

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996. c. 367

AND

IN THE MATTER OF THE REVIEW ON THE RECORD OF

THE REGISTERED COMPLAINT AGAINST

SERGEANT AJMER SANDHU OF THE VANCOUVER POLICE DEPARTMENT

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DECISION OF ADJUDICATOR

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To:	The Complainant (name withheld)	c/o Counsel for the Complainant
And To:	Sergeant Ajmer Sandhu	Member
And To:	Mr. Michael D. Shirreff & Mr. Greg Cavouras	Counsel for the Member
And To:	Chief Constable Adam Palmer Vancouver Police Department	Chief Constable
And To:	Mr. Prabhu Rajan	Police Complaint Commissioner
And To:	Mr. Mark G. Underhill, K.C. & Ms. Emma K. Ronsley	Counsel for the Police Complaint Commissioner
And To:	Chief Constable Les Sylven (Ret'd) Central Saanich Police Services	Discipline Authority

**There is a Ban on Publication of the Identity of the Complainant in this Proceeding or any Information That May Tend to Identify the Complainant**

## 1. Overview

[1] This is a Review on the Record arising out of findings of misconduct against Sergeant Ajmer Sandhu of the Vancouver Police Department [“the Member”] on three allegations of deceit pursuant to Section 77(3)(f)(i)(A) of the *Police Act*, in relation to statements made by him within a *Police Act* investigation of a fellow member of the Vancouver Police Department.

[2] The investigation arose out of an interaction on [REDACTED] in a B.C. provincial courthouse between the fellow member, referred to here as Cst. M, and a prosecutor, referred to here as the Complainant, during the afternoon recess of a trial in which a relative of the Member was being tried for manslaughter. The Member was attending the trial as an observer, and had asked his former partner, Cst. M, who was not a relative, to attend in support of the family. The Member had permission from his Inspector to attend while on duty, and Cst. M was on medical leave for a hip injury.

[3] During the break, Cst. M stepped into the path of the Complainant and her co-counsel as they were walking in the courtroom corridor on the way back to the courtroom, impeding their path in what they both described as an intimidating fashion. The lawyers both verbally challenged Cst. M after they passed the group, and the Complainant asked a sheriff to have him removed from the courthouse. The Complainant made a statement about the incident on the record at the trial. After learning that Cst. M was a police officer the Complainant filed a complaint with the Police Complaint Commissioner.

[4] A *Police Act* investigation ensued, and, as a witness, the Member provided a duty statement on April 5, 2018, and was interviewed by the investigator on September 12 and October 16, 2018. These three statements were all provided under Section 101 of the *Police Act*.

[5] In December 2018, the Discipline Authority directed that the *Police Act* investigator undertake an additional investigation in relation to the veracity of statements made by the Member in his duty report and the two interviews. The investigator ultimately recommended three allegations of deceit by false statements against the Member. These were accepted by the Discipline Authority in his decision under Section 112.

[6] The Discipline Authority convened a discipline proceeding against the Member and Cst. M together on November 6, 2019, and provided his decision under Section 125 on February 13, 2020. In relation to Cst. M, the Discipline Authority found proven one allegation of discreditable conduct in relation to the intimidation, and two allegations of deceit arising out of false statements during the investigation. As a result, Cst. M was demoted from First Class to Second Class Constable for a period of 9 months.

[7] In relation to the Member, the Discipline Authority found the three allegations of deceit proven and imposed a reduction in rank to First Class Constable with a 5-month suspension of his eligibility to compete for promotion.

[8] Pursuant to Section 141(1), the findings and penalty decisions of the Discipline Authority in relation to the Member collectively make up the disciplinary decision that is the subject of this Review on the Record. The standard of review to be applied is correctness: Section 141(9). Additionally, Section 141(10) directs the adjudicator to decide whether “any misconduct has been proven.”

[9] The materials that form the record for the purpose of the review are set out in Section 141(3), and include not just the disciplinary decision, but the final investigation report and all records “related to the investigation and the discipline proceeding”; the disciplinary disposition record provided by the Discipline Authority; and the report provided pursuant to Section 133(1)(a), which includes the disciplinary decision and reasons. As I interpret the relevant sections, the review comprises a full reconsideration of the evidence available to the Discipline Authority on the discipline proceeding, including any testimony on the proceeding, which would fall under “records related to the discipline proceeding” under Section 141(3).

[10] Bearing in mind the standard of correctness, and the apparent requirement that the review encompass all the evidence and materials underpinning the disciplinary decision, it is apparent from the legislation that the task of an adjudicator is not simply to consider whether the Discipline Authority made errors in his decision, but to consider and weigh the evidence disclosed by the record, and decide whether misconduct is proven.

[11] The term “proven” entails proof on a balance of probabilities, and, similarly to the standard applied by a discipline authority at a discipline proceeding, requires an adjudicator to base a finding of misconduct on a preponderance of clear, convincing and cogent evidence<sup>1</sup>. I will say more about the standard of proof in due course.

[12] For reasons that I shall endeavour to explain, I have decided that the findings of misconduct in this matter were incorrect, misconduct is not proven, and the allegations should be dismissed.

## **2. Legislative and Procedural Context**

[13] After the Discipline Authority's decision on the discipline proceeding was delivered, the Member sought a public hearing pursuant to Section 137(1). Section 137(2) provides that a member who faces reduction in rank is entitled to a public hearing unless the Police Complaint Commissioner concludes that it is unnecessary to cross-examine witnesses or to receive evidence that is not part of the disciplinary decision record, and that public confidence in the administration of police discipline can be preserved without a public hearing. The Commissioner addressed his mind to these considerations and decided to order a review on the record.

[14] I have noted the scope of the review in the overview. While additional evidence may be received under Section 141(4) in certain circumstances, none was offered or received in relation to the issue of misconduct. The member and the Police Complaint Commissioner are permitted by Sections 141(5) and (6) to make submissions on the review. Section 141(7) also provides that the adjudicator may permit the complainant and the Discipline Authority to make submissions. Neither sought to do so in this case.

[15] Pursuant to Section 141(11) the complainant is entitled to notice of a decision on the review. The original complaint in this investigation pertained to the actions of Cst. M, not the Member who is the subject of this review. The Member became involved as a subject of the investigation with the Discipline Authority's additional directions in December 2018. The

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<sup>1</sup> F.H. v. McDougall, 2008 SCC 53, at para. 46

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Member challenged the mechanisms by which that occurred in a judicial review application that was ultimately dismissed by the BC Court of Appeal.<sup>2</sup>

[16] The process followed in this matter accordingly resulted in a discipline proceeding pertaining to both the member and Cst. M, in which the complainant remained a party entitled to notice. For that reason, and because of the ban on publication, the complainant is referred to in this decision as “the Complainant,” rather than by name, and included in the list of those entitled to notice of this decision. Counsel for the Complainant made no submissions in relation to the outcome of the review, and attended for the sole purpose of safeguarding the publication ban.

[17] The Notice of Review on the Record was issued on May 28, 2020. The Member filed his application for judicial review on October 16, 2020, and on November 27, 2020 the B.C. Supreme Court stayed the Review on the Record pending the judicial review. In a written decision dated December 13, 2021, the Supreme Court allowed the judicial review application and quashed the disciplinary decision against the Member.

[18] The Commissioner's appeal to the B.C. Court of Appeal was heard on September 13, 2022, and on January 19, 2024 that court issued written reasons allowing the appeal and dismissing the judicial review application. The Review on the Record was reconvened on February 5, 2024 and a schedule for written submissions was set at that time, with final submissions delivered orally on May 31, 2024. Counsel for the Member and the Commissioner provided timely, helpful and thorough written and oral submissions.

[19] Section 141(11) provides that an adjudicator must give written notice of a decision, with reasons, “within 10 business days after reaching a decision.” The deliberation process in this matter entailed a thorough review of materials comprising multiple statements from over a dozen witnesses, several thousands of pages of reports and transcripts, and several hours of audio and video recording, such that the compilation of the facts for the purpose of fact-finding occupied a considerable time. The timeline provided by the section is sufficiently vague to accommodate a grace period for that function before turning to the matter of a decision, which I can assure the parties was conceptualized within the 10-business day period provided for in the legislation. I

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<sup>2</sup> British Columbia (Police Complaint Commissioner) v. Sandhu, 2024 BCCA 17 (CanLII), <https://canlii.ca/t/k2b47>

will add that my receipt of materials comprising the record was not complete until June 17, 2024, due to a glitch in one of the audio files.

