review of these third party statements indicates that some interviewees recall the Complainant providing details concerning her interaction with the SM that, on their face, appear to be inconsistent with the Complainant's two recorded statements, and with her testimony before the Conduct Board.

[177] I do not intend to provide a comprehensive list of potential inconsistencies, but note the following:

- Cst. T. S. recalled being told:
    - the SM had his hand down the Complainant's pants;
    - the SM used the words "Shhh, it's going to be okay, don't worry about it uh you'll like this";
    - the Complainant threw her clothing out later on the next day or when she got home, within a few days after; and
    - the hotel room door was locked or being closed and the SM was kissing her, pressing up against her.
- Ms. M. H. recalled being told:
    - the SM was kissing the Complainant.

- Cst. L. S. recalled being told:
    - They were on the bed and the SM was cuddling with her and then he molested her, he had his hand down her shirt or down her pants and he vaginally raped her.

[178] The MR did not put these potentially inconsistent elements to the Complainant in cross-examination, notwithstanding the subject of inconsistent statements involving third parties being raised in the PHC process. Therefore, I am satisfied that the MR did not intend to refer the Complainant to them, and did not inadvertently fail to raise them. As these potentially inconsistent elements were not explored by the MR with the Complainant in cross-examination, I am not (except on the extremely limited basis applied to two such items, explained immediately below) prepared to entertain using them in assessing credibility, in particular the Complainant's credibility.

[179] Before the Complainant was interviewed for a second time on November 15, 2017, an APD investigator had interviewed a number of individuals, including Cst. L. S. and, by telephone, Ms. M. H.

[180] In the course of the Complainant's second interview, she was advised that Ms. M. H. had recounted that the Complainant said that there "may have been some kissing". (See Investigation Report, Appendix H, pages 147 to 148 of 559.) The Complainant responded that, before providing her first statement, she had a discussion with Ms. M. H. that included discussion of what the Complainant might be asked about the details of what happened. The Complainant appears to suggest that this discussion with Ms. M. H. may have included that the Complainant might be asked in her upcoming statement if there was any "kissing or touching or you know […] any of that stuff", and this may have contributed to Ms. M. H.'s reference to kissing in her statement. Therefore, the Complainant does not dispute that kissing was referenced in her discussion with Ms. M. H., but offers a strained, but not entirely implausible, explanation for the recollection formed by Ms. M. H. that kissing had been mentioned as taking place with the SM. On this specific point, and in isolation from her actual testimony where this specific element of

Ms. M. H.'s statement was never raised, the Complainant's explanation detracts to some very limited degree from her credibility. Given that it was only raised by an APD investigator, and not specifically in the Complainant's testimony, I am obliged to assign negligible significance to this point in my overall assessment of credibility.

[181] Also in her second interview, the Complainant is advised that Cst. L. S. had indicated in his interview that he was told by the Complainant "[…] there was some cuddling that took place on the bed". (See Investigation Report, Appendix H, page 148 of 559.) The Complainant responded that she did go and sit down on the bed, but there was no cuddling with the SM. This response provides a plausible clarification that the Complainant did indicate to Cst. L. S. that the SM said he was a "bit of a cuddler", that the Complainant did then sit on the bed, but unlike Cst. L. S.'s impression, the Complainant and the SM did not then cuddle on the bed. On the basis of this explanation to the APD, I am not satisfied that a clearly inconsistent statement was made to Cst. L. S. I do note that in her direct examination testimony at the hearing, the Complainant testified that she briefly sat on the bed after the "I'm a bit of a cuddler" comment she attributes to the SM, but she then got up and indicated that she had to be going (Transcript, November 6, 2018, at pages 45-47). The purported element of cuddling on the bed in the statement of Cst. L. S. was only raised by an APD investigator in the Complainant's second interview, and not in cross-examination by the MR, and ultimately plays no part in my assessment of credibility.

Information directly from the Complainant

The reference to "tied up" jeans

[182] The Complainant's second statement contains a statement concerning her jeans (Investigation Report, Appendix H, page 128 of 559): "They were yanked down. I can pull them down with the -- everything tied up." This specific prior statement was not put to the Complainant in direct or cross- examination. It was referenced by the MR only in his closing oral submissions (Transcript, November 8, 2018, at pages 89 - 90), and the CAR asserted that this

prior statement by the Complainant should be entirely excluded from consideration, referencing the rule in *Browne v Dunn* (Transcript, November 8, pages 128 – 134).

