

**IN THE MATTER OF THE WATER POLO CANADA CODE OF CONDUCT
WITH DISCIPLINARY PROCEDURE**

AND

IN THE MATTER OF A HEARING CONCERNING

JUSTIN MITCHELL

RESPONDENT

Hearing Panel:

Irene Schell (chair)
Angus M. Gunn QC
Michael J. Hewitt

Hearing Dates: 24, 25, 26 September 2018
Closing Submissions: 30 October 2018

**Canadian Water Polo Association Inc., operating under the trade name Water Polo
Canada (“WPC”)**

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Not in attendance and not represented by Counsel

HEARING DECISION

1. Introduction

1. The Canadian Water Polo Association Inc., operating under the trade name Water Polo Canada (“WPC”), has initiated a disciplinary procedure under its *Code of Conduct with Disciplinary Procedure* (the “Code”)¹ following receipt of complaints (the “Complaints”) pertaining to the conduct of the Respondent Justin Mitchell, a water polo coach in British Columbia.

2. The Hearing Panel presided over a complaint process through which WPC has tendered evidence on seven allegations it particularized against the Respondent. They are set out below.

¹ Exhibit 3 (Affidavit No. 1 of Martin Goulet (08 June 2016), Exhibit “M”).

3. Initially, the Respondent participated in a preliminary process in which he requested that the Hearing Panel rule on his objection to the WPC’s assertion of disciplinary jurisdiction over him under the Code. After written submissions by the parties – which were made in a process approved and participated in by both parties – on 27 July 2018 the Hearing Panel informed the parties that it had concluded that WPC had jurisdiction to take this matter forward to a Hearing Panel.

4. Thereafter, the Respondent largely declined to participate further in the process. He did not attend or seek to attend any of the hearings of the Complaints, although he was given notice of their substance and an opportunity to attend and be heard in respect of them. He also was provided with ongoing access to online materials filed in relation to the Complaints.

5. Subsequently, the Hearing Panel proceeded with three days of evidence and argument, all of which was put forward by counsel for WPC. The Respondent did not participate in that process or respond to or with any evidence or argument, although he submitted a letter of objection after the hearings were complete.

6. Based on all of the evidence and argument that it received, the Hearing Panel has determined that the Respondent committed a number of infractions under the Code, some of a very serious nature, and that sanctions for that misconduct are warranted.

7. These reasons set out the Hearing Panel’s determinations with respect to the decision to proceed with the hearing of the complaint in the Respondent’s absence, and on the merits of the Complaints themselves, including the disciplinary sanctions that will be imposed.

8. The Hearing Panel’s joint reasons for decision are structured as follows:

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2. The Parties

9. WPC is a not-for-profit corporation under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23 (the “*CNCA*”).² WPC describes itself as a national umbrella organization for the administration of the sport of water polo across Canada.

10. The Respondent is an experienced water polo coach with the Fraser Valley Water Polo Club (“*FVWPC*”), a local water polo club in British Columbia, at most or all times material to the Complaints. During pre-hearing conference calls and communications, the Respondent informed the Hearing Panel that he was under a suspension.

² Exhibit 3 (Affidavit No. 1 of Martin Goulet (08 June 2018), Exhibit “A”, WPC Corporate Records Search dated 23 November 2017).

3. The Regulatory Framework

(a) WPC Organizational Structure

11. An understanding of WPC's organizational structure assists in assessing the scope of WPC's disciplinary jurisdiction. The uncontradicted evidence before us identifies that structure as follows.

12. WPC generally operates at three levels:

- (a) the national level, consisting of a series of programs and services;
- (b) the provincial branches, referred to as "Provincial Sport Organizations" (or PSOs), which regulate water polo within their respective jurisdictions, govern the province-wide development of water polo, and administer various provincial programs and membership services; and
- (c) the Clubs, which regulate and develop water polo within their respective club and administer the associated programs and services offered at the club level.³

(b) WPC Code of Conduct

13. For many years WPC had different policies dealing with such subjects as discipline and harassment. More recently, the trend has been towards consolidated policies that deal comprehensively with all disciplinary and harassment matters. On 17 October 2015, therefore, WPC adopted the current Code, which now addresses all disciplinary and harassment issues involving WPC.

14. According to the Code's Preamble, WPC developed the Code "in order to protect and guide individuals associated with WPC." The first part of the document is a Code of Conduct that outlines the expected behaviour for all individuals associated with WPC. The second part of the document is a Disciplinary Procedure that describes how individuals and groups can easily submit a complaint about the conduct of individuals associated with WPC. Complaints will be handled "fairly, quickly, and without bias."

15. Section 1 of the Code provides definitions for the terms "Minor Infraction" and "Major Infraction." A "Minor Infraction" is defined to mean "a potential minor violation of WPC's Code of Conduct, as determined by the Case Manager, which can typically be handled by a person with authority. Minor Infraction is further defined in this document along with examples." A "Major Infraction" is defined to mean "a potential major violation of WPC's Code of Conduct, as determined by the Case Manager, which is typically handled by a formal hearing and a decision by a Discipline Panel. Major Infraction is further defined in this document along with examples."

³ Exhibit 4A (Martin Goulet Book of Documents, Volume 2, Tab 71, Affidavit #1 of Heather Birenbaum (08 June 2016), para. 5); Exhibit 3 (Affidavit #1 of Martin Goulet (08 June 2018), para. 7).

16. In section 5, the Code states that it “applies to Registrants’ conduct during WPC business, activities, and events including, but not limited to, competitions, tournaments, games, matches, practices, tryouts, training camps, and travel associated with WPC.” Under section 6, the Code “also applies to Registrants’ conduct outside of WPC business, activities, and events when such conduct adversely affects relationships within WPC (and its work and sporting environment) or when it is detrimental, or perceived to be detrimental, to the image and reputation of WPC. Such applicability will be determined by WPC at its sole discretion.” The Hearing Panel addressed the Code’s definition of “Registrant” in detail in its Decision on Jurisdiction dated 17 September 2019.

17. Section 9 of the Code makes all Registrants “responsible for maintaining and enhancing the dignity and self-esteem of Registrants and other individuals by:

- a) Demonstrating respect to individuals regardless of body type, physical characteristics, athletic ability, age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, socioeconomic status, gender identity, gender expression, sex, and sexual orientation
- b) Focusing comments or criticism appropriately and avoiding public criticism of athletes, coaches, officials, organizers, volunteers, employees, or Registrants
- c) Consistently demonstrating a spirit of sportsmanship, sport leadership, and ethical conduct
- d) Acting, when appropriate, to correct or prevent practices that are unjustly discriminatory
- e) Consistently treating individuals fairly and reasonably
- f) Ensuring adherence to the rules of Water Polo and the spirit of those rules”

18. Section 10 of the Code states in part that “[a]ll Registrants are responsible for refraining from behaviour that can be considered **harassment, workplace harassment, workplace violence, and sexual harassment.**” (bolding in original)

19. Section 11 defines “Harassment” to mean “comment or conduct directed towards an individual or group – both face-to-face and electronically – which is offensive, abusive, racist, sexist, degrading, or malicious. Types of behaviour that constitute harassment include, but are not limited to:

- a) Written or verbal abuse, threats, or outbursts
- b) The display of visual material which is offensive or which one ought to know is offensive in the circumstances
- c) Unwelcome remarks, jokes, comments, innuendo, or taunts
- d) Leering or other suggestive or obscene gestures
- e) Condescending or patronizing behaviour which is intended to undermine self-esteem, diminish performance or adversely affect working conditions

-
- f) Practical jokes which cause awkwardness or embarrassment, endanger a person's safety, or negatively affect performance
 - g) Any form of bullying
 - h) Any form of hazing where hazing is defined as *“Any potentially humiliating, degrading, abusive, or dangerous activity expected of a junior-ranking athlete by a more senior teammate, which does not contribute to either athlete's positive development, but is required to be accepted as part of a team, regardless of the junior-ranking athlete's willingness to participate. This includes, but is not limited to, any activity, no matter how traditional or seemingly benign, that sets apart or alienates any teammate based on class, number of years on the team, or athletic ability.”*
 - i) Unwanted physical contact including, but not limited to, touching, petting, pinching, or kissing
 - j) Unwelcome sexual flirtations, advances, requests, or invitations
 - k) Physical or sexual assault
 - l) Behaviours such as those described above that are not directed towards a specific individual or group but have the same effect of creating a negative or hostile environment
 - m) Retaliation or threats of retaliation against an individual who reports harassment to WPC.” (Italics in original)

20. Section 14 defines “Sexual Harassment” to mean “unwelcome sexual comments and sexual advances, requests for sexual favours, or conduct of a sexual nature, either face-to-face or electronically. Types of behaviour that constitute sexual harassment include, but are not limited to:

- a) Sexist jokes
- b) Display of sexually offensive material
- c) Sexually degrading words used to describe a person
- d) Inquiries or comments about a person's sex life
- e) Unwelcome sexual flirtations, advances, or propositions
- f) Persistent unwanted contact”

21. Section 17 is titled “Inappropriate Behaviour” and states in relevant part that “Registrants must avoid behaviour considered to be inappropriate. Particularly, Registrants must:

- a) Refrain from the use of power or authority in an attempt to coerce another person to engage in inappropriate activities;

.....

As well, the registrant is responsible for the following:

-
- e) Adhere to all federal, provincial, municipal and host country laws.

.....

- g) If over the age of majority in the location of the WPC sanctioned activity (i.e. competition, training camp), there will be no supplying of alcohol to minors;”

22. Section 19 deals specifically with the topic of “Coaches” and states in relevant part that “In addition to sections 9 through 17 above, WPC’s Coaches have many additional responsibilities. The coach-athlete relationship is a privileged one and plays a critical role in the person, sport, and athletic development of the athlete. Coaches must understand and respect the inherent power imbalance that exists in this relationship and must be extremely careful not to abuse it. Coaches will

.....

- b) Prepare athletes systematically and progressively, using appropriate time frames and monitoring physical and psychological adjustments while refraining from using training methods or techniques that may harm athletes

.....

- f) Act in the best interest of the athlete’s development as a whole person

.....

- j) Under no circumstances provide, promote, or condone the use of drugs (other than properly prescribed medications) or performance-enhancing substances and, in the case of minors, alcohol and/or tobacco

.....

- o) Use inoffensive language, taking into account the audience being addressed.”

