

CITATION: R. v. McLeod, et al., 2025 ONSC 4319
COURT FILE NO.: CR-122-24 (London)
DATE: 2025/07/24

Delivered orally and in writing – July 24, 2025

ONTARIO
SUPERIOR COURT OF JUSTICE
(Southwest Region)

BETWEEN:

HIS MAJESTY THE KING

– and –

MICHAEL McLEOD, CARTER JOHN
HART, ALEXANDER FORMENTON,
DILLON DUBÉ & CALLAN HAYDEN
FOOTE

Accused

)
)
)
) Meaghan Cunningham and Heather Donkers,
) for the Crown
)
)
) David Humphrey and Anna Zhang, Counsel
) for Michael McLeod
)
) Megan Savard and Riaz Sayani, Counsel for
) Carter Hart
)
) Daniel Brown and Hilary Dudding, Counsel
) for Alexander Formenton
)
) Lisa Carnelos and Julie Santarossa, Counsel
) For Dillon Dubé
)
) Julianna Greenspan and Lauren Crawford,
) Counsel for Callan Foote
)
) **HEARD:** April 25, 28-30, May 1, 2, 5-9, 12-
) 16, 20-23, 26-30, June 2, 9-13, 2025

RESTRICTION ON PUBLICATION

By court order made under subsection 486.4(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, information that may identify the person described in this judgment as the complainant may not be published, broadcasted or transmitted in any manner. This judgment complies with this restriction so that it can be published.

TABLE OF CONTENTS

| | <u>Page No.</u> |
|--|------------------------|
| A. INTRODUCTION | 4 |
| B. THE EVIDENCE | 5 |
| i) The events at Jack's Bar | 5 |
| ii) The events at the Delta Hotel | 9 |
| iii) E.M.'s version of the events in room 209 | 10 |
| iv) The consent videos | 19 |
| v) The text exchange between E.M. and Michael McLeod | 21 |
| vi) The statements of the complainant | 23 |
| vii) The evidence of Taylor Raddysh and Boris Katchouk | 25 |
| viii) The group chat on June 26, 2018 | 28 |
| ix) The evidence of other people in the room | 29 |
| <i>Tyler Steenbergen</i> | 29 |
| <i>Brett Howden</i> | 31 |
| x) The evidence of the accused | 35 |
| <i>Carter Hart</i> | 35 |
| <i>The police statement of Alexander Formenton</i> | 39 |
| <i>The police statement of Michael McLeod</i> | 41 |
| <i>The police statement of Dillon Dubé</i> | 44 |
| xi) The police evidence | 45 |
| C. THE POSITIONS OF THE PARTIES | 45 |
| i) The position of the Crown | 45 |
| ii) The position of Michael McLeod | 48 |
| iii) The position of Carter Hart | 50 |
| iv) The position of Alexander Formenton | 52 |
| v) The position of Dillon Dubé | 53 |
| vi) The position of Callan Foote | 54 |
| D. THE APPLICABLE LEGAL PRINCIPLES | 55 |
| i) The presumption of innocence and onus of proof | 55 |
| ii) Essential elements of the offence of sexual assault | 56 |
| iii) Assessing the credibility and reliability of the witnesses | 57 |
| iv) The use of myths and stereotypes in assessing the evidence of a complainant on a charge of sexual assault | 61 |
| v) The use to be made of the statements of the accused | 61 |
| vi) Sexual attitude evidence | 61 |

| | |
|--|-----------|
| E. ANALYSIS | 62 |
| i) Assessing the evidence of E.M. | 63 |
| <i>Issues relating to the credibility of the complainant</i> | 63 |
| <i>Inconsistencies in the complainant's evidence</i> | 64 |
| <i>Evidence that specifically contradicts the evidence of the complainant</i> | 66 |
| <i>Issues with respect to the reliability of the evidence of the complainant</i> | 68 |
| <i>The complainant's consumption of alcohol</i> | 70 |
| <i>Motive to fabricate</i> | 72 |
| ii) Findings that relate to the charges against each of the accused | 72 |
| iii) The allegation relating to Carter Hart | 75 |
| iv) Was the complainant's consent vitiated by fear? | 77 |
| v) The allegation relating to Alexander Formenton | 80 |
| vi) The allegation relating to Callan Foote | 82 |
| vii) The allegation relating to Dillon Dubé | 84 |
| viii) The allegations relating to Michael McLeod | 86 |
| F. COUNT #2 – PARTY TO THE OFFENCE | 88 |
| G. CONCLUSION | 90 |

REASONS FOR JUDGMENT

CARROCCIA J.:

A. INTRODUCTION

- [1] On June 18, 2018, members of the 2018 Championship Canadian World Junior Hockey Team (“the team”) were gathered in London, Ontario to celebrate their victory in the World Junior Hockey Tournament earlier that year. What occurred during the early morning hours of June 19, 2018, between the accused and the complainant, E.M., forms the subject matter of the charges of sexual assault before the court.
- [2] The team was staying together at the Delta Armouries Hotel (“the Delta Hotel” or “the hotel”) located at 325 Dundas Street in London, Ontario. The formal events began on June 18, 2018, with a “ring ceremony” where each member of the team received their championship ring, which was followed by a Gala Dinner and a golf tournament scheduled for the following day.
- [3] Following the ring ceremony at the Delta Hotel, the team photograph filed as Exhibit #17 was taken. Later in the evening a Gala Dinner was held where alcohol was served both before and during the dinner.
- [4] After dinner, members of the team including Michael McLeod, Carter Hart, Alexander Formenton, Dillon Dubé and Callan Foote returned to the Delta Hotel, changed from their suits into casual clothes and attended at Jack’s Bar on Richmond Row in downtown London. The team arrived at the bar between 11:20 and 11:40 p.m. It was at Jack’s Bar that the complainant, E.M., met the accused and other members of the Canadian World Junior Hockey Team. E.M. eventually left Jack’s Bar with Michael McLeod and returned to his room, room 209 at the Delta Hotel, where they engaged in consensual sexual activity.
- [5] E.M. alleges that after the consensual sexual activity concluded she was sexually assaulted by each of the accused. The complainant testified that she did not consent to the sexual activity that took place and she felt that she did not have a choice about whether to engage in the group sexual activity due to intoxication or fear or a combination of both. The defence maintains that E.M. was an active and willing participant in the sexual activity that occurred with each of the accused in room 209, and in fact initiated much of it.
- [6] The events that took place in room 209 at the Delta Hotel in the early morning hours of June 19, 2018, were the subject matter of a London Police investigation and an investigation by Hockey Canada, the governing body of the World Junior Hockey Team. Initially those investigations resulted in no criminal charges being laid. Those events were also the subject matter of a civil claim filed by the complainant in the Superior Court of Justice in April 2022 that was settled by Hockey Canada in May 2022, for an undisclosed sum of money without the knowledge or the involvement of the accused in this case.

- [7] Once the settlement of the civil claim filed by E.M. was made public, and garnered national attention, the London Police Service re-opened their investigation, and there was a renewed investigation by Hockey Canada. There was also a meeting of the Standing Committee on Canadian Heritage ordered by the House of Commons to study Hockey Canada's involvement in alleged sexual assaults which included these specific events. Ultimately, the criminal charges that are contained on this indictment were laid.
- [8] The lengthy and contorted history of this case, including the multiple investigations by different agencies, including the civil action and settlement, has led to multiple, often conflicting statements from the complainant, the defendants, and witnesses. With five accused and that barrage of evidence, I can say that counsel conducted the trial efficiently, and that the time spent, particularly in the cross-examination of E.M., was entirely appropriate.
- [9] Much has been made in this case about the concept of consent. This case on its facts does not raise issues of the reformulation of the legal concept of consent. In this case, I have found actual consent not vitiated by fear. I do not find the evidence of E.M. to be either credible or reliable. In my lengthy reasons set out below, I will explain why I reach those conclusions.
- [10] As I must, I have applied the legal analysis directed by *R. v. W.(D.)*, [1991] 1 SCR 742. No rigid application of the three-step analysis is necessary. With respect to the charges before this court, having found that I cannot rely upon the evidence of E.M. and then considering the evidence in this trial as a whole, I conclude that the Crown cannot meet its onus on any of the counts before me.

B. THE EVIDENCE

i) The events at Jack's Bar

- [11] E.M. did not know any of the accused before June 18, 2018. That day she worked at a retail store in London, and made plans with some of her work colleagues to go out after work to Jack's Bar to socialize, drink alcohol and dance. After work she went home and changed her clothes and got ready to go out. She testified that she consumed two cans of Mike's Hard Lemonade while she got ready which made her feel more relaxed. She called an Uber and picked up a co-worker V.H. [name redacted] and went to Jack's arriving there between 11:00 and 11:20 p.m.
- [12] Jack's Bar is equipped with a video surveillance system with cameras that record most, though not all of the events that occur both inside and outside of the bar. Both the Crown and defence introduced into evidence various video recordings from Jack's from June 18 and 19, 2018. Those videos are recorded in 20-minute segments from different locations in the bar. The actual time is not shown on the recording, just the time period, for example from 11:00 p.m. to 11:20 p.m.
- [13] As soon as she arrived at Jack's, E.M. is observed on video going to the ATM machine and then she and V.H. went to the bar and ordered shots. E.M. consumed two Jagerbomb shots which contain Jägermeister liquor and Red Bull and then she and V.H. went to the

dance floor where their co-workers were. After dancing for a brief time, she and V.H. attended at the bar again where E.M. consumed another shot, this time a shot of Tequila or Vodka, she could not recall which.

- [14] E.M. testified that initially she was not feeling really comfortable, she was a little nervous and the alcohol helped calm her nerves and helped her enjoy dancing a bit more.
- [15] The accused, together with other members of the team, are observed on video arriving at Jack's Bar between 11:20 and 11:40 p.m. They were required to show identification to enter the bar and Mr. Formenton, who was not 19 years old, was not permitted to enter. Mr. McLeod, Mr. Hart, Mr. Dubé and Mr. Foote entered Jack's Bar.
- [16] According to E.M., she was approached while on the dance floor by a man and they started dancing a bit, and then he brought her over and introduced her to another man. There is no dispute that the first man that E.M. was dancing with was Brett Howden, who was also a member of the Canadian World Junior Hockey Team and the man to whom she was introduced was Michael McLeod.
- [17] After meeting Mr. McLeod, he and E.M. had a shot together at the bar. According to the complainant, she was already "drunk a little bit" at that point in time and does not recall any conversation with Mr. McLeod although she recalls that she spent a lot of time with him at the bar.¹
- [18] She learned during the evening that this group of men played hockey together, although she did not know at what level.
- [19] According to E.M. in addition to the two Mike's Hard Lemonades she consumed earlier in the evening, while she was at Jack's Bar, she consumed a Vodka Soda, one beer and eight Jagerbomb shots (according to her evidence, this includes the shot of vodka or tequila). She testified in chief that other than the first few shots she purchased when she was with her friend, the rest of the drinks were bought for her by either Mr. McLeod or the rest of the group of his friends. She also described an older gentleman who was with "the group" who poured a shot into her mouth during the evening.
- [20] In cross-examination by Mr. Brown, the complainant acknowledged that this was inaccurate when she was shown video footage of attending at the ATM machine to withdraw money, then purchasing her own drinks.
- [21] Furthermore, during her cross-examination E.M. was shown a glass from Jack's used to make Jagerbomb shots. Mr. Brown demonstrated and the complainant agreed, that the glass holds half an ounce of alcohol and not a full ounce.² It was suggested that the complainant consumed less alcohol than she thought, that is four ounces of alcohol in the eight Jagerbomb shots, rather than eight ounces based on the size of the glass. She agreed.

¹ Excerpt of the Transcript of Proceedings, May 2, 2025, at p. 7, lines 12-15.

² See Exhibit #28.

- [22] According to the complainant, at that point in her life, she was attending university and would go out to bars usually once every weekend, but normally four coolers would be enough to make her feel drunk. Consuming this much alcohol was “excessive” for her.
- [23] In cross-examination, E.M. agreed that “a normal” amount that she would drink on a night out at Jack’s would be six to eight drinks. She agreed that according to the video, after meeting Mr. McLeod, she purchased a shot for him.
- [24] Once shown the video evidence, the complainant conceded that she purchased the Jagerbomb shots for herself, most of them before ever meeting any of the players. She also acknowledged that she did not tell the police that she actually purchased a shot for Mr. McLeod. E.M. testified that “she forgot” about that because she was “really drunk”.
- [25] The complainant was shown a plastic glass from Jack’s which she agreed was like the glass from which she consumed a beer that night. The bottom of the glass is marked “7 oz” and she agreed that it was significantly smaller than regular beer glasses.
- [26] E.M. described that she was feeling the effects of the alcohol as the night went on and her inhibitions were lowered as she consumed more alcohol. According to her evidence in chief, she was less aware of her surroundings and felt her vision was a little blurry, and she was not feeling very aware.
- [27] E.M. testified in chief that she remembered dancing with the group of men at the bar, but she felt uncomfortable because they were taking turns dancing with her, and she felt “sandwiched in”. They were passing her back and forth and they circled around her. She testified that there was a lot of physical contact and “grinding” bodies against each other. She thought it was kind of odd that Mr. McLeod was okay with the way the others were pulling her away to dance. She also described that some of the men moved her hand to touch their “crotch area”.³ The complainant testified that when this occurred it felt a little off, but because she was drunk, she went along with it. She was trying to dance and have fun.
- [28] E.M. testified that over the course of the evening, she was attracted to Mr. McLeod, and he seemed interested in her. She acknowledged kissing him. She agreed during cross-examination that she did not tell the police when she provided her first statement on June 22, 2018 that she had kissed Mr. McLeod at the bar. She explained that she was not asked about it and that she thought it was “self-explanatory” with the dancing and interactions at the bar, but she did not purposely leave that out. She also agreed that she did not mention the kissing when she provided a statement to Hockey Canada on July 20, 2022.
- [29] The complainant was shown video recordings from Jack’s Bar. She did not recall dancing with Mr. McLeod and Mr. Howden together. She did not recall that Mr. Howden “hit her butt” as he walked away from the dance floor. According to her evidence, at that point in the night she was feeling off balance as if it was taking a lot of effort to move around and stay upright. She felt her judgment was “starting to be impaired at that point” like she was

³ Excerpt of the Transcript of Proceedings, May 2, 2025, at p. 13, lines 5-6.

not really aware of what was going on. She recalled going to the bathroom and slipping or losing her balance and falling to the ground.

- [30] In cross-examination, the complainant agreed that she told the police in her initial statement that she was alone when she fell leaving the bathroom, but in a statement provided to Hockey Canada on July 20, 2022, she stated that Mr. McLeod was present when she walked out of the bathroom and fell.
- [31] E.M. agreed that in her first statement to the police she told them that the players “separated her” from her friends. She explained that she was not trying to imply that they kept her away from her friends when she said that. It was suggested to her that she made a choice to separate herself from her friends. She denied the suggestion.
- [32] According to E.M., she felt “pressure” to be with Mr. McLeod throughout the night. She described at one point trying to go to the bathroom to “sneak away” so she could go off on her own, but he insisted on staying close to her. He walked her to the bathroom and waited for her until she came back out. She said she accepted that she would go with him to the hotel. She described herself as a person who “has a bit of a hard time saying no” to people.⁴ E.M. described feeling “okay” about going to the hotel with Mr. McLeod, but she felt that if she was not “drunk” she would not have done that.
- [33] In cross-examination, E.M. agreed that in her July 20, 2022 statement to Hockey Canada about these events, she was trying to convey that she felt that she could not get away from Mr. McLeod. She explained that she did not write that statement fully, and that what she said about falling outside of the bathroom in the initial statement provided to police was accurate and this was “an error”.⁵
- [34] Further in cross-examination, E.M. acknowledged that if she wanted to leave Mr. McLeod, she had lots of options to do so, but it was “hard to think” with a lot of alcohol in her system and she has a hard time saying no to others.
- [35] The complainant was shown video from Jack’s which showed her greeting and speaking several times to a man working as a bouncer or security for Jack’s Bar. E.M. advised that she knew this man from high school and that they had been friends in high school.
- [36] E.M. agreed in cross-examination that she did not mention her interactions with the bouncer in any of her statements to the police or to the Hockey Canada investigators and only did so when she prepared a statement dated March 18, 2025, after reviewing videos from Jack’s Bar during preparation for trial.
- [37] It was suggested by Mr. Brown in cross-examination, that she did not mention the bouncer because he could have attested to her state of intoxication. She replied that she “wasn’t thinking he could be helpful”. She also explained that she was embarrassed about what had happened and did not want him to know.

⁴ Excerpt of the Transcript of Proceedings, May 2, 2025, at p. 48, lines 22-24.

⁵ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 18, lines 3-23.

- [38] A video was shown to the complainant taken at approximately 1:20 a.m. showing her speaking to the bouncer alone for approximately seven minutes and it was suggested that if she wanted to get away from Mr. McLeod, she could have gotten help from the bouncer. She replied by saying that she was not trying to get away from him at that point, but pointed out that she was showing “visible signs of drunkenness” by leaning on the wall, although she had no memory of interacting with the bouncer at present.⁶
- [39] On the issue of her state of intoxication, during cross-examination by Ms. Greenspan, the complainant was shown the video recording at Exhibit #34 and agreed with a suggestion that she had the “wherewithal” to realize that the bartender had short-changed her when she ordered a drink.
- [40] E.M. was also cross-examined about the shoes she was wearing that night which were described as stilettos with thin high heels. She agreed that she wore the shoes all night while she was at Jack’s Bar, including when she was dancing.
- [41] The complainant did not recall exchanging Facebook Messenger messages with V.H. while at Jack’s Bar. They were shown to her in cross-examination and were filed as Exhibit #41a and b. When it was suggested to her earlier in her cross-examination by Mr. Brown that she was texting on her phone, she thought she was “scrolling” and did not recall texting. After being shown these messages, the complainant said: “And again you used the term texting, which means something different than a Facebook Messenger”.⁷
- [42] A message sent by V.H. at midnight said, “Let me know if you want me to get u from the guy!!” E.M. responded that she was okay for now and would return soon but she agreed that she did not return to join her friends. V.H. then texted E.M. three times without reply, then tried to call her as well.
- [43] The following morning at 9:04 a.m., V.H. asked E.M. if she made it home alright and E.M. replied that she did. And when V.H. texted that she was not “lit” enough the night before, E.M. agreed and said they would have to go out and get “really lit”, meaning really drunk. She explained that she did not want her “brand new” friend to know her business, so she was talking to her as normal.
- [44] The video surveillance from outside of Jack’s Bar shows Mr. McLeod and E.M. leaving the bar holding hands shortly after 1:30 a.m. Once outside, Mr. McLeod walks down the street quickly towards a cab and the complainant follows behind him almost running to catch up.

ii) The events at the Delta Hotel

- [45] The surveillance video from the Delta Hotel is of assistance in establishing a timeline of the circumstances that follow. The video shows that E.M. and Mr. McLeod arrived in a cab together at the hotel at 1:48 a.m.⁸ While Mr. McLeod leans into the cab to speak to

⁶ Excerpt of the Transcript of Proceedings, May 9, 2025, at pp. 137-138.

⁷ Excerpt of the Transcript of Proceedings, May 9, 2025, at p. 152, lines 28-30.

⁸ See Exhibit #6, lines 45-48.

the cab driver, E.M. can be seen standing nearby and seemingly looking at her cell phone. She then walks without difficulty towards the front entrance of the hotel.

- [46] They entered through the main doors with E.M. following Mr. McLeod up a short flight of stairs. It was suggested in cross-examination that she appeared to have no difficulty standing or walking as she entered the hotel. E.M. testified that she had to “really focus hard” to get up the stairs.
- [47] It was suggested by Mr. Humphrey in cross-examination that she “skipped” up the stairs without difficulty, and that she showed no visible effects of the consumption of alcohol. The witness agreed that it appeared that way on video.
- [48] But E.M. testified that when she arrived at the hotel, she was feeling the effects of the alcohol, had blurry vision and was “just completely out of it”.⁹ The complainant agreed that she did not consume any alcohol after she left Jack’s Bar at about 1:30 a.m.

iii) E.M.’s version of the events in room 209

- [49] According to the evidence of E.M., once they arrived at room 209 at the Delta Hotel she went to the bathroom and removed her clothes, and left them there. Then she had oral and vaginal sex with Mr. McLeod. Once it was over, she went to the bathroom to clean up and Mr. McLeod got dressed. She returned to the bed naked and laid on top of the covers. She noticed that Mr. McLeod was on his phone texting.
- [50] When confronted in cross-examination with the statement she gave to Hockey Canada investigators on July 20, 2022, she agreed that she was not so drunk at that time that she could not consent to engaging in sexual activity with Mr. McLeod. She agreed that she initiated oral sex with him. When asked whether she recalled any conversation with Mr. McLeod about using a condom, the complainant stated: “that seems logical to me”, but she could not remember any conversation. She further agreed that she initiated intercourse with him by getting on top of him while he was laying on the bed.
- [51] The complainant testified in chief that she expected that she would be spending the night in the hotel room with Mr. McLeod. She did not recall any conversation with Mr. McLeod about what was going to happen next.
- [52] In cross-examination, it was suggested to E.M. that she made a suggestion to Mr. McLeod that he invite some of his teammates to the room. Initially, she answered:
- “No, I don’t see that having been a – sorry - suggestion that came from my mouth. I don’t think that was something I would have said.”¹⁰
- [53] Although the complainant testified that she could not recall any conversation with Mr. McLeod, when it was suggested again to her in cross-examination that she asked Mr. McLeod to have some of his friends come back to the room because she was interested

⁹ Excerpt of the Transcript of Proceedings, May 2, 2025, at p. 51, lines 16-19.

¹⁰ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 61, lines 23-33 and at p. 62, line 1.

in having sexual interactions with them, E.M. replied: “No, I don’t think that would have been something I would have said.”¹¹

- [54] When it was suggested to the complainant that she did not want to go home after engaging in sexual activity with Mr. McLeod, because she wanted to engage in sexual activity with others, E.M. testified that usually around 2:00 or 3:00 a.m. would have been the time when she would be leaving, and she “would have wanted to be going home”.¹² When pressed by Mr. Humphrey that she remained in the room because she told Mr. McLeod that she wanted a “wild night”, she said “Again, that doesn’t sound like anything I would usually say, and I don’t remember saying those words”.
- [55] E.M. testified that she next remembered Mr. McLeod leaving the room and two other men entering the room while she was naked on the bed. This shocked her. She was surprised. E.M. did not recall having any conversation with these men. Nor did she remember if one of them had pizza. She remembered being naked on top of the bed when they came into the room. According to her testimony, shortly after the men came into the room she went to the bathroom again. She got off the bed while naked and walked to the bathroom. When she came back out, she saw that more men had entered the room.
- [56] E.M. disagreed with a suggestion in cross-examination that after the first two men left the room, she was alone in room 209 with Mr. McLeod for 10 to 15 minutes before the other men entered the room. She testified that the way she recalled the sequence of events was that after the first two men entered the room, she got up, went to the bathroom naked and when she left the bathroom there were more men in the room.
- [57] She indicated that she was feeling really uncomfortable and described herself as naked, drunk and feeling vulnerable and scared. According to E.M., she did not hear the other men entering the room while she was in the bathroom, because she was “still drunk”.
- [58] The complainant exited the bathroom naked and sat on the bed. She agreed with a suggestion by Mr. Humphrey that no one told her to come out of the bathroom naked and sit on the bed. She said it was just her body telling her to do that. She said it was an “automatic reaction”.¹³ She agreed it was possible she was being “flirty” with the men in the room.
- [59] The complainant also agreed that no one took her clothes off or forced her to undress. No one moved her clothes from the bathroom.
- [60] She then went and laid on a sheet that had been put down on the floor. When asked how the bedsheet came to be on the floor, the complainant testified that “they” made a comment about wanting her to get on the floor and she said no, so they laid a bedsheet on the floor for her.

¹¹ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 64, lines 16-17.

¹² Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 65, lines 1-6.

¹³ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 79, lines 18-19.

- [61] When asked in cross-examination why she did not simply return to the bathroom and put her clothes on when she saw the men in the room, the complainant replied that if she had been sober and able to think clearly, she might have done that, but she was drunk and was not able “to think about that”, and that was “just how my body responded”. She felt like she could not think clearly to make a choice.
- [62] E.M. testified that there were seven or eight men in the room who were much larger physically than she was. She testified that as soon as the other men began entering the room, her mind “separated” from her body. She felt as if her mind floated to the top corner of the ceiling, and she was just watching everything happening. She testified that she felt like she had no control and no choice.
- [63] E.M. testified that the men were talking loudly and joking with one another, and she felt like she was being bullied. According to her evidence, the physical contact with the men started when they wanted her to touch herself and moan. The complainant testified that she was confused because she felt like she was watching this happening and she “could feel like I was watching my body doing this and acting like I’m liking it and doing what they’re wanting to see from me, and it was confusing to know if I was liking the attention”.¹⁴ She agreed that in her initial statement to Detective Newton, she told him that she was “liking the attention for a little bit”.
- [64] E.M. was asked about her initial statement to police where she described comments that she alleges were made regarding golf balls and golf clubs being inserted in her vagina as something the men were joking about, as opposed to the way she described it in her civil claim where she said that the comments were intimidating and frightening to her. In response, the complainant explained that by the time the civil suit was filed, she “had time to process her fear”.
- [65] E.M. testified that the men were telling her what they wanted to see her do or telling each other what to do. She testified that some of the men started putting “penises in [my] face” and she performed oral sex on three men. She could not recall if she assisted in pulling the men’s pants down to do it.
- [66] E.M. testified that she was being told to “suck it” and the men were yelling “spit on it” and she felt someone spit on her back, and “some slapping”. She felt slapping on her butt while she was performing oral sex on the men. She felt as if her mind was separated from what she was doing. She described being on “autopilot”. She was asked if any of the men she performed oral sex on spoke to her directly. She said that she did not recall, but if they did, she was not really hearing it.
- [67] However, in cross-examination, the complainant agreed with a suggestion that she could not recall what if anything the three men said to her directly before the oral sex began.
- [68] The complainant recalled hearing comments like “no phones” or “put the phones away”. That made her worry that someone was recording what was happening.