[183] One possible interpretation, derived simply from the wording employed, is that the use of "everything tied up" means something akin to "with the jeans zipped and fully buttoned up". This interpretation would be consistent with the Complainant's account that the SM groped her buttocks and inner thighs outside her jeans, and was then able to summarily yank down or pull down her jeans and underwear without undoing her jeans.

[184] The MR argued this mention of "tied up" should be viewed as corroborating the SM's testimony, the correction made by the SM to the Klein statement, and the existence of a rope or string belt on the night in question, as one would not use this term if one were not wearing something that required tying up, such as the rope-type sash described by the SM. The MR stated: "Because you don't tie up a buckle, you tie up rope; you tie up a string to hold up pants up."

[185] Because this prior interview comment by the Complainant was not raised with her in her testimony, any clarification is absent. The MR's failure to raise this potentially inconsistent comment with the Complainant in cross-examination does not, in my view, give rise to the comment's exclusion under the rule in *Browne v Dunn*.

[186] *Browne v Dunn* typically deals with the expectation that a witness will be given the opportunity to comment on a contradictory version of the facts that will be later raised **by the other party**, in its evidence. As the CAR correctly pointed out (Transcript, November 8, 2018, at page 130), the MR did raise the contradictory issue of a string belt with the Complainant: "What holds them up? Is there any string devices of some type?" (Transcript, November 6, 2018, at page 130).

[187] Instead, what the MR did not do was raise with the Complainant her **own** prior, potentially inconsistent statement concerning "everything tied up".

[188] A conduct board matter is expected to be conducted in an informal and expeditious manner, so long as procedural fairness is safeguarded. In my view, it was incumbent on the MR to follow the accepted four-step procedure if he wished to impeach the Complainant's credibility by relying on this comment. The procedure is described in Justice Paciocco's well regarded legal text, "The Law of Evidence", (7th Ed.) (Toronto: Irwin, 2015), at page 488:

> 1) Counsel has the witness confirm the present testimony. The purpose here is to make the testimony clear in order to highlight the inconsistency.
>
> 2) The witness is then confronted with the making of a prior statement.
>
> 3) The prior inconsistent statement is then put to the witness showing the contradiction. Usually, the cross-examiner reads the prior inconsistent statement out loud for the record, the court, and the witness.
>
> 4) Finally, the witness may be asked to adopt the prior inconsistent statement for its truth. If the witness refuses to do so, then the statement goes only to credibility unless of course the witness is a party or an accused, which makes the statement admissible for its truth as an admission.

[189] In the absence of any specific exploration in the Complainant's testimony of the "everything tied up" aspect of her prior interview comment, and in light of the inherent ambiguity in the comment, I do not ascribe any probative weight to it, pro or con. The comment is given no weight in terms of whether the Complainant was wearing the rope-type sash described by the SM. The comment is given no weight as self-corroboration of the Complainant's account of the abrupt lowering of her jeans while they were still done up. I expressly do not consider the Complainant's prior comment as referencing the tying up of some form of rope-type sash, which would be inconsistent with her denial she was wearing any form of belt.

[190] However, I am prepared to accept the SM's testimony on the existence and undoing of a rope-type sash, and thus to necessarily reject the Complainant's account, for the independent reasons outlined below.

The rope "sash"

[191] I have considered both parties' submissions concerning the SM's correction of the account advanced in the Klein letter dated October 17, 2017. This correction, articulated by the MR on August 30, 2018, is as follows:

> […] [The SM] adopts this 4 page statement (page 318-321 of the disclosure page numbering) as his own with one minor correction. On page 3 (page 320 of the disclosure page numbering) in paragraph 4, he makes mention of struggling to remove the complainant's belt and that he "had trouble with the buckle". He did in fact struggle to remove the complainant's belt but rather than being a buckle, it was a knot/stringy accessory that was holding the belt together that he had trouble with.