23. Section 36 amplifies on the definition of “Minor Infractions” and states that “Minor infractions are **single incidents** of failing to achieve expected standards of conduct that generally do not result in harm to others, WPC, or the sport of Water Polo. Examples of minor infractions can include, but are not limited to, a single incident of:

- a) Disrespectful, offensive, abusive, racist, or sexist comments or behaviour
- b) Disrespectful conduct such as outbursts of anger or argument
- c) Conduct contrary to the values of WPC
- d) Being late for, or absent from, WPC events and activities at which attendance is expected or required
- e) Non-compliance with WPC’s policies, procedures, rules, or regulations
- f) Minor violations of WPC’s *Code of Conduct*” (bolding in original)

24. Section 41 amplifies on the definition of “Major Infractions” and states in relevant part that “Major infractions are instances of failing to achieve the expected standards of conduct that result, or have the potential to result, in harm to other persons, to WPC, or to the sport of Water Polo. Examples of major infractions include, but are not limited to:

- a) Repeated minor infractions
- b) Any incident of hazing
- c) Incidents of physical abuse
- d) Behaviour that constitutes harassment, sexual harassment, or sexual misconduct
- e) Pranks, jokes, or other activities that endanger the safety of others
- f) Conduct that intentionally interferes with a competition or with any athlete’s preparation for a competition
- g) Conduct that intentionally damages WPC’s image, credibility, or reputation
- h) Disregard for WPC’s bylaws, policies, rules, and regulations
- i) Major or repeated violations of WPC’s *Code of Conduct*

.....

- k) Abusive use of alcohol, any use or possession of alcohol by minors, or use or possession of illicit drugs and narcotics

.....

(c) **Other Codes of Conduct**

25. In addition to the Code adopted nationally by WPC, provincial and local water polo organizations also typically had their own counterpart codes. In British Columbia, for example, at the times relevant to the Complaints:

- (a) FVWPC bylaw 2.9 required every Member, Officer and Athlete to execute and comply with FVWPC’s Code of Conduct; and
- (b) BC Water Polo had a Coaches’ Code of Conduct.

26. Although to some extent these provincial and local codes addressed the conduct alleged in the Complaints, as will be seen ultimately the only disciplinary jurisdiction asserted over the Respondent was that of WPC under its national Code.

4. The Complaints

27. WPC received the Complaints in the fall of 2016 and the fall of 2017. At that time, for a variety of reasons, neither BC Water Polo nor FVWPC was in a position to handle the

Complaints under their respective codes of conduct. As a result, the Complaints caused WPC to initiate disciplinary proceedings under its national Code.

28. Given the nature of the Complaints, WPC considered mediation to be inappropriate and so the matter proceeded to a case manager.

29. The Hearing Panel required that WPC provide it with written particulars of the specific allegations to be pursued at the hearing, and to provide that written notice to the Respondent. WPC provided the Respondent with that notice on 16 December 2016 (in respect of the first of the Complaints) and on 23 January 2018 (in respect of the second and third Complaints).

30. On the first day of the merits hearing, though, WPC sought to proceed on the basis of allegations that had been revised to some extent from the detailed particulars already provided to the Respondent. The Hearing Panel refused to allow WPC to proceed on the basis of any particulars or Complaints not contained in the notices provided to the Respondent.

31. WPC asked the Hearing Panel to consider providing its decision in a manner that would protect the anonymity of the athletes who provided evidence in this proceeding, given that the decision could become public, in whole or part. Many of those individuals were minors at the time of the events described in the Complaints, and some of them still were. Many of the athletes are still involved in the sport and the larger water polo community. The Hearing Panel considered these to be legitimate reasons to protect the anonymity of the testifying athletes. The Hearing Panel also considered that there would be no prejudice to the Respondent from such anonymity, since he had access to all of the exhibits tendered at the hearing as well as a transcript of the hearing itself.

32. The Hearing Panel will therefore throughout these reasons refer to the testifying athletes via pseudonym initials, in the alphabetical sequence that those athletes' names appear in the Complaints.

33. WPC elected to present evidence and argument at the merits hearing with respect to allegations particularized in seven Complaints:

1. At various times between approximately September 2013 and May 2016 Justin Mitchell sexually harassed A.B., an athlete WPC Registrant he coached, contrary to sections 10 and 14 of the *Code of Conduct with Disciplinary Procedure*. This conduct constitutes a major infraction pursuant to section 41(d) of the *Code of Conduct with Disciplinary Procedure*.
2. At various times between approximately September 2013 and May 2016 Justin Mitchell harassed A.B. and C.D., athlete WPC Registrants he coached, by making statements that he knew or reasonably ought to have known would cause those persons to be humiliated or intimidated, contrary to sections 10 and 11 of the *Code of Conduct with Disciplinary Procedure*. This conduct constitutes a major infraction pursuant to section 41(d) of the *Code of Conduct with Disciplinary Procedure*.

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3. In or around March 2015, Justin Mitchell condoned the use of alcohol of underage athlete WPC Registrants he coached, contrary to section 19(j) of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to section 41(d), (h) and (i) of the Code of Conduct with Disciplinary Procedure.
 4. On or around November 20, 2017, Justin Mitchell engaged in inappropriate filming of E.F., a WPC athlete registrant, contrary to his obligations as a coach under s. 19(b) and (f) of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to s. 41(f), (g) and (h) of the Code of Conduct with Disciplinary Procedure.
 5. On or around May 19, 2016, Justin Mitchell harassed E.F., a WPC athlete registrant, contrary to s. 11 of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to s. 41(d) of the Code of Conduct with Disciplinary Procedure.
 6. On or around November 19, 2017, Justin Mitchell harassed E.F., a WPC athlete registrant, contrary to s. 11 of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to s. 41(d) of the Code of Conduct with Disciplinary Procedure.
 7. At various times in 2017, Justin Mitchell harassed G.H., a WPC athlete registrant, contrary to s. 11 of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to s. 41(d) of the Code of Conduct with Disciplinary Procedure.
34. The Hearing Panel considered no other allegations.

5. Proceedings to Date

(a) Code's Disciplinary Procedure

35. WPC has proceeded from the outset under the Code. It contains a set of rules applicable to the conduct of "Registrants", including obligations pertaining to discrimination, harassment, and violence. Section 19 specifically pertains to the conduct expected of coaches.

36. The Code's disciplinary procedure is set out beginning at section 22. As noted above, there are different designations for "minor infractions" and "major infractions" and WPC alleges that the Complaints fall into the latter category. The procedure provides that major infractions will be handled using the "Hearing Procedure" set out in sections 45 to 55, inclusive. That procedure includes appointment by a Case Manager of a "Discipline Panel", which will consist of a single adjudicator, to hear the complaint. Section 46 provides that "[i]n extraordinary circumstances, and at the discretion of the Case Manager, a Panel of three persons may be appointed to hear the complaint." The Case Manager followed the latter path in this case.

(b) Appointment of Hearing Panel

37. After the WPC notified the Respondent of its intention to proceed with the allegations and Complaints pursuant to the three-person Panel process prescribed by section 46 of the Code, an initial panel of three adjudicators (not the present panel) was appointed. The previous panel was unable to continue, and the present panel was appointed in its place, with the Chair of the Hearing Panel remaining the same.

38. Counsel for the WPC and counsel for the Respondent, at the time of the appointment of the present Hearing Panel, were both consulted in respect of the appointment of the reconstituted Hearing Panel. No objection was taken with respect to the validity of the reconstituted Hearing Panel. Rather, the parties have both recognized the Hearing Panel's authority to decide the Jurisdictional Issue that they have referred to the Hearing Panel.

(c) Preliminary Procedural Matters

39. A number of procedural events involving both parties took place before the application to determine the Jurisdictional Issue. Although most do not bear upon the Jurisdictional Issue, we will summarize those events in these reasons simply to document them.

40. The process engaged by WPC commenced as early as 2016 and, in November 2017, WPC gave notice to the Respondent that it was exercising jurisdiction to investigate the Complaints. Shortly after the present Hearing Panel was convened, at an initial prehearing conference convened to set procedure and schedule steps in the adjudication process, the Respondent raised the Jurisdictional Issue. He did so before any meaningful procedural steps had been taken before this Hearing Panel, and even before the adoption of a set of rules to govern the process.

41. The parties agreed to refer the Jurisdictional Issue to the Hearing Panel for adjudication. They agreed that that determination would be made before the matter proceeded any further, including before a formal complaint or charge had been articulated by WPC and before the parties adopted any procedural framework for the remainder of the process, other than the reserving of hearing dates to be used if the matter ultimately proceeded further.

42. The dates of the merits hearing were set in consultation with all parties. The parties agreed to set aside 24-28 September 2018 for the merits hearing to be held in the Greater Vancouver area. These dates were set on 16 April 2018⁴ on a conference call where WPC, the Respondent, and the Hearing Panel members were present and/or represented.

43. Following receipt of written submissions on the jurisdictional issue, on 27 July 2018 the Hearing Panel informed the parties that it had reviewed those submissions and supporting evidence, and had concluded that WPC had jurisdiction to take this matter forward to a Hearing Panel. The Hearing Panel informed the parties that, in order to preserve the hearing dates previously set for week of 24 September 2018, it wished to communicate that result so that both parties could move forward with preparations for the hearing. The Hearing Panel indicated that it

⁴ Exhibit 4B (Martin Goulet Book of Documents, Volume 2), Tab 62.

would issue its reasons for this decision in due course. Those reasons were subsequently issued on 17 September 2018 and determined that:

- (a) the Respondent was subject to WPC's disciplinary jurisdiction under the Code in respect of the Complaints;
- (b) the Hearing Panel had jurisdiction under the Code to hear and determine WPC's allegations that the Respondent violated the By-law and WPC's policies; and
- (c) to the extent that WPC's allegations were subsequently determined to be proven, the Hearing Panel had jurisdiction to order an appropriate sanction in respect of them.

The Respondent's objection to jurisdiction was dismissed, and the Hearing Panel reserved on the issue of costs in respect of the jurisdictional decision.

44. The Respondent did not participate in a scheduled pre-hearing conference call held on 18 September 2018, and the Hearing Panel is unaware of him participating in any aspect of this process thereafter.

45. As a result of the Respondent's non-participation, the Hearing Panel asked that WPC be prepared to provide evidence and submissions that detailed the steps taken to engage the Respondent in the proceeding, should he be neither present nor represented at the merits hearing. This information was to be presented at the start of the hearing.