¹⁴ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 81, lines 11-14.

- [69] E.M. testified that in her own mind, it was not what she wanted to be doing. She felt like she did not have any other option. She described it as her body protecting her from the situation. She testified that she did not know the men and did not know how they would react if she said no or tried to leave.
- [70] It was suggested to the complainant in cross-examination that after performing oral sex on the first man, she was asking other men in the room if they wanted to have sex with her. E.M. replied that she did not recall asking for that. She testified that she had no memory of saying anything.
- [71] When asked specifically if she said words to the effect of “come on, you’ve got a girl here, someone have sex with me, you guys are pussies”, E.M. testified that “that doesn’t even really sound like how I would usually speak.”¹⁵ However, she did remember someone saying, “this girl is fucking crazy”. She agreed that could have been said in response to her saying “someone have sex with me”.
- [72] When it was suggested to the complainant in cross-examination by Mr. Brown that it is easier for her to deny the deliberate choices she made on June 18 and 19, 2018 than to acknowledge the shame, guilt, and embarrassment she felt about those choices. She responded by saying “I don’t know. I’m kind of struggling to understand that. I had a lot of blame on myself. I also do believe other people should be held accountable for their actions that night. I think it’s just a combination of things.”¹⁶
- [73] E.M. described that after she performed oral sex on the three men, she was laying on the sheet on the floor and a different man, who had his pants off, did the splits “right over my face” and he put his penis “right on my face”. She did not recall something specifically happening before this, just that she was laying on the sheet. She thought this was “kind of gross” and it felt degrading.
- [74] When this was happening, she felt like the other men were making fun of her, like it was a joke to them. She agreed in cross-examination that she may have been acting like it was funny to her as well “to cope with the situation”.¹⁷
- [75] Further, it was suggested to the complainant that when she was on “autopilot” during these events, she may have been quite sexually assertive. She replied that she was not sure and did not recall. After further questioning, she stated that it is possible that she took on this personality to cope with it.
- [76] E.M. agreed with a suggestion by Ms. Savard that she had almost no memory of what she may have said while in room 209, but when she said no to something, that boundary was respected. She agreed that she was “missing memories” of what was said by her and others about the terms on which she was willing to engage in sexual activity.¹⁸ E.M. also agreed that when she testified that she would or would not have done something, that she was

¹⁵ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 89, lines 25-27.

¹⁶ Excerpt of the Transcript of Proceedings, May 8, 2025, at p. 66, lines 23-32.

¹⁷ Excerpt of the Transcript of Proceedings, May 13, 2025, at p. 104, lines 9-16.

¹⁸ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 63, lines 21-24.

relying on something other than habit, because she had no habits consistent with this unusual event.

- [77] The complainant also agreed in cross-examination that she adopted the persona of a “porn star” because she thought that is what the men in the room wanted, and some of the things she was doing, she did without being told to, to just get it done and get out of the room.¹⁹
- [78] She also agreed that no one physically forced her to do things in that room, but the number of people, and the “jokiness” with which they were approaching it, it did not “feel” like she had a choice.
- [79] The complainant described a further incident of sexual activity. She testified that the men were encouraging each other and saying: “someone have sex with this girl”, following which she got up and expected that this was another thing she had to do. So, she got up and a man followed her to the bathroom. Although in cross-examination on this point, she agreed that it was possible that she led him to the bathroom, but she did not recall it that way.
- [80] She did not recall any conversation with him. The man put a condom on and bent her over the bathroom sink and they had sex, and then the condom was removed, and she performed oral sex on him while she was on her knees and he was standing. The complainant believed that she did not remove the condom, that he did.
- [81] The complainant did not know where the condom came from. She felt that this sexual activity was a continuation of what was going on. She felt separated from what was happening, she was feeling numb and like she had no control.
- [82] The complainant identified the individual she had sex in the bathroom with on the team photograph entered as Exhibit #17. She identified him to Detective Stephen Newton who wrote what she said on the photo: “Mikey’s room-mate in room and sex in the bathroom”. It is acknowledged that this person is Alexander Formenton.
- [83] Although, at another point in her cross-examination, the complainant was unsure whether the sexual activity in the bathroom with Mr. Formenton happened earlier, before the oral sex and she said it could have happened before, but she was not certain about that.
- [84] After the sex in the bathroom, E.M. went back into the room naked, and laid on the bed sheet even though her clothes were in the bathroom. She recalled that at some points during the night she was getting up and getting her clothes on to try to leave and then a man would come over and convince her to stay. She said someone would put their arm around her and guide her back to the bedsheet and try to convince her they were having fun. E.M. testified that she was crying at some point.
- [85] E.M. agreed with a suggestion in cross-examination that none of the men physically stopped her from leaving the room. When asked why she did not leave after coming out

¹⁹ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 72, line 32 and at p. 73, lines 1-3.

of the bathroom since the door to the room was very close to the bathroom door, the complainant explained that she did not think of that.

- [86] E.M. testified that at some points “no one was doing anything” she started feeling sick, and she felt like she had to throw up but could not. “They” would notice she was crying, and they did not want her to leave while she was crying. E.M. testified that she heard someone say “oh she’s crying, don’t let her go” although she could not identify who said it. She agreed in cross-examination that this was the first time she told anyone that someone said those words to her.²⁰
- [87] At another point in the cross-examination in relation to this issue, the complainant agreed that in 2018 she told the police that she did not think that the men in room 209 would have actually physically stopped her from leaving, and that they said things like “oh come on, don’t leave”.
- [88] E.M. testified that she was “really drunk” and was not having fun, and did not want to stay there, but she felt like she did not have an option.
- [89] According to the complainant, she did not see Mr. McLeod much after the initial encounter with him. She recalled that after he left the room, he came back with food and then he was just lying on the bed eating food while everything was going on.
- [90] E.M. testified that “it was kind of made clear” that people wanted to see her perform oral sex on Mr. McLeod, and he asked for it, so she kneeled on the bed and performed oral sex. She did not specifically recall how that happened, either something was said, or he had asked for it. As she performed this oral sex, there were people behind her who started slapping her. She recalled multiple people taking turns trying to hit her as hard as they could. It started to hurt, and she told them to stop it.
- [91] In examination in chief, E.M. was asked to describe the atmosphere in the room. She said it stayed the same throughout the night, the men seemed amped up, it was very loud and chaotic. After she performed oral sex on Mr. McLeod, he asked the men to leave his room.
- [92] E.M. agreed that in her first statement to the police, she did not describe being scared in the room, but did describe being frustrated or upset. She explained that at the time of that interview she had “processed” the feeling of being frustrated but her mind had shut down and was protecting her from feeling fear. She had not fully processed the fear, she was not trying to think about it.
- [93] In cross-examination it was put to the complainant that she did express how she was feeling to Detective Newton in the statement of June 22, 2018 in that she described feeling tired, annoyed, and frustrated but she did not describe being fearful. The first description of her fear was in the Statement of Claim filed in April 2022. She explained that having to relive this over the years and talking about it, it was something she recognized.²¹ She testified that her mother contacted a civil lawyer on her behalf before February 2019,

²⁰ Excerpt of the Transcript of Proceedings, May 8, 2025, at p. 9, lines 9-16.

²¹ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 96, lines 26-32 to p. 99.

when Detective Newton told her that the investigation was going to be closed and no charges would be laid.

- [94] According to E.M., after the initial sexual encounter with Mr. McLeod, when the rest of the men came into the room, her mind just shut down. She felt like she was watching herself and when she left, she felt like her “mind was able to re-enter [her] body”.²²
- [95] In examination in chief, when asked to describe her level of intoxication during the time she was in the hotel room, the complainant testified that she was “very drunk” and felt like she wanted to throw up but could not. Although she felt that towards the end of the night, she had started to sober up a bit. In cross-examination, she said that it took a lot of effort in the room to appear “kind of sober”.²³
- [96] She described that she was crying in the room twice, either because of the comments the men were making or because she was being laughed at, and she was trying to leave at those points. In cross-examination, the complainant testified that on both of those occasions, she was walking towards the bathroom or front door of the room.
- [97] When asked in examination in chief if anyone “checked in” with her when the sex acts were taking place, E.M. testified that they did not. It was not until near the end that they were asking her if she was fine.
- [98] In cross-examination by Mr. Humphrey, E.M. agreed that in her initial statement to police she said that there were points in the night when she looked upset when Mr. McLeod would ask her if she was okay. It was suggested to the complainant that whenever he asked her if this was what she wanted, or if she was okay with what was happening, she said she was okay with it. The complainant agreed with that suggestion, but asked “what else was [I] supposed to say at that point?”²⁴
- [99] E.M. testified in chief that she was not able to identify any of the three men that she performed oral sex on, and was concerned about not identifying people correctly, if she was not sure.
- [100] After a further sexual encounter with Mr. McLeod, which is described in more detail below, E.M. recalled that he and his roommate were making comments about how they would have to be up soon to attend a golf tournament, and they wanted to know if she was leaving soon.
- [101] She then got dressed, and after leaving the room, realized that she had left some jewelry behind, specifically a ring, so she knocked on the door to get back into the room to look for it. She testified that the men seemed annoyed by that. She could not find the ring and felt “silly” and left. She testified that she burst into tears at that point. When she got to

²² Excerpt of the Transcript of Proceedings, May 5, 2025, at p. 24, lines 21-27.

²³ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 77, lines 21-23.

²⁴ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 101, lines 10-13.

the lobby, she called an Uber and then called her friend and was really upset with what had happened.

- [102] E.M. agreed in cross-examination that the ring she went back to retrieve did not have sentimental value and was not valuable, but she said she values her belongings and did not want to leave something behind. She sensed that Mr. McLeod was annoyed that she had returned. She felt that he was rude and awful at that point.
- [103] A video recording from the lobby of the Delta Hotel shows E.M. exiting the lobby, and walking into the vestibule and talking on her phone before exiting the hotel at 4:46 a.m.
- [104] E.M. testified that she was speaking with her best friend E.F. [name redacted] and she was very upset and crying and looking for emotional support. She said that she felt shame and embarrassment at that point. She testified that she blamed herself for even going to the hotel in the first place. She wished she “could have reacted in a different way” and did not know why she responded the way she did to what was occurring in room 209. She was “not happy” that she found herself in that situation. She could not stop crying all the way home.
- [105] In cross-examination, the complainant acknowledged that as she left the Delta Hotel on June 19, 2018, she called E.F., she was upset and crying and she told E.F. that she left the bar with a young man who was nice at first but turned out to be a “jerk”. She testified that she had a boyfriend at the time and felt guilty about cheating on him with Mr. McLeod.
- [106] The complainant testified that she arrived home at 5:08 a.m. and could not stop crying. She then got into the shower. She believed that her mother heard her crying and came in to check on her. She testified that she spoke to her mother who “took it upon herself” to call the police without consulting with her.²⁵ E.M. testified that it was her mother who determined that the accused were affiliated with Hockey Canada and her mother’s boyfriend who contacted Hockey Canada directly.
- [107] E.M. testified that she first reported the matter to the police on June 22, 2018, and attended at St. Joseph’s Health Care in London on the same day. She agreed that her mother believed she had been “roofied” and she told others in conversations she thought she had been drugged.
- [108] In cross-examination, the complainant was asked whether the nurse who conducted the sexual assault examination suggested a urine toxicology test be conducted to determine if there was evidence of drugs in her system. She agreed, but said she was given the impression that it would not show anything because of the time that had passed, so there was not a point, and so she did not take the test.
- [109] In addition to the phone call that E.M. made to her friend E.F. after leaving the Delta Hotel on June 19, 2018, there were text messages exchanged between them. The complainant agreed that she did not provide those text messages to the police.

²⁵ Excerpt of the Transcript of Proceedings, May 5, 2025, at p. 58, lines 24-32.

[110] At 3:36 p.m., E.F. sent the complainant a message asking if she was okay. E.M. responded “I’m ok girl. I think I was just being a little over dramatic earlier, but I’m good”.²⁶ She explained that she was “still processing it” and was doing her best to try to be fine.

[111] E.F. replied by saying “you scared me this morning”. In response, E.M. apologized and said:

I was just feeling really guilty and mad at myself for letting that shit happen. I just felt dirty and used after, the guy was such a jerk and he had all his friends in the room and it was a bad situation. I shouldn’t have put myself in that position.

[112] In cross-examination by Ms. Carnelos, it was suggested that the complainant told her best friend that she was feeling “dirty and used” because Mr. McLeod was a “jerk”. E.M. agreed and said that the disrespect at the end was all she could “process” of what had happened. She agreed with a suggestion that she felt guilty about cheating on her boyfriend. She agreed further that she felt embarrassment, but not about what she did, or what they did to her, it was because they were making fun of her all night.

[113] E.M. testified that she did not tell E.F. that she had been sexually assaulted because she was trying not to think about it, which is how she was processing it.

[114] The text messages continue and E.F. told her not to blame herself because he, meaning Mr. McLeod, seemed really “chill” at the bar, or seemed like a good guy, and her co-workers left her by herself. E.M. responded by saying that Mr. McLeod was “sweet” at the bar, but it was a “totally different story” when they got to the hotel. She told E.F. that she was disappointed in herself and felt guilty for what she did to her boyfriend.

[115] Ms. Carnelos suggested to E.M. that when she told her friend that her co-workers left her at the bar, that was not true. The complainant explained that that was how “she felt” and that they did leave the bar without her even though they did check on her before leaving. When pressed about the fact that V.H. had been checking in with her all night, including calling her, E.M. responded by saying “I accept that I did not go back to them.”²⁷

[116] The next time E.M. sent a text message to E.F. was on June 22, 2018, after going to the police. E.F.’s response made it clear that she was surprised by this information and she asked, “what happened?”. E.M. responded that “it was just for the situation that happened Monday night”.

[117] She then sent the following message to E.F.:

Pretty sure I was roofied tbh and my mom is taking it hella seriously contacting the police and shit. The group of guys are all high up hockey players. Go figure lmao

²⁶ See Exhibit #45.

²⁷ Excerpt of the Transcript of Proceedings, May 12, 2025, at p. 79, lines 15-32 and at p. 80, lines 1-11.

It's ok, I was trying to down play it and just forget it but honestly I'm pretty fucked up from it no so idk.

iv) The consent videos

[118] While she was in room 209, Mr. McLeod recorded two brief videos of E.M. which have been referred to as the "consent videos". In the first video, recorded at 3:25 a.m.,²⁸ which lasts only six seconds, a number of male voices can be heard. The complainant is asked by a male voice "hey you're okay with this though, right?" and she responds "yes, ya". She's asked again "You're okay with this?" and responds while wiping her eye with the back of her hand "ya, I'm okay with this". She was smiling in the video.

[119] When it was suggested to the complainant in cross-examination that if she was unaware that she was being recorded in that video, then she could not be acting for the camera when she said those things, she agreed "that would make sense", but said she did not recall what was really going on. She further agreed with a suggestion that she sounded "positive" in the video.

[120] In the second video which is 12 seconds long, and is time-stamped 4:26 a.m.,²⁹ the complainant is standing while holding a white towel in front of her body, but otherwise appears to be unclothed. A male voice (who is identified as Michael McLeod) can be heard saying: "say it". E.M. who is smiling and looking at the camera, says:

E.M.: Okay. It was all consensual. Are you recording me?

Michael McLeod: Ya

E.M.: Okay, good. It was all consensual.

M.M.: What else?

E.M.: Would you ... you are so paranoid...holy....I enjoyed it. It was fine.
It was all consensual ... I am so sober that's why I can't do this right now....

[121] While speaking on the video, E.M. does not display any signs of intoxication. She has no difficulty speaking or standing, she is not slurring her words and speaks clearly and coherently.

[122] E.M. was shown the first video during her examination-in-chief. E.M. testified that she has no recollection of the video being recorded. She is asked at what point in the night the video is taken and says it seems like it was towards the end of the night with all the men still in the room. She testified that she was "probably" on the bed sheet and since she is wiping her eyes a lot "it may have been" one of the points when she was crying. She testified that she felt like "I don't really look like myself".

²⁸ See Exhibit #6, line 60.

²⁹ See Exhibit #6, line 61.

- [123] She did not know whether when she stated she was “okay with this” she was referring to a specific act. She testified that she “wouldn’t say” it was a true reflection of how she was feeling about what was happening. E.M. thought this was still at a point where her mind is disconnected from her body and what she was doing.³⁰
- [124] According to E.M., she “felt” like the men were telling her she was okay with it, and she was going along with it but she was not feeling like she was able to think clearly.
- [125] When asked during examination-in-chief, E.M. did not remember the second video being recorded either. In that video, the complainant testified that she believed she looked “really drunk”.
- [126] Although she initially testified that she had no memory of the recording being made, she testified that after seeing the video it refreshed her memory, and she recalled that this video was taken at the end of the night after the other men had left the room and she was in the bathroom when Mr. McLeod entered and got in the shower and wanted her to get in the shower as well and she did so.
- [127] She testified that “McLeod kind of told me to say it”³¹ and was trying to get her to say what he wanted her to say on camera. She testified that although she said “it was all consensual” that is not in fact how she felt at the time.
- [128] She testified that at the end of the night, around the time that the video was recorded, she went into the bathroom and Mr. McLeod came in and they had sex again in the bathroom. She could not recall if that took place in the bathroom or in the shower. She believed that she also “performed oral” at that point.
- [129] In cross-examination, she agreed that the first time she saw the second video was during a police interview conducted on August 31, 2018. She agreed that she was asked by the police if she had showered, and she said that she could not recall. She also agreed that she did not mention having sex with Mr. McLeod in the shower at the end of the evening when she first spoke to the police.
- [130] It was suggested to the complainant that before the second video was recorded, there was some discussion with Mr. McLeod about how the sexual activity was consensual, and the complainant agreed that she recalled “something along the lines of that”, but she felt that he was “hounding her” to agree to that.
- [131] In cross-examination by Ms. Savard, when the complainant was asked why she said “I’m so sober” on the video, the complainant said “I didn’t feel sober at all”.³² But when it was put to her that at times in the room she was putting in considerable effort to be sober, she

³⁰ Excerpt of the Transcript of Proceedings, May 5, 2025, at p. 29, lines 1-5.

³¹ Excerpt of the Transcript of Proceedings, May 5, 2025, at p. 30, lines 30-33.

³² Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 78, line 22.

disagreed with that suggestion, despite the fact that she had said just that earlier in her cross-examination.³³

- [132] She described being tired and that this second encounter was different than the first encounter with Mr. McLeod.
- [133] In cross-examination, E.M. agreed that Mr. McLeod got into the shower alone at first and asked her to join him. When it was suggested that she made a choice to join Mr. McLeod in the shower, the complainant said she was still feeling like she did not have a choice.
- [134] After they had sex in the shower, the video was recorded and then E.M. got dressed. She agreed in cross-examination that at this point in the evening she began to think that Mr. McLeod was a jerk because he was just getting ready to go to bed and wanted her to leave. He said something like “are you going to leave anytime soon?” This comment made her feel like he was not treating her respectfully. This annoyed her. She felt he was being rude. She agreed with a suggestion made to her that she called him a jerk at this point. Mr. McLeod did not walk her to the door, he got into bed to go to sleep. He did not call her a cab or an Uber.
- [135] The complainant acknowledged as well that she was upset when Mr. McLeod asked her if she was sure she did not have any STDs. She was offended by the question.
- [136] The complainant testified that she had contact with Mr. McLeod the following day.

v) The text exchange between E.M. and Michael McLeod

- [137] On June 20, 2018, Mr. McLeod contacted E.M. through Instagram and asked her to call him. They then had a text exchange which was introduced into evidence as Exhibit #4.
- [138] Mr. McLeod asked the complainant to call him, but she did not. He then asked her over text if she went to the police. E.M. explained that her mother had contacted the police, but she told her not to. According to E.M., she was feeling nervous and scared about the messages and she was “starting to panic a little bit at this point”. She texted that she did not want anything “bad” to come of it and told her mother to stop.
- [139] According to E.M. at the time that the messages were being sent, she was “feeling scared” and she “resorted” to trying to “avoid confrontation and just keep people happy”.³⁴ She also testified that “she hadn’t really processed” what had happened yet and “hadn’t realized” that her mom had called the police already.
- [140] The following text messages were exchanged between E.M. and Mr. McLeod:

Michael McLeod (M.M.): You said you were having fun??

E.M.: I was really drunk, didn’t feel good about it at all after. But

³³ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 78, lines 11-13.

³⁴ Excerpt of the Transcript of Proceedings, May 5, 2025, at p. 42, lines 21-24.

I'm not trying to get anyone in trouble, I know I was in the wrong too.

[141] When asked in examination-in-chief what she meant when she texted "I was in the wrong too", E.M. testified that she was feeling like she was "blaming herself a lot" just for being at the hotel in the first place. She felt like it was all her fault, and she was "trying to take some responsibility for that."³⁵

[142] She then texted:

E.M.: I was ok with going home with you, it was everyone else afterwards that I wasn't expecting. I just felt like I was being made fun of and taken advantage of.

[143] In chief, the complainant testified that that is how she was feeling that night. She did not expect all the other men to come into the room and they were laughing at her and she felt "ganged up on". She felt she was being "taken advantage of" in that situation.

[144] In response to that message, Mr. McLeod said that he "understand[s] that you are embarrassed about what happened" but that she needed to talk to her mother to "straighten things out with the police" and that her mother was "mis representing[sic]" what happened that could have significant implications for a lot of people including the complainant. He then asked, "what can you do to make this go away?"

[145] E.M. testified that that message made her feel "scared again" because the message sounded threatening.

[146] Mr. McLeod then texts:

M.M.: Ok so can you please figure out how to make this go away and contact the police.

[147] That message was sent at 12:09 p.m. and E.M. responded "Ok". Mr. McLeod sent further messages and E.M. eventually responded by indicating that she was at work and would deal with it as soon as she could.

[148] That evening at 7:13 p.m. Mr. McLeod sent the following text message:

M.M.: Hey just wondering what's happening?

[149] At 7:38 p.m., E.M. sent this message:

E.M.: Told them I'm not going to pursue it any farther [sic] and that it was a mistake. You should be good now so hopefully nothing more comes of it. Sorry again for the misunderstanding

³⁵ Excerpt of the Transcript of Proceedings, May 5, 2025, at p. 43, lines 14-15.

- [150] E.M. testified that she had not yet determined whether she was “going to go through” with reporting the events. She just wanted Mr. McLeod to leave her alone. Mr. McLeod sent the following response: “I appreciate you telling the truth. Thank you all the best”. That was the last communication between them.

vi) The statements of the complainant

- [151] On June 20, 2018, E.M. told Detective Stephen Newton who had been assigned to investigate this case, by text message, that she did not want charges laid, she simply wanted the matter documented and the men involved spoken to.³⁶
- [152] However, the complainant attended at the London Police Service on June 22, 2018, in person and provided a statement to Detective Newton. Afterwards, she attended at the hospital and met with a sexual assault nurse. She declined a “head to toe” examination because she did not have physical injuries so she “didn’t think it was all that necessary”.³⁷
- [153] The complainant was cross-examined about her statement from June 22, 2018 when she told Detective Newton that it might have appeared she was consenting to what happened in the room even though she was “not okay with it”.³⁸ She agreed that was a truthful statement.
- [154] On June 26, 2018, a second interview with the complainant was conducted by Detective Newton where he informed her that he required information regarding her level of sobriety at the time of these events, and on the issue of consent.
- [155] E.M. also looked at a photo line-up on that date. In cross-examination, she agreed that she misidentified Sam Steel as someone on whom she performed oral sex. She said because of his blond hair, that was her “best guess” at the time. She did not consider that this was a way of accusing someone, she was just telling the detective who she thought was involved.³⁹
- [156] The complainant agreed that when she looked at a photo of Carter Hart during the photo line up, she told the detective that he was not in the room and she had no sexual activity with him. She agreed that she first believed Carter Hart was involved when she learned his name from Detective Newton in February 2019 at the time he told her that he was closing the investigation without laying any charges.
- [157] On August 31, 2018, the complainant met with a different investigator, Detective Constable Jilaine McConnell, because she preferred to deal with a female officer. Detective McConnell showed E.M. two video clips that had been obtained from Mr. McLeod, the consent videos. The complainant acknowledged in cross-examination that

³⁶ Excerpt of the Transcript of Proceedings, May 5, 2025, at p. 68.

³⁷ Excerpt of the Transcript of Proceedings, May 5, 2025, at p. 77, lines 10-14.

³⁸ Excerpt of the Transcript of Proceedings, May 7, 2025, at pp. 82-84.

³⁹ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 111, lines 5-9.

she told the detective that she did not know that the video timestamped 3:25 a.m. was being recorded.