### 3. Allegations

[20] The allegations contained in the Notice of Review on the Record are as follows, anonymized to respect the ban on publication:

- i. **Allegation #1:** Deceit pursuant to section 77(3)(f)(i)(A) of the Police Act, by knowingly making a statement that is false or misleading. Specifically, in his VPD Duty Report dated April 5, 2018, when describing [Cst. M's] interaction with [the Complainant] in the court hallway.
- ii. **Allegation #2:** Deceit pursuant to section 77(3)(f)(i)(A) of the Police Act, by knowingly making a statement that is false or misleading. Specifically, during his interview with [the investigator] on September 12, 2018, when describing [Cst. M's] interaction with [the Complainant] in the court hallway, or his interactions with BC Sheriffs or [Defence Counsel] following the removal of [Cst. M] from the courthouse.
- iii. **Allegation #3:** Deceit pursuant to section 77(3)(f)(i)(A) of the Police Act, by knowingly making a statement that is false or misleading. Specifically, during his interview with [the investigators] on October 16, 2018, when describing [Cst. M's] interaction with [the Complainant] in the court hallway, or his interactions with BC Sheriffs or [Defence Counsel] following the removal of [Cst. M] from the courthouse.

### 4. Summary of Evidence

[21] To set the scene and by way of a general description, the interaction between Cst. M and the Complainant that was the subject of the investigation took place closely following the Complainant's cross-examination of the Member's nephew, who was the defendant in a criminal trial. The Member's family and supporters had been attending the trial as well as family and supporters of the deceased. There had been tension among the observers, requiring the presiding judge to admonish attendees about potentially obstructive behaviour as recently as the morning

of the incident.<sup>3</sup> The Member believed it would be helpful for the accused's "side" to have more supporters, and asked Cst. M, a former partner of his who was on medical leave, to attend for that purpose. Cst. M attended on a day some weeks prior to the date of the incident, and then again, briefly on the incident date, shortly before the court took its afternoon break.

[22] The interaction occurred during that break, which followed the completion of the accused's cross-examination. The Member and Cst. M were in a group of males, primarily relatives of the accused, standing in the corridor of the courthouse. As the Complainant and her co-counsel walked toward the group on their way back to the courtroom, Cst. M turned to face them, causing them to alter their path. Cst. M then turned in the Complainant's direction as she passed closely by him. She and her colleague became agitated after they passed the group, turning back twice, and exchanging heated remarks with Cst. M.

[23] That much is not in dispute. What is in dispute is how the interaction was initiated, what was said, and by whom. The Complainant considered Cst. M's action to be obstructive and confrontational, and reported that the first verbal part of the interaction came from her, when she challenged Cst. M after he stared at her. Cst. M and the Member both reported that the Complainant initiated a friendly exchange as she passed by, and that only after that did the matter unexpectedly turn confrontational.

[24] The question of whether Cst. M had intimidated the Complainant therefore turned on credibility, necessitating that the investigator and Discipline Authority perform a detailed review of the various witnesses' evidence. The question on this review, as it was at the discipline proceeding, is whether the evidence proves that the Member knowingly made false statements about what occurred during the interaction. That question is of course wrapped up in the perceptions of the witnesses, including the Member and Cst. M, about the nature of the interaction, in light of their ability to perceive, underlying interests, and the context in which the incident occurred.

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<sup>3</sup> Book of Documents and Authorities – OPCC [hereafter referred to as CBOD for "Commissioner's Book of Documents"], page 711, Excerpt from Proceedings, [REDACTED], p. 1, lines 46-47; p. 3, lines 1-2.

[25] The standard of review I am to apply is that of correctness, which in my view entails both a review of the evidence and a review of the Discipline Authority's decision. I will say more about how I believe the standard of proof and the standard of review interact under the heading, "Applicable Standards" in the Analysis section of these reasons.

[26] With that framework in mind, I turn to a more detailed review of the evidence disclosed by the materials on the record. In this review of the evidence, references to the materials are provided as footnotes, and in the case of documents contained in the final investigation report, reference is made to the page numbers in the Commissioner's Book of Documents and Authorities [referred to as "CBOD"], given that the Final Investigation Report did not provide sequential page numbers for the attachments. I am indebted to Commission Counsel for that assistance, which among other things makes it easier to address the publication ban.

[27] As I have stated, I am also indebted to both counsel for their comprehensive submissions and reviews of the relevant evidence and materials, which greatly assisted to focus the factual analysis.

**a. The Video**

[28] A closed-circuit video from the courthouse depicts the Complainant and co-counsel approaching a group of six males, walking at a moderate pace, apparently in conversation with each other. As they reach about 6 or 7 paces from the group, shown on the video time counter as 3:09:59, Cst. M opens his stance and breaks away from the group by moving his right foot and pivoting to his right, facing the approaching prosecutors, and standing directly in what would have become the path of the Complainant.

[29] The Complainant and her colleague veer gradually perhaps a foot to their left, without breaking stride, to move around Cst. M, who raises his left hand to the lower part of his face as the Complainant's shoulder passes within perhaps 4 inches of his right side. As soon as she is past him, Cst. M turns somewhat quickly, but fluidly, further to his right, appearing to follow the Complainant's path, as she and her colleague continue at the same pace down the hallway toward the courtroom.



[30] When the pair reach about 6 or 7 paces past the group, the Complainant turns back toward them. Cst. M has returned to the group and has his back to the prosecutors at this time. Shortly after the Complainant turns, he turns to his left to look in her direction. Her colleague turns to look back at the group at about the same time. The prosecutors then turn away again, and move another 6 to 7 paces down the hallway, while Cst. M maintains his gaze on them. The Complainant then turns back again toward the group, her colleague follows suit, and both gesture or point toward Cst. M. He in turn gestures toward them, then turns back to the group as the prosecutors turn and continue down the hallway.

[31] The entirety of the interaction, from Cst. M's first turn to the end of the gesturing, occupies a total of 35 seconds according to the counter on the video. The time between Cst. M turning to face toward the prosecutors, which I will refer to as the first pivot, and their coming abreast with him, is 4 seconds. The time between the prosecutors passing Cst. M and the Complainant turning back toward the group is another 3 seconds. The part of the interaction that is in dispute, from the first pivot to the Complainant's turn back, therefore spans a total of about 7 seconds, and no more than 8. During that time, although not clearly visible, it does not appear that the Complainant alters her gaze away from her colleague, with whom she was engaged in a conversation about the trial. The colleague's attention appears to be directed straight ahead, then, as they pass, very briefly toward Cst. M.

[32] Earlier on the video, Cst. M can be seen moving back and forth in and out of the group throughout the time when they are standing in the hallway. At 03:06:49, and again at 3:07:55, he swings to his right and faces down the length of the hallway, in a similar action to the first pivot. On the second occasion, he does so as a couple pass by on his right. They are further away than the Complainant and do not have to alter their path to avoid him, but he is standing in the middle of the hallway on the edge of the group, which occupies one-half of the width of the hallway, and several groups of people can be seen to walk in an arc to get around them. At 03:09:31, Cst. M again pivots to his right facing down the hallway, this time moving closer to the opposite wall than he had before, beyond centre, and then again moving back to rejoin the group. The Complainant and her colleague then come into the frame at the bottom of the screen at 3:09:45, reaching to within 6 paces, as described above, as Cst. M turns or pivots once again to face down the hallway. In doing so, he moves into their path, directly ahead of the Complainant. His left leg

appears to be slightly behind his right and his weight appears to be on the right, with the left leg slightly outstretched.

[33] Before this pivot I have just described, the Member, who has been standing to Cst. M's right facing into the group, appears to look to his right down the length of the hallway, in the direction of the approaching prosecutors. Cst. M turns his head in the same direction, very briefly, immediately before he pivots to his right to assume a stance in the Complainant's pathway. The time between the Member's head turning and Cst. M pivoting to his right is less than a second, according to the video counter.

[34] Cst. M's second turn, as the prosecutors pass by him, occurs at 3:10:04, and he continues to turn and follow their path with his gaze for about 2 seconds until he turns back to the group. This is another fluid movement that follows directly from the first pivot. The stance between the two turns, where Cst. M is facing down the length of the hallway in the direction of the prosecutors, is maintained for a total of 5 seconds; however, it is not possible to tell exactly where Cst. M was looking throughout that time. During this time, the Member appears to maintain his focus on the group and not in the direction of Cst. M or the Complainant.

[35] The time spent here summarizing the video may indeed be time better spent viewing it; however, it will hopefully inform some of the evidentiary review and analysis that follows, for the assistance of a reader who does not have that opportunity.

#### **b. The Complainant**

[36] The Complainant's statement to the court about the incident was as follows:

6 Your Honour, I asked my learned friend if  
7 I could address you about an incident that just  
8 occurred as we were coming back from court. Mr.  
9 [Name] and I were walking down the main hallway  
10 when a very tall man in the group of men  
11 including the accused's family blocked our way in  
12 the hallway and stared at us in an aggressive  
13 manner. We confronted that person. He was  
14 problematic with us, rude and disrespectful. I  
15 have since learned he is a Vancouver police  
16 officer. We've asked that he not be in this  
17 courtroom and I've asked that the sheriffs remove

18 him from the courthouse and we'll be looking  
19 further into this.  
20 But it's quite disturbing that this kind of  
21 conduct is going on in -- in the hallways, and I  
22 wanted to bring it to your attention.  
23 I know people's emotions are running very  
24 high in a matter like this, but there is no need  
25 for this kind of behaviour.