[192] In my view, there was no strategic advantage gained by this correction. The Complainant's account, as disclosed in the investigative materials (only served on the SM on July 6, 2018), involved no undoing of any kind of belt on her person. The SM offering a correction, to some extent, risked putting the reliability of other details provided in the Klein letter at issue in his upcoming cross-examination. Moreover, if the presence and undoing of some sort of belt was purely an invention by the SM, sticking with the false description of a traditional belt buckle and belt would, applying an assessment of logic, clearly have been the superior course to take. After all, it is not as if the Complainant ever indicated she was wearing a belt with a buckle of any kind. I have also assessed whether the SM's correction of August 30, 2018, was an attempt to align his recollection with the Complainant's "everything tied up" comment (analyzed above) but this would amount to a far-fetched effort to enhance his credibility.

[193] I closely scrutinized all of the testimony of both the Complainant and the SM. It is the case that the Complainant consistently denied that any form of belt, including some sort of rope tied-up belt, was in use with her jeans on March 2, 2016.

[194] But I find the testimony of the SM on the issue of the type of belt-like appliance he encountered on the Complainant's jeans to:

- Be detailed yet somewhat spontaneous in the sense that it did not appear to be the product of significant rehearsal or a memorized description of what he claimed to have observed;
- Be expressed in a manner that was internally consistent;
- Be expressed without exaggeration about his opportunity to observe;
- Be expressed without any self-serving assumptions, and containing candid admissions where his recollection of certain details was absent; and
- Overall, in light of these features, to have such a ring of truth to it,

that I find it credible and reliable, and to be preferred to the Complainant's blanket denial of any form of belt being worn. It is appropriate to treat the Complainant's blanket denials with a degree of circumspection, given her efforts to bolster her credibility by citing the SM's ugly appearance. It is also worth noting that in cross-examination, the SM admitted that he could not recall the colour of the rope, an admission he was not obliged to make given that the Complainant denied the existence of **any** type of belt on her jeans.

[195] Accordingly, I find on a balance of probabilities that, on the night of March 2, 2016, the Complainant was wearing some sort of knotted string or rope belt—perhaps best described as a sash—and, furthermore, that this knotted sash required the efforts of both the Complainant and the SM to untie.

[196] I confirm that a finding of credibility on a single point in the evidence, in favour of one witness, does not necessarily mean that the credibility ascribed to that witness is the same with respect to all other elements in the case. I am very mindful of the guidance contained in the previously cited reasons of Justice Watt in *Clark* (paragraph 42) that, as a trier of fact, I may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings, and credibility is not an all or nothing proposition.

[197] But in this instance, the account of sexual assault of the Complainant contained in Particular 4 cannot be accepted as reliable, nor can it be found established on a balance of probabilities, when I have found that a sash was present on the Complainant's jeans and required joint, consensual efforts to be undone. Accordingly, given this individual finding, the Conduct Authority has failed to establish on a balance of probabilities the non-consensual vaginal penetration of the Complainant as alleged. There is insufficient clear and convincing evidence and information, as referenced in *McDougall*, to establish the allegation on a balance of probabilities.

The abdominal scar

[198] My finding that the Complainant was wearing a rope or string sash with her jeans on March 2, 2016, is supported by my further findings concerning the SM's observation of the Complainant's abdominal scar.

[199] Based on the Complainant's description of the SM's actions at the time he was purportedly vaginally penetrating her from behind, she was fully clothed but with her pants and underwear lowered and this episode involved three thrusts by the SM that took place over a matter of seconds. I understand the CAR's argument, that during this episode the SM could have inadvertently **touched** the indentation in the middle of the scar described by the Complainant, but I find this possibility very unlikely.

[200] I am not prepared to accept that the placement of the SM's hands, specifically acting as the Complainant described, would readily enable him to touch that scar. I accept that it was a small, "couple of inch" section in the middle of her abdomen that bore the indentation characteristic. But clutching the Complainant from behind, more or less by her hips, would offer no realistic opportunity to touch this middle section. Even if it was somehow touched by the SM while he was, according to the Complainant's account, positioned behind the Complainant committing sexual assault, it is highly unlikely that the SM would have noted this feature in the

course of the three alleged thrusts, never mind later indicate an identifying feature existed on the Complainant's abdomen, to wit, a "c-section" scar.

[201] From the information presented to me, including the Complainant's testimony on this specific point, I understand the SM's alleged buttock groping and inner thigh touching to have taken place while the Complainant's jeans **were still up**. With the scar located below the belt line of her jeans (according to the Complainant, four or five inches below her belly button), I find that the scar would certainly not be observed, nor touched, at this alleged initial stage.