- [158] It was put to the complainant in cross-examination by Ms. Savard that in that statement, she told Detective McConnell, after being shown the videos, that in that moment while she was still drunk, she thought it was all okay. She agreed with a suggestion that this was her best effort to describe her internal feelings at that time.⁴⁰
- [159] E.M. also agreed with a suggestion that her “best guess” as to her feelings at the time she gave this statement in August 2018 was that it was all probably okay, because she had not “processed” what had happened yet.
- [160] Further, the complainant agreed in cross-examination by Ms. Savard that when she spoke to Detective McConnell in August 2018, after reviewing the videos, she told her that she “was probably okay in that one minute” referring to the time when the video was recorded, but then the way they treated her afterwards upset her.⁴¹
- [161] On July 20, 2022, the complainant provided a written statement to Hockey Canada investigators after they re-opened their investigation (the 2022 statement). She referred to this statement as a statement “put together” by her civil litigation lawyers although she acknowledged that she reviewed it and signed it. The complainant agreed that the statement was prepared as a result of a letter sent to her lawyers by Danielle Robitaille of Henein Hutchinson, LLP. who had been retained by Hockey Canada to renew their investigation into these events.
- [162] She agreed that the request from Ms. Robitaille specified that the statement should be written in her own words. In addition, Ms. Robitaille requested that E.M. provide the identity of the eight John Doe defendants from her civil claim.
- [163] She explained that there were “errors” in that statement because she did not have an opportunity to review her earlier statement before preparing this statement, although she ultimately agreed that her lawyers were in possession of transcripts of her earlier statements.
- [164] The complainant agreed that in that statement she said that she was “too drunk to consent”, and that the players were responsible for getting her drunk. E.M. was confronted with the claim she made in the 2022 statement that she did not buy any drinks at Jack’s Bar, other than the first shots she had after she arrived. The complainant also stated that Mr. McLeod and the other men should have known she was too drunk to consent because they provided her with the alcohol. She acknowledged that these statements were inaccurate.

⁴⁰ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 52, lines 30-32 and at p. 53, lines 1-3.

⁴¹ Excerpt of the Transcript of Proceedings, May 7, 2025, at pp. 53-54.

- [165] She further agreed that in the 2022 statement she stated that she did not initiate any of the touching when she was dancing at Jack's Bar, which she acknowledged after reviewing the surveillance video, was not true.
- [166] In the 2022 statement she claimed to have fallen at Jack's Bar in front of Mr. McLeod, which was not true, although she explained that she got that mixed up with the time that Mr. McLeod was waiting for her when she came out of the bathroom.
- [167] In the 2022 statement, E.M. identified Drake Batherson as one of the first two men in the room and one of the men who put the bed sheet on the floor. In cross-examination, she said that at trial, she was not sure of that and could not say "for sure" that it was him who put down the bed sheet.⁴²
- [168] E.M. further agreed that the first time she said that she was assaulted in the shower at the end of the night was in the 2022 statement.⁴³
- [169] E.M. testified that the 2022 statement was just for Hockey Canada's investigation and not part of an actual police investigation. She stated that she took the police investigation more seriously, and she knew it had been closed in 2019 and did not result in charges being laid.
- [170] E.M. was confronted with the suggestion that she was actually advised by Detective Lyndsey Ryan in person, at 8:44 a.m. on July 20, 2022, that the London Police were re-opening the investigation into these allegations. Therefore at the time of the 2022 statement she would have known that was happening, the complainant said she did not agree because she could not say whether that happened the same day. She did confirm that she "truly believed" that when she signed the 2022 statement, it was for a separate investigation.
- [171] E.M. agreed that in the 2022 statement she indicated that the events of June 19, 2018 "caused a serious strain in my relationship with my boyfriend". She agreed that her boyfriend treated her with sympathy because he saw her as a victim.

vii) The evidence of Taylor Raddysh and Boris Katchouk

- [172] The Crown called the first two men who entered room 209 after Mr. McLeod and E.M. had engaged in the consensual sexual activity. They were Taylor Raddysh and Boris Katchouk. Both testified by videoconference pursuant to an order made under s. 714.1 of the *Code*.
- [173] Taylor Raddysh was a member of the 2018 Canadian World Junior Hockey Team. He was invited to go to London, Ontario along with the rest of the team, to celebrate their victory. He arrived on June 17, 2018, as did most of the team and was staying at the Delta Hotel. His roommate was Brett Howden.

⁴² Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 114, lines 4-18.

⁴³ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 69, lines 14-32.

- [174] Mr. Raddysh testified that he went to Jack's Bar on June 18, 2018, after the gala dinner but did not have any memory of what happened at Jack's that night. The surveillance video from the lobby of the Delta Hotel documents Taylor Raddysh's return to the hotel at 12:58 a.m. on June 19, 2018.⁴⁴
- [175] Mr. Raddysh testified that when he returned to the hotel, he "Face Timed" his girlfriend, meaning he made a video call to his girlfriend. According to his evidence, he recalled having an interaction back at the hotel with Michael McLeod and Boris Katchouk. After refreshing his memory from a statement he provided to the London Police on August 16, 2022, Mr. Raddysh testified that they knocked on his door and asked him to hang out for a bit.
- [176] Mr. Raddysh recalled going to the room next door, which was Mr. McLeod's room with Mr. McLeod and Mr. Katchouk. There was a woman there. He otherwise did not have any recollection of what occurred after that.
- [177] Mr. Raddysh identified a text message sent to a group chat that included 19 members of the 2018 Canadian World Junior Hockey Team. He did not recall seeing the message but acknowledged that it was sent to him. It was a message sent to the group chat by "Mikey" McLeod at 2:10 a.m. on June 19, 2018, which stated: "Who wants to be in a 3 way quick" followed a minute later by a text stating "209-mikey".
- [178] In subsequent text messages sent by Mr. McLeod directly to Mr. Raddysh, at 2:15 a.m. on June 19, 2018, Mr. McLeod said "come to my room If you want a gummer".⁴⁵ Mr. Raddysh did not recall when he saw those messages, but according to his evidence a "gummer" refers to oral sex.
- [179] Mr. Raddysh testified that on June 26, 2018, he sent a text message to both Mr. McLeod and Mr. Howden after receiving a call from Shawn Bullock. Bullock who is also known as "Bully", called regarding an investigation being conducted by Hockey Canada about the events which occurred on June 18-19, 2018, in London.
- [180] Mr. Raddysh had significant difficulty remembering the events of June 2018. Counsel came to an agreement to read into evidence, and admit on consent, as past recollection recorded, portions of a statement provided by him to lawyers Alex Smith and Gabriel Edelson of Henein Hutchinson, LLP., the lawyers conducting an investigation on behalf of Hockey Canada.
- [181] That evidence discloses that Mr. Raddysh was in room 209 at the Delta Hotel for about two minutes after being invited in by Mr. McLeod. He did not speak to the woman in the room, he was talking to "Boris and Mikey". He stated that the woman seemed "quite normal" and she was under the covers on the bed. The covers were pulled almost up to her neck and he could not tell whether she had clothes on or not.

⁴⁴ Exhibit #2.

⁴⁵ See Exhibit #16.

- [182] Mr. Raddysh indicated that he and Mr. Katchouk left room 209 together, and that while they were in the room, no other players entered. He did not return to room 209 after that.
- [183] The admissions included the fact that he was asleep when everyone came back from the bar. Mr. Raddysh heard noises from the room next door, and his roommate, Brett Howden, came into their room, making noise and woke him up. Mr. Howden came into their room a couple of times during the night and the last time, Mr. Raddysh told him to stop slamming the door. He could hear talking, chattering, and hooting and hollering coming from Mikey's room.
- [184] Mr. Raddysh was asked in cross-examination by Mr. Sayani whether he saw the young woman in room 209 get up out of bed and go to the bathroom. He testified that he could not remember that, but it was not something he mentioned in his 2018 statement. He agreed that he was telling the truth when he provided that statement, and that if he had seen that happen, he would have included it in his statement.
- [185] Mr. Raddysh disputed the evidence of the complainant that when he was in room 209, she got up out of bed and walked to the bathroom naked. He testified that if that had happened, he would remember it and it was not in his 2018 statement.
- [186] Mr. Boris Katchouk was also called as a witness by the Crown. He testified that he was in London along with the rest of the 2018 Canadian World Junior Team for the celebrations scheduled. He attended at Jack's Bar on June 18, 2018, and testified that he was pretty intoxicated as he was celebrating his birthday and the championship.
- [187] According to Mr. Katchouk, after leaving the bar that night, he went to a pizza stand and got some pizza before returning to the hotel. Boris Katchouk entered the lobby of the Delta Hotel at 2:23 a.m. with Callan Foote⁴⁶.
- [188] Mr. Katchouk testified that as he returned to his own room, he ran into Michael McLeod outside of his room and he invited him in. When he entered, he saw a woman laying under the sheets. He could not tell if she was wearing any clothing. While he was in the room Mikey asked him if he would like "a gummer". He indicated that he understood that to mean a "blow job". He laughed, but did not respond, and he did not recall if the woman had any reaction to this comment.
- [189] According to Mr. Katchouk, as they were speaking, Taylor Raddysh came into the room. Mr. McLeod went next door and brought him into room 209. While he was in that room alone with the woman, she asked him for a bite of pizza.
- [190] Mr. Katchouk testified that the men spoke for a couple of minutes and then Mr. Raddysh suggested that they leave and so they did. He then went straight to his room where he remained for the rest of the night.
- [191] In cross-examination, Mr. Katchouk acknowledged that his memory of the events that evening is impacted by the consumption of alcohol and the passage of time. He agreed

⁴⁶ Exhibit #2 and Exhibit #6, line 52.

that the woman in bed did not show any negative reaction when he entered room 209. He agreed further that the woman on the bed appeared to be following along with the conversation when Mr. McLeod asked him if he was interested in getting a “blow job” from her, and he did not notice any change in her demeanour. She did not seem upset.

- [192] When Mr. McLeod left the room briefly before returning with Mr. Raddysh, leaving Mr. Katchouk alone with the woman, he agreed that she seemed comfortable alone with him and he described her as “playful” and flirty.
- [193] Mr. Katchouk testified that he was in the room for a total of two minutes and agreed that he likely left by 2:27 or 2:28 a.m. He agreed that no one entered the room while he was there, other than Mr. McLeod and Mr. Raddysh.

viii) The group chat on June 26, 2018

- [194] By June 26, 2018, it is clear that an investigation into allegations of sexual assault was being conducted by the London Police Service and separately by Hockey Canada. Although some of the accused and other members of the team were aware of the investigation by Hockey Canada, they may not have been aware that the police were also conducting an investigation.
- [195] On June 26, 2018, eleven members of the 2018 Championship Junior Hockey Team participated in a group chat, meaning they were sending and receiving text messages to the entire group at the same time. The accused were participants in that group chat which was entered as part of Exhibit #5. Those messages were admitted on consent for the truth of their contents, but the messages sent by players who did not testify, are hearsay and will not be considered for their truth.
- [196] The group chat begins with Dillon Dubé asking for other players, who were in room 209 at the Delta Hotel to be added to the chat so he could say something. Mr. Dubé then advised everyone that there are no criminal charges, but Hockey Canada is investigating what happened as a Code of Conduct violation. He then asks people to call him.
- [197] Mr. McLeod advises the other participants “We all need to say the same thing if we get interviewed can’t have different stories or make anything up”.
- [198] Mr. Dubé states that “the boys who did things got consent so just tell them that and it’s fine”.
- [199] Brett Howden who testified at trial sent a message saying “all we have to say is someone brought the girl back to the room. We were all in there ordering food and the girl started begging from everyone to have sex with her....” He later sends a message stating “Nobody forced her to do anything. If anything we should put allegations on her fuck.” And he said, “She’s the one who got naked and started begging everyone”.
- [200] Mr. McLeod asked a general question about what he should say if they ask why he took the videos. Mr. McLeod tells the others that it was not the complainant who went to the

police, it was her mother. He also tells the others that if they were in the room they should not lie and say that they were not.

- [201] The players go on to discuss whether this is a police investigation or a Hockey Canada investigation. They discuss when they might expect to be called by Hockey Canada and whether they will have to provide a statement in person.
- [202] During the group chat, they receive an email from Henein Hutchinson on behalf of Hockey Canada.
- [203] Carter Hart joined the group chat late and sent the following message: “Honestly boys nobody did anything wrong. I ke [sic] we got consent to anything that she did. She was the one begging for guys to bang her”. He then asked whether they should get their agents involved.

ix) The evidence of other people in the room

Tyler Steenbergen

- [204] Tyler Steenbergen was called as a witness by the Crown. He was a teammate of the accused on the Canadian World Junior Hockey Team, and he was in London, Ontario on June 18 to 19, 2018, and in room 209 at the Delta Hotel when the events that form the subject-matter of the charges occurred.
- [205] According to Mr. Steenbergen, he attended at Jack’s Bar with other members of the team where he consumed alcohol. He described that he was drunk “but not overly drunk”. He left the bar with Mr. Dubé and others and went to a poutine place then back to the Delta Hotel.
- [206] In cross-examination he agreed that he recalled seeing Mr. McLeod with a woman at Jack’s Bar who was “hanging off of him” meaning fawning over him.
- [207] Mr. Steenbergen agreed that he observed Callan Foote doing the splits while on the dance floor at Jack’s.
- [208] According to the surveillance video and Exhibit #2, Mr. Steenbergen entered the Delta Hotel at 3:13 a.m. with Maxime Comtois, Colton Point, and Dillon Dubé.
- [209] He testified that he, or someone with him received a text message indicating that there was food in Mr. McLeod’s room, so he proceeded to room 209 with Jake Bean and Dillon Dubé. When he entered the room, he saw Sam Steel, Carter Hart, Maxime Comtois, Drake Batherson, Alex Formenton, and Michael McLeod.
- [210] Mr. Steenbergen testified that he sat at the desk at the far end of the room and then heard someone say, “there’s a naked girl in the bathroom”. A few moments later, he observed a naked woman exit the bathroom. She appeared pretty normal. She was not crying and did not display any sort of reaction to seeing the men in the room.

- [211] He said that he observed her go onto the floor onto a bed sheet that was at the foot of the bed. She began masturbating. Mr. Steenbergen did not remember anyone instructing her to do that, she did it on her own. Then the woman began asking the men to have sex with her.
- [212] When asked in examination-in-chief what words were being used by the woman he testified that she said: "Can one of you guys come over and fuck me?" He felt like the men in the room were in shock when she said that. This statement caught his attention and he felt uncomfortable at that point.
- [213] Mr. Steenbergen testified that he and some of the other players had girlfriends at the time and did not respond other than to laugh awkwardly.
- [214] After she said that, he observed Carter Hart go over to her and receive oral sex. He unbuckled his belt and pulled his pants down to his knees. Mr. Steenbergen testified that the oral sex was brief, maybe 30 seconds to one minute.
- [215] In cross-examination, the witness agreed with a suggestion that the woman called Mr. Hart over to her before she performed oral sex, and that she might have assisted Mr. Hart in pulling his pants down. He agreed that she seemed "into it", and that it seemed like a consensual sexual encounter to him. Mr. Steenbergen testified in re-examination that he was not worried about the woman in any way and it seemed like she "wanted to do stuff".
- [216] Mr. Steenbergen could not remember whether he heard Mr. Hart say anything before or during the oral sex. When Mr. Hart stopped the oral sex by stepping back, he heard the woman say something like "oh you guys are being pussies".
- [217] Mr. Steenbergen testified that he observed Mr. McLeod getting a "blow job" which was similar to the way it happened with Carter Hart, fairly brief.
- [218] Mr. Steenbergen remembered that he observed Mr. Dubé slap the woman's buttocks. He described it as not hard, but it did not seem soft either. The slap happened between the oral sex with Mr. Hart and the oral sex with Mr. McLeod. He testified that he heard "a small slap" but did not hear a reaction from the woman. While this was happening, he was having a conversation with Jake Bean.
- [219] In cross-examination, he agreed that it looked like foreplay, like light spanking or patting, not abusive. The mood was playful at that time.
- [220] About 10 to 15 minutes after he entered the room, he observed Callan Foote enter the room. He remembered "partially" seeing him do the splits but could not see the woman because there were people around her. He could not see whether Mr. Foote was clothed, but did not observe him to remove his clothing. He did not see whether Mr. Foote's body touched the woman. Mr. Foote left before he did.
- [221] Shortly after this, the woman got up and went to the bathroom and Mr. Steenbergen and Mr. Bean had a clear path to leave the room so they left. The witness agreed in cross-examination that he did not want to walk by the woman while she was on the ground. He

testified that she was being “quite vocal” about what she wanted, and he wanted no part of that. He estimated that he was in the room for 10 to 15 minutes.

- [222] Mr. Steenbergen provided the police with the group chat messages referred to earlier. He was at development camp in Arizona at the time and did not see the messages at the time they were sent. He saw them later. He felt nervous when he heard that Hockey Canada was conducting an investigation, but he knew based on what happened in the room that the woman was consenting and agreed with a suggestion that that was the theme of the group chat.
- [223] He also had a phone call with Dillon Dubé. During that call Mr. Steenbergen was asked by Mr. Dubé to “not say what he did and that he was going to explain it himself” when he met with Hockey Canada investigators.⁴⁷ He assumed that this was a reference to the slap because that is all he saw in relation to Mr. Dubé. He agreed that the call took place before they received the email from investigators, that it was brief, and he could not recall all the details of the call.
- [224] Mr. Steenbergen also had a conversation with Mr. Foote which was similar to the conversation he had with Mr. Dubé, although in cross-examination, he acknowledged that he could not remember anything that was said in that call from seven years ago. He agreed that he has had no communication with any of the accused since the group chat and the phone calls described.

Brett Howden

- [225] The Crown also called Brett Howden as a witness. It was apparent that Mr. Howden’s memory of the events was impacted by the consumption of alcohol and by the passage of time. It was also affected by a serious concussion he suffered in 2022 while playing hockey.
- [226] Mr. Howden was also a member of the 2018 Canadian World Junior Hockey Team. He was in London with the team on June 18 and 19, 2018. He attended at Jack’s Bar with most of the team on June 18, 2018. He drank when he was there, but he had been drinking before that as well. Nothing in particular stood out to him about his time at Jack’s. Mr. Howden said that he was socializing, drinking with his teammates and dancing.
- [227] Mr. Howden reviewed a video clip that showed him bringing Mr. McLeod over to E.M. to introduce them, but he had no recollection of doing that.
- [228] Mr. Howden returned to the hotel at 2:42 a.m. with Sam Steel, Drake Batherson and Jonah Gadjovic. He recalled wanting some food. He remembered attending at Michael McLeod’s room which was next to his. He recalled at some point seeing Mr. McLeod, Mr. Formenton, Mr. Dubé, Mr. Hart, Mr. Foote, Sam Steel, Drake Batherson, Jake Bean, Max Comtois and Tyler Steenbergen in the room.

⁴⁷ Excerpt of the Transcript of Proceedings, May 15, 2025, at p. 31, lines 16-19.

- [229] He also saw a woman that he recognized from the bar in the room. He was surprised that she was there. She came out of the bathroom. After refreshing his memory from a statement he provided to Hockey Canada on July 3, 2018, he was unable to recall the woman's state of dress when she exited the bathroom. He did recall that she was flirting with the guys. She was asking the men to engage in sexual acts with her although he could not recall the words she used. He described her as "chirping" guys and trying to egg them on because no one would take her up on her offer.
- [230] He recalled that she called them "pussies" for not engaging with her, and at one point she said she could not believe that nobody was taking her up on her offers. He said everyone was shocked at how aggressive she was being.
- [231] He testified in chief that he saw the woman engage in sexual contact with two men. He remembered that she was making offers and eventually Carter Hart "took her up on her offers".⁴⁸ He saw Mr. Hart and Mr. McLeod get oral sex.
- [232] He testified in chief that Mr. Hart said he would take her up on her offer, and she went over to him and gave him oral sex, but he was not really watching because it was uncomfortable and awkward. He remembered Mr. Hart standing and the woman was on her knees.
- [233] He remembered the woman being naked at some point, and he remembered her clothes being on as well.
- [234] Mr. Howden testified that when the woman was done with Mr. Hart she went over to Mr. McLeod and performed oral sex on him. He also watched the woman take Mr. Formenton to the bathroom. He did not recall whether there was any physical contact between them while they walked to the bathroom. He did remember Mr. Formenton saying "should I be doing this" or something like that and the woman seemed excited to be taking him to the bathroom.
- [235] Mr. Howden also said that he saw Mr. Dubé spank the woman on the butt, but he testified that he could not now recall seeing it. He did not know whether the woman was clothed when that happened or the circumstances surrounding it, but he recalled hearing the sound of it.
- [236] He wanted to leave the room because he felt uncomfortable with the situation and with the woman asking the men to do things because it was awkward.
- [237] The following day Mr. McLeod showed him a video of the woman but he could not recall what she was saying on the video.
- [238] Mr. Howden was asked in chief about a message he sent during the group chat on June 26, 2018. In it he said "all we have to say is someone brought the girl back to the room. We were all in there ordering food and then this girl started begging from everyone to have sex with her. Nobody would do it. But then as time went on she gave 3 guys head.

⁴⁸ Excerpt of the Transcript of Proceedings, May 20, 2025, at p. 20, lines 13-18.

Once things started to get out of hand we all left and got her out.” He testified that when he wrote this message he was trying to say “exactly what happened”.

- [239] He testified that in those messages he was “speaking the truth”. He was asked about a message he sent saying “Nobody forced her to do anything. If anything, we should put allegations on her fuck.” He testified that “there was some anger coming across” because he felt like she was the one initiating everything and put them in that situation.
- [240] According to Mr. Howden, when he was in the room she was the one “begging guys” to do anything with her.
- [241] Mr. Howden testified about a phone call with Mr. Dubé that took place where Mr. Dubé asked him to “leave his name out of things”. He also received a phone call from Cal Foote which was “essentially the same type of call” but he could not recall the details.
- [242] Following a *voir dire*, portions of a statement that Mr. Howden provided on July 3, 2018 to Danielle Robitaille who was conducting the investigation for Hockey Canada, were admitted into evidence. In that statement Mr. Howden said that when he was leaving, the woman kept saying “I’m too sober for this”.⁴⁹ The woman came out of the bathroom, fully clothed, and was calling “Mikey” by the wrong name. So Mr. McLeod told her that was not his name and said, “why are you even here?” Mr. Howden said: “you could tell she didn’t want to leave”. She made it look like she wanted to, but she didn’t want to.
- [243] Mr. Howden also said in his statement that when he was leaving, he heard the woman crying, he did not know what happened, so he left and went to his room. At another point he described it as “weeping” although in cross-examination he admitted he had an uncertain memory of this, even in his earliest statement in July 2018.
- [244] Another portion of the statement that was read in referred to the point in time when Mr. Formenton went to the bathroom with the woman. In that statement, Mr. Howden said “on the way he asked me...will I get in trouble for this? Like, am I okay to do this? He’s like, do you think I’m fine? And at the time I was like I don’t know. Like I was like, if she wants to have sex with you, like I guess it’s okay....if she consents and she wants to then sure.”⁵⁰
- [245] Mr. Howden also said in that statement that after the woman said, “I’m too sober for this” she said she was going to leave and a couple of guys would say “baby don’t leave”, and then she would say “so you guys do want to have sex?” and the men did not want to have sex and then she did not want to leave.
- [246] Mr. Howden said in that statement that Mr. McLeod showed him the video the next day and it was taken after she had her “little episode”. He told him that he thought she was embarrassed, and Mr. Howden agreed that he thought the same thing.

⁴⁹ Excerpt of the Transcript of Proceedings, May 23, 2025, at p. 3, lines 18-21.

⁵⁰ Excerpt of the Transcript of Proceedings, May 23, 2025, at p. 5, lines 20-25.

- [247] He further told Ms. Robitaille that when he saw “the smack” that was drawing a line for him. He already felt uncomfortable, so he left.
- [248] In cross-examination, Mr. Howden agreed that there are some things he simply has no memory of, seven years later, but some of the big things that happened, he still remembers. He agreed with Mr. Humphrey that on June 18, 2018, he was drinking at the gala and also drinking at Jack’s Bar. This was a night of celebration, and he was not counting his drinks. He agreed that he was intoxicated.
- [249] Mr. Howden had no memory of how he ended up in Mr. McLeod’s room. He remembers being hungry and trying to find food. He remembers eating wings in Mr. McLeod’s room.
- [250] In cross-examination Mr. Howden stated that he had no memory of seeing the woman naked in the room, but he did remember her “asking guys to do sexual things to her”. He remembered her asking “can someone fuck me?” But when she said this, no one wanted to have sex with her.
- [251] Mr. Howden remembered that some of the men were not taking her up on it because they had girlfriends. He felt uncomfortable when she said this. He agreed with a suggestion from Mr. Humphrey that the woman was making offers to have sex and the men were not telling her what to do. Mr. Howden adopted a statement he made to Ms. Robitaille on July 3, 2018, that the woman was saying “can I suck your dick?” and then she performed oral sex on Mr. Hart for a short time and then she said: “can someone fuck me?”⁵¹ She then performed oral sex on Mr. McLeod briefly.
- [252] In cross-examination by Ms. Savard, Mr. Howden agreed that his impression was that Mr. Hart did not really seem like he wanted to agree to oral sex at first. He agreed it was brief and that Mr. Hart appeared embarrassed.
- [253] In cross-examination, Mr. Howden adopted a statement he made on July 3, 2018, that the woman said, “if no one’s going to do anything with me, I’m just going to leave” and then she did not leave, and did not even try to leave. He described that she started putting on her clothes and then would take them off again. He agreed that no one physically tried to stop her from leaving the room.
- [254] Mr. Howden agreed that he has had no communication with Mr. Hart since the group chat on June 26, 2018.
- [255] In cross-examination by Ms. Dudding, Mr. Howden agreed that Mr. Formenton went to the bathroom with the complainant after she asked for someone to have sex with her. He agreed that Mr. Formenton said he would do it but not in front of everybody, and that the woman led him to the bathroom.
- [256] He said that the complainant did not slur her words when she was speaking and did not display any other symptoms of impairment.

⁵¹ Excerpt of the Transcript of Proceedings, May 26, 2025, at p. 25, lines 1-5.