[37] The Complainant made a complaint to the OPCC on March 1, 2018, in which she described the incident this way:

... a man stood in front of me, stared at me menacingly, and as I walked around him, he followed me visually. The man was acting in an aggressive and intimidating fashion. I confronted the man by asking what he thought he was looking at. We then exchanged words which I do not recall other than I said his behaviour in the courthouse was unacceptable.<sup>4</sup>

[38] The Complainant's description of the interaction in her interview with the investigator on May 14, 2018 was as follows<sup>5</sup>:

...a court break had been called at about 3:00 p.m., and at the end of that court break, I was walking down the main hallway of the courthouse with my co-counsel ..., and as we, ..., walked down, the accused'[s] group of men that had been in the courtroom, I guess supporting him, ...were standing in the middle of the hallway. I was chatting with [Name] as we were walking along the hallway, ... and ... I had seen the group but, ... had no interaction with them. You kind of just ignore when you're the prosecutor or the ... accused people. ... however, one of the men in the group, a very tall, ... Indo Canadian man in a blue sweatshirt, ... turned from the group to face me, so we were face to face ... He stared at me ... he had a very hostile ... demeanor, and the look on his face. We didn't exchange any words at all, he didn't say anything to me. I had to physically move around him, as I did so he tracked me ... visually. ... we kept walking .... When I was about ... maybe six ... to eight feet away, I was so disturbed by that interaction that I turned around and I said to him, the man in the blue sweatshirt, ... who was still closest to us, out of that group, I said, "What do you think you're looking at?" He then replied ... – you know, some sort of denial, and I said, "Your behaviour in the courthouse is inappropriate." He then – ... said something else, again. I can't remember exactly what but it was ... a bit like, why – ... are you talking to me?

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<sup>4</sup> CBOD, p.89

<sup>5</sup> CBOD, p. 140-141 (pause words are omitted in transcript excerpts)

[39] The Complainant could not remember what she said next, but recalled her colleague responding with words to the effect of, “No, sir, you were staring at her,” and that their voices were raised.

[40] The Complainant stated that she informed the sheriff of the incident and then walked with the sheriff to point out the man who had accosted her, whom she reported was then standing with the accused, “who kind of snorted”. Cst. M responded with, “Do you know what I do for a living?” The Complainant left at that point and “went back to the courtroom [and] put ...the incident on the record.”<sup>6</sup>

[41] The Complainant went to the Sheriff's office the next day and asked for the video. She believed they had showed her the same one that she saw in the interview. She stated to the investigator:

I found the incident very strange because I've been doing this work for a very long time and, ...you don't often get a – approached like that, especially in a courthouse, and I wanted to, you know, sort of *evaluate what had happened*, so I went to the sheriffs and asked them to make sure that they held whatever video they had of that incident. ..., and I think they did show me what you've shown me. ...they – when they had seized it, and we looked at – at it, so that was the first time I had seen that video. *And after watching it I, ... – the incident was very brief, and no words were exchanged, but it was very clear that, ..., it was a hostile encounter, I think that's the best word I could use to describe it.*<sup>7</sup>  
[Emphasis added.]

[42] The Complainant added, “And then the security advisor for the prosecution service became involved, and that was when I was informed that I would have to make a complaint.”

[43] In questioning by the interviewer, the Complainant denied that there were any words exchanged when Cst. M first turned to face her, and noted that she had just spent the day cross-examining the accused in a very tense courtroom situation and would have had no need to exchange anything with the group. She noted their difference in size and said she perceived his move into her path as an “aggressive move” and that he had a “look of hostility” on his face. It

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<sup>6</sup> CBOD, p. 141

<sup>7</sup> CBOD, p. 142

impeded her walk down the hallway and she had to physically move around him to keep walking.<sup>8</sup>

[44] The Complainant was asked if she believed the incident was related to her cross-examination of the accused, and she stated, "I felt like it was directly connected to the fact that I had cross-examined ... because of the negativity that was coming from this man, ... and the context of that courtroom I think is important because there were times in my cross-examination where the deceased's family, ... were vocal when they thought I had ... scored a point, or made my point, ... which I think probably made it tense in the gallery that morning."<sup>9</sup>

[45] It is not entirely clear from the interview whether the Complainant was aware that the group were supporters of the accused before she passed by them, although in her interview she described them as such. Clearly she would have known that by the time she was interviewed, and in fact, immediately after the initial interaction; however, it is not apparent on a close reading of her statements that she realized who they were before essentially coming face to face with Cst. M, whom she admittedly did not know.<sup>10</sup>

[46] Although, as I have noted she said earlier, "I had seen the group but ... had no interaction with them. You kind of just ignore when you're the prosecutor or the ... accused people," later in the interview, in answer to a question about whether the accused was in the group, she says, "To be honest with you, I didn't look at ... that group of people as I approached them, ... and I didn't know who was in that group."

[47] In further questioning as to whether she initiated conversation with Cst. M, the Complainant's evidence was as follows:

Interviewer: "Okay. Now, ... was there any conversation, ... at all regarding, "Hi, how are you today?" ..., and to the – words to the effect of, "Yeah, we're just discussing, uh, where we're gonna get a beer after."

Complainant: No, absolutely not. And in fact – no words were exchanged between Constable whatever – I don't know what is rank ... is, [M] and, myself, and to – and I'm

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<sup>8</sup> CBOD, p. 143

<sup>9</sup> CBOD, p. 144-145

<sup>10</sup>CBOD, p. 143, ll 107, 108

not ... – he didn't say anything to me during this whole physical incident, and the first words that were ever exchanged were when I turned around to say, "What are you looking at?"

Interviewer: Those are the first words –

Complainant: Those are the first words I share with him, and I did not speak to that – anybody in that group.<sup>11</sup>

[48] The Complainant denied making eye contact with anyone in the group at all. She also said she noticed, in viewing the video, that the person next to Cst. M, later identified as the Member, appeared to see her and her colleague approaching and turn back to the group just before Cst. M stepped into their path.<sup>12</sup> As noted above, the Member had not turned back to the group before Cst. M stepped into her path, although his turn toward the group almost coincided with Cst. M's pivot.

### **c. The Complainant's Colleague**

[49] The Complainant's colleague was interviewed on May 14, 2018. He believed the accused was with the group in which Cst. M was standing. He described the interaction as follows<sup>13</sup>:

...[Cst. M] peeled away from the group ..., and essentially squared off in front of [the Complainant]. ... he was significantly taller than her ...and essentially in my mind puffed out his chest. Stared directly at her, ... sorta staring her down ... and she had to move slightly out of the way to get around him ..., given that the male was standing with the accused that we're in the middle of prosecuting ... and that [the Complainant] had just finished cross examining him as well, ... [it] certainly came across to me as some form of an intimidation tactic ..., and it certainly felt that way. ...as we moved around and moved [past] ... the male ..., the [Complainant] turned and said something to the effect of, what do you think you're doing. ..., and the male said something that I took to be sort of chippy back. I cannot recall exactly what he said. We continued to move, the male said something further ..., it certainly felt like an attempt to continue to engage with us or at least to try to [elicit] some form of response ..., [the Complainant] and the male ..., had a brief back and forth. ..., I recall pointing at the male and saying, sir you got in the way of us as [we were] trying to walk by you.

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<sup>11</sup> CBOD, p. 146, ll 182-196

<sup>12</sup> CBOD, p. 147 – 148

<sup>13</sup>14493 2018-08-21 [Colleague's Name] statement 2018-05-14 – Transcript proofed, CBOD p. 152

[50] It is common ground that the colleague was mistaken in believing that the accused was in the group. He did not recall any words being spoken before the Complainant addressed the male after they had passed the group. In this respect, he stated as follows:

... in my recall there were no words, it was ..., him just really blocking [the Complainant's] way, staring at her ..., sort of quite wide eyed ..., it honestly, it- it just felt like an aggressive stance. ..., it was one as I walked by thought that's either the way a gangster stands or the way a Police Officer stands.

[51] The interviewer asked, "Was there anyone that ..., said hi, how are you? Or any words to that effect?" The colleague answered, "Not that I recall."<sup>14</sup>

#### **d. Others in the Group**

[52] Five of the Member's family and friends were present for the interaction. I will review their evidence in the order in which the transcripts of their statements are presented in the final investigation report<sup>15</sup> and I will identify them as: an elderly uncle of the accused; a friend of the family; a cousin of the Member; the Member's brother; and the cousin's brother.

[53] The elderly uncle was interviewed on March 11, 2019.<sup>16</sup> He provided the following description of the events:

I think the, it was the Crown Counsel who was walking along the corridor, right? And ... as she goes past us, I told, not, not quite past as she was going, ..., just about where we were, and she makes a comment. Right? And I cannot remember what she said now. It's, it's been a while.

...