46. The Respondent did not attend a pre-hearing conference held on 18 September 2018.

(d) Proceeding in Respondent's Absence

47. At the commencement of the merits hearing on 24 September 2018, the Respondent was not present or represented. WPC was, therefore, directed to provide evidence, argument, and authorities to the Hearing Panel detailing how the Respondent has been engaged in the process, and whether it was appropriate to proceed with the merits hearing in his absence. This presentation was to be done at the start of the merits hearing and the Hearing Panel would render a decision as to whether the merits hearing would proceed without the Respondent.

48. When the Respondent failed to attend the first scheduled date for the merits hearing of the Complaints, notwithstanding his participation in scheduling that date and subsequent indication after the jurisdictional ruling that he would not attend the substantive hearing, it became necessary for the Hearing Panel to determine whether it was appropriate to hear and determine the Complaints by conducting an evidentiary hearing in his absence. The Hearing Panel decided at that time to proceed, and to issue reasons for that procedural ruling as part of its final decision on the merits. Section 48 of the Code provides that: "If a Party chooses not to participate in the hearing, the hearing may still proceed."

49. WPC supported its request to proceed in the Respondent's absence by establishing the following facts through the affidavit and oral testimony of Mr. Martin Goulet, WPC's Executive Director since November 2013:

- (a) the Respondent was informed of the allegations against him and was engaged in the process directly and/or through representation beginning in November 2016.⁵
- (b) the Respondent participated in the process through to 11 September 2018, either directly or via legal counsel.
- (c) the dates of the merits hearing were set well in advance and the Respondent was on the conference call when those dates were set.
- (d) the Respondent received notice of the dates of the merits hearing.⁶
- (e) the Respondent knew that he was entitled to attend the merits hearing but was not required to so.⁷
- (f) the Respondent was aware that WPC intended to proceed if he chose not to participate in the merits hearing.⁸
- (g) the Respondent disputed the Hearing Panel's authority and was not interested in participating in the process or merits hearing.⁹

Some but not all of those facts were known to the Hearing Panel, as they had participated in pre-hearing conferences involving the Respondent and/or his counsel.

50. WPC conceded that the Respondent was owed a duty of fairness but argued that its content was no higher than what is provided by section 475 the *Criminal Code* in situations where an accused person absconds during the course of a trial.¹⁰

51. The fact is that the Respondent was engaged in (or represented in) the proceedings from November 2016 onward. In that regard:

- (a) the jurisdiction decision came down on 27 July 2018¹¹ and as of the commencement of the merits hearing on 24 September 2018 no appeal had been received.

⁵ Exhibit 4A (Martin Goulet Book of Documents, Volume 1), Tab 2.

⁶ Exhibit 4B (Martin Goulet Book of Documents, Volume 2), Tab 83.

⁷ *Supra*, note 1 at section 48.

⁸ Although WPC did not tender evidence at the merits hearing about the Respondent's knowledge as to whether the merits hearing might proceed in his absence, his legal counsel previously had acknowledged that potential in submissions on the jurisdiction issue when he indicated that he had been told by the WPC that "[i]f he chooses not to participate, the hearing will proceed in his absence."

⁹ Exhibit 4A (Martin Goulet Book of Documents, Volume 1), Tab 7; Exhibit 4B (Martin Goulet Book of Documents, Volume 2), Tab 68.

¹⁰ *R. v. Taylor*, 2010 BCCA 58.

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- (b) the Respondent was part of the conference call on 16 April 2018 when the dates of the merits hearing were set.
 - (c) The Respondent noted on the 16 April 2018 conference call that he was having challenges logging into the Case Management Portal. The Case Manager offered administrative support.
 - (d) The Hearing Panel confirmed with the Case Manager that assistance was provided to the Respondent in logging into the portal and that the email address on file is the same as that the email address the Respondent last corresponded with the Case Manager and was used as his login for the Case Management Portal.
 - (e) The Respondent submitted a request via the portal on 11 September 2018, demonstrating that his challenges with access to the portal had been resolved.
 - (f) While correspondence from previous counsel for the Respondent referenced the Respondent's plan to not participate in the proceedings and/or hearing, there was never formal notice of this, other than the Respondent's lack of response or attendance at the hearing.

52. The Hearing Panel determined that:

- (a) the Respondent was not only aware of but also participated in setting the dates of the merits hearing;
- (b) the Respondent was aware of, and afforded, the opportunity to participate in the merits hearing;
- (c) the Respondent was aware that the merits hearing could still continue in his absence; and
- (d) although the Respondent expressed disagreement with the jurisdictional ruling, he took no steps to initiate an appeal of it.

53. The Hearing Panel determined that the Respondent was aware of the dates of the merits hearing, of his entitlement to participate in it, and of the risk that the hearing would proceed in his absence if he declined to participate. The Hearing Panel found that the Respondent voluntarily elected not to attend or participate in the hearing, and that he had ample opportunity to consult with legal counsel on this points. In the circumstances, the Hearing Panel was satisfied that no breach of procedural fairness would arise if the merits hearing proceeded in the Respondent's absence.

¹¹ Exhibit 4B (Martin Goulet Book of Documents, Volume 2), Tab 75.

(e) **Evidentiary Hearing on Merits**

54. The evidentiary phase of the merits hearing occurred on 24, 25, and 26 September 2018. WPC tendered the evidence of six witnesses in support of its case. A further hearing was scheduled for 30 October 2018 for closing arguments. At the conclusion of the hearing on 30 October 2018, the Hearing Panel reserved its decision. Although section 52 of the Code contemplates written decisions being distributed within 14 days after the hearing concludes, section 58 of the Code empowers the Hearing Panel to direct that the timelines outlined by the Code be revised. With WPC's consent, the Hearing Panel directed that the time within which a written decision would be issued in this case would be revised to the date of these reasons.

6. The Evidence

55. Due to the Respondent's non-participation in the merits hearing, the only evidence presented to the Hearing Panel in relation to his background, experience, and conduct was presented by WPC and witnesses called by them in an effort to prove the foundation for the Complaints. The Hearing Panel appreciates that, by definition, all of that evidence was selected in order to prove misconduct. Therefore a complete picture of the Respondent as a coach and a person likely was not presented, and generally speaking no mitigating factors were presented on his behalf.

56. Accordingly, in considering the Respondent's conduct, the Hearing Panel has proceeded with caution when examining the evidence and has placed emphasis on only the most reliable, credible, and untainted evidence presented. Although it is permissible to relax the strict rules of evidence in this context, due to the one-sided nature of the hearing, the Hearing Panel relied on in-person testimony, given under oath, from direct personal observation. No hearsay or prior consistent statement has been relied upon for its truth and no character evidence has been relied upon to establish any propensity to commit the acts alleged. Where the evidence of alleged misconduct was equivocal, inconsistent, uncorroborated, or lacking in specificity, it has been disregarded. In relation to making findings of fact on the merits, the Hearing Panel was presented with and has applied the principles stated in *R. v. Tom*¹² and *Bradshaw v. Stenner*.¹³

(a) **The Respondent Justin Mitchell**

57. Mr. Mitchell was at all material times an adult male. He was a head water polo coach employed by the FVWPC. He also held other responsibilities and designations within the British Columbia water polo community.

58. The Respondent's teams of dedicated young athletes practiced and scrimmaged frequently under his direct supervision. They participated in competitive events locally, and in some cases up to national level of competition. His teams experienced success and were competitive within the relatively small number of comparable clubs that existed at the time.

¹² 2014 BCSC 2660 at para. 6.

¹³ 2010 BCSC 1398 at paras. 186-187.

59. The evidence established a pattern of frequently sexualized, negative, abusive, and sometimes aggressive behavior and language used by the Respondent that did not respect the athlete-coach relationship and did not seem to account for the impact he was having on the young athletes on his teams, but it also established his longstanding commitment and dedication to the sport of water polo and to his club.

60. In that regard, the Respondent is part of a family with a longstanding commitment to and participation in the sport of water polo. There was some evidence that the Respondent's family participated in founding the FVWPC, and considerable evidence that they were involved in influential positions both within the club and the sport more broadly. The role of the Respondent's siblings in the sport was emphasized in the evidence but not significant to the facts found below.

61. Overall, it appears that the Respondent was a dedicated and passionate coach who developed close and often intense relationships with the young athletes whom he coached, most or all of whom looked up to him as an authoritative figure, some in more a positive light than others. Although the hearing was comprised of witnesses who had fallen out of favour with the Respondent at some point, and *vice versa*, their evidence made clear that he also had many followers within the club and wider community who either tacitly accepted or approved of his coaching tactics, and at a minimum tolerated his aggression and profanity toward young athletes as the norm.

62. There was no comprehensive evidence as to the coaching methods and techniques used by the Respondent, or his abilities, and those matters are not particularly relevant to the matters at issue herein. It is clear from the evidence in its totality, however, that his training of athletes focused on endurance and resilience, as well as techniques and strategies of the sport. Not everyone agreed with his methods, but the FVWPC as an organization endorsed them.

63. Water polo, particularly at the level played by the Respondent's teams, is a highly competitive sport that can involve considerable physicality and challenge. Consistent themes in the evidence were that the Respondent:

- pushed his athletes to be successful;
- cared greatly about team and club success in competitive events;
- used force, yelling, and in particular swearing in an effort to improve athlete performance;
- routinely engaged in what he viewed as harmless joking with players; and
- was largely unaware as to whether his aggressive behavior and off-colour sense of humour had adverse effects on the athletes.

64. There was a substantial amount of evidence that the Respondent had a tendency to show preferences for athletes in some instances, and provided more reinforcement to stronger players. The basis upon which he made these preferences seemed to vary from time to time.

65. A consistent theme in the evidence was that the Respondent positioned himself, by his own actions and words, as a person of considerable power and influence in the B.C. water polo community, particularly when buttressed by the reputations of his family members. Whether in fact he yielded such power is not something that can be determined on the evidence presented, but it is clear on the evidence that he portrayed that status in a manner that was believed by the teenage athletes in his club, and that this perception influenced the athletes' behavior. In some cases, the athletes' perception that the Respondent could affect their position in the sport manifested itself in their fear of being seen to take a stand against the Respondent in any way.

66. Again, from the evidence given by his detractors, it seems likely that the Respondent's supporters might comment on positive influences that he had on athletes, and benefits they achieved through his efforts. No such person was brought forward to testify, though, and the Hearing Panel is therefore left with a void in that respect.