- [257] Under cross-examination by Ms. Carnelos, Mr. Howden agreed that in relation to the slap by Mr. Dubé, he could not say when in the sequence of events that happened. He also acknowledged that as of June 26, 2018, he was worried about the investigation by Hockey Canada and the effect it might have on his reputation. He agreed that in his text messages that day, he was expressing that he could not believe that there was going to be an investigation based on what happened in that room.
- [258] When asked about the telephone call with Mr. Dubé in cross-examination, Mr. Howden said that he might have said that he wanted to talk to Mr. Bullock first and tell his own story, but he did not remember the exact conversation.
- [259] In cross-examination, Mr. Howden testified that although he did not have a current memory of a phone call with Callan Foote after the group chat, he adopted the statement that he provided to Hockey Canada investigators in 2022 which indicated that a call took place where Mr. Foote asked him to leave something out that he did not even see. He denied a suggestion that the phone call did not take place.
- [260] He agreed that he danced with the complainant at Jack's Bar as depicted on the video and then introduced her to Mr. McLeod, but denied a suggestion put to him by Ms. Greenspan that he intentionally downplayed his contact with the complainant when he spoke to the police and Hockey Canada investigators.
- [261] Mr. Howden said that he did not think that there was a problem with the behaviour of any of his teammates before the investigations began, and his biggest concern was with Hockey Canada and the impact it might have on his future.
- [262] He agreed with a suggestion by Ms. Greenspan that Hockey Canada demanded a second interview with him under threat of being "named and shamed" which caused him concern.

x) The evidence of the accused

Carter Hart

- [263] Carter Hart testified in his defence. He was a goaltender on the 2018 Canadian World Junior Hockey Team. In June of 2018, he was 19 years old. He was in London with the team to celebrate their victory. He flew in on Sunday, June 17, 2018, and events were scheduled for Monday with a ring ceremony and gala dinner as well as a golf tournament on Tuesday.
- [264] He stayed at the Delta Hotel with the rest of the team. His roommate was Colton Point. Mr. Hart testified that alcohol was being served at the Hockey Canada events including champagne during the ring ceremony, along with an open bar. At the gala dinner, there was an open bar, and he drank vodka sodas. By the end of the dinner, he described himself as "having a good buzz going".
- [265] Following the dinner, he and his teammates took a shuttle bus back to the hotel where they changed and went out. They walked downtown. Mr. Hart remembered that they went to Joe Kool's and then to Jack's Bar. He consumed three or four beers at Joe Kool's. He

had been given a contact name of the manager at Jack's and had texted him to let him know the team was coming so they could skip the line.

- [266] Mr. Hart recalled that there was a drink special at Jack's, dollar beer, so that is what he drank. Prior to this time, he had only drunk alcohol three other times, so the amount of alcohol he consumed that night was unusual for him. In cross-examination, Mr. Hart agreed that he was not counting his drinks that night and described himself as very drunk. Mr. Hart then left Jack's Bar and returned to Joe Kool's where he met up with Alex Formenton and Rob Thomas who had been denied entry at Jack's. They remained until closing time.
- [267] Mr. Hart testified that he received a text from Mr. McLeod in a group chat asking if he wanted to be in a "3 way" and responded "I'm in" because he was single at the time and open to sexual encounters. However, he was not going to make a decision about participating until he got to the hotel to see what was going on. Mr. Hart also received a call from Mr. McLeod, and although he testified that he did not remember the details of the call, the gist of the call was that Mike was with a girl at the hotel who wanted to have sex with some of the teammates.
- [268] Mr. Hart agreed in cross-examination that he wanted to make sure that any sexual activity was fully consensual before he committed.
- [269] Mr. Hart arrived back at the hotel with Mr. Formenton and Mr. Thomas at 2:46 a.m. according to the video surveillance from the Delta Hotel. He was feeling pretty drunk at that point. He acknowledged that he has gaps in his memory due to the alcohol he consumed and the passage of time, although he was confident in his memory about the things he does remember.
- [270] When he entered room 209, Mr. Hart remembered other guys being in the room including Mr. McLeod sitting on the bed not wearing a shirt. His first memory of seeing the complainant was when she was lying naked on the bedsheet on the floor masturbating. She seemed to be enjoying it.
- [271] Mr. Hart testified that E.M. was on the floor on a bedsheet placed at the foot of the beds. When asked to identify the other players in the room at that time, he said that Sam Steel, Jake Bean, Drake Batherson, Tyler Steenbergen, Max Comtois, Michael McLeod and Alex Formenton were there. In chief, Mr. Hart was asked to mark the positions of the individuals on a photo of the room. He was positioned closest to the door.
- [272] Mr. Hart testified that while she was on the floor masturbating, the complainant said, "can somebody come fuck me?" At that point, Mr. Hart testified that he felt excited because there was a naked girl in the room doing these things willingly. He had never seen that before.
- [273] According to Mr. Hart, some of the men in the room were encouraging each other to have sex with the woman, but most had girlfriends and so he said to her "can I get a blowie?" and she replied by saying "yeah" or "sure" or something along those lines. He walked towards her, and she got on her knees, on the sheet and kind of crawled to the end of the

bedsheet, grabbed his penis over top of his pants and pulled his pants down while he did the same. He was wearing joggers.

- [274] E.M. performed oral sex on Mr. Hart for 30 to 60 seconds. He was not able to get fully erect and did not want to do it anymore. He described it as weird. Mr. Hart testified that he did not touch her body other than his penis in her mouth. He then backed away, pulled his pants up and returned to where he had been standing previously.
- [275] In cross-examination, Mr. Hart was confident in his recollection that this was the first sexual encounter.
- [276] He recalled that E.M. then sat on the floor propped up against the bed and she seemed annoyed and said something like “what’s wrong with you guys? If no one is going to come fuck me then I’m going to leave”. He was shocked and could not believe the things she was saying. He also testified that she said things like this on more than one occasion. He then remembered that she went to the washroom with Alex Formenton. He observed Mr. Formenton walk over to E.M. after she made those statements and then they held hands and she led him to the bathroom. Mr. Hart could not recall whether there was any conversation between the two of them. After they went to the bathroom, he heard a shower running.
- [277] When asked in cross-examination whether he heard any conversation between Mr. Formenton and Mr. Howden as Mr. Formenton was walking to the bathroom with E.M., he did not remember it, but said it was possible that a conversation took place.
- [278] Mr. Hart texted Dante Fabbro at 3:27 a.m. “get to 209”.⁵² When asked by Ms. Savard why the message was sent, Mr. Hart testified that at the time E.M. was asking the men to have sex with her and since most of the men in the room had girlfriends, no one wanted to, but Mr. Fabbro was single, and he thought he might be interested. In cross-examination on this point, Mr. Hart agreed that he sent this text because he believed, based on what she was saying that E.M. wanted to have sex with more men. He agreed as well that his voice can be heard on the first “consent” video recorded at 3:25 a.m. saying “I’ll get Fabs, I’ll get Fabs” referring to Mr. Fabbro. Mr. Hart had no memory of the video being recorded.
- [279] Mr. Hart testified that the order of things was difficult to remember, but he believed that after E.M. exited the bathroom, Mr. Foote, and Mr. Dubé had entered the room. He believed that either Tyler Steenbergen or Drake Batherson had left the room. Then some of the men were saying “Footer do the splits”. He remembered seeing Mr. Foote drop down into the splits over top of E.M., but he did not go into a full split. He was fully clothed and did not touch her body. He then “popped” back out it. He described that E. M. was laughing when it happened.
- [280] He agreed in cross-examination by Ms. Greenspan that Mr. Foote was generally over the torso area of the complainant when he did the splits, and it lasted only a few seconds. He also agreed with a suggestion that Mr. Foote pushed himself off the bed to get back up.

⁵² Exhibit #73.

Mr. Hart explained that he was right beside him when this happened, and did not view this act as sexual.

- [281] In cross-examination by Ms. Cunningham, Mr. Hart disagreed with a suggestion that he was not sure whether Mr. Foote had fully done the splits but agreed that he is not sure whether he saw Mr. Foote push on the bed to get out of the splits, but “it made sense”, but he had no memory of it.
- [282] Mr. Hart did not observe any sexual contact between E.M. and Mr. Dubé. He did not see anyone slap E.M. He did not observe any sexual contact between Mr. McLeod and E.M.
- [283] After leaving London, the next communication that Mr. Hart had with any of his teammates was the group chat on June 26, 2018. At that time he was in development camp for the Philadelphia Flyers. Generally, the players were scheduled from 8:00 a.m. to 8:00 p.m. focusing on training. He was physically at the Jersey Shore, so he did not receive or review the messages sent by others until the end of the day.
- [284] After skimming through the messages, he realized that Hockey Canada and possibly the police were conducting investigations. He realized that they were being accused of sexual wrongdoing. He agreed that the first message he sent was when he said “Honestly boys nobody did anything wrong. L ike [sic] we got consent to anything that she did. She was the one begging for guys to bang her.”
- [285] Mr. Hart testified that he was concerned about what to tell Shawn Bullock since they were out partying late and had a girl at the hotel. A subsequent message sent by Mr. Hart asks whether they should get lawyers. He testified that he said that because everyone had received an email from a law firm representing Hockey Canada that was conducting an investigation which said they should seek counsel for advice.
- [286] Mr. Hart testified that everyone in the group chat was telling the truth and was agreeing to tell the truth because they had nothing to hide. After the group chat, he did not talk to any of his former teammates about what happened in room 209. He did text Jake Bean and spoke to Michael McLeod about who was conducting the investigation. Mr. Hart indicated that he received a call from Cal Foote but he had bad cell service and could not hear what he was saying. In cross-examination by the Crown, he agreed that in the group chat, “everyone is trying to get on the same page about what they’re going to say about what happened in that room”.⁵³ He explained that his concern related to an investigation by Hockey Canada and getting into trouble for partying and having a girl in the room. He agreed with a suggestion that he was concerned about criminal charges being laid, but not because he had concerns about whether the complainant was actually consenting to the sexual activity.
- [287] According to Mr. Hart, none of the players ever approached him to compare versions of the events that occurred.

⁵³ Excerpt of the Transcript of Proceedings, May 30, 2025, at p. 195, lines 6-9.

- [288] In examination-in-chief, Mr. Hart testified that in 2022, he learned about the settlement of the civil suit by Hockey Canada from his agent. That agreement was made without his knowledge or consent. He also learned that Hockey Canada and the police had re-opened their investigations.
- [289] In cross-examination, Mr. Hart acknowledged that his memory was affected by the amount of alcohol he consumed that night and by the passage of time. He agreed that he does not have a complete memory of the events and remembers his own interactions with E.M. more than the other's interactions with her.
- [290] Mr. Hart was asked in cross-examination by Ms. Dudding whether he observed anyone acting disrespectfully to E.M. and he said he did not. If something like that had happened, he would have left.
- [291] In cross-examination by the Crown, Ms. Cunningham, Mr. Hart agreed he sent a message to the group chat on June 19, 2018 at 1:13 a.m. asking if anyone wanted to see strippers, although he did not go to a strip bar. This message was sent when he was leaving Jack's Bar. He received no response and so he went to Joe Kool's.
- [292] He disagreed with a suggestion that when he received the "3-way" text from Mr. McLeod that he was prepared to engage in group sex no matter what the conditions were. He explained that he was expressing interest.
- [293] Mr. Hart testified that he had no memory of anyone telling the complainant to touch herself. He said that throughout the night, she was the one asking them to do things with her. Mr. Hart maintained in cross-examination when pressed on this issue, that E.M. was saying "can somebody come fuck me" while she was masturbating on the sheet on the floor.
- [294] Mr. Hart agreed with a suggestion in cross-examination that it was possible that he received oral sex on two occasions and had no memory of the second occasion.
- [295] In cross-examination, Mr. Hart said that the things that E.M. was saying were forward and sexually demanding, and he could not believe she was saying these things. He agreed that the mood in room 209 was one of excitement and awkwardness. He also agreed that it was possible that E.M. put her clothes on and took them off during his gaps in memory.

The police statement of Alexander Formenton

- [296] The Crown introduced into evidence statements voluntarily provided by several of the accused to Detective Stephen Newton of the London Police Service.
- [297] Alexander Formenton provided a statement on November 24, 2018. He was accompanied by his lawyer during the interview, which was video recorded.
- [298] During the interview, Mr. Formenton was advised by Detective Newton that he has been conducting an investigation into allegations of sexual assault, but he did not have grounds to arrest or charge him with any offence.

- [299] Mr. Formenton stated that he was in London along with the rest of the team for a ring ceremony following their victory at the World Junior Hockey Tournament. The team was staying at the Delta Armouries Hotel and his roommate was Michael McLeod.
- [300] They had scheduled activities including a gala dinner on June 18, 2018 with sponsors. Following the dinner, they took a chartered bus back to the hotel, changed and walked downtown. The team went to Jack's Bar. He and Robert Thomas were denied entry to the bar because they were underage, so they went to Joe Kool's and met up with their former coaches and had a couple of drinks.
- [301] He was at Joe Kool's for a couple of hours when he received a text message from Michael McLeod saying that there was a girl in the hotel room who wanted to have a threesome. About 10 minutes after he received the text, Carter Hart showed up at Joe Kool's. He responded to the text saying that he was coming back to the hotel. According to Mr. Formenton, Mr. McLeod told him they were getting food, and she would probably be there for a while. He, Mr. Hart and Mr. Thomas walked back to the hotel. Mr. Formenton thought the message from Mr. McLeod was just sent to him.
- [302] According to the video surveillance from the Delta Hotel and the agreed facts, Mr. Formenton returned to the hotel with Mr. Thomas and Mr. Hart, arriving at 2:46 a.m.
- [303] When he arrived at room 209, he observed a woman sitting on the bed and some boxes for take-out food. Mr. Thomas left. Mr. Formenton observed Mr. Bean, Mr. McLeod, Mr. Dubé, and Mr. Steenbergen in the room. Mr. Hart had entered the room with him.
- [304] According to Mr. Formenton, the woman was fully clothed at this time and talking to the guys. She seemed "fully normal". Mr. Formenton said he had had two to three drinks at Joe Kool's and felt fine; on a scale of one to ten he was a six. He sat on his bed and observed Mr. Hart talking to the woman and they were "flirting" with each other. He then observed her get on her knees and perform oral sex on Mr. Hart. This lasted about five minutes, then she went to the washroom and came out naked.
- [305] After another five minutes of performing oral sex on Mr. Hart, the woman said, "is anyone going to bang me?" She was also saying "is anyone going to do anything to me or do I have to do it all?"
- [306] According to Mr. Formenton, a lot of guys did not feel comfortable, or had girlfriends so he "volunteered" but he did not want to have sex in front of his friends, so they walked into the washroom.
- [307] He said it was a "mutual" decision to go to the washroom because he did not want to do it in front of the guys and she walked to the washroom and he followed her. When they were in the washroom, he put on a condom and they had intercourse. Near the end, he removed the condom and the woman performed oral sex on him to finish it. After she left the bathroom still naked, he got into the shower. Mr. Formenton said that when he exited the bathroom after showering, he observed the woman was performing oral sex on Mr. Hart again. The other men in the room were sitting there watching.

- [308] After performing oral sex on Mr. Hart, Mr. Formenton observed the woman perform oral sex on Mr. Dubé for about 10 minutes. She then stopped for a brief time and “started crawling up onto the bed” where Mr. McLeod was laying and started performing oral sex on him. After doing that, the woman got onto the floor on all fours and was “playing with herself” and saying things like “is anyone going to bang me?” and “this is embarrassing that you have a naked girl in front of you and a bunch of guys in the room and no one’s going to do anything”.
- [309] When asked by Detective Newton, he agreed that there was a white bed sheet on the ground that the woman was on when she was masturbating. Mr. Formenton said that no one was encouraging or ordering the woman to do anything. He did not hear any comments about golf clubs. He described the woman as “instigating” everything that happened. He said that the sex they had was consensual. No one was stopping her from leaving if she chose to.
- [310] According to Mr. Formenton, at that point the woman began to get frustrated and said she was going to leave if no one was going to do anything with her. He thought she felt embarrassed that no one was giving her any attention while she was sitting there naked, but it was because most of the men had girlfriends, and it was awkward.
- [311] No one was doing anything and so she started putting her clothes on and people were leaving. After everyone left the room only he, Mr. McLeod and the woman remained. Mr. McLeod asked her how she was getting home and she said she called an Uber. Mr. McLeod then went into the washroom and the woman followed him in, and they were in the washroom for about 10 minutes. He believed it was after that that Mr. McLeod recorded the video. He was laying in bed when that happened, and saw him take the video.
- [312] The woman left but returned soon after. At that point she was crying and told him that she lost one of her grandmother’s rings. He helped her look for the ring. Mr. Formenton said that she was pretty upset. They could not find the ring and so the woman left.
- [313] According to Mr. Formenton, when he observed the woman in the room, at no time did she appear to want to leave, nor did she appear as if she did not want to participate in the sexual activities.
- [314] When asked about other men in the room, Mr. Formenton said that Drake Batherson was in the room, as well as Sam Steel, and Brett Howden, but he did not remember Cal Foote being in the room.

The police statement of Michael McLeod

- [315] The video recorded statement of Michael McLeod to Detective Newton on November 17, 2018 was introduced by the Crown. That statement was taken at the office of Mr. McLeod’s lawyer, who was present.
- [316] In that statement, Mr. McLeod said that he and the team arrived at Jack’s Bar between 11:30 to 12:00 a.m. He met E.M. and they had a drink with her. He bought one and she

bought one. He did not see what she was drinking, but he had a few more. They decided to go back to the hotel where they had sex.

- [317] According to Mr. McLeod, he ordered some food and then some of the other players came into the room. Carter Hart was one of them. He went down to the lobby to pick up the food including chicken wings and mozzarella sticks. As he walked back into the room, he observed the complainant performing oral sex on Mr. Hart. He was laying on the bed on his back.
- [318] The other guys were hanging out. He said she seemed fine with it. They ate the food and then more men came into the room. At that time there were eight or nine players in the room. He said they were drunk, but not “black out” drunk.
- [319] According to Mr. McLeod, E.M. wanted to do things with the other guys. She was naked on the bed and said, “who wants to have sex with me, who’s going to step up and have sex with me.” They were kind of stunned by what she said. None of the men wanted to have sex with her.
- [320] Mr. McLeod said that his roommate, Alex Formenton, had come back earlier and E.M. wanted to have sex with him. There were only four or five men in the room at that time. Mr. Formenton did not want to have sex in front of everyone so they went into the bathroom and were in there for about 10 or 15 minutes. After they came out of the bathroom more men came into the room.
- [321] Mr. McLeod said about 15 minutes later, she wanted to have sex again and she was saying “no one is going to have sex with me, guys are pussies”. He thought this was pretty weird. E.M. got upset that no one would have sex with her, and he had to calm her down and he told her they were not going to have sex with her because no one wanted to have sex in front of nine other guys. He said she felt better after that.
- [322] They continued to hang out and she offered to give “blow jobs”. He got one and Carter Hart got another one and maybe Dillon Dubé as well. Just before that happened, he took a video of E.M. asking her if she was okay with this. He said it was a weird situation he was not expecting to happen.
- [323] Around 3:30 to 4:00 a.m., everyone started leaving and he took a second video just getting her consent on video and to confirm she was not drunk. According to Mr. McLeod, E.M. said “why are you so paranoid” on the video because he kept asking her if she was okay with the whole night.
- [324] After that, he hopped in the shower and she came into the shower with him and they had sex. After she got dressed, she could not find one of her rings and was pretty upset about that. They looked for it for about 15 minutes but did not find it and she was still kind of upset when she left.
- [325] The next day, he received a call from Hockey Canada informing him that E.M.’s mother had made a complaint. He searched for E.M. on Instagram and messaged her. He wanted to speak to her and asked her if she called the police. She said no that her mother did, but

she had told her not to. The text exchange with E.M. on June 20, 2018 was shown to Mr. McLeod during the interview.

- [326] Following questions from Detective Newton, Mr. McLeod confirmed that he was in London with the Canadian World Junior team to celebrate their victory and attended the gala dinner.
- [327] Mr. McLeod said that he was affected by the alcohol he consumed at the bar, but he was not “crazy drunk”. As for E.M., they had maybe three drinks together and he said, “she wasn’t hammered by any means”.
- [328] He recalled that they went to the bathroom together, but he did not see her fall.
- [329] Mr. McLeod was shown photographs and identified Drake Batherson, Brett Howden, Jake Bean, Jonah Gadjovic and Max Comtois.
- [330] When asked who decided that they would go back to his hotel together, he said it was a mutual decision. By the end of the night, he thought E.M. was affected a bit by the alcohol she consumed, but she was not drunk and was walking and talking fine. They took a cab back to the hotel.
- [331] According to Mr. McLeod, his teammates came to his room because he told them that he had ordered food, and he told them he had a girl in the room, and he invited them over. At a later point in the statement, he denied sending a message.
- [332] Mr. McLeod remembered Max Comtois, Sam Steel and Cal Foote coming into the room, as well as Carter Hart, his roommate Alex Formenton, Dillon Dubé, Brett Howden, Jake Bean and Drake Batherson.
- [333] According to Mr. McLeod, E.M. was an active participant in the sexual activity, she was leading the way and asking for things. He remembered that she was on the bed naked and asked “who’s going to have sex with me? You guys are pussies. None of you guys want to have sex with me.”
- [334] Mr. McLeod saw E.M. have sexual contact with Carter Hart, he believed she had sex with Alex Formenton, then she performed oral sex on him and Mr. Dubé, but that was really brief. He did not hear anyone saying anything about golf clubs.
- [335] Mr. McLeod said that E.M. got up and got dressed a couple of times, and then undressed. He said she did this because she got upset that no one wanted to have sex with her, and she was embarrassed. He calmed her down by telling her no one wanted to have sex in front of so many guys. Mr. McLeod said he asked her at least five times during the night if she was okay.
- [336] Mr. McLeod was shown a team photo by Detective Newton and he identified all of the players who were in the room including Tyler Steenbergen who was not mentioned earlier.

The police statement of Dillon Dubé

- [337] An audio recorded statement from Dillon Dubé was introduced into evidence by the Crown. The statement was recorded by phone on December 18, 2018 by Detective Newton. Mr. Dubé's counsel was on the call as well. Mr. Dubé was advised that he was named during the investigation as a person who had some sexual contact with the complainant.
- [338] Mr. Dubé confirmed that he too was in London with the team for the celebration on June 18, 2018. He said that after the gala, they went to a bar called "Jack Astro's". As the team captain, Mr. Dubé was in charge of the trophy. He stated that he was one of the last ones to leave the bar. About an hour before he left, he received a text from Jake Bean saying that they had ordered pizza to a certain room. He returned to the hotel at 3:13 a.m. When he was in the elevator with one of his teammates, he handed him the trophy.
- [339] He walked into the room where he saw a woman laying naked on the floor. He did not know what was going on. While he was there, the woman started putting her clothes back on and someone asked her what she was doing. The woman replied that she was putting her clothes on because "no one will bang me and you guys are pussies". He described it as the woman "chirping us" for not doing anything with her which he thought was weird, and something he had not seen before. He was shocked by that.
- [340] According to Mr. Dubé if things "were really bad" he probably would have controlled the guys and kicked them out, but he did not think the woman was drunk or acting against her will. She was talking fine and moving at a normal pace.
- [341] Mr. Dubé remembered that Carter Hart said something like, "I'll do something, I want to", so she started taking her clothes off by herself and laid on the floor, then got on her knees and started to perform oral sex on Mr. Hart. He did not observe Mr. Hart force anything and it did not last very long.
- [342] Most of the men were just talking. They did not want to do anything because they had girlfriends. Mr. Dubé said he then stood up and thought "I might as well" and he pulled his pants down, and the woman came up to him and "gave me oral" for about 10 seconds. He knew it was bad idea and he did not want to be a part of it so he stumbled back and rolled over in between the beds, and Cal Foote helped him up, because he was drunk. He left the room. He thought he was one of the first to leave.
- [343] When asked about how much alcohol he consumed that night, he said he was drunk. He remembered that it was dollar beer night at the bar, and he was exhausted from two days of "partying".
- [344] Mr. Dubé remembered seeing Carter Hart, Alexander Formenton, Michael McLeod, Callan Foote, Brett Howden, Jake Bean and Maxime Comtois in the room.
- [345] Mr. Dubé said at one point he had a golf club in his hands and it was "beside her not really". The woman said to him something like "are you going to play golf or fuck me?"

Mr. Dubé was asked by Detective Newton whether anyone suggested putting the golf club in the woman's vagina, and he said "no - not at all".

- [346] When asked if he had the feeling at any point that the woman did not want to be there or that she wanted to leave, Mr. Dubé said he felt like she wanted to be there more than the guys.

xi) The police evidence

- [347] Detective Stephen Newton, a member of the London Police Service now retired conducted the initial investigation into these allegations. He was a member of the Sexual Assault and Child Abuse Unit at the time.
- [348] He acknowledged that the allegations were initially reported by the mother of the complainant and her boyfriend, and that the complainant changed her mind approximately five times about whether or not she wanted to pursue criminal charges.
- [349] He investigated the matter and concluded in February of 2019 that there were no reasonable grounds to lay criminal charges. He advised the complainant of his decision on February 6, 2019.
- [350] In July 2022, Detective Lyndsey Ryan was assigned to investigate this matter after it was reopened by the London Police. The London Police determined that the investigation should be reopened after Hockey Canda settled the civil suit brought by the complainant, and that information was made public.

C. THE POSITIONS OF THE PARTIES

- [351] The parties made closing submissions over the course of a week. I need not address every issue raised by counsel. These are the main issues argued by them.

i) The position of the Crown

- [352] The Crown submits that it has proven each of the essential elements of the offences against each of the accused and, accordingly, the court should find each accused guilty as charged.
- [353] The Crown asks the court to find that the complainant in this matter was a credible and reliable witness and that her evidence should be accepted in its entirety. Intoxication does not equate to unreliability.
- [354] It is submitted that the complainant's evidence was not shaken in any material way during cross-examination. She was clear and consistent about her lack of consent to the sexual activity that took place. She was fair. She acknowledged possibilities when put to her in cross-examination.
- [355] It is submitted that any inconsistencies in her evidence were minor and related to peripheral issues and she provided explanations for those inconsistencies. The evidence of

the complainant was corroborated in important ways by other evidence. The Crown points to the video from Jack's Bar, for instance which confirms the number of drinks she consumed. Many of the acts that she described, were corroborated by the evidence of Tyler Steenbergen and Brett Howden.