... [Cst. M] made a remark back to her right. But he didn't say anything bad at all. But we weren't ... the group wasn't in anyone's way. If you know what I mean. I mean ... people were walking ... past us, you know? Fr-, on the side towards the courtroom right. And ... that was it. And we were all surprised. You know when she made a remark and he didn't ..., said something back to her. And ... it wa-, he didn't say anything bad at all right. And ... then ... we were all surprised. We thought ... they knew each other or something. Like to make the, make the remark to ..., a remark to him. So ... as she, I think it's going, she just ... said something to him, as she, went, went past. But no one

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<sup>14</sup> CBOD, p. 153

<sup>15</sup> CBOD, p. 157 to 476

<sup>16</sup> CBOD p. 157-196

was looking at them or anything right? We, we were just, they were, we were all gathered and just talking to each other sort of thing.<sup>17</sup>

[54] In further questioning by the interviewer, the elderly uncle said the remark he heard from the Complainant was not “a friendly kind of comment<sup>18</sup>,” and that there was no conversation before that. He believed she made the comment before she reached the group and that Cst. M’s response was more in the nature of an attempt to calm the situation.<sup>19</sup> The Complainant’s statement surprised him. He did not recall anyone saying the Crown counsel were approaching before the interaction. He confirmed that Cst. M said after the incident that he did not know the prosecutor. He assumed that he knew she was the prosecutor as she approached because he had been in the courtroom, and they “all” knew that, but he didn’t know where Cst. M had been sitting in the courtroom, and there was no comment about that as the prosecutors approached. This witness did not know Cst. M and referred to him in the interview as “the police officer”.<sup>20</sup>

[55] After viewing the video in his interview, the elderly uncle identified the point where the Complainant first turned around as when she made the remark he recalled, after which Cst. M responded to her<sup>21</sup>. He stated that Cst. M did not say anything before that. He did not recall a comment about going for a beer, or the group laughing at all; however, as the interview progressed it became clear that this witness’s memory of the events had faded.<sup>22</sup>

[56] The friend of the family was interviewed on August 2, 2018. He described the interaction as follows<sup>23</sup>:

... there’s a, I think five or six of us, just standing ... close to the washroom. And we were just standing there and ..., what I can remember is that ..., the prosecutor ... they were walking down. ...And uh, when they were walking down and I guess when, soon as they went by ... I don’t know what happened, she turned around said something to him ... she said, she said something anyways and they all, ... and [Cst. M] didn’t say, he say I didn’t say anything. ...And uh, and she said something and then he said no what did I do, right and something like that...

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<sup>17</sup> CBOD, p. 158 - 160

<sup>18</sup> CBOD, p. 162, l.127

<sup>19</sup> CBOD, p. 169, l. 296

<sup>20</sup> CBOD, pp. 159 & 172 -178

<sup>21</sup> CBOD, p. 188, ll. 743-747

<sup>22</sup> CBOD, p. 190 - 194

<sup>23</sup> CBOD, p. 201-202



... And we were standing there, I was kind of shocked to see what happened because we- I didn't see anything. I didn't see anything anybody touched anything or anybody see anything, you know. And that's all I know.

[57] Later in the interview, this witness was asked to elaborate on what he saw and heard, and added:

... when they were walking down, and when the prosecutor went back and that's when ... she turned around says something to him and ... he says something to her – I don't know what the words and ..., then ... all of sudden ... she's said I see or some-I don't know what she said anyways 'cause I can't remember that much. ... And that's all it happened.<sup>24</sup>

[58] This witness also said in his interview that he did not discuss the incident with anyone except his wife afterward, and he did not become aware of what Cst. M was believed to have done wrong. He confirmed that he did not hear any exchange of conversation before the Complainant turned back to confront Cst. M, or at least, after she passed the group, and he was shocked and surprised by her response.<sup>25</sup> It was apparent that he did not know Cst. M before the day of the incident.<sup>26</sup>

[59] A cousin of the member<sup>27</sup> was interviewed on August 3, 2018 and March 11, 2019. In his first interview, he described the exchange between Cst. M, whom he referred to by his first name, and the Complainant as follows<sup>28</sup>:

... the two Crown Counsels who were... originally in the court house, they were coming back to court. And then, we're standing on one side, kind of in a circle, and ... they were walking by and ..., I think [Cst. M] had made eye contact or ..., with one of the Crowns I think, I think the female Crown and ..., at-th-then-what they just said was hi, and I think she said hi and he said hi and ..., and that was about it, 'n' there was (SIGHS) from what I recall, there's enough room and they were on one side and we were kind of on side of the hallway, and ... w-she walked by and then – I don't know if, 15, 20 feet away it stopped and ..., for some reason stopped and made a – I, I think she made some type of comment to [Cst. M], 'cause ... trying to remember what she might have said at the time was how are things or something like that. And I think [he] jokingly replied back that ... I, he was looking for a pub or something like that, wanted to go for a beer. And I know

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<sup>24</sup> CBOD, p. 204

<sup>25</sup> CBOD, p. 218

<sup>26</sup> CBOD, p. 200, ll. 28-30; p. 202, l. 90

<sup>27</sup> CBOD, pp. 223 - 224

<sup>28</sup> CBOD, p. 224

[Cst. M] is a Police Officer and at that time, what I just thought these guys knew each other, they jus'-you know. They probably had some cases together and ..., nobody thought of-anything of it, but then- I think-jus' like shortly after there she was jus'- then she made some type of comment that what are you looking at, or what are you staring at, or something, something towards that straight ..., line and ... -or don't ..., don't try to intimidate me or something like that and that was – I think we all kind of looked at each other and said what's going on here...

[60] This witness stated that there was “no intimidation or anything derogatory said” to the prosecutors. He later elaborated that the first part of the interaction was a cordial exchange of “hi” from each, which caused him to wonder if they knew each other. This was followed by the Complainant saying something like, “what are you staring at,” to which Cst. M responded, “like no, I’m looking for a pub, wanna go for a beer?” He took this remark as a joke. The Complainant then stopped 10 or 15 feet further down and said something like, “what are you doing, you know why are you trying to stare me down, or something like that.”<sup>29</sup>

[61] Later in the first interview, this witness stated:

There was no impedance of her path. There was enough room, there was – he didn't step in front of her or anything, it was ..., I don't even think, he might jus' turned to acknowledge her and that was it. ... Or turned his head, said hello, hi – had replied back and that's it.<sup>30</sup>

[62] This witness told the investigator that he and the others present had talked about the incident right after it: “saying what happened here,” and that when the Complainant made her statement to the court, “everybody was taken aback” that she said the family of the accused were trying to intimidate the Crown, and that he did not think it was right that she did that, and it was not in his opinion what happened at all.<sup>31</sup>

[63] In his March 2019 interview, this witness said he believed Cst. M and the Complainant had made eye contact because they had exchanged pleasantries, and that he had not been told by anyone that they made eye contact. He said that after the incident and before the sheriff came

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<sup>29</sup> CBOD, p. 235

<sup>30</sup> CBOD, p. 240

<sup>31</sup> CBOD, pp. 240-241

over to ask Cst. M to leave, the group discussed what had happened and why the Complainant had made the comment to him, that it was “kinda bizarre.”<sup>32</sup>

[64] The investigator suggested to this witness that someone in the group had come up with the suggestion that there had been an exchange of pleasantries only after the confrontation, to which the witness responded, “No. I, I heard it,” and added that was the reason he thought they knew each other.<sup>33</sup> The investigator persisted, providing reasons that the Complainant would not have engaged with a member of the group affiliated with the accused, and then saying, “I’m being a little bit more adamant of are, are you sure you actually heard it? ... and it wasn’t just something that was shared with you. ...And you ... maybe took on as ...” These questions overlapped the witness’s answers, but they were transcribed as “Yeah,” (after the initial question), and “No. ...No. ... I, I heard, I heard that pleasantry happen. ... Yeah, those comments being made. ... At the time. ... Yeah, it wasn’t the, after the fact because I’m like, okay.”<sup>34</sup>

[65] This witness viewed the video in his March 2019 interview and identified himself as the person closest to Cst. M’s right side, suggesting that he turned to face him, or toward him, and was actually speaking to him as the Complainant passed by. He pointed out the point at which he believed the Complainant had said hi, or the two exchanged pleasantries. He later corrected himself and identified the Member as the person immediately to Cst. M’s right. He agreed that Cst. M had clearly not turned to speak to him before or as they passed, and suggested it may have been the Member he turned to talk to. The investigator pointed out that he seemed to have recalled a conversation that didn’t happen (that between himself and Cst. M), while maintaining that he recalled pleasantries were exchanged between the Complainant and Cst. M, to which the witness responded, “No, that, that, that I recall hearing.”<sup>35</sup>

[66] The father of the accused, the Member’s brother<sup>36</sup>, was interviewed on August 3, 2018. He recalled that Cst. M, whom he knew by name, had his back to the Complainant as she and her colleague passed by the group, and that she “made eye contact” with him and said something to