[202] The SM, in his testimony, confirmed that he saw the scar during the time the Complainant was disrobed and engaged in consensual activity with him. I do not find that his admission, that he might have touched the scar while engaged in **his version** of consensual activity, in any way establishes that he touched it during any non-consensual thrusting episode relied upon in Particular 4.

[203] I find the testimony of the SM, concerning his observation of the scar, to have the same qualities creating a ring of truth that I noted when he testified about the existence of the knotted sash that he and the Complainant jointly acted to untie. In particular, I find the following portion of his testimony, trying to describe the scar's appearance, to be worded in a such a fashion that, in my opinion, makes fabrication extremely unlikely (Transcript, November 6, 2018, pages 217-218):

> So when I was kissing her stomach I noticed – she's very tanned and this isn't what it was, but it had -- it was a small couple inch scar just below her waistline. And I know some people when they're doing fake tanning will place, like, an object on them to tan a mark in. And my recollection was that it had this distinct like -- it looked like it wasn't as tanned, like, it might have been purposely done, but it was this line just below the waistline that I could see when I took her jeans and her underwear off.

[204] Moreover, in the materials (Investigation Report, page 23 of 559), the following entry by the APD investigator can be found:

> In addition to the document of intended evidence of [the SM], two follow up questions were posed to [the SM], through counsel, resulting from conversation from [the Complainant]. [The Complainant] indicated in her second interview (and in a conversation with Det. [B.] after the interview) that [the SM] had not observed her naked, nor taken her shirt off, and that [the SM] would only have had the opportunity to see [the Complainant] unclothed from behind based on the mechanism of the described assault. **[The Complainant] was clear that [the SM] would not have observed her c-section scar on her lower abdomen based on how he assaulted her**. As a result of these follow up questions (relating to physical characteristics and or marks observed on [the Complainant]) [the SM] described, through counsel, that [the Complainant] had a scar near her waist line below the belly button and having large areolas. These observations suggest that [the SM] observed [the Complainant] naked from the front and that the duration of the observation period was long enough to observe the scar, and recognize it as such.
>
> [Emphasis added]

[205] This is part of the information contained in the Conduct Authority's documentary investigative materials. It was never put to the Complainant in her testimony by either representative. Nevertheless, the SM is entitled to rely on the accuracy of information contained in those materials, here gathered by an independent investigator, where it serves an exculpatory function and is not contradicted by other evidence or information.

[206] The most reasonable interpretation of this reproduced entry is that, when asked by an investigator, the SM, through his counsel, indicated that he observed two distinguishing features of the Complainant's body while she was disrobed, one of which was her abdominal scar. The SM is also entitled to rely on the comment from the Complainant, recorded as: "[the Complainant] was clear that [the SM] would not have observed her c-section scar on her lower abdomen based on how he assaulted her." (I note the Complainant's testimony that the scar resulted from an abdominoplasty, not a caesarian section procedure, but I do not believe anything turns on this point.)

[207] Based on all of the foregoing, I find that the Conduct Authority has not established on a balance of probabilities that any sexual assault occurred as the Complainant testified and as

alleged under Particular 4. I find it more likely that, on March 2, 2016, the SM observed the Complainant's abdominal scar while she was voluntarily disrobed and engaged in sexual activity with the SM that permitted her lower abdomen to be observed. This observation precludes the version of events asserted by the Complainant as identified in Particular 4.

[208] The specific body observation of the Complainant provided by the SM to the APD investigator offers more than an exculpatory suggestion. I find on a balance of probabilities that the SM's abdominal observation establishes that he saw the Complainant naked, below the waist, **from the front** and that the duration of the observation period was long enough to observe her scar, and recognize it as such.

Other arguments raised in submissions

[209] It was apparent that the SM was significantly taller and physically stronger than the Complainant at the hotel room. Nevertheless, I do not accept the CAR's argument that the "bad back" condition claimed by the SM, if it caused him to stop his performance of intercourse with the Complainant as he testified, would provide the opportunity for someone of smaller stature such as the Complainant to push away the SM, as she described that action, and to get away.

[210] Contrary to the CAR's specific submissions, I do not consider the SM's description of his location on the bed when viewing the pursuit video as implausible or undermining his credibility, nor do I find his admission that he can "be a cuddler at times" to undermine his credibility, nor to enhance the Complainant's credibility. He directly denied requesting a cuddle from the Complainant (Transcript, November 6, 2018, at page 309).