- [356] It is submitted that the complainant did not have a motive to fabricate her evidence. She acknowledged that she cheated on her boyfriend. She testified that she told him about these events. The civil suit against Hockey Canada was not filed until four years after she first went to the police and does not provide a motive.
- [357] As for the other witnesses, the Crown submits that some aspects of Tyler Steenbergen's evidence may have been consciously or unconsciously influenced by the group chat but he was forthcoming in his evidence in chief. His evidence in cross-examination ought to be approached with caution.
- [358] The Crown submits that Brett Howden, a witness for the Crown, was clearly influenced by the group chat. It is submitted that he remembers more about what transpired in room 209 than he admitted at trial. It is submitted however, that those portions of his testimony and his past statements that were adopted during his evidence can be and should be accepted by the court.
- [359] It is submitted that the evidence clearly establishes that it was Mr. McLeod's idea to invite his teammates into room 209 for sexual activity and that E.M. did not know and did not consent to that sexual activity. That is supported by the text sent by him to all his teammates and by his offer of a "gummer" to Boris Katchouk while E.M. sat quietly and did not say anything.
- [360] It is submitted that the complainant testified that she had no memory of any conversation about other men coming into the room, nor would she have asked him to invite other men into the room for sexual activity. Their arrival in the room was a surprise to her.
- [361] The Crown argues that this case is about whether there was sexual touching that took place between each of the accused and the complainant that she did not voluntarily choose to engage in when it was happening. The Crown submits that the evidence of E.M., supported by the other evidence, including the video evidence, the text messages and the evidence of the Crown witnesses should not leave the court in doubt as to the guilt of each of the accused.
- [362] According to the Crown, the evidence of the accused, namely the testimony of Carter Hart and the statements of Michael McLeod, Alexander Formenton, and Dillon Dubé should not be accepted nor should they raise a reasonable doubt as to the guilt of any of the accused.
- [363] The Crown submits that the credibility and reliability of each of the men who were in room 209 is compromised as a result of the group chat that took place on June 26, 2018. The accused were actively engaged in "getting their stories straight" and were likely tainted by what was said by others. This was an effort to construct a narrative of the events that was not true.

- [364] The Crown argues that the court should find that the accused who participated in the group chats concocted a narrative to portray E.M. as instigating all the sexual activity that took place.
- [365] As for the credibility of Mr. McLeod, the Crown submits that the exculpatory portions of his evidence should be rejected. It is submitted that he intentionally lied to the police when he voluntarily provided a statement because he did not tell the police that he invited the players into his room by sending the message “who wants to be in a 3 way quick”. This calls into question his credibility.
- [366] The Crown submits that parts of Carter Hart’s evidence should be rejected and it should not leave the court with a reasonable doubt. Mr. Hart initially testified that he told E.M. that he would be open to receiving a “blow job” but not sex. He said he was open to taking her up on one of her offers, but acknowledged that she did not offer oral sex.
- [367] There are also issues with the reliability of his evidence. He was admittedly intoxicated on the night in question, and it is submitted, has major gaps in his memory.
- [368] It is submitted that E.M. did not make a voluntary choice to perform oral sex on Mr. Hart. Her ability to choose was constrained by her intoxication and her vulnerability in this situation. The complainant testified that she felt she was not in control of her body. E.M. does not remember asking for or demanding sex from anyone. The Crown submits that the words were not spoken by her.
- [369] As it relates to Dillon Dubé, the Crown submits that the complainant testified that she was not consenting to being slapped by anyone. The court should find that Mr. Dubé slapped the complainant hard on the buttocks while she was performing oral sex on Mr. McLeod.
- [370] Both Mr. Howden and Mr. Steenbergen testified that they saw a slap, and Mr. Howden agreed that he left quickly after this happened. It is submitted that this is why Mr. Dubé called them and asked them to lie to Hockey Canada about his involvement by leaving his name out.
- [371] It is submitted that Mr. Dubé is also guilty of sexual assault in relation to the oral sex he received from the complainant. E.M. did not make a voluntary choice to perform oral sex on Mr. Dubé, because her ability to choose was constrained by her intoxication, and her vulnerability. She testified that she did not want to perform oral sex in Mr. Dubé, but did so to get out of the situation.
- [372] It is submitted by the Crown that E.M. was not consenting to the oral sex with Mr. McLeod because she did not make an affirmative choice to engage in that sexual activity with him, she felt she was doing what was expected of her.
- [373] It is submitted that the vaginal sex that took place between them at the end of the night in either the bathroom or the shower was also an incident of sexual assault because the complainant did not consent to the vaginal sex at the end of the night. The complainant

testified that it was a continuation of the rest of the night and just something she needed to do and not something she really wanted to do.

- [374] The Crown submits that the “consent videos” do not provide evidence of consent, because the complainant must provide her voluntary agreement to engage in sexual activity at the time that it is happening, but it is important evidence to support that Mr. McLeod knew that she was not consenting to this activity and that is the reason for making the recording.
- [375] As for count #2, the charge of being a party to the offence of sexual assault, it is submitted that Mr. McLeod took steps with the purpose of encouraging the other men to commit the offence of sexual assault. He encouraged men to come to his room with the “3 way” text and he offered that she would perform oral sex on Mr. Katchouk. He did so without her consent. He should be convicted of that offence.
- [376] As it relates to Alexander Formenton, the Crown submits that he should be found guilty of sexual assault for the vaginal sex with E.M. without her consent. When she had sex with him, she was not making a voluntary choice to engage in that act with him. Even if the complainant did say the words “isn’t anyone going to fuck me?” that does not mean that she made a voluntary choice to have sex with Mr. Formenton in the bathroom.
- [377] Again, the complainant testified that she did not make a choice to engage in this conduct, she felt like it was a continuation of what was happening. She did not communicate her consent to him. When she walked to the bathroom that was ambiguous conduct and cannot be seen as communicated consent.
- [378] As it relates to Callan Foote, the Crown submits that he is guilty of sexual assault for doing the splits over E.M.’s face while he was naked. The court should accept the evidence of the complainant and the manner in which she described this event happening. The complainant testified that she was not consenting to this act.
- [379] It is submitted that Mr. Foote was aware of that and that is why he made phone calls to his teammates to leave his name out of it.
- [380] The Crown submits that even if the court has a doubt about whether the complainant consented to any of the sexual activity in question, that consent was vitiated by E.M.’s fear of the application of force.
- [381] The Crown submits that on the totality of the evidence they have proven each of the charges against each of the accused beyond a reasonable doubt and convictions should follow.

ii) The position of Michael McLeod

- [382] On behalf of Mr. McLeod, Mr. Humphrey submits that the Crown has failed to prove the charges against him beyond a reasonable doubt. The case for the Crown rests almost entirely on the credibility of E.M., and it is submitted that the court should have serious concerns about the credibility and reliability of her evidence.

- [383] In relation to Mr. McLeod, since the sexual contact is admitted, the issue to be determined is whether the Crown has proven beyond a reasonable doubt that the complainant did not consent to the sexual activity in question.
- [384] Mr. Humphrey asks the court to find that the complainant's claims of non-consent are undermined by eyewitness evidence. It is submitted that the complainant engaged in an alcohol-fueled night of disinhibited sexual activity, in which she was a willing participant and which she later regretted. What she described as disrespectful treatment, at the end of the night, propelled her to develop a false narrative of the events.
- [385] Mr. Humphrey asks the court to closely examine the implausibility of the version of events put forward by E.M.
- [386] The defence asks the court to consider the evidence of the Crown's own witnesses who testified that the complainant was the one who was initiating sexual activity in the room. It would be preposterous to believe that because she was scared, she initiated sexual activity with the men in that room. It is more likely that she made a regrettable choice to give in to sexual attraction, to be sexually adventurous with men she just met, and that her concern for her reputation caused her to present herself as a victim. This is supported by the fact that she changed her mind five times about whether she wanted to pursue criminal charges.
- [387] According to Mr. Humphrey, the complainant did not claim to be "scared" when she was in room 209 until she filed a civil claim against Hockey Canada in 2022. This was a claim that was scripted after the fact, to remedy the deficiencies in her first narrative. It is argued that this false narrative was used by the complainant to support her civil suit against Hockey Canada.
- [388] Mr. Humphrey submits that the Crown wants the court to ignore the statement given by the complainant on June 22, 2018, when she did not say she was scared. It is inconceivable that it would take years for her to "process" her fear.
- [389] The defence also submits that the court should not accept the complainant's claim of intoxication to a point close to incapacity. This claim is shown to be false based on the objective video recordings that were submitted into evidence which show no signs of intoxication. E.M. tried to bolster this claim when she testified by pointing out various points in the video where she said she appeared "drunk". In doing so, she was acting as an advocate for her own cause rather than a complainant.
- [390] Furthermore, it is submitted that much of the evidence of the witnesses called by the Crown, Tyler Steenbergen and Brett Howden confirms that it was E.M. who was asking the men in room 209 to engage in sexual activity with her. This was memorable to them because they had never seen any behaviour like this, and it made them feel uncomfortable. Ultimately the complainant agreed that it was possible she said the things attributed to her.
- [391] It is submitted that after E.M. engaged in consensual sex with Mr. McLeod, there were two intervals of approximately 15 minutes each when she was alone with him for which

she cannot account. The first period is after they finished their sexual encounter and the “3 way” text was sent until Mr. Katchouk and Mr. Raddysh enter room 209 and the second period of 15 minutes after they leave until the time when other men return to the hotel and enter room 209. The complainant chose to stay, and this supports an inference that she was waiting for other players to come into the room. This evidence contradicts her claim that she did not have an opportunity to leave.

- [392] It is acknowledged by Mr. Humphrey that in his voluntary statement, Mr. McLeod did not tell Detective Newton about the “3 way” text, but he submits that this does not detract from the credibility and reliability of his evidence. He does tell the officer that he told “the guys” that he ordered food and he told them that he had a girl in the room.
- [393] In relation to the “consent videos”, in his statement, Mr. McLeod explained that before E.M. performed oral sex on Carter Hart for the second time, and on Dillon Dubé, he took the video and asked her “are you okay with this?” and she said yes. He said that throughout the night he was trying to make sure she was okay with what was happening because it was a weird situation and he was worried something like this might happen.
- [394] It is submitted that the videos are critical evidence that support that E.M. was smiling and fine with engaging in the sexual activity that she initiated.
- [395] It is submitted that the onus is on the Crown to establish the non-consent of the complaint, and that requires the court to consider what is in the mind of the complainant, and determine whether the court accepts that evidence, but the court is entitled to consider all of the evidence to make that determination, including the evidence of Mr. Howden, Mr. Steenbergen and Mr. Hart who unequivocally say that E.M. instigated the sexual activity and was an enthusiastic and active participant.
- [396] It is submitted that the court should exercise common sense in assessing all of the evidence, and should conclude that the Crown has failed to prove the absence of consent on the part of E.M. and the charges should be dismissed.
- [397] As for count #2 the allegation that Mr. McLeod is a party to the sexual assaults committed by the co-accused, Mr. Humphrey submits that the Crown has failed to establish beyond a reasonable doubt that Mr. McLeod aided or encouraged anyone to commit the offence of sexual assault. It is submitted that even the evidence of E.M. does not support this theory of the Crown and that charge should be dismissed.

iii) The position of Carter Hart

- [398] Ms. Savard on behalf of Mr. Hart submits that the Crown has failed to prove beyond a reasonable doubt that E.M. did not consent to engage in sexual activity with Carter Hart.
- [399] It was argued that they engaged in one brief episode of oral sex which was unambiguously consensual. Mr. Hart arrived at the room hoping to engage in a sexual encounter. He testified that he responded to the text sent by Mr. McLeod because he was open to the idea. In room 209 he saw E.M. who was lying on a bed sheet, naked and masturbating.

He asked for oral sex and she agreed. She demonstrated by her words and actions that she was consenting to engage in oral sex with Mr. Hart.

- [400] That consent was not vitiated by fear, because there is no evidence of threats, or force being applied to the complainant to secure her cooperation.
- [401] It is submitted that the evidence of Mr. Hart ought to be accepted because it is a complete account of his sexual encounter with E.M. If the court does accept his version of the events, then he should be found not guilty. However, even if the court does not accept his version of the events, the court should have a doubt about the absence of consent on the basis of the rest of the evidence.
- [402] Ms. Savard points out that the court should have concerns with the poor quality of the Crown's evidence in this case. The court should be cautious of the evidence of Tyler Steenbergen and Brett Howden, particularly when it is unsupported by other evidence. Mr. Steenbergen should be believed in relation to his evidence that E.M. quite clearly said "can one of you guys come over and fuck me?" before Mr. Hart received oral sex from her. Mr. Howden corroborates this evidence.
- [403] While it is acknowledged that Mr. Hart's memory of the events is imperfect, and he has some gaps in his memory, they do not relate to the events in which he participated. His evidence was frank and forthright. The defence submits that contrary to the position of the Crown, the absence of Mr. Hart's memory of some events is not convenient, it is inconvenient.
- [404] Mr. Hart acknowledged that the oral sex may have stopped and started, but he was firm in his memory that there was only one episode of oral sex. Both Mr. Howden and Mr. Steenbergen testified that this was the first event of sexual activity. No one testified that three men received oral sex at the same time as E.M. testified.
- [405] Ms. Savard submits that the complainant's account of how these events occurred cannot be trusted. She had serious gaps in her version. The evidence supports that E.M. was asking for sex throughout the time she was in that room.
- [406] It is submitted that the court should not accept the evidence of E.M. She was a witness with an agenda, and her agenda led her to change her story when confronted with inconsistencies in her evidence. The manner in which she testified obscured rather than illuminated how and why she acted in the manner in which she did. Her evidence was rehearsed, she engaged in speculation and filled in gaps with assumptions about what happened.
- [407] It is submitted that the court can accept that the group chat represents the genuine response of the accused upon first being accused, and is a spontaneous and genuine reaction. It supports Mr. Hart's position and there is no evidence of fabrication.
- [408] The defence submits that this is a case about credibility made more difficult because everyone involved was under the influence of alcohol.

- [409] It is submitted that there is no basis upon which to believe that the complainant's mind was separated from her body as she described. E.M. agreed that her behaviour in that room looked like she was consenting, and she was in fact consenting to the sexual activity with Mr. Hart.
- [410] Further, the defence submits that there is no evidence to support a consent-vitiating level of fear depriving her of the ability to make a choice about engaging in sexual activity. There is no evidence of any physical coercion. No one blocked the door of the room to prevent her leaving. There is no evidence of use of force, or the threat to apply force.
- [411] As a result, the Crown has failed to prove beyond a reasonable doubt that Carter Hart sexually assaulted E.M.

iv) The position of Alexander Formenton

- [412] Mr. Brown on behalf of Mr. Formenton submits that the evidence overwhelmingly establishes that the complainant consented to engage in sexual activity with him, and that consent was not vitiated by fear. He submits that she asked for sex, and he agreed to have sex with her. Consent while impaired but not incapacitated is still consent.
- [413] It is submitted that E.M. was not a reliable witness. Her evidence was at times exaggerated or false as demonstrated by the video evidence. At other times, it is submitted that E.M. lied. She lied when she told the police that the players separated her from her friends and got her drunk and she lied when she said that she felt pressured to be with Mr. McLeod. It was her choice, just as the activities in room 209 were the result of her choices.
- [414] The defence asks the court to find that the evidence of all of the witnesses support that E.M. was asking the men in the room to engage in sexual activity with her because it was her choice to do so.
- [415] It is submitted that the complainant had a shifting narrative to explain her conduct in room 209 on the date in question. Initially she claimed to be too drunk to consent, then claimed that her mind and body separated, then she claimed that through fear and terror she was forced to do things she did not want to do. She also claimed that she was a people pleaser who was pressured to have sex when she did not want to. Ultimately, the defence submits that what really happened is that at the time, she was enthusiastically consenting to engage in the sexual activity in question.
- [416] According to Mr. Brown, the complainant decided when she was at Jack's Bar that she was willing to engage in sexual activity with Mr. McLeod despite the fact that she was involved in a relationship. Thereafter she was a willing participant in the sexual activity that took place in room 209. Her shame and embarrassment about her choices caused her to develop a false narrative about those events after the fact.
- [417] It is submitted that E.M.'s evidence of her drunkenness is exaggerated and false. She relies on it as a crutch to explain the unexplainable in relation to her conduct. In her

evidence, she was quick to point out what she said were signs of intoxication because it was not obvious, because it was fabricated.

- [418] Mr. Brown suggests that when the investigation was reopened, after she received a settlement, the complainant added to her narrative that she was terrified, something she had not previously said, to bolster her story. She could not acknowledge that she lied.
- [419] It is submitted that the evidence of Alexander Formenton in the statement he provided to the police should be accepted. He described how the complainant was asking for sex and he accepted. They then agree to go to the bathroom to engage in sexual activity. All of the evidence supports this version of the events and that E.M. made a choice to engage in sexual activity. This evidence ought to be accepted and Mr. Formenton ought to be found not guilty.

v) The position of Dillon Dubé

- [420] Ms. Carnelos on behalf of Mr. Dubé submits that the evidence of E.M. ought not to be accepted because she was not telling the truth about her role in the sexual activity she engaged in.
- [421] It is submitted that it would be unsafe to convict Mr. Dubé based on the evidence of E.M. or based on the totality of the evidence. The evidence of all of the witnesses was impacted by the passage of time and by the alcohol they consumed that night. Their memories have limitations as a result.
- [422] It is submitted that E.M. has been “working on her narrative” from 2018 through to the civil claim filed in 2022 and through to her testimony in court. The Crown is asking the court to pick and choose among the evidence and accept what assists the Crown and disregard what does not.
- [423] Dillon Dubé provided a statement to the police voluntarily and that evidence should be accepted. Based on that evidence, he received brief oral sex from a person who willingly engaged in the sexual activity. It is submitted that his statement represents his genuine recollection of the events and is credible and should be accepted.
- [424] According to the evidence, he returned to the hotel at 3:13 a.m. He was one of the last people to enter room 209. There are parts of his statement that are wrong, for instance when he said he had the trophy with him that night. The video from the hotel clearly shows he did not. However, this does not detract from the rest of the statement. His evidence ought to be accepted and is supported by other evidence.
- [425] The accused did not mention slapping E.M.’s buttocks in his statement. It is submitted that it would be speculative to find that he omitted that part intentionally. The court should not accept the submission of the Crown that the failure to refer to something in his statement supports a finding of consciousness of guilt. In fact, it would make no sense for Mr. Dubé to admit to receiving oral sex, but leave out more minor contact, like the slap.

- [426] Ms. Carnelos submits that the only cogent evidence relating to the slap came from Tyler Steenbergen. He did not say that it happened at the same time as the oral sex. He said it was not hard, but not soft, possibly foreplay and playful. It is submitted that the evidence of Mr. Howden was that he left because he was uncomfortable with the whole situation, not just the slap.
- [427] It is submitted that the court should not accept the evidence of E.M. that she performed oral sex on three men at the same time. The rest of the evidence shows that there was a break in between. The oral sex was brief, and it was stopped by Mr. Dubé.
- [428] It is submitted that the court should conclude that the complainant was an active and willing participant in the sexual activity and was actively seeking it out, and was upset when she did not receive it.
- [429] As for the group chat, Ms. Carnelos submits that the gist of the discussions is that they were all talking about being truthful. There is no evidence from which the court can conclude that this was an effort to fabricate a narrative. They were all nervous about the Hockey Canada investigation and frustrated about what was happening. Further, the calls made by Mr. Dubé appear to be an effort by him to explain himself first, not to tell others what to say, in fact he tells the others to tell the truth.
- [430] It is submitted that the charge should be dismissed against Mr. Dubé because the Crown has failed to prove beyond a reasonable doubt that the complainant did not consent to the sexual activity that occurred.

vi) The position of Callan Foote

- [431] Ms. Greenspan submits that her client, Callan Foote, did not sexually assault E.M. and that the Crown has not discharged their burden to prove the charge beyond a reasonable doubt.
- [432] It is submitted that when Mr. Foote performed the splits in room 209, the evidence establishes that he was fully clothed, it was done in jest and that he did not touch E.M., let alone in a manner that involved her sexual integrity. The act was non-sexual.
- [433] Ms. Greenspan adopts the submissions of other counsel as to the reasons that the complainant's evidence is unreliable and not credible. It is submitted that the complainant's evidence is undermined by the other evidence called by the Crown, including the videos and the evidence of other witnesses, and she urges the court to reject the Crown's position that the complainant's evidence should be believed.
- [434] Ms. Greenspan submits that the complainant's testimony was obviously coloured by her own personal agenda. E.M. was focused on "her" truth and not "the" truth.
- [435] The defence submits that the only credible and reliable evidence tendered supports their position that the act was not a sexual assault. Ms. Greenspan asks the court to consider the exculpatory evidence led by the Crown, which supports the defence position, as well as the evidence of Mr. Hart who was a credible and reliable witness.

- [436] The defence argues that the evidence of Mr. Steenbergen, a witness called by the Crown, supports that Mr. Foote was clothed at the time that he did the splits, and that he did not touch E.M. This is consistent with the evidence given by Carter Hart.
- [437] It is submitted that the complainant has transformed what started as a playful act into an incident of sexual assault. It would be dangerous to convict based on the evidence of the complainant, who cannot give a cohesive account of the events relating to Mr. Foote.
- [438] As it relates to the phone calls made by Mr. Foote, Ms. Greenspan suggests that I should not accept the evidence of Mr. Howden regarding the call because it is unreliable. He has a limited memory about the call and cannot recall the details. Even if the court is satisfied that a call was made by Mr. Foote, this cannot be used as evidence of a guilty mind because there are other possibilities for the call.
- [439] On the totality of the evidence, Ms. Greenspan urges the court to find the accused not guilty of this charge.

D. THE APPLICABLE LEGAL PRINCIPLES

i) The presumption of innocence and onus of proof

- [440] Each of the accused is charged with sexually assaulting E.M. contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. In addition, Michael McLeod is charged on count #2 with being a party to a sexual assault. Each of the accused is presumed innocent of those charges unless and until the Crown has proven their guilt beyond a reasonable doubt. The presumption of innocence is enshrined in s. 11(d) of the *Charter of Rights and Freedoms*.
- [441] There is a high criminal standard of proof which applies to the Crown's case against each of the accused. The Crown must prove each of the essential elements of the offences charged against each of the accused beyond a reasonable doubt.
- [442] The concept of proof beyond a reasonable doubt is a cornerstone of our legal system. A reasonable doubt is not based on sympathy or prejudice, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence: see *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39. The Crown is not required to prove a criminal charge to an absolute certainty, but the court must be satisfied on the basis of all of the evidence, of the guilt of the accused beyond a reasonable doubt.
- [443] Although the accused are charged on the same indictment, they are not charged as co-accused. They are charged individually with having committed offences of sexual assault against E.M. The court must consider the totality of the admissible evidence as it relates to each of the accused individually, to determine whether the Crown has proven the case against each one of them.

ii) Essential elements of the offence of sexual assault

- [444] In order to prove the charge of sexual assault, the Crown must prove the *actus reus*, that is the physical act and the *mens rea*, the intent required to commit the offence beyond a reasonable doubt. To prove the *actus reus* of the offence, the Crown must establish the following three elements:
- i) a touching of the complainant by each of the accused,
 - ii) that the touching was of a sexual nature, and
 - iii) the absence of consent to the sexual touching.
- [445] The first two elements are objective and the third element, consent, is subjective: see *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 25-26.
- [446] The Crown must prove each of these essential elements of the offences beyond a reasonable doubt. In this case, except for the conduct of Mr. Foote, which it was submitted does not constitute a sexual assault, there is no issue that each of the accused had sexual contact with E.M. The issue is whether that contact was consensual. The accused are not required to prove that the complainant consented to the sexual contact, the onus is on the Crown to prove beyond a reasonable doubt that the accused had sexual contact with her without her consent.
- [447] In so far as consent is concerned, the question at the *actus reus* stage is solely whether the complainant, in her mind, wanted sexual touching to take place: see *R. v. Othman*, 2025 ONCA 449, at para. 48.
- [448] In addition to the *actus reus*, the Crown must prove the *mens rea* of the offence, that is that the accused knew of, or were wilfully blind to, or were reckless about the absence of the complainant's consent to the sexual activity: see *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 87; *R. v. H.W.*, 2022 ONCA 15, 160 O.R. (3d) 81, at para. 37; and *Othman*, at para. 49.
- [449] Consent is defined in s. 273.1(1) of the *Criminal Code* for the purpose of an offence under s. 271 of the *Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question". Section 273.1(1.1) requires the consent to be present at the time that the sexual activity in question takes place.
- [450] Since consent requires the "voluntary agreement" of the complainant, the complainant must be capable of understanding that they have a choice of whether or not to engage in the sexual activity in question: see *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 56.
- [451] The capacity to consent requires that the complainant be capable of understanding what is required for subjective consent – no more, no less: see *G.F.*, at para. 45.

[452] No consent is obtained if the complainant expresses by words or conduct, a lack of agreement to engage in the activity (s. 273.1(2)(d) of the *Code*) or if the complainant having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity (s. 273.1(2)(e) of the *Code*).

[453] Intoxication is a factor to be considered in assessing the capacity of a complainant to consent to sexual activity. In *G.F.*, at para. 84, the Court said: “Obviously, equating any degree of intoxication with incapacity would be wrong in law.”