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<sup>32</sup> CBOD, p. 258

<sup>33</sup> CBOD, p. 260

<sup>34</sup> CBOD, p. 266

<sup>35</sup> CBOD, p. 300

<sup>36</sup> CBOD, p. 307, ll. 135-136, p. 309, ll. 180-185

the effect of, "hi, how are you doing?" He replied, hi, and "basically good". She continued on, then stopped and turned at about 20 feet away, saying "stop staring me down," or words to that effect.<sup>37</sup> The two continued down the hallway, and the group talked about "what the heck was that." He noted that the group "knew Crown was having a bad day that day...They were... frustrated and they were having a bad day." Cst. M was asked to leave. The Complainant stated on the record that a family member or friend of the accused had "blocked her way ... in the hallway in a threatening manner," which he said was untrue, and that the video spoke for itself and that Cst. M didn't do anything.<sup>38</sup>

[67] A bit later in the interview, this witness remembered that the Complainant had asked what was happening or what he was doing, and Cst. M had jokingly said something about looking for a pub to have a beer. Cst. M was laughing. After that the Complainant stopped about 20 feet away and told him to stop staring her down. He said the group were taken aback by that, and asked Cst. M if he knew the Complainant, which he denied. They wondered what the hell just happened and figured she was having a bad day.<sup>39</sup> He denied having any other conversations with the group about what happened. He described the first part of the interaction as very friendly. That part of the conversation was in passing, as she continued walking by. He was unable to suggest why the interaction had moved to a confrontation after that. He described Cst. M as not intimidating, but "a bit of a fidgety guy," "he can't kind of stand still".<sup>40</sup>

[68] Another cousin of the Member, the brother of the cousin discussed above<sup>41</sup>, was interviewed on August 2, 2018. He reported that the "prosecutor side," by which he meant the deceased's supporters, were heckling in the courtroom in the morning, presumably as the defence witnesses were testifying. This caused the judge to give them a warning. This witness initially reported that during the afternoon he came out of the washroom after the Complainant and colleague had passed the group and the Complainant was looking back and saying a bunch of things, "like why are you staring at me," to the fellow officer, whom he had met that day and knew only by his first name. He then asked what happened and said he told him, "she ... tapped

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<sup>37</sup> CBOD, p. 306

<sup>38</sup> CBOD, p. 307

<sup>39</sup> CBOD, p. 314

<sup>40</sup> CBOD, p. 317

<sup>41</sup> CBOD, p. 365

me on the shoulder and says hi, how are you? And he repeated, hi ah fine, I'm good, right? ... And then ... that was it. She started walking by and ..., then she turns around (INDECIPHERABLE) you staring me down, or something?" This witness believed this was a tactical maneuver on the part of the prosecutor, whom he perceived was not making headway in court.<sup>42</sup>

[69] As he continued his interview, this witness stated that as he was coming out of the washroom, "she walks by and taps him on -- *I observe him her tapping on the shoulder* and saying hi, how are you to him and ... he-and then he turns around says hi, fine, right? Then ..., then she turned around a little bit further when she goes about ten, ten fifteen more. She turns around and said why you staring me down? Right? And he wasn't even looking at her. Right?"<sup>43</sup> [Emphasis added.]

[70] He reiterated several times in this interview that he recalled seeing the Complainant tap Cst. M on the shoulder as he was coming out of the washroom. He said he did not hear the conversation, just what Cst. M told him had been said, afterward.<sup>44</sup>

[71] Later in the interview, the interviewer told this witness that he had viewed the videotape and there was no shoulder-tapping. The witness said he had only been informed about that, and had not observed it, and did not say he had. The interviewer pointed out that he said he had observed it, and he said that as he came out of the bathroom, the Complainant was on the far side of the group, so he couldn't see a shoulder tap, but he asked what had happened and was advised.

[72] This witness was interviewed again on January 21, 2019. The contradiction between his statements on the prior occasion and the video was put to him. He denied talking to anyone about what had happened other than that day when he asked what had happened, and he recalled being told by Cst. M that the Complainant had tapped Cst. M on the shoulder. He confirmed he had not seen that, and said he had mixed things up, but that he had not been asked or told by anyone to tell a particular version of the events.<sup>45</sup>

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<sup>42</sup> CBOD, p. 357-359

<sup>43</sup> CBOD, p. 360

<sup>44</sup> CBOD, p. 363

<sup>45</sup> CBOD, p. 471 – 474

[73] In the video, this witness is seen to enter the washroom at 3:08:20 before the prosecutors start walking down the hall, and exit at 3:10:16, as the prosecutors are turning back toward the group for the second time.

**e. The Sheriffs**

[74] Deputy Sheriff Brar was the sheriff first approached by the Complainant after the incident. In her statement to the investigator during her interview on August 24, 2018, she reported that the Complainant came to her, upset, and said Cst. M had “intimidated” her outside the courtroom; “blocked her path and wouldn’t let her ... pass and kind of stared her down.”<sup>46</sup> She confirmed later in that interview that the Complainant said, “he didn’t let me pass.”<sup>47</sup>

[75] She was involved with Deputy Sheriff Tracy MacIsaac in later asking Cst. M to leave the courthouse, and in this respect, she stated, “we noticed that there was a ...man, in a blue sweatshirt and he was standing with the accused family. As Tracy and I ...approached the man, he turned and walked towards us. Before we could say anything, he said I didn’t do anything, I’m leaving any- I’m a VPD member, I am leaving anyways.”

[76] It is not clear whether Deputy Sheriff Brar made notes or a report before her interview. The only transcript of her evidence is the interview with the investigator in April 2018. While she said Cst. M was with the accused’s family when she approached him, she did not say whether he was with the accused.

[77] Deputy Sheriff Eric Lister filed the Incident Report in connection with the report from the Complainant. He stated that the report was made to Deputy Sheriff Brar. The Incident Summary reads, “A member of the public from the manslaughter file that she is prosecuting stood in her way, blocking her from walking back to the courtroom. [She] stated that they exchanged some words and that she would like the subject removed from the courthouse. DS Brar then had conversations with the subject explaining that there was zero tolerance and that he needed to leave the courthouse. The subject then stated that he was a police officer and that he would never do anything like that.”

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<sup>46</sup> CBOD, p. 478-479

<sup>47</sup> CBOD, p. 480

[78] In the narrative portion of the report, Deputy Sheriff Lister stated, "The male would not move out of the way of Crown [Counsel]. Crown [Counsel] asked the male to move and he did not." Deputy Sheriff Lister further reported that Cst. M was angry and in disbelief that he was being asked to leave, that the "Crown is unbelievable" and he "didn't do anything wrong."<sup>48</sup>

[79] In his interview, Deputy Sheriff Lister recalled that Deputy Sheriff Brar had reported to him that the subject "had acted inappropriately in the courtroom towards crown. Crown had asked him to leave... he was upset, swearing a little bit. Disgruntled, ... about something in the courtroom that happened" and he mentioned he was a police officer.<sup>49</sup>

[80] Sheriff Sergeant Steve Gill, in his interview on October 15, 2018<sup>50</sup>, recalled that the Complainant had brought to his attention that there may have been an individual who was "making remarks, or comments that were inappropriate." He also confirmed that he had a conversation with the Member on the following day, where the Member "said that he was trying to present his point of view ... of what had happened. And said that it was taken out of context and I basically said a go, you know what, you should basically, ... if you should know better as a member, as a police officer and stay away. ...not make any types of remarks in any sort court proceeding whether it's to Crown, or anybody else."

[81] Deputy Sheriff Sergeant Tracy McIsaac provided a statement in her December 17, 2018 interview, in which she recalled Deputy Sheriff Brar coming to speak with her before they went to walk Cst. M out. Deputy Sheriff Brar reported that, "crown approached her... saying this individual was threatening, stood in her way, ...wouldn't let her pass so she asked him to move."<sup>51</sup>

[82] Similarly to Deputy Sheriff Brar, no notes or reports from Sergeant McIsaac beyond the transcript of her interview were included in the materials, nor does it appear that she was asked about those.

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<sup>48</sup> CBOD, pp. 485-486

<sup>49</sup> CBOD, pp. 487-493

<sup>50</sup> CBOD, pp. 495-

<sup>51</sup> CBOD, p. 500.

[83] Deputy Sheriff Tyler Haley was involved in walking Cst. M to the door of the courthouse, but had no interaction beyond standing behind a colleague who walked Cst. M out.<sup>52</sup>

[84] None of the Deputy Sheriffs were asked if the accused was standing with Cst. M when they approached him to leave the courthouse, as reported by the Complainant.

**f. Cst. M**

[85] Cst. M made no contemporaneous notes of the incident. In his duty report dated April 5, 2018, he described the interaction as follows:

I recall observing a male and female dressed in attire indicating they were lawyers walking towards us from the North in the corridor. As the female walked by she made eye contact with me and said "How are you?" I responded with words to the effect of "I am just fine thanks." She then asked as she was walking by something to the effect of "What is going on or what is happening?" To that I said words jokingly to the effect of "I am doing ok but wouldn't mind a beer after the day." I believe she responded however I do not recall what she said.