67. The Respondent also involved himself on a social level with the lives and activities of the male and female teenagers under his care, in a manner that was sometimes considered invasive by the teens, and which may have been welcome or considered humorous by some others. Some of that conduct was sexual in nature and some if it was manipulative and petulant. Virtually all of the behavior that is found below to have constituted harassment was presented by the Respondent as if it were entirely acceptable adult behavior toward teens.

68. A remarkable thread that tracked through the evidence of many of the young witnesses was that the Respondent's behavior, which the witnesses clearly viewed as aggressive to the point of being offensive, was known in large part to other adults in positions of authority, including other coaches, parent observers, and association board members. Although the sexual behavior toward females was well concealed, the abusive yelling and swearing that the athletes described as being common at practices seems to have been observable to anyone within earshot of the pool. The fact that such notorious conduct went almost entirely unchecked is difficult to reconcile, even with the explanation of power imbalance that was frequently described. Thus, the apparent inaction by FVWPC adults against inappropriate behavior by a person in authority provides another reason for scrutiny of the youthful witnesses' testimony, corroboration, and testing of the events alleged against common sense, to protect against any possible fabrication or exaggeration.

69. Along the same lines, there was a glaring absence of testimony from other adults to corroborate the assertions of the young adult witnesses, who described emotional events that occurred during their teens. Although that factor did not necessarily undermine the credibility of the younger witnesses, who generally speaking presented as credible and thoughtful young adults, and although it may instead have reflected a choice by WPC to focus on those who were directly affected by the misconduct, the absence of such corroboration does leave room for an inference to be drawn either that numerous adults turned a blind eye to outrageous behaviour or lacked the courage to stand up for the children in the circumstances. Absent more evidence on that point, the Hearing Panel does not accept the suggestion that the Respondent's family so intimidated the water polo community that no adult capable of supporting the complaints, other than one, would be willing or able to testify.

70. As indicated, the Hearing Panel does not doubt that the Respondent may have made other significant contributions to the club and the sport, and demonstrated other positive qualities that were not put into evidence. Indeed, his tenure and position with the club suggest that was the case. Accordingly, although it is arguable that an adverse inference should be drawn from the Respondent's failure to testify at the hearing, and from the absence of any excuse or explanation for the misconduct that is described below, no such inference has been drawn in the circumstances.

71. Equally, the Hearing Panel has placed no emphasis on the Respondent's pre-hearing denials of the allegations against him, except in consistently requiring WPC to tender convincing evidence before concluding on balance that any alleged event occurred. Specifically, the standard of proof set out in *H. (F.) v. McDougall*¹⁴ was applied.

(b) **Evidence Adduced by WPC**

72. WPC presented testimony from six witnesses in respect of the Respondent's alleged violations of the Code. The evidence presented by those witnesses in direct examination by WPC and in answer to questions from the Hearing Panel is summarized below.

(i) *C.D.*

73. WPC's first witness was C.D., an athlete playing with FVWPC from 2013 when she was 12 until June 2016 when she was 15. She outlined:

- (a) that the Respondent was her coach at FVWPC;
- (b) that she learned early on in her time at FVWPC that she had to get used to the Respondent's behaviour, which would switch between yelling or swearing at her and joking with her;
- (c) that she often dreaded going to practice, and started to hate water polo;
- (d) that the Respondent's behaviour would often make her, and many of the female athletes cry;
- (e) that as she got older, the Respondent's comments became more sexual in nature, toward her and others, including parents, using terms such as "MILF" ("Mom I'd Like to Fuck") about other players' mothers;
- (f) another example of the Respondent's sexualized comments was his telling the players that they all had really nice bodies except for one whom he described as "two raisins on a cutting board";

¹⁴ 2008 SCC 53.

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- (g) that the Respondent would tell the girls to “get their tits out of the water” or “tits to the ground” when doing some of the exercises;
 - (h) that the Respondent would comment on the girls’ bathing suits and on one occasion in 2016 he told them to “fix their bathing suits” (telling them to pull their “asses out of their suits” in reference to their bathing suit “wedgies”, or when the tops of their bathing suits shifted during play to reveal their breasts) because it “made him uncomfortable and distracted him”;
 - (i) that the sexual comments of the Respondent made her feel uncomfortable but she often felt pressure to laugh in order to not upset the Respondent;
 - (j) that the Respondent developed an obsession with A.B., making sexual comments to her, being active on social media with her, and commenting on a hickey on her neck which led to her harassment by other teammates;
 - (k) that the Respondent promised the players “a bathtub full of alcohol” if they won a particular competition;
 - (l) that the Respondent often used vulgar language and swore at and around the players; and
 - (m) that the Respondent yelled at her on several occasions, often commenting on her performance or training, in front of other players, embarrassing her and causing her stress.¹⁵
 - (ii) *A.B.*

74. WPC’s second witness was A.B., who played with FVWPC from 2013 when she was 14 until 2016 as she was turning 17. She outlined:

- (a) that the Respondent made it clear to her that he could help or hinder her advancements in the sport and selection for scholarships;
- (b) that the Respondent regularly yelled and swore at her and the other female players;
- (c) that the Respondent regularly made sexual remarks toward her and the other female players;
- (d) that the Respondent would sometimes comment favourably on the girls’ bodies, and when referring to their chests would instead use the word “titties”;

¹⁵ See C.D.’s oral evidence and Exhibit 1 (C.D. Book of Documents, Tabs 1 to 4).

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- (e) that the Respondent, without her permission, touched her upper thigh on multiple occasions in 2013 while she was doing leg swings during dry land training before practice;
 - (f) that the Respondent would at times give her “side hugs”, sometimes while he too was in a bathing suit;
 - (g) that the Respondent, without her permission, tickled her stomach during dry land training before practice in Chilliwack in 2015 and also once at the Fleetwood pool;
 - (h) that the Respondent often paid her special attention and that it was a joke amongst her teammates that he had a crush on her;
 - (i) that the Respondent commented on her body on more than one occasion both in person and in electronic communication;
 - (j) on one occasion the Respondent also spoke about how other men were likely reacting to A.B.’s body when he referred to her as a “jet fucker” after she exited the hot tub and suggested that she was giving adult men in the hot tub and pool area “boners” or “hard ons”;
 - (k) that the Respondent told she reminded him of someone he used to know and after pressing him to reveal who he was referring to, the Respondent told her it was the first person he ever loved;
 - (l) on one occasion when she came to practice with a hickey on her neck, the Respondent commented on it and made comments to her in front of others, causing her to be embarrassed and feel as if she had been “slut shamed”;
 - (m) that the Respondent shared a video with her over social media and made a sexual comment about her in relation to it;
 - (n) that the Respondent contacted A.B.’s mother while A.B. was away at camp and expressed his belief that her father was sexually assaulting her, even though A.B. never discussed her home life with the Respondent;
 - (o) that the Respondent tried in the summer of 2015 to convince A.B. to move in with him;
 - (p) that the Respondent phoned and tried to initiate video chat with her on multiple occasions throughout the summer of 2015, at times very late at night;
 - (q) that the Respondent pulled pranks on her;
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- (r) that the Respondent told the players that he would host a party for them and provide “a bathtub of alcohol”;
 - (s) that the comments, attention, calls, social media messages, and posts toward or about her by the Respondent made her uncomfortable and alarmed; she felt that it was not normal for a coach to be interacting with a player in these ways;
 - (t) that in some of the electronic communications the Respondent referred to A.B. as “gorgeous”, made lewd remarks such as “you would suck it not blow it”, and made comments about her appearance; and
 - (u) that these behaviours by the Respondent ruined her love of the sport of water polo and that in her last year she not only dreaded going to practice but also cried at home after practice every day.¹⁶

75. It was apparent that the Respondent used social media to communicate from time to time with all of the female players he coached, but the evidence established a significantly more extensive use of social media to communicate with A.B. personally and not just about coaching or team business. She felt pressured to accept his social media friend requests on Facebook, Snapchat, and Instagram, and found it unusual that some of these media would be used as coaching platforms. The frequency of contact escalated in the summer of 2015. By the 2015-2016 season the Respondent was calling or messaging her at least once a week.

76. A.B. preserved a number of the messages sent to her by the Respondent. A representative few of those messages are reproduced in Schedules A through D of these reasons as follows:

- (a) In the spring of 2015 the Respondent sent A.B. the Instagram messages redacted and reproduced in Schedule A. They accompanied a video that the Respondent forwarded to A.B. in which a man presented a dandelion to a woman, who rather than blowing on it instead put it in her mouth;
- (b) In November 2015 the Respondent sent A.B. the Instagram photo reproduced in Schedule B while she was travelling in Mexico;
- (c) In approximately March 2016 the Respondent sent A.B. the text reproduced in Schedule C in response to her request for assistance in replacing her expired gym pass; and
- (d) The Respondent subsequently moved his messaging of A.B. from texts to Snapchat, where messages would normally disappear after 10 seconds unless preserved. In around March of 2016 the Respondent sent A.B. the message reproduced in Schedule D to say that he had made her Instagram photograph the wallpaper on his phone.

¹⁶ See A.B.’s oral evidence and Exhibit 2 (A.B. Book of Documents, Tabs 1 to 4).

(iii) *Martin Goulet*

77. WPC's third witness was Mr. Martin Goulet, WPC's Executive Director since November 2013. Mr. Goulet gave affidavit and oral evidence:

- (a) that Provincial/Territorial Sections accepted as members of WPC must ensure that all "local clubs register participants with the provincial organization and subsequently registers all Registrants;"¹⁷
- (b) that Provincial/Territorial Sections provide WPC annually with a database of coaches, athletes, and officers registered with the Provincial/Territorial Section;¹⁸
- (c) that as a coach employed by the FVWPC the Respondent was a member of FVWPC between 2015 and 2017 as FVWPC had submitted membership for the Respondent to WPC;
- (d) that at the time of the hearing, the Respondent was not a Registrant with WPC;
- (e) that in his capacity as WPC's Executive Director, Mr. Goulet was responsible for the administration of the Code;
- (f) regarding the documentation of the procedures of the Complaints leading up to the hearing;
- (g) that the Canadian water polo community is relatively small, and that the Respondent and his family are well-known within it;
- (h) that the Respondent was one of the founders of the FVWPC and was a well-known coach;
- (i) that FVWPC was one of two highly competitive clubs in BC;
- (j) that WPC had employed the Respondent before 2013; and
- (k) that the Respondent had taken National Coaching Certification courses over many years, including a Respect in Sport for Activity Leaders on 19 June 2017.¹⁹

(iv) *E.F.*

78. WPC's fourth witness was E.F., who played with FVWPC from 2014 when she was 12 until late 2016 or early 2017 when she was 16. She outlined:

- (a) that the Respondent was her coach throughout her time with FVWPC;

¹⁷ Exhibit 3 (Affidavit #1 of Martin Goulet (08 June 2018), Exhibit "C", WPC By-Law No. 1, section 2.2).