[454] In *R. v. S.B.*, 2023 ONCA 784, at para. 49, the Court of Appeal said:

Proof of intoxication or of a complainant’s lack of memory are not enough to establish lack of capacity, although evidence of both is relevant: see *G.F.* at para. 86.

[455] The provisions of s. 265(3) of the *Code* are incorporated into the definition of consent by virtue of s. 273.1(1). That section states that no consent is obtained where the complainant submits or does not resist by reason of threats or fear of the application of force to the complainant (s. 265(3(b))).

[456] In *R. v. Choudhary*, 2023 ONCA 467, 167 O.R. (3d) 74, at para. 31, Coroza J. speaking for the Court said the following in the context of an application to admit evidence of other sexual activity, but the reasoning is of assistance:

First, while there are no bright line rules, trial judges should use their common sense and not artificially parse a sequence of events that may be integrally connected. For example, other sexual activity may include sexual words and gestures that are anchored to the sexual activity that forms the subject-matter of an alleged sexual assault because they were made immediately before, during or immediately after the sexual activity at issue.

iii) Assessing the credibility and reliability of the witnesses

[457] In *R. v. Kruk*, 2024 SCC 7, 489 D.L.R. (4th) 385, at para. 81, the Supreme Court sets out the difficulty that trial judges often encounter in assessing the credibility and reliability of the evidence of witnesses. The Court said:

Assessments of credibility and reliability can be the most important judicial determinations in a criminal trial. They are certainly among the most difficult. This is especially so in sexual assault cases, which often involve acts that allegedly occurred in private and hinge on the contradictory testimony of two witnesses. The trial judge, while remaining grounded in the totality of the evidence, is obliged to evaluate the testimony of each witness and to make determinations that are entirely personal and particular to that individual. Credibility and reliability assessments are also context-specific and multifactorial: they do not operate along fixed lines and are “more of an ‘art than a science’” (*S. (R.D.)*, at para. 128; *R. v. Gagnon*, 2006 SCC 17, [2006]

1 S.C.R. 621). With respect to credibility in particular, while coherent reasons are crucial, it is often difficult for trial judges to precisely articulate the reasons why they believed or disbelieved a witness due to “the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events” (*Gagnon*, at para. 20; see also *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 28; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 81). The task is further complicated by the trial judge’s ability to accept some, all, or none of a witness’s testimony.

[458] The Court goes on to refer to the “common-sense assumptions” that underlie all credibility and reliability assessments. At para. 73 of *Kruk*, the Court recognizes that:

...Common sense underpins well-established principles guiding credibility assessment — including the now-universal idea that witnesses who are inconsistent are less likely to be telling the truth — and assists in assessing the scope and impact of particular inconsistencies. Reliability also requires reference to common-sense assumptions about how witnesses perceive, remember, and relay information, invoking generalizations about how individuals tend to present information that they are remembering accurately and completely, as opposed to matters about which they are unsure or mistaken. A trial judge may, for example, infer that a witness was credible yet unreliable because they appeared sincere but displayed indicia that tend to suggest an unclear or uncertain memory (e.g., equivocation, phrases such as “hmm . . . let me see”, long pauses, or failure to provide much detail).

[459] As recognized in *Ewanchuk* at paras. 29-30, the statement of a complainant that she did not consent to the sexual activity in question is a matter of credibility to be weighed in light of all the evidence including the complainant’s words and actions before and during the incident including any ambiguous or contradictory conduct. See also *R. v. Reimer*, 2024 ONCA 519, 173 O.R. (3d) 412, at para. 74.

[460] In *S.B.* at para. 50, the Court of Appeal said:

... The evidence of other witnesses, including the accused, about the “totality of the complainant’s conduct” can be considered to determine whether it is consistent with the complainant’s claim of non-consent.

[461] In this case, one of the accused, Carter Hart, testified and the Crown introduced into evidence the police statements of Michael McLeod, Alexander Formenton, and Dillon Dubé, which contain exculpatory evidence. Accordingly, the court must apply the principles set out in *W.(D.)*.

[462] The Supreme Court suggests that the issue be considered in three steps:

- i) First, if I accept the evidence of the accused, I must acquit;

- ii) Second, if I do not accept the evidence of the accused, but I am left in reasonable doubt by it, I must acquit; and
- iii) Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt of the guilt of the accused.

[463] The court must not choose between competing versions of the events and decide whose version it prefers. In this case, there is potentially exculpatory evidence that was led by the Crown through their witnesses as well that must be considered in the context of the whole of the evidence.

[464] In *R. v. Smith*, 2020 ONCA 782, at paras. 11-12, Harvison Young J.A. explained the test as follows:

The purpose of the *W.(D.)* test is to assist the trier of fact in “evaluating conflicting testimonial accounts” to determine whether the Crown has proven its case beyond a reasonable doubt: *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152, at para. 9. The *W.(D.)* test is not a “magic incantation”: *R. v. S.(W.D.)*, 1994 CanLII 76 (SCC), [1994] 3 S.C.R. 521, at p. 533. It is the substance of the test that must be respected: *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 23. The test is a reminder that the “burden never shifts from the Crown to prove every element of the offence”: *J.H.S.*, at para. 9.

The *W.(D.)* test applies not just to an accused person’s testimony, but to any defence evidence and to any potentially exculpatory evidence whether led by the defence or the Crown: *R. v. B.D.*, 2011 ONCA 51, 266 C.C.C. (3d) 197, at para. 114; *R. v. Kirlew*, 2017 ONCA 171, at para. 17.

[465] In applying this principle to cases where there are multiple accused, the Court of Appeal said in *R. v. U.K.*, 2023 ONCA 587, 168 O.R. (3d) 321, at para. 119:

It is a basic principle of criminal liability that in a joint trial, the trier of fact must consider the liability of each accused individually. This principle applies to instructions given to a jury on the principles from *W.(D.)*. It is an error for a trial judge in a joint trial to conflate two (or more) accused for the purposes of a *W.(D.)* instruction: *R. v. Josipovic*, 2019 ONCA 633, 147 O.R. (3d) 346, at paras. 40, 60, 62; *R. v. Parris*, 2013 ONCA 515, 300 C.C.C. 3(d) 41, at paras. 77-79.

[466] In *R. v. T.A.*, 2020 ONCA 783, at para. 28 the Court said:

It is not the task of a trier of fact to determine which of two versions of an event is true. Rather, the trier's task is to determine whether the Crown has met its burden of proving the elements of an offence beyond a reasonable doubt. As Cory J. held at p. 757 of *W.(D.)*:

It is incorrect to instruct a jury in a criminal case that, in order to render a verdict, they must decide whether they believe the defence evidence or the Crown's evidence. Putting this either/or proposition to the jury excludes the third alternative; namely, that the jury, without believing the accused, after considering the accused's evidence in the context of the evidence as a whole, may still have a reasonable doubt as to his guilt.

- [467] The court must consider both the credibility and reliability of a witness's evidence. Those concepts are different. Credibility relates to the veracity, or the truthfulness of a witness's evidence and reliability relates to the accuracy of the witness's testimony including their ability to accurately observe, recall and recount the events in question.⁵⁴ Sometimes an honest witness might be unreliable.
- [468] Courts must be cautious in considering demeanour evidence in assessing credibility, particularly emotional upset when testifying since emotional presentation can vary depending on many factors: see *Reimer*, at para. 93.
- [469] In *R. v. A.M.*, 2014 ONCA 769, 123 O.R. (3d) 536, at paras. 12-14, the Court of Appeal set out certain principles that a judge should consider when assessing the credibility and reliability of a witness's evidence. While not exhaustive, the criteria are of assistance, and include the following considerations:

Fourth, one of the most valuable means of assessing witness credibility is to examine the consistency between what the witness said in the witness box and what she has said on other occasions, whether or not under oath: *R. v. G. (M.)*, 1994 CanLII 8733 (ON CA), [1994] O.J. No. 2086, 93 C.C.C. (3d) 347 (C.A.), at p. 354 C.C.C., leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 390. Inconsistencies may emerge in a witness' testimony at trial, or between their trial testimony and statements previously given. Inconsistencies may also emerge from things said differently at different times, or from omitting to refer to certain events at one time while referring to them on other occasions.

Inconsistencies vary in their nature and importance. Some are minor, others are not. Some concern material issues, others peripheral subjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned: *G. (M.)*, at p. 354 C.C.C.

Fifth, a trial judge giving reasons for judgment is neither under the obligation to review and resolve every inconsistency in a witness' evidence, nor respond to every argument advanced by counsel: *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3, [2008] S.C.J. No. 52, 2008 SCC 51, at para. 64. That said, a trial judge should address and explain how she or he has resolved major inconsistencies

⁵⁴ *R. v. H.C.*, 2009 ONCA 56, at p. 41.

in the evidence of material witnesses: *G. (M.)*, at p. 356 C.C.C.; *R. v. Dinardo*, [2008] 1 S.C.R. 788, [2008] S.C.J. No. 24, 2008 SCC 24, at para. 31.

Sixth, prior consistent statements of a witness are not admissible for their truth: *R. v. Stirling*, [2008] 1 S.C.R. 272, [2008] S.C.J. No. 10, 2008 SCC 10, at para. 7. Mere repetition of a story on a prior occasion does not make the in-court description of the events any more credible or reliable: *R. v. Curto*, [2008] O.J. No. 889, 2008 ONCA 161, 230 C.C.C. (3d) 145, at paras. 32, 35; *R. v. Ay*, 1994 CanLII 8749 (BC CA), [1994] B.C.J. No. 2024, 93 C.C.C. (3d) 456 (C.A.), at p. 471 C.C.C.

iv) The use of myths and stereotypes in assessing the evidence of a complainant on a charge of sexual assault

[470] When assessing the evidence of a complainant in relation to an allegation of sexual assault, the court must not resort to the use of myths and stereotypes. Myths and stereotypes have no place in our law and distort the truth-finding function of the court.

[471] For instance, it is a myth that if a complainant remained passive or failed to resist the accused's advances either physically, or verbally by saying "no", she must have consented to the sexual activity. In the past "twin myth" reasoning, that a sexually active woman is more likely to have consented to the sexual activity that forms the subject matter of the charge and/or is less worthy of belief shifted the enquiry away from the alleged conduct of the accused and towards the moral character of the complainant: see *Kruk*, at para. 36.

[472] People react differently to events. There is no correct or standard way for a complainant to react to a sexual assault.

v) The use to be made of the statements of the accused

[473] In *R. v. Srun*, 2019 ONCA 453, 146 O.R. (3d) 307, at para. 121, the Court of Appeal confirmed that a statement made by an accused person to the police is evidence for and against its maker and cannot be used against a co-accused.

[474] The version of events given by one accused in his out-of-court statement cannot be used to assess the reliability of a different version of those events given by another accused's out-of-court statement: see *R. v. Dooley*, 2009 ONCA 910, at para. 136.

[475] Further, it is trite law to say that the court cannot use the pre-trial silence of the accused as evidence of consciousness of guilt: see *R. v. Kiss*, 2018 ONCA 184, at para. 37.

vi) Sexual attitude evidence

[476] In *R. v. Al-Akhali*, 2025 ONCA 229, Tulloch C.J.O. addressed the issue of the use of "sexual attitude evidence", that is, evidence from a complainant in a sexual assault trial that they did not or would not have consented to certain sexual activity because it would

be inconsistent with their beliefs, attitudes, practices and preferences. Even if a complainant cannot recall the sexual activity, this evidence is circumstantial evidence that can support an inference that they did not consent: see para. 52.

[477] The Court goes on to say that this evidence must be approached with care while also avoiding myths and stereotypes. That discussion is at paras. 54-55:

Care is needed because people do not always do what they say they would have done. For instance, “intoxication can lead people to do things and make choices they would not have made if they were sober.” See *R. v. Demong*, 2023 SKCA 109, 90 C.R. (7th) 403, at para. 24.

But courts must also guard against “dangerous speculation, based on stereotypical notions of how drunken, forgetful women are likely to behave.” See *R. v. Esau*, 1997 CanLII 312 (SCC), [1997] 2 S.C.R. 777, at para. 95, *per* McLachlin J. (dissenting, but not on this point). Courts neither presume that intoxicated people consented nor assume that they are promiscuous, willing to have sex anywhere with anyone, to blame for harm they suffer, or more likely to lie about being sexually assaulted. See *R. v. Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577, at pp. 652-653, *per* L’Heureux-Dubé J. (dissenting, but not on this point); *R. v. Capewell*, 2020 BCCA 82, 386 C.C.C. (3d) 192, at para. 50, leave to appeal refused, [2020] S.C.C.A. No. 125; and *R. v. McKnight*, 2022 ABCA 251, 416 C.C.C. (3d) 248, at paras. 141-142, leave to appeal refused, [2022] S.C.C.A. No. 341.

[478] The Court goes explains that trial judges can achieve both of those goals by considering all of the evidence and applying credibility and reliability assessment principles. At para. 56:

Sexual attitude evidence thus gains force if other evidence confirms it and loses force if other evidence contradicts it. See *R. v. Le Goff*, 2022 ONSC 609, at para. 175. Courts can also rely on reason and logic to assess this evidence. See *R. v. Kruk*, 2024 SCC 7, 489 D.L.R. (4th) 385, at para. 72; *R. v. J.R.* (2006), 2006 CanLII 22658 (ON SC), 40 C.R. (6th) 97 (Ont. S.C.), at paras. 38-39, *aff’d* 2008 ONCA 200, 59 C.R. (6th) 158, leave to appeal refused, [2008] S.C.C.A. No. 231.

E. ANALYSIS

[479] It is not the function of this court to make determinations about the morality or propriety of the conduct of any of the persons involved in these events. The sole function of this court is to determine whether the Crown has proven each of the charges against each of the accused beyond a reasonable doubt. The burden rests squarely on the Crown and does not shift.

- [480] In approaching this task, I am mindful of the words of Molloy J. in *R. v. Nyznik*, 2017 ONSC 4392, at para. 17:

Although the slogan "Believe the victim" has become popularized of late, it has no place in a criminal trial. To approach a trial with the assumption that the complainant is telling the truth is the equivalent of imposing a presumption of guilt on the person accused of sexual assault and then placing a burden on him to prove his innocence. That is antithetical to the fundamental principles of justice enshrined in our constitution and the values underlying our free and democratic society.

- [481] A determination of whether the Crown has met its onus requires a consideration of the entirety of the evidence. The court can accept some, all, or none of a witness's evidence.
- [482] The court must consider the case against each of the accused individually, but the Crown's case relies, for the most part, upon the evidence of the complainant that the various acts of sexual touching occurred, and that she did not voluntarily consent to the sexual activity in question.
- [483] The Crown's position is that E.M. did not make an affirmative voluntary choice to engage in sexual activity with any of the accused on June 19, 2018.
- [484] As it relates to Michael McLeod, Carter Hart, Alexander Formenton, and Dillon Dubé, it is admitted that sexual activity took place between them and the complainant. The onus on the Crown to prove the absence of consent to the sexual activity requires an assessment of the reliability and credibility of the evidence of the complainant.

i) Assessing the evidence of E.M.

- [485] The Crown submits that the complainant gave a cogent and detailed version of the events and never waived on the core elements of her testimony and that any inconsistencies in her evidence were minor, insignificant, and usually on peripheral issues.
- [486] The evidence of the complainant that she did not consent to the sexual activity in question is a matter of credibility to be considered in light of all the evidence including the evidence of other witnesses to determine whether it is consistent with her claim of non-consent: see *S.B.*, at para. 50, *Ewanchuk*, at paras. 29-30.
- [487] Witnesses who are inconsistent in their evidence are less likely to be telling the truth, however, not every inconsistency is important. Where inconsistencies relate to peripheral or minor issues, they are of less importance.

Issues relating to the credibility of the complainant

- [488] There are troubling aspects to the manner in which the complainant gave evidence. For instance, there was an exchange in cross-examination by Mr. Brown, on a relatively minor point, but the manner in which the complainant answered the question was telling. The

complainant was asked why she testified in chief that she weighed 120 lbs when, after reviewing her medical records she knew that when she was weighed by the nurse on June 22, 2018, she actually weighed 138 lbs.

[489] She responded:

E.M.: Because I know that's what I had estimated at the time. So....

Q: So, you just said what you said at the time rather than telling the truth?

E.M.: I just-I knew that's what I had estimated, but now I know later on with the medical records, I knew that that was what I weighed. So- I'm sorry, I'm not sure if I'm understanding the question.

[490] It appears in this answer that the complainant, rather than answering the question truthfully, chose to repeat what she had said previously.

[491] It also causes the court concern that the complainant acknowledged that where she has gaps in her memory, she filled those gaps with assumptions. This causes concern in relation to the witness's credibility and her reliability.

[492] The complainant also gave a vague answer when it was suggested to her in cross-examination that it was easier for her to deny the deliberate choices she made on June 18 and 19, 2018, than to acknowledge the shame, guilt, and embarrassment about those choices. She did not deny the suggestion, she said: "I don't know. I'm kind of struggling to understand that" and went on to explain that she blames herself and that other people should be held accountable, but it was "a combination of things".

[493] When E.M. was asked in cross-examination by Mr. Brown how anyone would know that what she was telling them about what happened at Jack's Bar was not the truth if not for the surveillance videos, the complainant answered "I'm not sure how that's my issue. I said what I could recall. I gave them the details I could provide. I was doing my best in giving them that information...."⁵⁵

[494] On several occasions the complainant referred to her evidence as "her truth" rather than "the truth", which seemingly blurs the line between what she believes to be true and what is objectively true.

Inconsistencies in the complainant's evidence

[495] At trial the complainant testified that the sexual contact with the accused in room 209 which occurred after the sexual activity she engaged in with Mr. McLeod alone, was not consensual.

⁵⁵ Excerpt of the Transcript of Proceedings, May 9, 2025, at p. 119.

- [496] In cross-examination she acknowledged that when she provided a statement to the police on August 31, 2018, she said she believed that what occurred in that room was “all okay” in her mind. She was probably thinking “yeah it’s fine”.⁵⁶
- [497] She also acknowledged in cross-examination that what she said was her “best guess” about how she felt about the events in room 209 when she saw the “consent videos”. She testified:
- Based on what I’m seeing in the video and where I’m saying okay, and I’m trying to understand why I’m saying that that was my best guess, yes, that’s on this day”
- Q. And that was your best effort to describe your internal feelings about the room 209 group events at the time in August?
- A. Yeah. So, again, it’s seeing that video, and for the first time, and trying to make sense of it as well. That’s what I’m communicating to the officer, yes.⁵⁷
- [498] E.M. testified that she was feeling scared and fearful when she was in the hotel room, yet she did not mention her fear in any of the three statements she provided to the police in 2018. The first mention of fear was in her Statement of Claim. She explained that she had not “processed” the fear yet.
- [499] The complainant testified that her fear caused her to follow the directions of the men in the room to lay on the sheet on the floor and masturbate and moan. However, in 2018 she admitted in a statement to police that she was liking the attention “a little bit” at the beginning. When confronted with this inconsistency she said she had no explanation for that and at that point she had not yet “processed” what happened.
- [500] The complainant testified in chief that she was trying to sneak away from Mr. McLeod while at Jack’s Bar, and that she felt uncomfortable when she was dancing with the players. However, the complainant acknowledged in cross-examination that she reported in her first police statement that she “maybe” liked the attention she was getting at the bar.⁵⁸ She also acknowledged that the videos from the dance floor at Jack’s Bar showed that “outwardly” it looked like she was enjoying the attention she was receiving on the dance floor, but in her mind, she was “really drunk”.
- [501] The complainant testified that it would have been obvious that she was not consenting to the sexual activity in room 209 because she was crying and trying to leave. However, she also testified that she was crying because she was being laughed at or because of the comments the men were making.

⁵⁶ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 53.

⁵⁷ Excerpt of the Transcript of Proceedings, May 7, 2025, at pp. 52-53.

⁵⁸ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 21, line 5-15.

- [502] When confronted with the possibility that she appeared to be consenting when she was engaged in the sexual activity in room 209, E.M. testified “it could have appeared I was consenting”.⁵⁹
- [503] When confronted with inconsistencies between her evidence at trial and her earlier statements, E.M. had a tendency to blame others. For instance, she said that Detective Newton spoke over her and cut her off when he took her statement, so that impacted on her answers. She also blamed her civil lawyers for inconsistencies and failing to catch the “errors” contained in her July 2022 statement to Hockey Canada.⁶⁰

Evidence that specifically contradicts the evidence of the complainant

- [504] Some of the complainant’s testimony in chief was proven to be wrong once compared with the video evidence. For instance, during examination-in-chief, E.M. was asked about the interactions she was having on the dance floor at Jack’s Bar with Mr. McLeod and the other players. The complainant testified that she felt uncomfortable, and that Mr. McLeod took her hand and placed it on his “crotch” as did others.
- [505] In cross-examination, E.M. was shown a video from Exhibit #6, line 37 as well as a still photo taken from that video, and she acknowledged that the video clearly showed that she touched Mr. McLeod’s genital area with her hand as she was dancing, and Mr. McLeod did not guide her hand nor cause her to touch him. She explained that this was not something she recalled happening. There was no other video submitted showing Mr. McLeod or anyone else taking the complainant’s hand and putting it on their “crotch”.
- [506] The complainant agreed in cross-examination that she told the police that once she met the players that they were encouraging her to drink more and get drunker.⁶¹ She testified in chief that the players bought six of the drinks she consumed at Jack’s.⁶² She also testified that once she met the players, they bought all of her drinks. This evidence was not supported by the video evidence. The video from Jack’s Bar shows that E.M. purchased eight drinks for herself. There is no video of any of the players purchasing any drinks for her except a small glass of beer given to her by Mr. McLeod.
- [507] E.M. testified that she felt pressure to be with Mr. McLeod throughout the night and that the players “separated” her from her friends. She was shown video from Jack’s Bar that showed that throughout the night she spoke to a bouncer whom she identified as a friend from high school. She also had a long conversation with him at the end of the night, prior to leaving the bar. She then returned to the dance floor and left the bar with Mr. McLeod shortly afterwards.
- [508] E.M. was shown messages in cross-examination from her friend V.H. who was looking for her at Jack’s. When V.H. sent her a message asking if she wanted her to “get u from the guy”, E.M. said she was “ok for now”. V.H. then sent her six more messages and

⁵⁹ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 84, line 8.

⁶⁰ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 12, lines 17-22.

⁶¹ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 4, lines 8-12.

⁶² Excerpt of the Transcript of Proceedings, May 2, 2025, at p. 9, May 6, 2025, at pp. 2-3 and May 9, 2025, at p. 62.

made an audio call that E.M. did not respond to, although she is observed on video looking at her phone. She remained with Mr. McLeod. That evidence is inconsistent with her evidence that she was being “separated” from her friends. When confronted with this in cross-examination, she denied a suggestion that she intentionally separated herself from her friends.

- [509] She also denied that she was texting with V.H. while at the bar, something that is captured on video and she explained it by saying that counsel referred to “texting” when she was using Facebook Messenger.
- [510] The complainant testified that she tried to “sneak away” from Mr. McLeod while at Jack’s Bar but he followed her even to the bathroom, and that ultimately, she agreed to leave with him. It was suggested that there were many opportunities to get away from Mr. McLeod at the bar if she really wanted to do that. At the end of the night, just before she left the bar with Mr. McLeod, the complainant had a conversation with the bouncer that lasted about seven minutes and she could have sought his assistance, but did not.
- [511] The complainant testified that when she arrived at the Delta Hotel with Mr. McLeod, she was “completely out of it” and did not know where she was, but the video shows that she exited the cab without difficulty, looked at her phone, waited for Mr. McLeod while he is talking to the cab driver, entered the hotel and walked up the stairs without difficulty.
- [512] The complainant testified that she was naked and on the bed when the first two men entered room 209, and that she walked to the bathroom naked. Both Taylor Raddysh and Boris Katchouk testified that the woman in room 209 was in bed and under the covers and she did not get up naked and go to the bathroom.
- [513] The complainant testified that when she exited the bathroom naked and laid on the bed sheet that had been put on the floor, that the men in the room were telling her what to do and telling her to touch herself.
- [514] E.M. denied suggestions that she was the one who was being sexually aggressive towards the men in room 209 and asking for sex. When it was put to her in cross-examination that she exited the bathroom naked and started masturbating and then was asking men to have sex with her, she said that she had no memory of saying anything, and it did not sound like the way she would usually speak.⁶³
- [515] Tyler Steenbergen testified that the complainant came out of the bathroom and began masturbating and said: “can one of you guys come over and fuck me?” Brett Howden testified that the complainant said, “who wants to have sex with me”.
- [516] Mr. Hart testified that the complainant said: “somebody come fuck me”. Mr. McLeod in his statement said that the complainant said: “no one is going to have sex with me, guys are pussies”. Mr. Formenton in his statement said that E.M. said “is anyone going to bang

⁶³ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 89.

me”, and Mr. Dubé in his statement said that the complainant said: “no one will bang me”.

[517] Also, Mr. Steenbergen and Mr. Howden both testified that E.M. called the men in the room “pussies” when no one would agree to have sex with her. That term was used by both Mr. Dubé and Mr. McLeod in their statements.

[518] According to the evidence of E.M., she wanted to leave the room but the men would not let her and they convinced her to stay, however the evidence of Mr. Howden, which was read in from his statement of July 3, 2018 is that Mr. McLeod said to her “why are you even here” and that it did not appear that she wanted to leave even though she threatened to leave.