Nonetheless, that was the end of the conversation. It was a very short, normal and pleasant exchange.

After approximately 5 seconds I remember a female voice aggressively saying "Stop looking at me or stop staring at me." Everybody in our group looked over and we were not sure who she was talking [to]. I calmly asked "Are you talking to me or somebody else?" She was looking straight at me otherwise I would not even have thought she was talking to me nor would I have even asked her the question.

She stated words to the effect of "Yes you."

I was shocked as to what she was talking about and could not figure out why she would say that. The rest of the group I was standing with heard this exchange and had a similar reaction of shock and confusion to what had just occurred.

I have never met this person in my life and I did not even know she was Crown Counsel in the case I had just observed as I had not been paying any attention to her. She initiated conversation with me and I respectfully reciprocated.

Either her or her male partner asked me to turn around and not look at them to which I shockingly obliged.

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<sup>52</sup> CBOD, p. 504



[86] After that, Cst. M said, the Complainant brought a sheriff to ask him to leave the courthouse. He stated that he was a police officer and that the Crown needed more professionalism, expressed to the sheriff that he was shocked, and left voluntarily.

[87] He denied that he had stepped in front of the Complainant or impeded her in any way. He said he had turned to face her in response to her talking to him, out of respect. He said that the suggestion he was staring intimidatingly at her was a “fabrication.”<sup>53</sup>

[88] Cst. M was interviewed on October 16, 2018, by the investigator and a fellow interviewer. He reiterated the description of the incident contained in his duty report: as the prosecutors approached, the Complainant made eye contact with him and said something like, how are you, he said something like, fine. As she passed, she asked something like, what's going on, and he responded jokingly by saying he was doing okay but wouldn't mind a beer after the day. The two passed by and Cst. M returned to look at the group. He then heard a voice yelling aggressively, something like, “stop staring at me, stop looking at me...” He wasn't sure who she was talking to, so he asked if it was him and she confirmed that it was. The male prosecutor told him to turn around, which he did.<sup>54</sup>

[89] In response to questioning by the interviewers, Cst. M said he had only talked about the incident to the group on that day, and that they had seen the same thing he did.<sup>55</sup>

[90] Cst. M said he had been at the trial on one prior occasion, perhaps two weeks earlier. He attended to support the Member, his old partner, but was not paying a lot of attention to what was happening in court. He stated that he had testified in court probably over 100 times. He maintained he did not know the Complainant was the prosecutor in the case. He said he believed the prosecutors were wearing robes, from his memory and perhaps from the video he had seen.<sup>56</sup>

[91] Cst. M viewed the video in the interview and pointed out the part where he believed the Complainant made eye contact and spoke to him. The time shown on the counter at that point does not appear to have been recorded in the interview. In describing the point, Cst. M stated, “I

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<sup>53</sup> CBOD, p. 511- 512

<sup>54</sup> CBOD, p. 518

<sup>55</sup> CBOD, p. 526

<sup>56</sup> CBOD, pp. 522 - 525

can see, I can see where – at this point we're talking, I believe, she said something *as she walked by me.*"<sup>57</sup> [Emphasis added.]

[92] The interview proceeded as follows<sup>58</sup>:

Cst. M: See I'm looking in the direction now.

Interviewer: Mm-hm.

Cst. M: Look, at this point, she's saying, Hi, how are you?

Interviewer: So as soon as you turned – before you turned?

Cst. M: Uh, I can't answer that. If it was before I turned, I assumed it was, 'cause, uh, she made eye contact with me and she asked me the question, but she initiated it by asking how I was, how are you.

Interviewer: Okay.

Cst. M: When I have my body turned that direction, I don't know, I, I assume we made contact at that point – eye contact and she asked me the question.

Interviewer: So did you make eye contact before you turned?

Cst. M: I don't think so. It would have been when I turned, right? You know?

Interviewer: So –

Cst. M: I mean, I was talking with the group, so, uhm, something would have made me look at that way, I'm guessing is that's when she asked the question. So if– was I looking at her first? I, I believe I probably would have been, from memory I was (sic) when she asked the question but, you know, it's –

Interviewer: I noticed that a couple people turned before (INDECIPHERABLE) she approached, and you can go back and look at that. Was there any conversation that, uh, basically said, Here comes the Crown?

Cst. M: No, not at all. Absolutely not.

Interviewer: From the group? Anyone else (INDECIPHERABLE).

Cst. M: Absolutely not. We were talking ...

Interviewer: (INDECIPHERABLE).

Cst. M: ... about random stuff. I don't recall anything like that.

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<sup>57</sup> CBOD, p. 533

<sup>58</sup> CBOD, pp. 533 - 539

Interviewer: So would you agree at – uh, [the Complainant] ...passes approximately ten others in the, uh, court hallway and doesn't appear to converse with them.

Cst. M: It doesn't appear like she talked to anybody else, no.

Interviewer: And she appears to be involved in a conversation with [the colleague] (PHOENTIC)?

Cst. M: I don't recall them having a conversation, I mean, they're walking side –

Interviewer: Like, from looking –

Cst. M: They're walking side by side, ...

Interviewer: Looking at the video ...

Cst. M: ... I don't know if they were talking.

Interviewer: ... if you were looking – if you look at –

Cst. M: I can't tell if they're talking. Yeah, it looks like they might be talking right there for sure, but I can't say for sure.

Interviewer: And obviously without any ...

Cst. M: Yeah.

Interviewer: ... audio, I mean we can't ...

Cst. M: Yeah, we're just –

Interviewer: ... confirm anything, I'm just (INDECIPHERABLE).

Cst. M: Yeah, we're assuming. Yeah.

Interviewer: Oh, body language. You know, body language is important when people are speaking. Uhm, she's turned. I mean, as it – go down the stairs, she's turned facing him.

Cst. M: Yes. You know, it looks like they were talking at, ...

Interviewer: Okay.

Cst. M: ... at some point, at some point.

Interviewer: So prior to you turning, she had the opportunity to pass unobstructed, would you agree?

Cst. M: I don't know. I mean, it's a tight hallway, I'm a big guy, and I'm, ...

Interviewer: Well –

Cst. M: ... I'm kind of in the middle of it, right? So –

Interviewer: Well how tall are you?

Cst. M: 6'3.

Interviewer: Okay. Uhm, if you look at it straight line, if she was to continue in a straight line after she comes down the stairs.

Interviewer: Now before you turn, if she went straight – yeah, she might brush shoulders with you, but would you agree that you've stood more in – I mean, you're face to face with her ...

Cst. M: That's when she –

Interviewer: ... when she approaches.

Cst. M: Well, at some point like I said, I turned because she asked me a question. Right?

Interviewer: Okay.

Cst. M: It is pretty ta – even if I hadn't moved there, it's pretty tight there. I don't know if both of them could have walked by me regardless.

Interviewer: Yeah. And then of course we've got the piece afterwards where she turns to you and, ...

Cst. M: Yes.

Interviewer: ... and says that.

Cst. M: Yes.

Interviewer: Uhm, so there are about – she's about twenty feet away when, uh, uhm, when you turn your body towards her.

Cst. M: Looks like it.

Interviewer: Yeah. Uhm, she didn't turn her head towards you, uh, as one would when carrying on a conversation. You talked about body language yourself. Like, ...

Cst. M: yeah.

Interviewer: ... you turn and face her. She's looking straight ahead, she doesn't turn her head.

Cst. M: She asked me, How are you? And I answered the question, and there's, there's seven – there's six other people in that circle that heard the same thing. So ...

Interviewer: Okay.

Cst. M: ... that's exactly what happened.

Interviewer: Okay.

Cst. M: That's when I looked at her.

Interviewer: So, again, you know, you've heard my partner here talk about reconciling video with statements ...

Cst. M: Mm-hm.

Interviewer: ... and, and things. It's, it's tough but, uhm, I'm trying to – and look at some of the other facts that we have in the case. Uhm, [the colleague] believed that the accused from their case, ...

Cst. M: Mm-hm.

Interviewer: ... uh, was standing with your group. It was erroneous, ...

Cst. M: Mm-hm.

Interviewer: ... but that was his belief.

Cst. M: I don't recall.

Interviewer: No, I'm, I'm telling you ...

Cst. M: Yeah.

Interviewer: ... that.

Cst. M: Yeah.

Interviewer: Okay? Uhm, I'm not asking you if you know this because you – how could you possibly.

Cst. M: Right.

Interviewer: You know, I wanna be fair to you. And, you know, that lawyers are governed under the Legal Profession Act.

Cst. M: Yes.

Interviewer: And it's an offence for a lawyer to contact opposing counsel's client without them being present. Okay? Both [the Complainant] and [the colleague] state that they did not have a conversation with you prior to her asking, uh, why are you staring her down.

Cst. M: That's a bit false.

Interviewer: Uhm, and of course we (sic) that they're about ten to twelve feet, they turn to face you afterwards.

Cst. M: I had – as they were approaching me?