¹⁸ Exhibit 3 (Affidavit #1 of Martin Goulet (08 June 2018), Exhibit "C", WPC By-Law No. 1, section 2.10(b)(v)).

¹⁹ Exhibit 4B (Martin Goulet Book of Documents, Volume 2), Tab 86.

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- (b) that the Respondent would yell and swear at her and would call her out as a “bad example”;
 - (c) that the Respondent rarely gave her constructive feedback on positive encouragement;
 - (d) that the Respondent would speak to her in a derogatory manner and would swear and/or use sexually charged language;
 - (e) that when the Respondent yelled he would yell loud and often would get red in the face;
 - (f) that the Respondent would at virtually every practice make comments like “get your tits out of the water” to the female players and would often (a few times a month) tell them to pull their asses out of their suits in reference to their bathing suit wedgies;
 - (g) that she witnessed the Respondent flirting with the female lifeguards during practices;
 - (h) an incident in May 2016 when in the car with the Respondent and a parent chaperone where the Respondent kept accusing E.F. of calling someone “a bitch,” which E.F. repeatedly denied. An exchange ensued between E.F. and the Respondent where both were yelling at one point. E.F. was very upset. The parent chaperone told the Respondent to stop three times, which he did not, and then asked him to pull the car over so that she and E.F. could get out – that they would take a taxi the rest of the way home; at this point the Respondent stopped yelling;
 - (i) that E.F. told her parents about the preceding incident, and they complained to the FVWPC Board. In April 2017, after E.F. was no longer a member of the FVWPC, a written apology from the Respondent was provided to E.F. and her family;
 - (j) that the Respondent’s behaviour has had a profound impact on her – she felt unable to stop him and because of his and his family’s position in the water polo community, his influence carried a greater weight than her own experiences; and
 - (k) that as a result of the repeated interactions with the Respondent when she heard anyone yelling she would get scared and begin crying without realizing it and that this happened even with members of her family. She also outlined that she withdrew from her family, even though she had been close to them before the incidents with the Respondent and that she began drinking a lot when she was in Grade 8 in order to deal with the stress caused by her interactions with the Respondent.
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(v) *I.H.*

79. The WPC's fifth witness was I.H., the father of G.H. In the course of his evidence, I.H. outlined:

- (a) that the FVWPC was a member of WPC during the times of the incidents leading to this complaint and hearing and that at the time of the incidents the FVWPC had around 125 members;
- (b) that the Respondent and his family were founders of the FVWPC;
- (c) that WPC's suspension of the Respondent came as a surprise to him and when he asked WPC for details they shared only that it had to do with minors and alcohol;
- (d) the WPC suspension required a second adult to be with the Respondent when he was with athletes;
- (e) the FVWPC continued to support the Respondent during his suspension and the Respondent continued to receive his pay;
- (f) that he investigated the complaint from E.F.'s parents regarding the incident that E.F. had in the car with the Respondent in May 2016 and their assertion that the Respondent adjusted rosters based on favoritism of players. I.H. testified that based on his investigation, he concluded that bullying had indeed occurred but that there was insufficient evidence to support the allegations of roster-tampering or favoritism;
- (g) that the findings of his investigation were provided to the FVWPC Board, which confirmed that there had been no other issues or complaints regarding the Respondent, causing I.H. to conclude that an appropriate sanction would be a written apology to E.F., for a copy of the letter to be placed in the Respondent's employment file, and for the Respondent to be required to take the Respect in Sport course;
- (h) that despite the request to have the apology issued within a week, and despite repeated requests and follow-up by I.H., the Respondent did not issue the apology until the spring of 2017;
- (i) that the Respondent was not to be permitted to coach in the 2017-2018 season until he had taken the Respect in Sport course, which was done in June 2017; and
- (j) that he felt that by way of retaliation for the investigation and penalty imposed by I.H., the Respondent dropped G.H. from the U16 team despite having recently had success at an international event.

(vi) *G.H.*

80. WPC's sixth and final witness was G.H., who played with FVWPC from 2014 when he was 11 years old until 2017 when he left the club at age 14. He outlined:

- (a) that when G.H. was in the U12 program in 2014, the Respondent was friendly and laid back and offered constructive criticism and feedback to the players;
- (b) that during the 2014-2015 season the Respondent would tell his male players the pick-up lines he would use on lifeguards;
- (c) that by 2015 the Respondent's demeanour changed significantly: he was not as caring, he would swear at athletes rather than offer any constructive feedback, and he no longer appeared to enjoy coaching;
- (d) that the Respondent would talk to the boys about girls in their lives and make sexual jokes with them;
- (e) that on one occasion during the 2015-2016 season the Respondent asked the boys what pornographic websites they looked at and then proceeded to tell them about the sites he looked at;
- (f) that G.H. was embarrassed and made uncomfortable by these interactions with the Respondent;
- (g) that by the 2017 summer season the Respondent stopped engaging with G.H. in the same way as before – no longer asking about his progress, giving only clipped answers to any questions, providing no follow-up to any of their discussions, and seeming disinterested in providing any feedback that would help G.H. in his training or skills in the sport; and
- (h) that because G.H. was not getting what he needed from the Respondent, he ultimately became fed up, lost his love of the sport of water polo, and decided to play the game only recreationally thereafter.

7. Analysis

(a) Context In Which Complaints Have Arisen

81. Before analyzing the allegations contained in the Complaints, it is appropriate to situate that analysis in its broader context. From the evidence presented it is clear that the Respondent had a great deal of coaching experience. He took many Coaching Association of Canada National Coaching Certification courses, including some where the focus was on coach interactions and behaviour.

82. In the course of his testimony, Mr. Goulet provided an outline of the Respect in Sport Activity Leader Program.²⁰ He described this course as a requirement for all coaches and provides the Respondent's National Coaching Certification Program ("NCCP") transcript, which showed that the Respondent had taken the course in June 2017.²¹ The course outline included information about:

- the role of leaders (who may be in a coaching role or other leadership role);
- bullying and harassment, the importance of activities being safe, and how the important role of being "a trusted leader means being highly conscious of how [they] behave and interact with the young people [they] lead";
- the importance of the NCCP Code of Conduct; and
- the importance of the leader's behaviour in helping young athletes explore their abilities.

The curriculum further outlined that in addition to focus, dedication, expertise, and hours of practices, athletes also need "patience, kindness, and balance". The curriculum also included a discussion about power and influence and the power imbalance that exists in the coach-athlete relationship that enables coaches to have influence over their athletes and that because of that inherent imbalance coaches and leaders need to be careful in how they use their power and express their influence. Considerable time in the course is spent outlining the types of leaders and how they impact those they lead. As well, a section of the course looked at how to provide feedback and corrective comments to athletes, cognitive development of children at different ages, and cyberbullying, emotional abuse, etc. The online course used audio and video scenarios as well as text and information to convey the concepts presented and to illustrate the differences between good coaching techniques and those that are not ideal or could be harmful to athletes' development.

83. Mr. Goulet also during his testimony placed into evidence the NCCP Make Ethical Decisions Coach Workbook.²² The Respondent's NCCP transcript indicated that the Respondent took the Make Ethical Decisions Workshop in 2004 and completed the evaluation in 2009.²³ The curriculum for this course addressed the following core competencies:

- problem-solving,
- valuing;
- critical thinking;
- leading, and
- interacting

²⁰ Exhibit 4B (Martin Goulet Book of Documents, Volume 2), Tab 88.

²¹ Exhibit 4B (Martin Goulet Book of Documents, Volume 2), Tab 86.

²² Exhibit 4B (Martin Goulet Book of Documents, Volume 2), Tab 90.

²³ Exhibit 4B (Martin Goulet Book of Documents, Volume 2), Tab 86.

and provides scenarios and information to help coaches explore how to make decisions that take into account many factors, including the self-esteem of athletes, the respect and dignity of others, personal control, and what is in the best interest of the athletes.

84. The Respondent, having taken these courses, would be expected to apply in his coaching the principles they canvassed. Indeed, section 19 of the Code makes clear the Respondent's special obligations as a coach:

... WPC's Coaches have many additional responsibilities. The coach-athlete relationship is a privileged one and plays a critical role in the person, sport, and athletic development of the athlete. Coaches must understand and respect the inherent power imbalance that exists in this relationship and must be extremely careful not to abuse it.

85. The Hearing Panel is satisfied that at all relevant times the Respondent must have possessed a clear understanding of the Code's prohibitions against harassment of young athletes. As a result, the Respondent would have understood that conduct of the type alleged in the Complaints would constitute a serious breach of the Code. The next question is whether WPC has proven the allegations contained in the Complaints to the requisite standard.

(b) The Complaints

86. As indicated above, section 11 of the Code provides a general definition for the term "harassment" as "comment or conduct directed towards an individual or group – both face-to-face and electronically – which is offensive, abusive, racist, sexist, degrading, or malicious". It then provides a list of examples of this type of behaviour. At least the following categories, from within that list, are engaged by the allegations contained in the Complaints:

- verbal abuse;
- unwelcome remarks, jokes and comments;
- condescending behaviour intended to undermine self-esteem;
- bullying;
- unwanted physical contact; and
- unwelcome sexual flirtations.

87. Similarly, section 14 – which overlaps to some extent with section 11 – defines "sexual harassment" to mean "unwelcome sexual comments and sexual advances, requests for sexual favours, or conduct of a sexual nature, either face-to-face or electronically". Again the provision lists examples of this type of behaviour, and some of those categories are also engaged by the allegations contained in the Complaints:

- sexist jokes;
- sexually degrading words used to describe a person;
- inquiries or comments about a person's sex life; and
- unwelcome sexual flirtations.

88. WPC advanced various allegations through the seven particularized Complaints that proceeded at the hearing. The Hearing Panel will consider each allegation separately. In the course of doing so, these reasons will briefly summarize the lengthy written submissions made by WPC in support of those allegations.