Issues with respect to the reliability of the evidence of the complainant

[519] As for the reliability of the evidence of E.M., she testified that she did not remember the events of that evening continuously, but just remembered moments throughout the night.⁶⁴ She agreed in cross-examination that she has gaps in her memory that make it hard to remember the events of June 18 and 19, 2018 in a cohesive way.⁶⁵ She acknowledged that when she first spoke to the police, she said she could only remember “bits and pieces” of the sexual activity. She also agreed while testifying that she filled in the gaps in her memory or knowledge with assumptions.⁶⁶

[520] These are some examples of the “gaps” in the complainant’s memory:

- She did not remember touching Mr. McLeod’s groin while dancing with him at Jack’s;
- She did not remember dancing with Mr. Howden and Mr. McLeod together until she was shown the video;
- She did not remember texting V.H. while she was at Jack’s;
- She did not remember her conversation with the bouncer at the end of the night;
- She cannot recall any conversation with Mr. McLeod during the consensual sexual encounter including whether they discussed the use of a condom;
- She did not remember a gap of approximately 15 minutes in time between the time Mr. Raddysh and Mr. Katchouk left room 209 and other men entered or what happened during that time;
- She cannot recall if she had any conversation with the men upon whom she was performing oral sex;

⁶⁴ Excerpt of the Transcript of proceedings, May 5, 2025, at p. 12, lines 31-32 and at p. 13, lines 1-2.

⁶⁵ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 13, lines 20-25.

⁶⁶ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 8, line 5.

- She has “missing memories” of what was said by her and others about the terms on which she was willing to engage in sexual activity;
- She does not remember much of what she said while she was in room 209;
- She did not remember either of the two videos being recorded in room 209;
- She did not remember having sex with Mr. McLeod in the shower at the end of the night until it was included in the Statement of Claim filed in 2022.

[521] Another way that the complainant apparently filled in gaps in her memory with assumptions is the manner in which she answered questions. For instance, she would say “I feel that I...” and she would speculate as opposed to remembering or knowing the answer to the question. This reflects an uncertainty of memory.

[522] Although the complainant did not remember texting with V.H. while she was at Jack’s, she testified that she did not reply to those messages because she “really drunk and dancing”.⁶⁷

[523] The complainant agreed in cross-examination that she could have done flirty or suggestive things while on “autopilot” that she simply does not remember.⁶⁸ She described acting and speaking without being fully present.

[524] Although E.M. had no memory of what she said while she was in room 209, when it was suggested that she was the sexual aggressor in this situation, and trying to initiate sexual activity with the men, she testified that she “did not recall asking for that.....I feel I wasn’t saying anything, or I really just have no memory of saying anything”.⁶⁹

[525] At another point in cross-examination when it was suggested that the complainant called the men “pussies” because they would not engage in sexual activity with her, she said “that doesn’t even really sound like how I would usually speak”. When it was suggested that with the disinhibition she was experiencing from the consumption of alcohol, she was doing things she wouldn’t ordinarily do, she said:

With how drunk I was and the comments I was hearing the men make about this girl being f-g crazy, maybe I was saying things like that, but I have no memory of that, I just know that’s not how I would usually be acting. And if they could see that I was that out of my mind and acting that crazy, then I feel like they should have known better.⁷⁰

[526] Although she did not recall either of the two “consent videos” being filmed, she offered that Mr. McLeod was “hounding” her to say certain things on the video.

⁶⁷ Excerpt of the Transcript of Proceedings, May 9, 2025, at p. 154.

⁶⁸ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 60, lines 17-23, at p. 62, lines 27-31.

⁶⁹ Excerpt of the Transcript of Proceedings, May 6, 2025, at p. 89.

⁷⁰ Excerpt of the Transcript of Proceedings, May 6, 2025, at pp. 89-90.

- [527] During cross-examination when it was suggested to E.M. that she was not responding to questions, she said it was her time to “stand up for herself” and she wanted to respond to questions how she wanted to respond.

The complainant’s consumption of alcohol

- [528] The consumption of alcohol by the complainant affected her memory of the events on the evening in question. The complainant stated repeatedly during her testimony that she was “drunk” throughout the night, and in particular when she was in room 209. The Crown did not argue that the complainant was incapable of consenting to the sexual activity in question. In fact, the complainant testified that she was capable of consenting, and did consent, to the sexual activity with Michael McLeod which occurred before the sexual activity that forms the subject matter of the charges.

- [529] In the recent Court of Appeal decision of *R. v. Zock*, 2025 ONCA 483, at para. 70, the Court states that the capacity to consent to sexual activity requires an operating mind that is capable of understanding the physical act, its sexual nature, the identity of the sexual partner and that they have a choice whether to engage in sexual activity. As to the effect of alcohol on the issue of consent, the Court said:

Whether intoxication has resulted in a lack of ability to consent must be determined on all the evidence. Relevant evidence in this respect may include, among other things, the amount of alcohol consumed, signs of impairment, and expert evidence....

- [530] Although this is not a case about the capacity to consent, alcohol consumption clearly plays a role in the assessment of the reliability of the evidence of the complainant, as well as the other witnesses.
- [531] I agree with the submission of the Crown that intoxication does not automatically equate to unreliability of the evidence. It is a factor to be taken into account in assessing the evidence of the complainant.
- [532] E.M. went to great lengths to point out that she was “really drunk” most of the night. Sometimes she pointed to portions of the video that she said supported that she was “drunk” which she observed while reviewing the videos during preparation for trial.
- [533] In this case, in addition to her evidence on the issue, there is evidence from other witnesses as well as video surveillance evidence from which the court can assess that claim.
- [534] The complainant gave inconsistent evidence relating to her consumption of alcohol. She testified in chief that ordinarily consuming four coolers is enough to make her feel “really drunk” and that this night the amount of alcohol she consumed was “excessive”.⁷¹ In cross-examination she agreed with a suggestion that on a “regular Saturday night”, she would consume up to four coolers before getting to Jack’s and then six to ten drinks at

⁷¹ Excerpt of the Transcript of Proceedings, May 2, 2025, at p. 10.

Jack's.⁷² On the night in question, she testified that she consumed two coolers before going out, one vodka soda, a beer and eight Jagerbomb shots at Jack's.

- [535] In relation to her behaviour after she consumed alcohol, E.M. agreed in cross-examination that the alcohol consumption had positive effects for her including helping her to be more outgoing, less nervous, less anxious and a bit more social.⁷³
- [536] When reviewing some of the video from Jack's in examination in chief, the complainant pointed out that it appeared that she was drunk and leaning on the bar, but a close examination of that portion of the recording seems to reveal that after ordering a shot for herself, E.M. looked at the change provided to her by the bartender, and she called her back because she had been short-changed. The bartender is observed returning to the cash register, removing a bill, and providing it to E.M. who promptly puts it in her wallet. That conduct seems to be inconsistent with her assertion that she was leaning on the bar because she was drunk.
- [537] E.M. does not appear to show any obvious signs of impairment, such as stumbling or having difficulty walking on any of the videos. E.M. was wearing high heels all night and appeared to have no difficulty standing or walking. Although I recognize that she testified that she fell near the bathroom at Jack's Bar, she did not attribute that to the consumption of alcohol. According to her evidence, she slipped or lost her balance. The complainant is observed on video at Jack's walking and dancing without difficulty. She is observed walking down the steps at Jack's Bar following Mr. McLeod. She walked quickly down the sidewalk, almost running after him when he walked ahead of her when they left at the end of the night.
- [538] Although she testified that at the bar it was taking a lot of effort to "stay upright", that is not depicted on any of the videos submitted into evidence.
- [539] The complainant agreed that she did not consume alcohol after she left Jack's Bar with Mr. McLeod and that as the night went on, she would be getting more sober.
- [540] The surveillance video from the Delta Hotel also shows that the complainant had no difficulty in walking or standing when she entered the hotel.
- [541] E.M. was able to interact and communicate with people. There is no evidence that her speech was slurred or that she displayed any signs of intoxication.
- [542] The "consent videos" depict how E.M. presented at certain points in time, namely 3:25 a.m. and 4:26 a.m. on June 19, 2018. In both of those videos, she does not display any signs of intoxication.

⁷² Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 40.

⁷³ Excerpt of the Transcript of Proceedings, May 8, 2025, at p. 69, lines 22-32.

[543] It is difficult to reconcile the evidence of the complainant that the initial sex acts with Mr. McLeod were consensual if the court is to believe her evidence of intoxication at the bar and the effects of the alcohol upon her when she was in room 209.

[544] In my view, the complainant exaggerated her intoxication. When confronted with inconsistencies, or when she was unable to explain why she acted in a certain manner, the complainant defaulted to say that it was because she was drunk.

Motive to fabricate

[545] The defence submits that the complainant had a motive to fabricate. It is submitted that the complainant created a narrative to explain to her mother who found her crying in the shower how she spent a night drinking, left her friends behind and left the bar to engage in sexual activity with a man who was not her boyfriend. Furthermore, she had to find an explanation to provide to her boyfriend that she was a “victim” and not an active participant in this group sexual activity.

[546] The complainant testified that her mother called the police without consulting her, and her mother’s boyfriend called Hockey Canada.

[547] According to the complainant, although she told her boyfriend what happened, she did not provide him any details. She told him she was “too drunk to consent”.⁷⁴

[548] Furthermore, once the criminal investigation was closed in February 2019, the complainant filed a civil claim and included an additional fact, namely that what happened in room 209 caused her to experience “terror and fear”, something that she had not mentioned previously in the three statements that she had given to the police in 2018.

[549] E.M. also agreed that at the end of the night, she was upset because she felt that Mr. McLeod acted like a jerk, asked her if she had STDs and wanted her to leave.

ii) Findings that relate to the charges against each of the accused

[550] After E.M. and Mr. McLeod returned to the Delta Hotel at 1:48 a.m. on June 19, 2018, they proceeded to room 209 where they engaged in consensual oral and vaginal sex.

[551] The complainant could not recall in her evidence any discussion that they had following the sexual encounter. At 2:10 a.m., Mr. McLeod sent a text to a group chat involving 19 members saying: “Who wants to be in 3 way quick” and a minute later he sent the following text: “209- mikey”.⁷⁵

[552] At 2:19 a.m., Carter Hart sent a text saying, “I’m in”.

[553] According to the surveillance video from the hotel and Exhibit #2 which contains an Agreed Statement of Fact as to when all the players involved in this matter returned to

⁷⁴ Excerpt of the Transcript of Proceedings, May 7, 2025, at p. 35.

⁷⁵ See Exhibit #15.

the hotel, Boris Katchouk and Callan Foote return at 2:23 a.m. Taylor Raddysh had returned earlier.

- [554] Mr. Katchouk entered room #209 at approximately 2:25 a.m. followed by Mr. Raddysh shortly afterwards and they remained in the room for only about two minutes. I accept the evidence of both Boris Katchouk and Taylor Raddysh that the complainant was under the covers and not sitting naked on the bed when they entered.
- [555] The earlier statement of Mr. Raddysh admitted into evidence on consent was that the woman appeared quite normal. Mr. Katchouk testified that when he was in the room, Mr. McLeod asked him if he would like “a gummer” or oral sex. This statement was made in front of the complainant who showed no negative reaction. When he was alone with the woman, after Mr. McLeod exited the room, Mr. Katchouk described the woman as flirty and playful.
- [556] Each of those witnesses testified in a straightforward manner and their evidence was not challenged. This evidence is inconsistent with the evidence of the complainant that she was naked on top of the covers when they entered and that she was shocked and surprised and went to the bathroom.
- [557] The complainant testified that she then exited the bathroom and there were more men in the room. However, there is an interval of approximately 15 minutes from the time when Mr. Raddysh and Mr. Katchouk leave room 209 until Brett Howden, Sam Steel and Derek Batherson return to the Delta Hotel and they enter room 209. This is consistent with the statement of Mr. McLeod.
- [558] The complainant in her evidence disagreed that she was alone in the room with Mr. McLeod for about 10-15 minutes after the first two men left the room, and before others entered. In my view, this is one of the gaps in memory experienced by E.M.
- [559] The complainant gave inconsistent evidence about what she expected to happen after the consensual sexual activity with Mr. McLeod was completed. In examination in chief, she testified that she expected to spend the night. Again, E.M. had no memory of any discussions about that. In cross-examination, she said she “would have wanted to be going home” around that time.
- [560] It was suggested to E.M. that she remained in the room because she was expecting the other men to enter and wanted to participate in sexual activity with the other men. She denied this suggestion. But it was not a denial because she did not say it, or did not recall saying it. E.M. testified that it “doesn’t sound like something I would say”.
- [561] How a person behaves when they are clear-headed and sober may not be the way a person behaves when they are disinhibited after consuming alcohol.
- [562] According to E.M., when she exited the bathroom naked and saw that there were other men in the room she was surprised and scared. However, she did not retreat to the bathroom and put on her clothing, she walked into the room naked and laid on the bed

sheet which was already on the ground and began to masturbate. The complainant testified that she could not think clearly to make a choice at this point.

- [563] According to the complainant, the men told her to do that. This evidence is disputed by other evidence called by the Crown. Tyler Steenbergen gave evidence that she did it on her own.
- [564] While she was naked on the sheet according to the evidence of Mr. Steenbergen, Mr. Howden, and Mr. Hart, and the statements of Mr. McLeod, Mr. Formenton, and Mr. Dubé, the complainant was masturbating and being sexually forward and asking the men in the room to have sex with her.
- [565] The Crown urges the court to exercise caution in approaching the evidence of any of the players who participated in the group chat on June 26, 2018. The Crown suggests that the players “concocted” a narrative in that group chat and that taints their evidence.
- [566] I disagree with this characterization of the group chat. While the men who participated in the group chat were recounting their observations of what occurred in room 209, there is no basis upon which I can conclude that they did so for the purpose of concocting a false narrative of the events. At that point in time, they were concerned about an investigation by Hockey Canada. According to the texts sent by Mr. McLeod, there was no ongoing police investigation because the complainant told the police that she did not want to pursue it, and it was a mistake. This is consistent with the text exchange that took place between him and E.M. on June 20, 2018.
- [567] Mr. Howden testified that in the group chats he was trying to convey exactly what happened. He was expressing anger because he felt that the complainant initiated all the sexual activity in the room.
- [568] Mr. Hart agreed in cross-examination that they were “trying to get on the same page” about what they would say to Hockey Canada. He texted late in the chat “Honestly boys nobody did anything wrong. ...we got consent to anything that she did. She was the one begging for guys to bang her”.
- [569] In his texts Mr. McLeod reminded everyone to “tell the truth” and not to “make anything up”. Mr. Dubé told the group: “Let’s not make her sound like too crazy because if she gets wind of this and then she can get even more angry and we don’t need that so just be good about it but the truth with it”.
- [570] In my view, the group chat reflects that the participants were expressing their honest recollections about what happened in room 209 and not concocting a false narrative. The evidence was that the participants have not had any further contact in the seven years since that chat.
- [571] It was suggested to the complainant that she was the one who was being sexually aggressive and asking for sexual contact in that hotel room. Various statements were put to her in cross-examination that were alleged to have been made by her. When she was asked in cross-examination whether she said certain specific things while she was in room

209, for instance “Someone come fuck me” or “you guys are pussies”, E.M. often answered by saying that it did not sound like something she would say. She did not deny saying those things. She also admitted she could not remember much, if anything, of what she might have said when she was in room 209, and at points conceded that she may have said those things. This behaviour made the men in the room feel uncomfortable.

[572] The Crown is not relying on sexual attitude evidence to establish the absence of consent because, they submit that the complainant has provided direct evidence about her state of mind at the time of the sexual touching.

[573] However, the evidence of what was said by the complainant and heard by others can be considered by the court when assessing the complainant’s credibility along with the other evidence that might support her testimony or contradict it.

[574] In *Reimer*, the Court considered an appeal against conviction where one of the grounds of appeal related to whether the trial judge erred in excluding sexualized text messages sent by the complainant before the sexual activity that was the subject matter of the charge took place. In that case, the Court found that the sexualized texts were relevant to the issue of consent. The appellant also testified that the complainant spoke about doing things described in the sexualized texts. The Court said at para. 72:

Once again, if the complainant indeed made this statement, it would be relevant on the issue of consent as a statement by her of her present intention to consensually engage in those described acts a short time later at the motel. Derivatively, the sexualized texts referenced in that statement would also be relevant since they provide the details of the acts she communicated her intention to engage in.

[575] Whether or not the complainant made statements indicating that she wanted to engage in sexual activity is relevant to a determination of the issue of consent. On the basis of all of the evidence, I find as a fact that the complainant did express that she wanted to engage in sexual activity with the men by saying things like “is someone going to fuck me?” and masturbating.

[576] Given the issues relating to the credibility and reliability of the complainant’s evidence I conclude that I cannot rely on it.

[577] With this, I will now address each of the allegations against the accused beginning with Carter Hart.

iii) The allegation relating to Carter Hart

[578] Carter Hart is charged on count #3 with committing a sexual assault against E.M.

[579] To prove the *actus reus* of the offence, the Crown must prove beyond a reasonable doubt that Mr. Hart touched E.M., that the touching was of a sexual nature and that the touching happened without the consent of the complainant.

- [580] The first two elements of the offence are conceded. It is acknowledged that Mr. Hart had sexual contact with the complainant on June 19, 2018, in that E.M. performed oral sex on Mr. Hart. The issue is whether this sexual contact occurred without the consent of E.M.
- [581] The Crown submits that the complainant did not make a voluntary choice to perform oral sex on Mr. Hart. The onus is on the Crown to establish non-consent beyond a reasonable doubt. On the totality of the evidence, they have failed to do so, and I am left with a reasonable doubt as to whether the complainant consented to engage in oral sex with Mr. Hart.
- [582] This is an unusual situation in that there are witnesses to the sexual activity in question and what occurred immediately before it happened. I note that the evidence of each of the witnesses has been impacted to varying degrees by the passage of time and the consumption of alcohol.
- [583] As I indicated, I accept the overwhelming evidence that E.M. was acting in a sexually forward manner when she was masturbating in this room full of men and asking them to have sex with her. This evidence alone does not establish her consent to engage in oral sex with Mr. Hart, or anyone else, but it does establish that she communicated her willingness to engage in sexual activity.
- [584] According to the evidence of the complainant, the men were telling her what they wanted to see her do, and they put “penises in [her] face” and she performed oral sex on three men. She could not recall what if anything the men said to her immediately before this took place. She could not identify any of the men.
- [585] The complainant testified that she took on the “persona of a porn star” and that she was doing what she thought the men wanted her to do. She described being on “autopilot”. When asked if any of the men on whom she performed oral sex spoke to her directly, she did not recall and if they did, she “wasn’t really hearing it”. E.M.’s account of how the sexual contact began is unclear.
- [586] According to the evidence of Mr. Hart, when he replied to the text sent by Mr. McLeod, he was open to the possibility of engaging in a sexual encounter. When the complainant was asking the men “can someone come fuck me?” he stepped forward. Although it was awkward, he also found it exciting. He testified that he did not want to engage in sexual intercourse in front of others and asked for oral sex by saying “can I get a blowie?” At that point E.M. moved towards him and she agreed by saying “yeah” or “sure”.
- [587] I have considered the totality of evidence including the words and actions of the complainant before and during the incident including any ambiguous or contradictory conduct to determine whether she did not consent to the sexual activity in question with Mr. Hart: see *Reimer*, at para. 74.
- [588] The first consent video can also be considered by the court. Although I agree that it cannot be used to establish that the complainant consented to each sexual act that she engaged in, in my view it is circumstantial evidence as to the manner in which she was behaving. The first video was taken without her knowledge, so it presumably depicts how she was

behaving at the time. She was speaking normally, she was smiling and did not appear to be upset or in distress. She did not appear to be intoxicated. The complainant can be seen rubbing her eyes, and she said she may have been crying, but in my view that evidence is speculation on her part, given that she has no memory of the recording being made or what was happening at the time.

[589] This incident of oral sex with Mr. Hart was brief, and it was ended by him. The Crown alleges that there was a second incident of oral sex that occurred after Mr. McLeod and Mr. Dubé received oral sex. Mr. Hart did not recall a second incident of oral sex but agreed in cross-examination that it was possible that it happened. The complainant only testified about a single incident of oral sex with three men and then performing oral sex on Mr. McLeod. The Crown relies on the evidence of Mr. Howden, at least on this point to support that there were two instances of oral sex with Mr. Hart. Based on all of the evidence, I cannot find beyond a reasonable doubt that there were two instances of oral sex with Mr. Hart.

[590] The evidence of each of the witnesses has gaps and does not constitute a complete or sequential recounting of the events. For the reasons set out above, I have concerns regarding the credibility and reliability of the evidence of the complainant, and therefore I have a reasonable doubt about whether the complainant consented to the sexual activity with Mr. Hart.

[591] I accept the evidence of Mr. Hart that he asked for oral sex and the complainant indicated by her words, and by her actions that she would engage in oral sex with him and did so.

[592] Given the position of the Crown, however, I must go on to consider whether the consent of the complainant was vitiated due to her fear.

iv) Was the complainant's consent vitiated by fear?

[593] The Crown submits that even if the court has a doubt about whether there was voluntary agreement to the sexual activity in question, that agreement was vitiated by E.M.'s fear of the application of force, pursuant to the provisions of s. 265(3) of the *Code*.

[594] At this stage, the court is concerned with whether the complainant freely chose to participate in the sexual activity in question. In *Ewanchuk*, at para. 39, the Court said:

The question is not whether the complainant would have preferred not to engage in the sexual activity, but whether she believed herself to have only two choices: to comply or to be harmed. If a complainant agrees to sexual activity solely because she honestly believes that she will otherwise suffer physical violence, the law deems an absence of consent, and the third component of the *actus reus* of sexual assault is established.

[595] While the fear need not be reasonable, it must be honestly held.

- [596] E.M. testified that “in her mind” she did not want to be engaging in the sexual activity and she did so because she had no other option. She testified that she did not know how the men would react if she said no or if she tried to leave. She said she was scared.
- [597] The fact that there is no “usual” way for a person to respond to a sexual assault is well-established in law. The court cannot and will not engage in stereotypical reasoning. The Crown suggests in their written submissions that “[S]cience tells us that when a person is exposed to a threatening situation that causes extreme fear, stress, or a feeling that they cannot escape the brain and body can flood with stress chemicals.”⁷⁶
- [598] No evidence was called in this case as to what “science” tells us about how people react to threatening situations. In *R. v. Hoggard*, 2024 ONCA 613, a case referred to by the Crown, the Court of Appeal for Ontario found that the trial judge erred in admitting expert evidence of the effect of traumatic events on an individual.
- [599] In *R. v. P.J.C.*, 2025 ONCA 196, at para. 38, the Court said that the assessment of the credibility and reliability of witnesses is the “daily fare” of judges and is grounded in common knowledge and experience.
- [600] I must assess the claim by the complainant that any participation in the sexual activity was not because she voluntarily consented to it but because she felt she had no other option due to her honestly held fear that she would be harmed if she did not comply.
- [601] The approach is subjective, but the plausibility of the fear is relevant to assessing the credibility of the complainant’s claim that she consented out of fear: see *Ewanchuk*, at para. 38. I must consider the totality of the evidence.
- [602] The complainant testified that she was scared and confused in room 209 and that her fear began from the moment the first two men entered the room after the sexual encounter with Mr. McLeod. At trial, she testified that the actions of the young men caused “terror and fear” in her mind. E.M. did not mention experiencing any fear in the three statements she provided to the police in 2018, nor did she apparently tell anyone else. She did however describe feeling “upset”, “annoyed” and “frustrated”.
- [603] The complainant referred to her own lack of “processing” what had happened on several occasions to explain inconsistencies on this issue. According to her evidence, her fear resulted in her compliance, but she had not processed that.
- [604] If I accept the evidence of the complainant that she did not know that the men would be entering room 209, and if she was honestly fearful once Mr. Katchouk and Mr. Raddysh entered the room, there is an interval of about 15 minutes after they left and before other men entered the room after arriving at the hotel.⁷⁷ During that time, the complainant went to the bathroom, where her clothes were located and according to her evidence emerged

⁷⁶ Written Submission of the Crown, at para. 105.

⁷⁷ See Exhibit #2.

naked. She did not accept that there was any passage of time between when the first two men left the room and others entered.