Interviewer: No, no, uh, they –

Cst. M: After, yeah.

Interviewer: She turned ten or twelve feet past you, ...

Cst. M: Yes, that's right.

Interviewer: ... and turned (INDECIPHERABLE) ...

Cst. M: Yeah, I commented on it already, yeah.

Interviewer: ... conversation. So this is where witnesses say that [the Complainant] said, staring you down. Why are you staring?

Cst. M: Stop looking at me, you're staring me down.

Interviewer: (INDECIPHERABLE) staring you down.

Cst. M: That's right.

Interviewer: Uhm, so I'm having a hard time reconciling your statements with the evidence and I want you to clarify it for me if you can.

Cst. M: Sure. Yeah, absolutely. Let's clarify.

Interviewer: Uhm, one witness tells us there was no conversation until [the Complainant] had already passed you. Second witness states the conversation about a beer happened after [the Complainant] had stopped and asked you if you were staring her down. A third witness felt the need to manufacture a scenario that was completely false and discounted by the video.

[93] It should be noted that the characterization of one of the witnesses as having said the beer comment came after the Complainant turned around does appear to be an accurate interpretation of that witness's evidence, which was mostly led by the interviewer.<sup>59</sup>

[94] In response to this summary of witnesses' evidence by the interviewer, Cst. M said he told the truth in his statements. A portion of the video was replayed for him, and the second interviewer made a lengthy statement to the effect that the video does not support Cst. M's version of the events; that two prosecutors have put "their careers on the line," by saying that there was no conversation before the heated interaction; that other witnesses support that; and that it is not plausible that Cst. M did not know the Complainant was the prosecutor.<sup>60</sup>

[95] The following exchange ensued:

Cst. M: Can I speak? Can I speak?

Interviewer: Sure.

Cst. M: Okay. You know what? What I said in my initial statement is exactly what happened. Interviewer: 'Kay.

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<sup>59</sup> CBOD, p. 247 & 259

<sup>60</sup> CBOD, pp. 540 - 545

Cst. M: You can manipulate that video any way you want, I'm a big guy, I was standing in the middle of the hall – in the hallway, she approached me, she said, Hello, how are you? I answered. She walked by me. I have no idea what I did wrong and I'll stick to that to this second.

Interviewer: Okay.

Cst. M: I thought about this a thousand times.

Interviewer: Mm-hm.

Cst. M: I did nothing wrong here. ..., as far as the other witnesses, you can talk to them about what their recall is.

Interviewer: Mm-hm.

Cst. M: You know, you're talking about two Crown Counsel's, well, I'm a police officer.

Interviewer: Mm-hm.

Cst. M: You know? I've been around for twenty years, ...

Interviewer: Mm-hm.

Cst. M: ... what do I get out of making up stuff?

[96] Cst. M later clarified that “articulate” was a better word than “manipulate” as he did not intend to suggest the video had been altered.<sup>61</sup>

[97] It is apparent from this interview that Cst. M stated he was not entirely sure if he and the Complainant made eye contact before or after he turned, and at another point, said he turned because the Complainant spoke to him. It is unfortunately not clear from the questioning however which of his two turns is being referenced at any given time. As I understand Cst. M's answers on a close review of the audio tape and the transcript, it appears he is consistent about referring to his second turn when he relates the conversation. However, the investigator appears to have concluded that Cst. M said the conversation started sooner after the first turn. This can be seen from his statement in the final investigation report<sup>62</sup>:

Enhanced Frame 185 – [Cst. M] begins to turn towards [the Complainant] who is approximately 15 to 20 feet away. *According to [Constable M's] statements [the Complainant] has already started a conversation at this point.*

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<sup>61</sup> CBOD, pp. 545 - 546

<sup>62</sup> FIR, p. 33; CBOD, p. 34

[Emphasis added]

[98] In his second interview on April 9, 2019, two allegations of deceit had been added to the investigation. Cst. M continued to express surprise at how the incident had unfolded, and described it as a “humongous” misunderstanding that could have been cleared up with a discussion. (Notably, the attempt at a complaint resolution had been abandoned after the Complainant wrote a letter withdrawing from that process on June 6, 2018.)

[99] In this interview, Cst. M made the point that he believed the Complainant was under stress due to the case, which fueled her misunderstanding. He reiterated that he did not know she was the prosecutor in the case before the interaction, although he had watched the proceedings briefly that morning. He also commented that he believed the Complainant had stereotyped him as a thug due to his casual clothing. He offered to take a polygraph. He continued to deny any intimidation, and maintained the veracity of his prior statements.<sup>63</sup>

[100] On the discipline proceeding, Cst. M answered questions posed by the Discipline Authority. He maintained that he did not know it was the prosecutor that was coming toward him, and that he made brief eye contact with her while he was talking to the Member, then he heard her ask the question, how are you doing, or something to that effect. He was shown the video and asked about his left hand being against his mouth, described a bit later as the back of his hand being against his chin. He said that was something he often did, and he was just trying to figure out who was talking to him.<sup>64</sup>

[101] As I have noted, the Discipline Authority found that Cst. M committed discreditable conduct and two allegations of deceit in connection with his duty statement and his first interview regarding the interaction in the courthouse, and imposed a reduction in rank from first to second class constable with reinstatement to second class after 9 months. He did not seek a review of those findings.

#### **g. The Member**

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<sup>63</sup> CBOD, pp. 569

<sup>64</sup> Transcript of Discipline Proceeding, p. 45 – 48, CBOD Tab A 1



[102] The Member's first record of the incident was the notes he made on his phone, which he said in his duty statement were made the day of the incident, at 4:45 p.m., after the court session. He noted in his duty statement that he had referred to the notes in preparing his duty statement. As noted by the investigator, there is no way of testing his assertion about when the notes were made, as the copy he provided to the investigator showed only the date on which the note was last retrieved from the phone. The Discipline Authority asked for the investigator to have the phone forensically examined to ascertain when the note was first made, but ultimately accepted that the Member was being truthful about when he made the notes.<sup>65</sup>

[103] The portion of the Member's cell phone notes pertaining to the issues reads as follows:

- both crown walked by, [Complainant] said "hi, how are you?" to [Cst. M] as she walked by him, [he] said "hi ... good" back, as she was walking by she asked [him], "What's happening?"
- [Cst. M] replied (jokingly) "looking for the nearest pub to have a beer, laughing"
- [Complainant] stopped about 15 feet away, turned around and in an aggressive tone said, "don't stare me down!"
- [Cst. M] replies "are you talking to me? I think you have me mistaken for someone else"
- we all looked at each other completely in disbelief as to her demeanour and tone
- the [male crown] who was with [her] directed [Cst. M] to turn around and face the other direction, to which [he] complied.
- ...
- in court [Complainant] made mention to the judge that as she was walking down the hallway, she was impeded by the accused's family/friend and he stared down at her in an intimidating fashion (completely fabricated and untrue)

[104] He also mentions in these notes that the Complainant pointed him out to a deputy sheriff named "Steve" the next day, he explained to him that he had had nothing to do with her and Steve said not to worry about it. This likely would have been the interaction described by Deputy Sheriff Gill.

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<sup>65</sup> FIR, p. 62, CBOD, p.63

[105] The Member made a duty statement on April 5, 2018 and participated in three interviews. He also testified on the discipline proceeding.

[106] In his duty report the Member states that he had asked Cst. M to attend in support of his family. A group of his relatives were standing in the hallway during the break. He goes on<sup>66</sup>:

We were standing in a circle with [Cst. M] (who was to my left) and I was near the middle of the hallway with my back towards the east wall of the hallway. It was at this time, I heard a female voice, which I recognized to be the voice of the crown prosecutor ... in my nephew's trial, say: "hi, how are you doing?" and it seemed to me she was addressing [Cst. M]. [He] turned and faced her as she was walking by and said "hi" back and as she was walking by, she asked ...: "What's happening or going on?" (words to that effect). I remember [him] jokingly saying: "Not much...just trying to find the nearest pub to go have a beer". We all chuckled, and my initial impression was that [they] knew each other, perhaps from a previous criminal case they may have worked on. [The Complainant] then stopped walking, about 15 feet away, turned around and in an aggressive tone questioned [him], "are you staring me down? And then loudly stated "Don't stare me down!"

[107] The Member was surprised at her aggressive tone. Cst. M asked if she was talking to him. Her colleague told Cst. M to turn around, also in an aggressive tone.

[108] When the Complainant made her statement to the judge, the Member was "in disbelief" as he did not perceive that Cst. M had impeded her path, only turning to face her after she initiated a conversation. He did not stare at her menacingly, or in an intimidating manner, nor say or do anything threatening. The Member spoke to a sheriff after court and asked him to preserve the video. The sheriff said he would pass on the Member's concerns to his sergeant. The Member said he made immediate notes in his cell phone of the incident after hearing the Complainant's statement in court.