Allegation #1: At various times between approximately 2015 and May 2016 Justin Mitchell sexually harassed A.B., an athlete WPC Registrant he coached, contrary to sections 10 and 14 of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to section 41(d) of the Code of Conduct with Disciplinary Procedure.

89. The WPC points to six different incidents – each involving A.B. – that it alleges fall within the meaning of “sexual harassment” in the Code, and all of which according to the evidence took place within the timeframe referred to in the allegation.

90. The conduct began no later than the fall of 2015 and, in its early stages involved a single incident of physical contact in which the Respondent tickled the teen athlete’s stomach while she was wearing a swimsuit and participating in an exercise on the pool deck. He also, from time to time, would give her “side hugs”, which we interpret to mean partial physical hugs using the arms while the body was turned sideways, sometimes while he too was in a bathing suit.

91. The Respondent persisted over 2015 and 2016, on a number of different occasions, with comments to A.B. about her physical appearance. While the comments apparently were intended to be complimentary and flattering, they were unwanted and embarrassing to A.B., and noticed by members of the team who commented that the Respondent had a “crush” on her.

92. Further escalation occurred over electronic media, although only limited documentary evidence was able to be put before the Hearing Panel because the Respondent evolved in his ability to conceal social media communications to the point of using Snapchat, rather than Facebook and other social media, which made it easier to avoid detection because of the absence of a lasting record of the communication. The communications that were able to be produced referred to A.B. as “gorgeous”, made the lewd remark that “you would suck it not blow it”, and made various comments with respect to the Respondent’s perception of the young athlete’s attractive appearance.

93. An incident that reflected the complete lack of boundaries that the Respondent observed during this time period occurred in early 2016 when he referred to A.B. as a “jet fucker” after she exited the hot tub and suggested that she was giving adult men “boners” or “hard ons”. While there were some minor inconsistencies between the versions of events provided by witnesses to this incident, there was sufficient similarity and uniqueness to warrant the inference that the incident occurred essentially as A.B. described.

94. Ultimately, the Respondent took the further egregious step of attempting to involve himself in A.B.’s family life, at a time when he knew her to be highly vulnerable and he had already made known his amorous intentions towards her. In that regard, during the summer of

2015, he made telephone calls to her at home, sometimes late at night, and went so far as to encourage her to move in with him because of his perception of her family situation.

95. This brief summary of the evidence pertaining to the Respondent's treatment of A.B. is not exhaustive. The record, and indeed WPC's submissions, cover other incidents along the same lines. Suffice it to say that, over the period covered by this Complaint, the Respondent's flirtatious advances and commentary toward A.B. were varied but persistent, and on many occasions sexual in nature.

96. A.B.'s evidence made it clear that this behaviour was unwelcome, although undoubtedly on most occasions she did not consider herself to be in a position to communicate that feeling to the Respondent. She was not required to do so. It was the Respondent's sole responsibility to refrain from all of the foregoing behaviour, which he knew to be inappropriate and went to some length to conceal.

97. The Hearing Panel finds that this allegation is proven and that each of the examples referred above, individually, constitutes a major infraction under the Code.

Allegation #2: At various times between approximately 2015 and May 2016 Justin Mitchell harassed A.B. and C.D., athlete WPC Registrants he coached, by making statements that he knew or reasonably ought to have known would cause those persons to be humiliated or intimidated, contrary to sections 10 and 11 of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to section 41(d) of the Code of Conduct with Disciplinary Procedure.

98. In addressing this allegation, the Hearing Panel excludes the incidents described under Allegation #1, noting simply that all of that conduct could have fit under this allegation as well.

99. With respect to this allegation, WPC refers to a number of incidents involving A.B. and C.D. The Hearing Panel's focus here is on the Respondent's conduct toward C.D., as A.B. is addressed under Allegation #1.

100. The Respondent's conduct toward C.D. was more in the nature of abuse and bullying, and not as often sexual in nature as compared to the circumstances just described. C.D. gave general evidence that the Respondent lost his temper and yelled at her and would swear at her and other athletes, using the word "fuck" more than frequently, such as in the phrase "you guys are fucking idiots".

101. These are examples of the Respondent's conduct, referred to generally above, that occurred on the pool deck, sometimes in full view of other adults and children. The totality of the evidence implies that the behaviour was, in effect, tolerated by the FVWPC. That is not to say, though, that it did not amount to harassment contrary to the Code. In some cases, it clearly did.

102. C.D. testified that some of the abuse directed toward her from the Respondent, and toward others in her presence – over time – became sexual in nature. She referred to his sexual

comment about another athlete's mother being a MILF and his frequent references to the breasts of female athletes, on some occasions even commenting specifically about his impression of them. One common refrain, captured by C.D. and other witnesses, was the language the Respondent used when female athletes were performing an egg beater swim exercise, in which the athlete was intended to raise part of his or her torso out of the water. The Respondent's perverse version of encouragement during that exercise was to yell at females to get their "tits out of the water". Needless to say, the young athletes were offended and embarrassed by the direction whenever it was given.

103. A similar lack of restraint in relation to the physical characteristics of the teenage females was pointed out by C.D. when she testified that the Respondent frequently made reference to "wedgies" (involving the positioning of the athletes' buttocks in their swimsuits) and made other comments about their bodies.

104. Finally, the Respondent also directed a specific racist taunt toward C.D. by referring to her as a "terrorist", specifically referring to her family's country of origin.

105. In the case of C.D., much of the Respondent's offending conduct was directed to her, although some of it was also harmful to her when she witnessed it connected to others. With the exception of the anger and language used in an attempt to motivate her as an athlete, the Hearing Panel finds that the conduct directed at, and witnessed by, C.D. over time clearly constituted harassment as defined in the Code.

106. In view of the catalog of specific and clearly harassing behaviour set out above, it is unnecessary for the purposes of this decision to determine as well whether each of the many other instances of swearing and anger directed by the Respondent toward C.D. and others in her presence constituted harassment.

Allegation #3: In or around March 2015, Justin Mitchell condoned the use of alcohol of underage athlete WPC Registrants he coached, contrary to section 19(j) of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to section 41(d), (h) and (i) of the Code of Conduct with Disciplinary Procedure.

107. This allegation by the WPC, which was the subject of evidence by number of witnesses, referred to a series of communications involving the Respondent in which he initially indicated that he would reward a particular success with the supply of alcohol. No witness testified, however, that the supply of alcohol actually occurred and it appears from the evidence that the plan was cancelled when the Respondent recognized that certain parents had learned about it.

108. Although the plan to supply alcohol was foiled, the Hearing Panel finds that there is sufficient evidence to prove that the Respondent condoned the use of alcohol by minor athletes within the club, by the series of statements he made in that respect that clearly indicated his intention to reward them by supplying alcohol if they were successful in competition. The Respondent's reactions after the plan was discovered only serve to reinforce the fact that his

original intention was to condone alcohol use, and that his actions in fact had that consequence. The Hearing Panel finds that this allegation has been proven.

Allegation #4: On or around November 20, 2017, Justin Mitchell engaged in inappropriate filming of E.F., a WPC athlete registrant, contrary to his obligations as a coach under s. 19(b) and (f) of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to s. 41(f), (g) and (h) of the Code of Conduct with Disciplinary Procedure.

109. This complaint stems from an incident on a pool deck at a competitive event in which it is alleged that E.F., as a former member of FVWPC, was filmed by the Respondent while he was wearing a body camera.

110. The WPC was not in a position to tender any film resulting from the incident. There certainly was, however, evidence that the Respondent used the camera in such a manner that it was intended to lead E.F. to conclude that she was being filmed by a person who, based on past events, may have borne hostility toward her.

111. From the evidence, the Respondent's precise conduct and intentions in relation to these events are unclear. It does appear that he may well have been filming the young female athlete without her consent, and if so committed a further infraction. However, the Hearing Panel is unable to reach that conclusion to the required standard based on the evidence provided.

112. WPC alleges that the filming in question breached section 19(b) and 19(f) of the Code. Section 19(b) states that coaches must "[p]repare athletes systematically and progressively, using appropriate time frames and monitoring physical and psychological adjustments while refraining from using training methods or techniques that may harm athletes." Section 19(f) states that coaches must "[a]ct in the best interest of the athlete's development as a whole person." The Hearing Panel is unable to find, on the evidence adduced, that WPC has proven that the Respondent's wearing of a body camera constituted a training method or technique that may harm E.F., or that in wearing the camera the Respondent failed to act in the best interest of E.F.'s development as a whole person.

113. The Hearing Panel reaches a similar conclusion under Sections 41(f), (g) and (h) of the Code. Those provisions define "major infraction" to include conduct that intentionally interferes with a competition or with any athlete's preparation for a competition, conduct that intentionally damages WPC's image, credibility, or reputation, or disregard for WPC's bylaws, policies, rules, and regulations. The Hearing Panel is unable to find, on the evidence adduced, that WPC has proven that the Respondent's wearing of a body camera breached any of these provisions.

Allegation #5: On or around May 19, 2016, and November 19, 2017, Justin Mitchell harassed E.F., a WPC athlete registrant, contrary to s. 11 of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to s. 41(d) of the Code of Conduct with Disciplinary Procedure.

114. The first incident cited in support this allegation involved a sequence of events in which the Respondent screamed aggressively at E.F. in a moving vehicle after an event. The circumstances do not appear to have been significantly disputed at the time.

115. Although the events that took place in the vehicle were said to be corroborated by an adult witness, that witness was not called to testify at the hearing. Accordingly, the Hearing Panel assigns no weight to the alleged corroboration.

116. This first incident was the subject of a complaint letter sent to the FVWPC, whose Board subsequently investigated. While the formality of the FVWPC's investigation was unclear to the Hearing Panel, a letter of apology from the Respondent was offered as evidence that the incident occurred.

117. The Hearing Panel finds that E.F.'s evidence with respect to this incident is sufficient to prove a breach of the Code. Although standing alone this incident might only have been classified as a minor infraction, in the circumstances of this case it continued a sustained pattern of conduct that contravened the Code. It therefore constituted a major infraction under section 41(a) of the Code. The Hearing Panel notes, however, that the incident in question under this allegation was to some extent dealt with by the FVWPC previously. As a result, the Hearing Panel will not impose any further sanction as a consequence of this infraction.