- [605] At this point, she chose to walk into a room full of men while naked. No one directed her to do this, nor did anyone prevent her from going back into the bathroom and putting her clothes on. No one had threatened her or applied any force to her. She made no effort to leave the room. Up until this point there has been no sexual contact with anyone other than consensually with Mr. McLeod. The complainant provided no satisfactory answer as to why she chose to do this.
- [606] Furthermore, in her initial statements to the police, the complainant said that she did not think that the men in room 209 would have physically stopped her from leaving the room. There is no evidence that anyone applied force or threatened to apply force to the complainant to cause her to remain in the room naked.
- [607] Another circumstance that caused her fear, according to her evidence at trial, were the comments made about golf clubs or golf balls being inserted in her vagina. Again, in her initial statement to the police, the complainant described these comments as being made in a joking manner, not a threatening one. I do not accept E.M.'s evidence that these comments caused her to be fearful. That evidence is inconsistent with the way she described it in the first statement to police. Other than the sexual touching described by E.M. there was no other physical force applied to her by anyone in the room to cause her to remain there, and certainly no violence or threats of violence.
- [608] The evidence of the other men who were present when the sexual activity took place describe that the complainant was smiling and seemed to willingly participate in the activities. The demeanour she displayed on the first consent video does not show that she appeared to be in fear. This is particularly significant because the complainant, by her own admission, did not know that the video was being recorded and therefore was not "acting" for the camera.
- [609] E.M. testified that during the time when she was in the room and scared, she engaged in a conversation in French with Maxime Comtois. She found it was a good opportunity to practice her French.
- [610] Furthermore, Mr. Howden said, in his statement from July 3, 2018 that was admitted into evidence, that at one point she called Mr. McLeod by the wrong name and he said, "why are you even here?" and it appeared that she did not want to leave.
- [611] The inconsistencies in the evidence of the complainant regarding her fear, along with the other evidence referred to causes me to have a reasonable doubt about whether an honestly held fear was the reason for her participation in the sexual activity.
- [612] For all of these reasons, I am not satisfied beyond a reasonable doubt that the complainant did not consent to the sexual activity she engaged in with Carter Hart.
- [613] As a result, he will be found not guilty of count #3.

v) The allegation relating to Alexander Formenton

- [614] Alexander Formenton is charged on count #4 in this indictment with committing a sexual assault against E.M.
- [615] He is presumed innocent of that charge unless and until the Crown has proven each of the essential elements of the offence beyond a reasonable doubt.
- [616] As I indicated earlier, there is no issue that Mr. Formenton touched E.M. and that the touching was of a sexual nature. The touching in question is the sexual intercourse that occurred in the bathroom of room 209. The issue is whether the Crown has proven beyond a reasonable doubt that the complainant did not consent to that sexual activity.
- [617] In relation to this incident, the complainant testified that while she was on the sheet on the floor, some of the men in the room were saying to each other “someone have sex with this girl”. Following this, she got up because she felt it was something she had to do and she went to the bathroom and a man followed her in there. He bent her over the sink and they had vaginal sex using a condom, then the condom was removed, and she performed oral sex. E.M. also testified that at the end of the night Mr. Formenton asked her for oral sex and she refused.
- [618] Based on the findings made above, I can conclude that the phrase “someone have sex with this girl” was likely said in response to the complainant’s request that someone have sex with her. The witnesses testified that the things the woman was saying made them uncomfortable. No one wanted to have sex with her in front of a room full of men. Many of them had girlfriends and did not want to engage in sexual activity with E.M. as described in the evidence of Mr. Steenbergen.
- [619] E.M. testified that while she was on the sheet, at some points she was “frustrated” because nothing was happening, and she said she was going to leave. She said she did not leave because she was convinced to stay.
- [620] Mr. Hart testified that after he received oral sex from the complainant, she was on the floor leaning against the bed and she said, “if no one is going to fuck me then I’m going to leave”. Mr. Formenton walked over to her and E.M. led Mr. Formenton to the bathroom, and they were holding hands. This evidence was confirmed to some extent by Mr. Howden who testified that he watched the woman take Mr. Formenton to the bathroom.
- [621] In his statement to police, Mr. Formenton indicated that after performing oral sex on Mr. Hart, E.M. was on the floor asking if anyone was going to do anything to her. He described that situation as awkward. He “volunteered” but he did not want to have sex in front of everyone, so she walked to the washroom and he followed. He told Detective Newton that this was a mutual decision because he did not want to “do it in front of the guys” and they went to the bathroom and engaged in sexual intercourse. Afterwards, he remained in the bathroom and took a shower, and she left the bathroom naked.

- [622] The evidence of Mr. Howden is that on the way to the bathroom, Mr. Formenton was expressing doubt and asking if it was okay to do this. Mr. Howden told him that if she was consenting then it was okay.
- [623] The court has considered the totality of the evidence including the conduct of the complainant immediately before engaging in sexual activity with Mr. Formenton. I need not repeat the analysis conducted above, but, it is applicable in these circumstances as well. Her words and her conduct can be considered in determining whether the Crown has proven non-consent beyond a reasonable doubt.
- [624] The defence submits that the consent of the complainant is clearly established by her conduct and by her words. She asked for sex and Mr. Formenton agreed to, and did engage in sex with her.
- [625] Although the complainant was feeling the effects of the alcohol, it is difficult to reconcile the lack of obvious symptoms of impairment with her position that she was “disconnected” from her body. Likewise, it is difficult to reconcile the evidence of the complainant that she was able to make a conscious choice to leave Jack’s and return to the hotel to engage in sexual activity with Mr. McLeod but was unable to make a conscious choice a short time later.
- [626] The description of the sequence of events leading up to the sexual contact between Mr. Formenton and E.M. is fairly consistent among the witnesses, including E.M. although she testified that she did not consent to this activity, she saw it as something she had to do.
- [627] Consent can be communicated by conduct and by words. In this case, I find that E.M. by her words was expressing her willingness to engage in sexual activity. When Mr. Formenton stepped forward, he was prepared to engage in sexual activity with the complainant but did not want to do so in front of other men. I accept his evidence that it was a mutual decision to go to the bathroom. It is consistent with the evidence of all witnesses that the complainant got up after Mr. Formenton approached and they walked to the bathroom.
- [628] For all of these reasons, including the concerns in relation to the reliability and the credibility of the evidence of E.M., I am not satisfied that the Crown has proven beyond a reasonable doubt that the complainant did not consent to engage in sexual activity with Alexander Formenton.
- [629] I must also consider whether I am satisfied beyond a reasonable doubt that there was not an absence of consent because that consent was vitiated by fear. I do not find it necessary to repeat my reasons set out above on this issue. Those reasons apply equally to the sexual activity with Mr. Formenton.
- [630] I am not satisfied beyond a reasonable doubt that the complainant participated in the sexual activity with Mr. Formenton because she had a reasonably held fear of harm if she did not.

[631] Accordingly, Mr. Formenton will be found not guilty of count #4.

vi) The allegation relating to Callan Foote

[632] Mr. Foote is charged on count #6 with committing a sexual assault against E.M. In order to be convicted of this offence the Crown must prove each of the essential elements of the offence beyond a reasonable doubt.

[633] The issue in relation to Callan Foote is different than the issue relating to the other accused. In this case, the defence submits that the Crown has not proven beyond a reasonable doubt that the act engaged in by Mr. Foote constitutes a sexual assault.

[634] The Crown submits that on any version of the events, the accused is guilty of a sexual assault, but that the court should accept the evidence of the complainant as credible and reliable and should convict on that basis.

[635] In *R. v. V.K.*, 2024 ONCA 858, at para. 20, the Court set out the definition of what constitutes a sexual assault as follows:

The test to determine whether conduct is of a sexual nature is objective. The question to ask is: “viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?”: *R. v. Chase*, 1987 CanLII 23 (SCC), [1987] 2 S.C.R. 293, at para. 11.

[636] In *R. v. Chase*, [1987] 2 S.C.R. 293, at para. 11, the Court sets out the factors to consider in making this determination including: the part of the body touched, the nature of the contact, the situation in which it occurred and any words or gestures accompanying the act are relevant. It is also relevant to consider the intent or purpose of the person committing the act, to the extent that it may appear from the evidence when considering whether the conduct is sexual.

[637] As I indicated previously, the Crown must prove each of the elements of the offence. The first element of the offence of sexual assault is that there is an application of force. Section 265(1) of the *Criminal Code* defines an assault, which applies to offences of sexual assault as well:

s.265(1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose.

[638] Although, on the totality of the evidence, I am satisfied that Callan Foote did the splits over E.M.’s body, in order to find him guilty of the offence charged, I must be satisfied

that he applied force, or threatened to apply force of a sexual nature without the consent of the complainant and he knew or was reckless as to whether she consented.

- [639] According to the evidence of the complainant, Mr. Foote did the splits right over her face as she was lying on the bed sheet on the ground and put “his penis right on my face” and was not wearing any pants or underwear. She testified that the other men in the room were laughing and making fun of her.
- [640] Mr. Hart testified that someone said: “Footer do the splits” and in response, E.M. laid down and was laughing as Mr. Foote, fully clothed partially did the splits over her torso without touching her and then “popped” back up.
- [641] Mr. Steenbergen testified that he did not observe Mr. Foote remove any of his clothing before he did the splits, but he could not say whether there was any touching of the complainant by Mr. Foote because of where people were positioned.
- [642] On the evidence, either Mr. Foote’s genitals touched E.M., as she testified, or he was in a position over top of her but did not touch her. I must also consider the circumstances in which this occurred.
- [643] On the evidence, Mr. Foote was one of the first men to return to the hotel at 2:23 a.m. with Boris Katchouk, however the only evidence as to when he entered room 209 is from Tyler Steenbergen who said that Mr. Foote entered the room 10 or 15 minutes after he did. Since we know that Mr. Steenbergen returned to the hotel at 3:13 a.m., based on that evidence Mr. Foote would have entered the room sometime around 3:30 a.m. or so. He is not one of the men who received oral sex from E.M. or with whom she engaged in any other sexual activity.
- [644] E.M. could not provide any evidence about what was happening immediately before Mr. Foote did the splits, she just remembered that she was laying on the sheet. She described the act as gross and degrading. She described that when this was happening, she felt like the men were making fun of her and it was a joke to them. In cross-examination, E.M. was pressed on why she did not tell Detective Newton that the man who did the splits was naked? She responded by saying that it was difficult to say that, despite the fact that the very reason she was speaking to Detective Newton was to describe alleged sexual assaults, and she had already described other men as having their penises exposed. That explanation does not make sense.
- [645] Carter Hart testified to observing Mr. Foote do the splits. According to his evidence, immediately before Mr. Foote did the splits, the men in the room were saying “Footer do the splits” and were laughing and joking. He described E.M. laughing as well when this was said and she then laid back on the sheet so he could do the splits. He said that Mr. Foote was fully clothed and did not touch the complainant’s body. He described these observations with some detail.
- [646] Although Mr. Hart’s memory, like the memory of all of the witnesses was impacted by the consumption of alcohol, he was not shaken in cross-examination on this point. I agree with the submission of the Crown that his evidence was unclear about how Mr. Foote got

up after doing the splits, whether he pushed off the bed or popped up on his own, but in my view that does not detract from his evidence about the observations he made.

- [647] When Mr. Foote did the splits, it was separate from any other sexual activity with the complainant. For the reasons set out previously, regarding the concerns I have about the credibility and reliability of the complainant's evidence in general, I do not find the complainant's evidence on this issue reliable. None of the other witnesses, including the witnesses called by the Crown, testified that Mr. Foote removed his clothing. Although the complainant was naked at the time, I am not satisfied beyond a reasonable doubt that there was contact, or a threat of contact, nor am I satisfied that the act itself was sexual in nature.
- [648] For those reasons, the Crown has not proven beyond a reasonable doubt that Mr. Foote committed a sexual assault on E.M. and he will be found not guilty of count #6.

vii) The allegation relating to Dillon Dubé

- [649] The Crown submits that Mr. Dubé is guilty of a sexual assault in relation to the slap on E.M.'s buttocks and the oral sex that she performed on him. It is submitted that the slap on the buttocks was an application of force of a sexual nature to which the complainant did not consent. The Crown submits that the court should find, based on the evidence of E.M., that Mr. Dubé slapped her hard on the buttocks while she was on the bed performing oral sex on Mr. McLeod.
- [650] The Crown relies on the portions of Brett Howden's evidence that was read in to support that position, particularly because he indicated that after he observed this happen, this was the thing that "finally pushed [him] out the door".
- [651] It is submitted that the reason Mr. Dubé called both Mr. Howden and Mr. Steenbergen on June 26, 2018, was to ask them to lie and leave this out when they spoke to investigators.
- [652] In addition, the Crown takes the position that Dillon Dubé is guilty of a sexual assault in relation to the oral sex he received. E.M. did not make a voluntary choice to perform oral sex on Mr. Dubé. It is submitted that her ability to choose whether to engage in this sexual act was constrained by her intoxication, her vulnerability, and her fear.
- [653] The defence submits that the slap of E.M.'s buttocks was playful and not the hard slap described by her that hurt and caused her to tell the men who were slapping her to stop. It was described as foreplay. Furthermore, the defence submits that it did not occur at the same time that sexual activity was taking place and that the Crown has not established beyond a reasonable doubt that this constituted a sexual assault.
- [654] As for the oral sex that occurred, Mr. Dubé does not dispute that this constitutes a touching of a sexual nature but submits that the Crown has failed to establish beyond a reasonable doubt that the complainant did not consent to this sexual activity.
- [655] The complainant did not identify Mr. Dubé as one of the men who slapped her on the buttocks or one of the men on whom she performed oral sex, however, in his voluntary

statement to the police he acknowledged that he received oral sex from the complainant and other witnesses indicated that he is one of the people involved in the incidents of oral sex.

- [656] In relation to the slap of E.M., she described in her evidence two separate events when slapping occurred. The first occasion was relatively minor, and did not hurt, but the second incident, she describes as painful and involved a number of men who took turns trying to hit her as hard as they could while she was performing oral sex on Mr. McLeod.
- [657] While I accept that the slap took place, I do not accept that Mr. Dubé was one of several men who took turns slapping E.M. as hard as they could. As with the other sexual activity that forms the subject matter of the charges, the issue has always been, not that each of the acts happened, but rather proof of lack of consent.
- [658] E.M. testified that while she was performing oral sex on the three men that she felt someone spit on her back and “some slapping”. The complainant described her mind being separated from her body at this point. According to Mr. Steenbergen, the slap was light and playful, not hard and not soft, and did not occur at the same time as the oral sex was happening. Mr. Howden testified that he has no present memory of the slap, but in his earlier statements, he said that he could not remember if E.M. was clothed when this happened or the sequence of events involving the slap. Mr. Howden testified that he ultimately left because he was uncomfortable with the entire sequence of events.
- [659] It would be wrong for me to parse out this one discrete slap from what I find to be a single multi-faceted period of sexual conduct. It would be wrong for me to find a lack of consent beyond a reasonable doubt for this application of force which caused no bodily harm, imbedded in this broader consensual conduct. As a result, I cannot separate the slap from my broader findings regarding the participation of Dillon Dubé.
- [660] In relation to the oral sex on Mr. Dubé, according to his statement, after E.M. was on the ground and “chirping” them for not doing anything with her, he stepped forward to E.M. and pulled down his pants, she came up to him and began performing oral sex on him which lasted only about 10 seconds. He knew it was a bad idea and did not want to be part of it and so he stumbled back.
- [661] According to E.M., she was naked on the floor, the men were talking loudly and then they began putting penises in her face. She performed oral sex on three men and she did not recall if she assisted them in pulling down their pants in order to do so. She could not recall what if anything was said between her and the men before the oral sex began.
- [662] Based on the evidence of E.M., it is unclear whether Mr. Dubé, although she could not identify him, was the first of these men, the second or the third. Her recollection of these events is not cohesive, detailed or clear.
- [663] On the totality of the evidence, I find that this event occurred after E.M. was on the sheet on the floor, masturbating and asking any of the men to engage in sexual activity with her. Although this does not constitute her consent to engage in any and all sexual activity, it does reflect her interest in doing so. I must consider the totality of the circumstances,

including the complainant's words and actions before and during the event to determine whether I am satisfied beyond a reasonable doubt that she did not consent to the sexual activity in question.

[664] The complainant cannot say whether any words were spoken before Mr. Dubé received oral sex. She does not remember. According to Mr. Dubé, he stepped forward, pulled his pants down and the complainant came up to him and began performing oral sex.

[665] The only issue in relation to this act is whether the complainant voluntarily consented to engage in this sexual act. On the basis of all of the evidence, including the issues with the credibility and reliability of the evidence of the complainant, which I have set out above, and need not repeat here, I cannot find beyond a reasonable doubt that this conduct on the part of the complainant was non-consensual.

[666] As I indicated earlier, I am not satisfied beyond a reasonable doubt that the complainant's consent to the sexual activity was vitiated by fear. For the same reasons expressed earlier, that applies to the circumstances surrounding the sexual activity she engaged in with Mr. Dubé.

[667] As a result, Dillon Dubé will be found not guilty of count #5 on the indictment.

viii) The allegations relating to Michael McLeod

[668] Mr. McLeod is charged on count #1 on the indictment with an offence of sexual assault. The Crown submits that Mr. McLeod is guilty of sexual assault because of an act of oral sex that occurred with the complainant or because of the act of intercourse with her in the bathroom at the end of the night. It is submitted that both acts occurred without the consent of the complainant.

[669] There is no issue that Mr. McLeod engaged in further sexual activity with E.M. after the consensual sexual activity that occurred earlier in room 209. The issue to be determined is whether the Crown has proven beyond a reasonable doubt that that sexual activity was non-consensual.

[670] The evidence of E.M. about the oral sex with Mr. McLeod is confusing. The complainant testified that she performed oral sex on three men when they put their penises in her face. This was the first sexual contact described by her. She was not able to identify any of the three men on whom she performed oral sex.

[671] Then E.M. described performing oral sex on Mr. McLeod. The complainant testified that "it was kind of made clear" that people wanted her to perform oral sex on Mr. McLeod and he asked for it, so she kneeled on the bed to perform oral sex on him. She could not recall how it happened. She said either something was said, or he asked for it. After this happened Mr. McLeod asked the men to leave, and they did. According to this evidence, this would have been the last sexual contact she engaged in until she had intercourse with Mr. McLeod in the shower.

- [672] However, Mr. Steenbergen testified that he saw Carter Hart receive oral sex and this was the first sexual encounter he observed. Then he observed Mr. McLeod receive oral sex and it was brief. He does not describe the details surrounding this observation. She then went to the bathroom. He left after the complainant went to the bathroom. He did not observe E.M. and Mr. Formenton go to the bathroom together. This seems to suggest it happened earlier in the evening.
- [673] Brett Howden testified that he observed Mr. McLeod receive oral sex. He testified that when she was done with Carter Hart, she went over to Michael McLeod and performed oral sex on him, and it was brief. He then saw her go to the bathroom with Mr. Formenton.
- [674] E.M. spent most of the evening with Mr. McLeod. She testified that she did not see him much in the room after the initial encounter. She testified that he left the room at some point and returned with food and was laying on the bed eating it. She testified essentially that she was unsure whether he asked for oral sex or whether “something was said”. Whether that was said by him or someone else is unclear on her evidence.
- [675] Mr. McLeod in his statement gives a much clearer account of what occurred. He said that after he returned from getting his food, he observed the complainant giving oral sex to Mr. Hart. After that time, Mr. McLeod said that E.M. was naked on the bed and saying, “who wants to have sex with me?” Then she and Mr. Formenton went to the bathroom together. Then more men came into the room.
- [676] About 15 minutes later, E.M. said that she wanted to have sex again and called the men “pussies” for not wanting to have sex with her. She got upset because no one wanted to have sex with her, and he calmed her down and explained that no one wanted to have sex in front of the other guys. He said that she offered “blow jobs” and he got one. He took the first video before that happened, because he wanted to make sure she was okay with it. She looked like an active participant, and she seemed excited and was “kinda leading the way” with the sexual activity in the room.
- [677] In his statement, Mr. McLeod does not disclose that he sent the “3 way” text message. He does say that he told some of the guys that there was a naked girl in the room. He said a lot of the guys were not looking for anything because they had girlfriends. Failing to specifically mention the text message causes me concern about his evidence, however it does not cause me to disbelieve his evidence in its entirety.
- [678] Based on this evidence, I am not satisfied beyond a reasonable doubt that the Crown has proven that E.M. did not consent to this act of sexual activity with Mr. McLeod.
- [679] The last act of sexual activity occurred at the end of the night before E.M. left. The first time that she mentioned having sex in the bathroom or in the shower with Mr. McLeod was during her police interview of August 31, 2018, which was the third statement she provided to police. She testified that she went to the bathroom at the end of night and Mr. McLeod came in after her. She said in chief that he either asked her or told her to get in the shower and she did. She agreed in cross-examination that Mr. McLeod got into the shower alone and asked her to join him. They then had vaginal sex. The only other person

in room 209 at this time was Mr. Formenton. Mr. McLeod said in his statement that he was showering, and she came in the shower, and they had sex.

- [680] According to the Crown, this sexual activity was not consensual. The complainant said in her evidence that this was not something she wanted to do, but that this was one last thing she felt she had to do before she could leave.
- [681] The second video was recorded at around this time which shows E.M. speaking clearly and saying that Mr. McLeod was “so paranoid” for asking her if the activity in the room was consensual and that she was “so sober”. In chief, the complainant testified that although she could not recall this video being recorded, her memory was refreshed when she saw it. She said that she had to say things on camera in order to leave the room.
- [682] In cross-examination, she testified that after the video was recorded, she started to think that Mr. McLeod was a jerk because he got into bed and wanted her to leave on her own. He also asked her if she had STD’s. She felt he was disrespectful and rude. At another point she said she was “taken aback” when he said, “are you going anytime soon”.
- [683] The evidence given by E.M. in relation to this sexual activity at the end of the night and the circumstances surrounding it is vague and inconsistent. Based on her evidence, I am not satisfied beyond a reasonable doubt that the Crown has proven that this sexual activity was not consensual.
- [684] For the reasons set out previously, which I need not repeat, I find that the Crown has not proven beyond a reasonable doubt that the complainant’s consent was vitiated by fear.
- [685] As a result, Mr. McLeod will be found not guilty of count #1.

F. COUNT #2 – PARTY TO THE OFFENCE

- [686] The legal principles in relation to party liability pursuant to s.21(1) of the *Code* were set out succinctly by Watt J.A. in *R. v. Almarales*, 2008 ONCA 692, at paras. 65-67:

Secondary participation by aiding or abetting includes both conduct and fault requirements. Conduct may include acts, omissions (where there is a legal duty to act), words and gestures. The fault element has to do with the aider’s or abettor’s state of mind when engaged in the conduct.

Section 21(1)(b) applies to aiders. A person is a party to a crime as an aider if that person:

- Does (or, in the case of a legal duty, omits to do) something that helps the (or a) principal to commit the offence [the conduct requirement]; and
- Provides the assistance with the intention of helping the (or, a) principal to commit the offence [the fault requirement].

R. v. Maciel (2007), 2007 ONCA 196 (CanLII), 219 C.C.C. (3d) 516 (Ont. C.A.) at para. 86, leave to appeal to S.C.C. refused (2007), 220 C.C.C. (3d)

vi; *R. v. Hibbert*, 1995 CanLII 110 (SCC), [1995] 2 S.C.R. 973, 99 C.C.C. (3d) 193 at paras. 36-37.

Section 21(1)(c) governs abettors. Despite its use of the verb “abets”, rather than the more expansive “does or omits to do anything for the purpose of abetting”, abetting includes conduct and fault elements similar to those of aiding. A person is a party to a crime as an abettor if that person:

- Says or does something that encourages the (or, a) principal to commit the offence [the conduct requirement]; and
- Offers the encouragement by words or conduct with the intention of encouraging the (or, a) principal to commit the offence [the fault requirement].

R. v. Helsdon (2007), 2007 ONCA 54 (CanLII), 216 C.C.C. (3d) 1 (Ont. C.A.) at paras. 43-44.

- [687] In order to convict Mr. McLeod as a party to the offence of sexual assault, the Crown must establish beyond a reasonable doubt, that Mr. McLeod did something that helped someone commit the offence of sexual assault with the intention of helping that person to commit the offence. Or, that he said something that encouraged someone to commit the offence of sexual assault with the intention of encouraging someone to commit that offence.
- [688] Although the terms “aiding and abetting” are often used interchangeably, they are distinct concepts in law. In their written submissions, the Crown argues that Mr. McLeod took steps for the purpose of encouraging other men to commit the offence of sexual assault. This includes by sending the “3 way” text and by asking Mr. Katchouk and Mr. Raddysh if they wanted “a gummer” and by recruiting other men to engage in the sexual assault of E.M.
- [689] The Crown submits that Mr. McLeod did not care that E.M. was not consenting to the sexual activity with others, he nevertheless encouraged others to commit the offence. For those reasons, it is submitted that he aided and encouraged others to commit the offence of sexual assault against E.M.
- [690] It is the position of the defence that E.M. was interested in group sexual activity with the other players and that is why Mr. McLeod invited others into the room. Once they were in the room, there is no evidence from E.M. or anyone else that Mr. McLeod did anything or said anything to encourage others or to assist others to engage in sexual activity with the complainant.
- [691] Again, the evidence of E.M. is that she does not remember whether she said anything about inviting others into room 209. When asked in cross-examination if she made the suggestion that Mr. McLeod invite his teammates into the room, she said “I don’t think that’s something I would have said”.

- [692] E.M. had almost no memory of what she might have said while she was in room 209. Her claim of intoxication almost to the point of incapacity is contrary to other evidence, including the evidence called by the Crown, and I do not accept it.
- [693] According to the evidence of both Boris Katchouk and Taylor Raddysh, E.M. did not appear upset or surprised to see them enter the room. She did not react in any way when Mr. McLeod asked Mr. Katchouk if he wanted “a gummer” in her presence.
- [694] According to the evidence of other witnesses that I have reviewed elsewhere in these reasons, I find that I am satisfied that E.M. was asking the men in the room to engage in sexual activity with her, and appeared to be upset when they did not. There is no evidence that Mr. McLeod participated in that.
- [695] Mr. McLeod in his statement to the police said that he checked with E.M. during the night to make sure she was okay. I accept that evidence.
- [696] I am not satisfied, based on the evidence that Mr. McLeod invited men into room 209 without the knowledge of E.M. for the purpose of committing a sexual assault. Once inside the room, there is no evidence that he encouraged or assisted others to commit a sexual assault.
- [697] Accordingly, I am not satisfied beyond a reasonable doubt that Mr. McLeod was a party to the offence of sexual assault.
- [698] For all of these reasons, count #2 will be dismissed.

G. CONCLUSION

- [699] Accordingly, Michael McLeod will be found not guilty of count #1 and count #2.
- [700] Carter John Hart will be found not guilty of count #3.
- [701] Alexander Formenton will be found not guilty of count #4.
- [702] Dillon Dubé will be found not guilty of count #5.
- [703] Callan Hayden Foote will be found not guilty of count #6.



Justice Maria V. Carroccia

CITATION: R. v. McLeod, et al., 2025 ONSC 4319

COURT FILE NO.: CR-122-24 (London)

DATE: 20250724

ONTARIO

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

– and –

MICHAEL McLEOD, CARTER JOHN HART,
ALEXANDER FORMENTON, DILLON DUBÉ &
CALLAN HAYDEN FOOTE

Accused

REASONS FOR JUDGMENT

Carroccia J.

Released: Orally and in writing – July 24, 2025