[211] The Complainant testified that she did no more than sit near the corner of the bed closest to the door while watching the pursuit video. However, I noted how the SM took care to explain that, in his recollection, the Complainant did not remain perched in a sitting position as she had testified. He described that the Complainant was lying on the right side of the bed (as viewed

from the door) with her face relatively close to the screen of the laptop at the **foot of the bed**, and with her feet located at the **headboard** end of the bed.

[212] If the SM's account of their interaction after the video was contrived, and thus included a false progression from consensual face to face kissing on the bed, one would have rationally expected his account to put the two of them with their heads **both at the headboard end of the bed** during the video watching. If his post-video account was fabricated, it is contrary to common sense and logic for the SM to have located the Complainant as he did in this portion of his testimony. Placing the Complainant as lying at his side, her head beside his head, would have been a much simpler lie, and more supportive of later consensual kissing, yet the SM carefully explained how the Complainant had watched the video while lying with her feet at the same end of the bed as his head.

[213] As I trust that I have made absolutely clear earlier in this written decision, voluntarily lying on a bed does not constitute consent to sexual intercourse. But in accepting that the Complainant did position herself in a lying position as the SM took care to clarify, I must view the state of unease or wariness claimed by the Complainant (even before entering the room) with significant circumspection, thus undermining her credibility.

[214] I do not find the SM giving his business card to the Complainant at the lounge to assist any aspect of his answer to the allegation.

[215] I accept that the Complainant's purse was with her at the lounge on March 2, 2016, and was with her the next day. I do not find the exact whereabouts of the Complainant's purse to affect my view of the case, although if, as the Complainant testified, she pulled up her underpants and jeans while fleeing from the room, having her purse in one of her hands may, at a minimum, have complicated this action. If the Complainant intended to provide the SM with a cursory hug before her departure, it would have been reasonable for her to have her purse in hand at the time the hug began. The Complainant testified to using both of her hands to fend off the SM's groping and touching actions, without any reference to her purse.

Suggestions concerning inquisitorial powers

[216] It should also be noted that the MR's closing oral submissions did not advance the suggestion made in his email of October 29, 2018, that "as an inquisitorial board you do have available the power to call your own witnesses if you think the anticipated evidence will be insufficient to base your decision upon". The impetus for the MR's email suggestion appears to be section 17.8 of the *Conduct Board Guidebook*:

> A conduct board may make a decision solely on the basis of the investigation report and supporting information if it is satisfied that it has sufficient evidence to make a determination on [*sic*] balance of probabilities without requiring further information.

[217] I note that since my oral decision in the SM's matter was delivered on November 28, 2018, the final written decision in *Conduct Authority for "K" Division and Cst. Phillips*, 2018 RCAD 20 [*Phillips*], has been issued. At paragraphs 146 – 147 of *Phillips,* the confusion that persists about a purportedly "inquisitorial" board function is addressed. The conduct board process should not be viewed as an inquisitorial process, as such a process would place responsibility for conduct of the file on the conduct board, where (among other things) the board would be expected to seek out evidence where a case, as presented by the conduct authority, is not sufficient to establish misconduct.

[218] Clearly, conduct proceedings are now "board-led", but in my view, that does not mean that a board may, as the MR appeared to suggest, "call its own witnesses" if the filed materials are insufficient. Subject to an exception that might be justified in the specific circumstances of a matter, I believe approval by a conduct board of a witness requested by the parties should be granted only where testimony is not only required in order to resolve any serious or significant conflict in the evidence, but is also material and necessary in resolving that conflict (see *Conduct Board Guidebook,* section 29.1). **Conflicting** evidence or information should not be confused with **insufficient** evidence or information.

CONCLUSION

[219] Accordingly, I find the SM's contravention of section 7.1 of the Code of Conduct, as alleged by Allegation 1 in the NOCH, is not established.

[220] This written decision issued on today's date, February 18, 2019, constitutes the written decision required to be served on each party under subsection 25(3) of the *CSO (Conduct).* It may be appealed to the Commissioner by filing a statement of appeal within 14 days of the service of this decision on the SM (section 45.11 of the *RCMP Act*; section 22 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-293).

[221] The SM is hereby given notice that this final written decision is available to the public, and the SM will not be notified of any request for a copy of this decision.

John A. McKinlay

Conduct Board