Allegation #6: On or around November 19, 2017, Justin Mitchell harassed E.F., a WPC athlete registrant, contrary to s. 11 of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to s. 41(d) of the Code of Conduct with Disciplinary Procedure.

118. This alleged incident, also involving E.F., occurred after she had left the FVWPC to join another club, and after the apology letter noted above was received. In a "handshake" line-up after a game between her new team and the FVWPC team, E.F. withheld from shaking the Respondent's hand. In reaction to that gesture, the Respondent dramatically and vocally called attention to her action.

119. This behaviour was obviously childish. The Hearing Panel is unable to conclude, though, that it rose to the requisite level of gravity as to constitute harassment under the Code.

Allegation #7: At various times in 2017, Justin Mitchell harassed G.H., a WPC athlete registrant, contrary to s. 11 of the Code of Conduct with Disciplinary Procedure. This conduct constitutes a major infraction pursuant to s. 41(d) of the Code of Conduct with Disciplinary Procedure.

120. G.H. testified that he was a young athlete who had been successful in the Respondent's programs, and nationally, until his father became involved in disciplinary measures pertaining to the incident involving E.F., referred to above. G.H. testified that, thereafter and without explanation, he was excluded by the Respondent from certain opportunities to practice and participate in the events in which he would otherwise have been included and for which, at least according to himself, he was eminently qualified.

121. There is no reason to doubt the credibility of the evidence given on this issue by G.H. He was convincing in his evidence that his treatment at the Respondent's hands was demonstrably different after the disciplinary events occurred.

122. Section 11(m) of the Code defines harassment to include "[r]etaliatio[n] or threats of retaliatio[n] against an individual who reports harassment to WPC," and section 41(d) defines "major infractions" to include behaviour that constitutes harassment.

123. It is difficult for the Hearing Panel to reach a conclusion that the purpose of the change in behaviour was the exclusive result of I.H.'s actions, and that it reflected an intention to harm G.H., even though that seems to be a rather rational conclusion to reach. Without doubting their perceptions or the reasonableness of the inferences, in view of the fact that G.H. never asked the Respondent to explain the change in his treatment the Hearing Panel is not able to make a finding of harassment based solely on that evidence.

(c) **Sanction**

124. The Hearing Panel has found that the Respondent violated the Code through comments and conduct that amounted to major infractions under the Code in the form of harassment simpliciter and in some instances sexual harassment. The question then arises of what sanction responds appropriately to those findings.

(i) *Sanctioning Jurisdiction Conferred by Code*

125. Section 53 of the Code confers a wide discretion on the Hearing Panel with respect to sanction as follows:

53. The Panel may apply the following disciplinary sanctions, singularly or in combination:
- a) Verbal or written reprimand from WPC
 - b) Verbal or written apology
 - c) Further education, training, or counselling
 - d) Service or other voluntary contribution to WPC

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- e) Removal of certain privileges for a designated period of time
 - f) Suspension from certain competitions, activities, or events
 - g) Expulsion from the WPC
 - h) Fines
 - i) Payment of the cost of repairs for property damage
 - j) Any other sanction considered appropriate for the offense.

(ii) *WPC's Submissions on Sanction*

126. In its written closing submissions, WPC sought an order that the Respondent be expelled from WPC pursuant to section 53(g) of the Code. In the alternative, WPC sought an order that the Respondent be permanently banned from registration with WPC pursuant to section 53(j) of the Code.

127. In advocating these sanctions, WPC urged the Hearing Panel to take a global approach to the issue of penalty and emphasized:

- (a) the fundamental common law principle that the severity of a penalty must be commensurate with the seriousness of the offence committed; and
- (b) the “totality” principle visible in criminal and professional regulatory sanctioning decisions, according to which an appropriate global sentence must be fixed when dealing with multiple offences, reflecting the specific circumstances of the offences and the unique circumstances of the offender.

128. WPC maintained that given the Respondent’s repeated infractions (some of which were committed while he was subject to interim conditions by WPC in respect of his conduct) and given the seriousness of the infractions that fall within the definition of harassment (or, in respect of at least one of the Complaints, sexual harassment) the Respondent should no longer be entitled to any rights and privileges of WPC membership.

129. WPC acknowledged that the Respondent is not currently registered as a Registrant with WPC, raising the question of whether it was possible to expel an ex-Registrant. WPC submitted that the Respondent could still be expelled from WPC and, if necessary, the Hearing Panel could make its order effective *nunc pro tunc* (“now for then”) as of November 2017 (the date on which the earliest of the Complaints was received) or November 2017 (the date on which the Respondent’s interim suspension ended) or any other date the panel considered appropriate. Regardless of the label and the remedial mechanism used, WPC sought to deny the Respondent the ability to apply for registration status with WPC in future – a remedy the WPC maintained was within the panel’s discretion under paragraphs 53(g) or (j) of the Code. WPC argued that no lesser penalty was appropriate given the following factors: (1) recurrence of contraventions; (2) specific deterrence; (3) general deterrence; (4) severity of impact on the Respondent; (5) seriousness of contraventions; and (6) deliberateness of contraventions.

(iii) *Hearing Panel's Conclusions on Sanction*

130. The Code contraventions found by the Hearing Panel fall into broadly two categories.

131. The first category involves harassment of athletes through conduct in the nature of hostility, profanity, and unnecessary embarrassment. The Hearing Panel's approach to sanction for this first category of contravention must be informed by the fact that such conduct, in much milder doses, is no doubt common throughout sport. While the conduct in this case still warrants condemnation and sanction, it is likely capable of being remedied through training and exposure to alternative options for behaviour and conduct.

132. If the Respondent's conduct had been restricted to this first category, in which the Respondent behaved as a routinely and inappropriately abusive coach toward his players over a prolonged period of time, some kind of lesser sanction would have been called for. Consideration would also need to be given, though, to whether the Respondent's conduct could be remedied, whether he could be rehabilitated, and whether there could be circumstances in which the Respondent could eventually continue in his position as a water polo coach within WPC.

133. The Hearing Panel has concluded, however, that these alternative considerations are excluded in the present case due to the second category of Code contravention that has been found – namely, highly inappropriate sexual harassment. Although the primary target of this intentional and repeated conduct was A.B., it also affected many other female athletes – teenagers whose emotional and physical safety and protection were supposed to be the Respondent's highest priority.

134. The seriousness of the conduct toward A.B., involving virtually unrelenting sexual pursuit of a young teenage girl by an adult male in a position of power, is obvious. It alone warrants a very serious sanction, and most of the alternatives provided in section 53 of the Code are simply inadequate. The Respondent displayed an utter failure to respect what conduct is appropriate and legal, and the nature of his duties when in a position of power and trust. Only a sanction that ensures that the Respondent never again be allowed by WPC to occupy a similar position of power will be sufficient to address this conduct.

135. The Hearing Panel emphasizes as well that the Respondent's conduct toward all of the female athletes in his care (*i.e.*, not solely those in whom he took a personal interest) is equally as worthy of sanction and deterrence due to the persistent, long-term, and pathological nature of that conduct. One of the most consistent themes in all of the evidence, no matter which young person testified, was the Respondent's constant reference to the body parts of teenage females, in a sport in which the regular uniform is a bathing suit and in which youths by definition were required to expose themselves in a vulnerable manner to observation.

136. The WPC made no submissions as to whether a particular level of intention or knowledge needed to be proven in order to establish a violation of the Code. The Hearing Panel considers it unnecessary to analyze that point because the Hearing Panel is satisfied that all of the conduct through which the Respondent breached the Code was either intentional or at the least reckless. The Hearing Panel is satisfied that at all relevant times the Respondent must have possessed a

clear understanding of the Code's prohibitions against harassment of young athletes. Given his experience as a coach and his training, the Respondent must have known that conduct of the gravity alleged in the Complaints would constitute a serious breach of the Code. The inescapable inference is that he was indifferent in that respect.

137. The Hearing Panel has concluded that the Respondent's behaviour toward young athletes reflected a consistent pattern of disregard for the ethical principles that governed the Respondent's conduct. Based on his training and experience, and the abundance of information readily available on the subject of the coach-athlete relationship, the patterns of behaviour exhibited by the Respondent were willful and displayed a persistent neglect for his position of influence over young people.

138. The fact is that the Respondent, an adult male, was placed in a position of trust and power imbalance, failed to recognize the highly sensitive nature of his position, and failed to control his impulses. Given that backdrop, the Hearing Panel is satisfied that a sanction designed to re-train the Respondent would be insufficient, even if accompanied by a public and unqualified condemnation of his behaviour. The record before us offers no basis upon which to expect that children and young adults who come into contact with the Respondent in a swimming pool setting in future would be adequately protected from incidents of a similar nature. To the contrary, absent the Respondent's complete and permanent removal from this setting, the Hearing Panel considers it reasonable to infer that the Respondent's overall lack of impulse control and sexual propriety would result in the recurrence of similar harm in future.

139. For these reasons, the Hearing Panel has concluded that all steps necessary should be taken to ensure that the Respondent is never again in the company of any of WPC's athletes. Putting aside the general ability under paragraph 53(j) of the Code to fashion any "other sanction considered appropriate for the offense", the most pertinent sanctions are those referred to by counsel for the WPC including banning and expulsion.

140. As a result, the Hearing Panel is satisfied that the following sanctions respond appropriately to the Code contraventions that have been established against the Respondent:

- (a) that the Respondent not be permitted to join WPC and that he not be permitted to be a member of or coach at any WPC sanctioned event or club; and
- (b) that the Respondent be permanently banned and prohibited from any future application or attempt to gain reinstatement, membership, or Registrant or any other status with WPC.

8. Other Matters

141. As noted in paragraphs 81 and 82 of the Jurisdictional Decision, the Respondent raised two matters in the course of his jurisdictional submissions that did not relate to the Jurisdictional Issue. The Hearing Panel declined to address those two matters, without prejudice to the Respondent's ability to raise them at a later stage in this proceeding if he wished to do so.

142. The Respondent did not raise those two matters further. The Hearing Panel therefore will not be addressing either of them.

9. Disposition

143. The Hearing Panel:

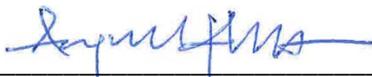
- (a) determines the evidence establishes that the Respondent breached the Code in the manner set out in Allegation number 1, 2, 3, and 5 of the Complaints;
- (b) determines that the Respondent not be permitted to join WPC and that he not be permitted to be a member of or coach at any WPC sanctioned event or club; and
- (c) orders that the Respondent be and is permanently banned and prohibited from any future application or attempt to gain reinstatement, membership, or Registrant or any other status with WPC.

144. The Hearing Panel directs WPC to serve the Respondent with a copy of this decision as soon as practicable and to provide the Hearing Panel with proof of service as soon as possible after service.

145. The issue of costs in respect of this decision and the Decision on Jurisdiction is reserved. WPC may make written submissions to the Hearing Panel on the issue of costs within 30 days of today's date, must serve the Respondent with a copy of those submissions as soon as practicable thereafter, and must provide the Hearing Panel with proof of service as soon as possible after service. The Respondent may make written responding submissions to the Hearing Panel on costs within 30 days after the date on which he receives service of this decision or the date on which he receives service of the WPC's submissions on costs, whichever is later.

This decision is dated 09 April 2019 at Vancouver, British Columbia.

Irene Schell (Chair)



Angus M. Gunn QC

Michael J. Hewitt

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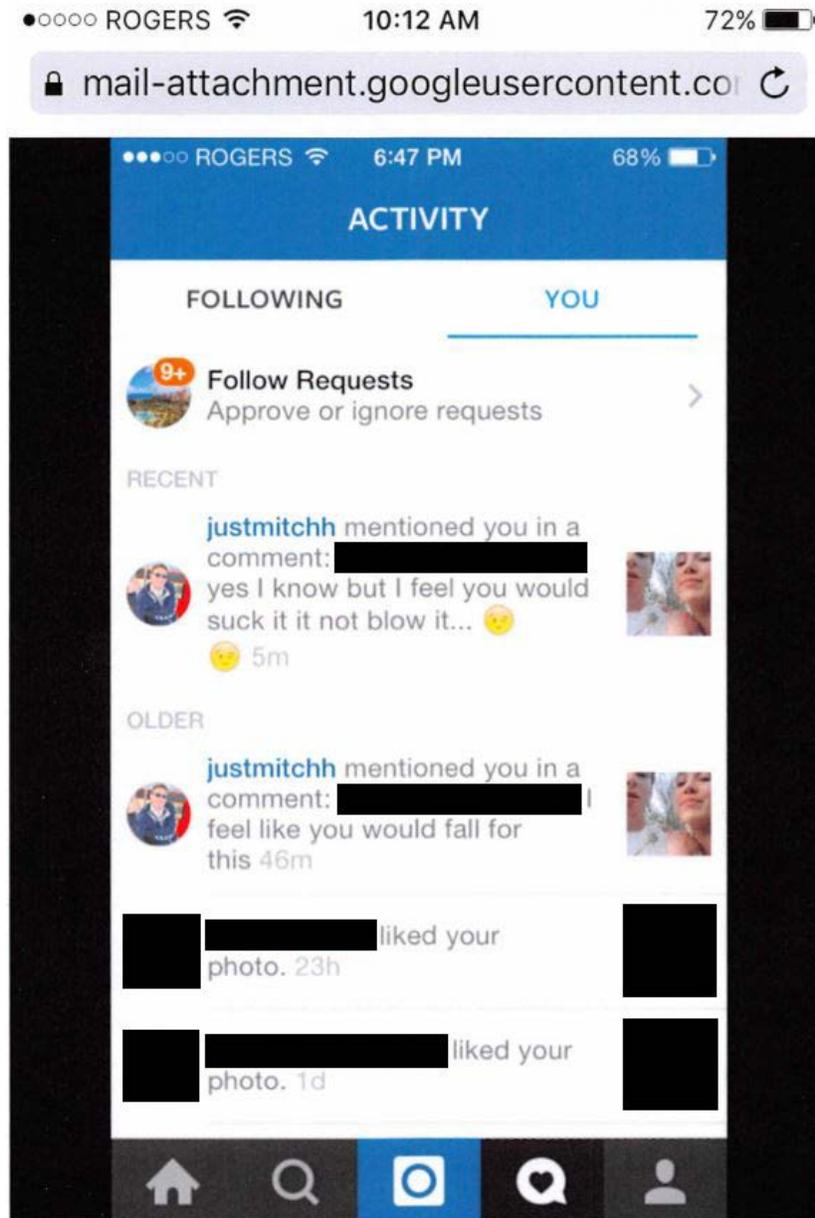


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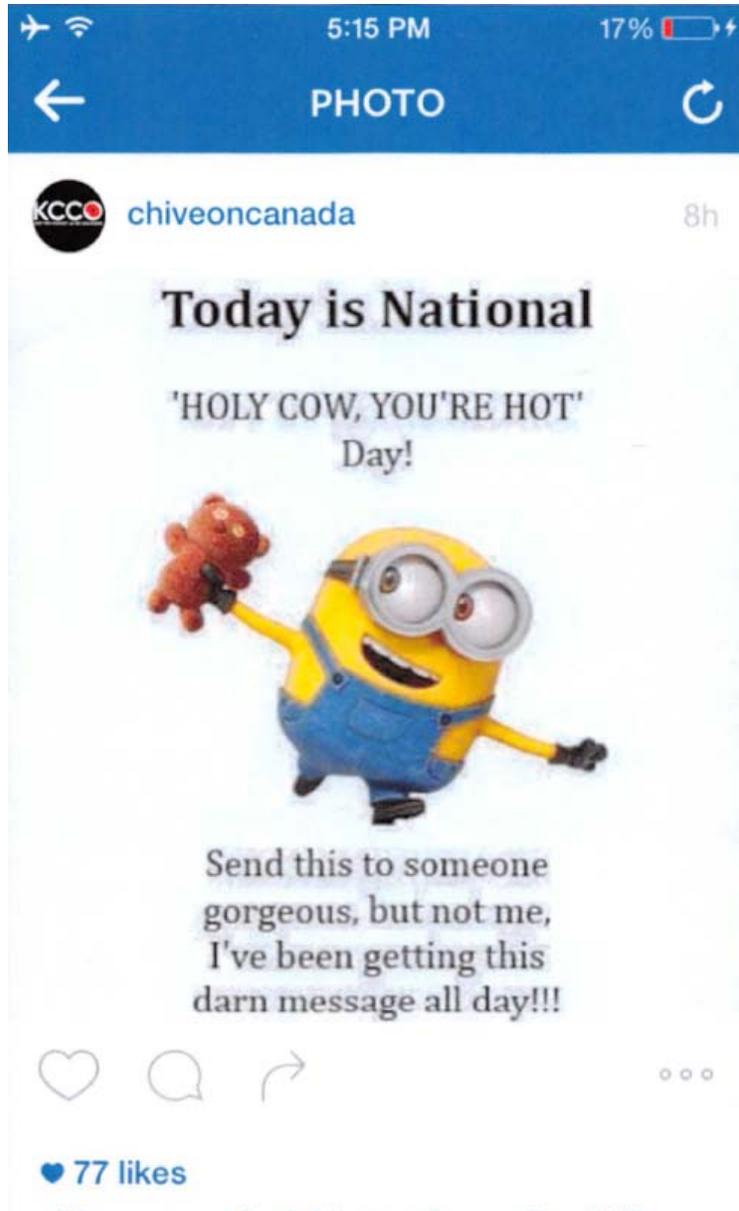
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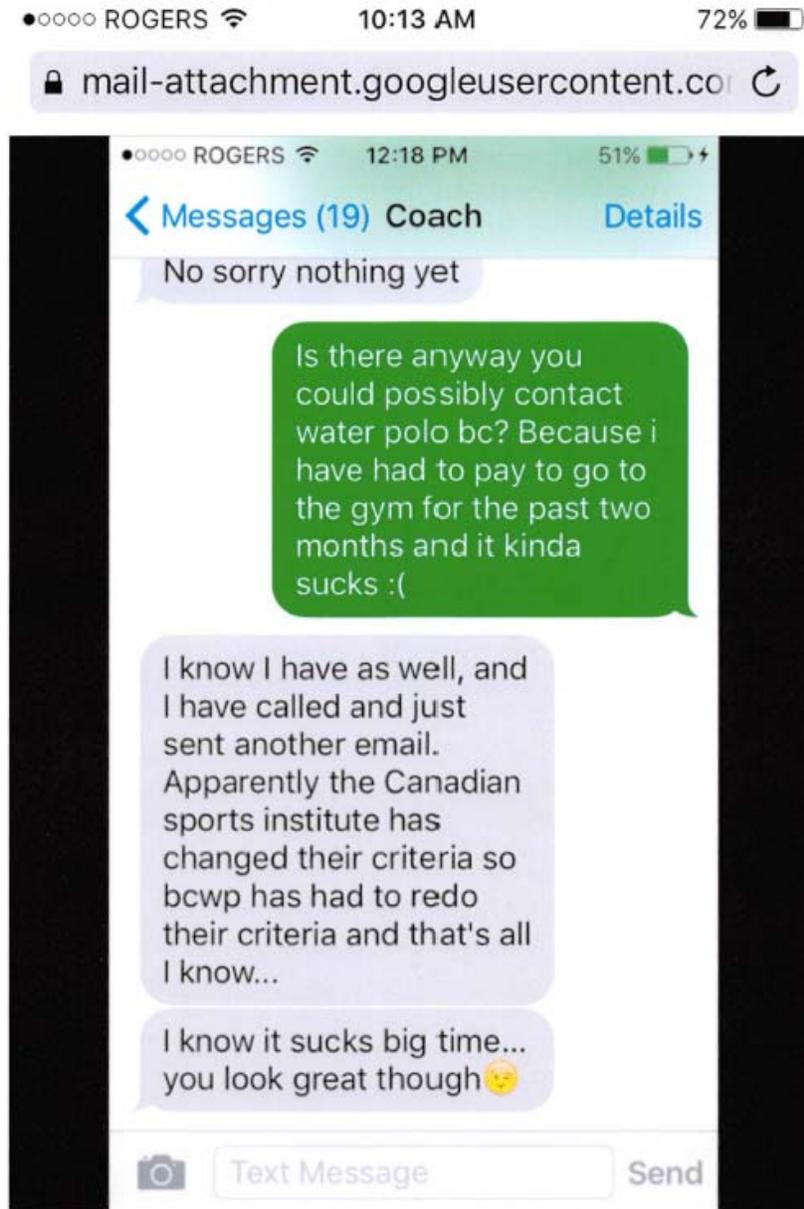
SCHEDULE A



SCHEDULE B



SCHEDULE C



SCHEDULE D