[109] The Member was first interviewed on September 12, 2018 by the investigator and a colleague. His account of the interaction in that interview was as follows.<sup>67</sup> (I have omitted pause words and some comments from the interviewers):

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<sup>66</sup>CBOD, p. 585 - 587

<sup>67</sup> CBOD, p. 592 - 593

I remember ..., two people walking towards us and ..., as they approached us one was ..., the c- the Crown Prosecutor .... And she was probably the closest to us as they were walking toward us. And then her partner, ... as they were approaching us, ..., she, she basically ... said oh hey how you're doing. As she's kinda coming up behind me. And at that point [Cst. M] turned around and said, oh hey not bad how are you. They exchanged pleasantries. ... and as ... she was walking by she says hey ah, what's going on? What are you doing? ..., I recall [him] saying words to the effect of, and he was kinda joking saying, oh just looking, you know, talking about ..., going, going for a beer or looking for the nearest pub to go for a beer type of thing and we all kinda chuckled. Kinda laughed...

And ..., so she continued walking and about maybe 10, 15 feet away ... she turns around and says ..., are you staring at me? Are you staring me down? Don't stare me down. And we all kinda looked at each other and [Cst. M's] looking at me and I'm, I'm like what just happened here? She ..., he says, he he replies a-and asked I, are you talking to me? Like, I think you might've mistaken me for someone else. And that's when her partner... interjects and says, hey you need to turn around and face the other way. Like look the other way. And then [he] basically turns around and we're all looking at each other in the circle, we're going what is, what just happened here.

[110] After the Complainant returned with the sheriff to ask Cst. M to leave, the Member said he observed that Cst. M, "did say to her like, listen lady you n- you don't know what I do for a living. Meaning like I'm a Police Officer. You know I'm dressed the way I am. But you need to be more professional. In the way you, you know, you talk to people. So then he, you know there's a couple other sheriffs that came and he basically said I'm leaving too. ... So he, he left, he was- I guess he was escorted out of the courthouse. He left voluntarily."<sup>68</sup>

[111] In relation to the Complainant's statement on the record at the trial, the Member said this, in the first interview:

... she made a note of it. She actually on the record stated that you know once she was coming to the courtroom, ah that one of the family members or one of the accused family members or friend ... impeded her way, her pathway and obstructed her and ... stared at her menacingly in a threatening manner. Or intimidating fashion. And again I was, I was, I was flabbergasted. I was taken back. I was shocked as to what she was stating. And she's stating this on record... in a criminal trial which I thought was fairly significant. Um, so anyways the court ..., proceedings continued. ..., and about, it was probably around four o'clock...., the court case had concluded for the day and ..., we then exited

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<sup>68</sup> CBOD, p. 594

the courtroom and I just, I just made a mental note to myself because the fact that she made a, ... comment like that to the judge and it was on record. That I thought it would be prudent for me to make some notes as to what actually transpired. So then I made, as soon as we left the courthouse I got home, it was about quarter to five. I made some notes in my phone. I just typed them out as to exactly what happened. ... according to my perspective. And ..., and so I just made those notes and I told, I actually told [Cst. M], I said you know, given the fact that this has occurred and she made a ..., public statement in ,, on [the] record that you should probably make some notes too. ..., I don't know if he did or not but ..., anyways so that was the end of that day.

[112] The Member went on to describe the initial interaction as a friendly exchange, initiated by the Complainant, that caused him to believe that Cst. M and the Complainant knew each other. The investigator pointed out to the Member that other witnesses, including the Complainant and her colleague, and some from the group, had either denied that words were spoken in the initial interaction, or did not recall that being the case. He asked if the Member wanted to correct any portion of his duty statement and he said no.

[113] The Member had a second interview with the investigator and the fellow interviewer on October 16, 2018, in which he was first asked what surprised him about the Complainant's statement on the record. He stated:

Just the, the facts of what she had said ..., you know she said that ..., a member of the accused family ..., basically impeded her way as she was coming into court. ..., and that ..., you know it was in a menacing sort of fashion. So those comments really it, it kinda took me ... by surprise because that's not what happened. ..., it was absolutely to the contrary. There was no sort of, you know, threatening ... gestures made by ..., [Cst.M] at all. ..., so, so when she made those comments it just, it really took me back. And you know, it just, those just, those f- those, you know that statement those facts just did not happen. Like that's not what happened at all. So y-yeah that's the reason why I was so taken aback and surprised.<sup>69</sup>

[114] The investigator went on to question the Member<sup>70</sup>:

Interviewer: So would you s- was it your opinion that ..., [the Complainant] was not being truthful?

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<sup>69</sup> CBOD, pp. 606 - 607

<sup>70</sup> CBOD, pp. 607 - 610

Member: I felt at that time yes that she was not being truthful at all. ..., or she maybe was completely ..., you know, she misinterpreted or I, I don't know. I honestly can't say what was going through her mind at that time but, but what she stated in in the courtroom was completely false. It, it d-just did not happen which is why I actually made notes as to ..., you know this is, this is ludicrous. This is absolutely bizarre. It, it's not truthful at all and she's making it on record, in the courtroom. That's when I decided that, you know, I better make some notes as to what happened so.

Interviewer: So in fact, perhaps would you go as far as saying she perjured herself?

Member: Yes.

Interviewer: So what...

Member: Yes.

Interviewer: ...did you do about it. You're a Sergeant.

Member: Well I, I, right away I went and after the court had ... adjourned. I basically contacted one of the sheriffs that was on the floor as...

Interviewer: Which sheriff?

Member: Ah, it was a young guy. He, he was in the courtroom after court had ... concluded that day. I went and spoke to him, I said, hey listen. I know you guys s- have CCTV video. Make sure you guys secure it right away because of what Crown Counsel said in court did not happen. And I said if you guys secure that video it'll, it'll show that, that was not the case.

Interviewer: Right and, and I get that. We talked about that in your statement. But did you make any ..., allegation to the court that someone had perjured themselves?

Member: That was not my position. I was, I mean, I was part of the gallery. I was there ah for my nephew's court case...

Interviewer: Right.

Member: ...um...

Interviewer: But you were on duty that day...

Member: Yeah but I did, I did speak to his counsel. ... [Name] and notified him of, of what occurred. And that it was absolutely not true.

Interviewer: ..., you were never contacted by anybody ... to give you [sic] an account of what you saw in the court.

Member: No

...

Member: I spoke to ...my nephew's lawyer and he said, you know, let's just wait till the trial has concluded and we'll see from there. And, you know, ... but then after, soon after that this Police investigation ... was initiated. So having said that ..., depending on the outcome of this investigation ..., I will be seeking ..., notifying law society.

[115] The October interview concluded with the following exchange:<sup>71</sup>

Interviewer: ...when you look at the video and, and again in any investigation we do we, we follow the evidence for example and we don't, we don't make conclusion based on one small piece of evidence. We generally look at the totality of the pieces of evidence situation generally give us a story as to what happened right and any one of those pieces on their own may not show that that's exactly what happened or it may, may almost contradict in certain situations. But when you look at all the pieces together of actual evidence plus, you know, you talking to the witness and up ah and every...

The Member: Mm-hmm.

Interviewer: ...it will generally paint a certain picture and my, my point to [Cst. M] was and this is what's concerning to me is that, that the story that's being told is not necessarily fit with what it doesn't fit. With what's being sh- seen in ... in my opinion and and in looking at the evidence and it's not my opinion alone, it's as we look at this and that's why we're here ultimately is because it doesn't fit and, and to give someone the opportunity, memory, interpretation all ha- has a way of playing tricks on us and, and, and even as I said to [Cst. M] too like this, this is not about catching someone in some trick as to what a person's wearing or not wearing and how it contradicts with your duty statement to begin with. It's, it's about looking at the, the substantive actions of what went on and do they fit with what's being told. What, what I could say is it does fit in, in totality with what's being told from the Crown's perspective and it doesn't fit with what's being told from your perspective. And so, does that mean someone's lying. No, not necessarily it just means someone is maybe, they found themselves and, and I'll b- be honest, [Cst. M]'s found himself in a situation where he's a group of friends and ..., supporters and, and it was a heated trial. It's- it is, it was a heated trial. There's a lot of emotion involved. You see two Crown coming down and, and when you see what [Cst. M] did, as he t- he it, it again, as he turns and I'm just going from the ..., the video itself he turns and the fashion he turns is, is not one of the cordial and friendly. And, and then you add to that ..., the nature of the conversations between the two Crown, they're looking at each other, they're in conversation for the entirety that they're in, in the video um, ... view with each other. They don't look to [Cst. M], they don't turn to him until after the fact and after they passed which [the Complainant] took offence to ..., so, again, ... and, and I'll also add to that the fact that you know having spoken to ..., I want to say

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<sup>71</sup> CBOD, p. 612 - 618

pretty much everyone that was in that group, the stories are, aren't in, in an alignment. Basically yours and [Cst. M]'s are and ... it falls off significantly after that. So everyone was there however, ah there, they're in fact are people who, who s- say that there was no conversation at all until after which is, is in line with what we're seeing on the video right. So, you got, you and [Cst. M] are partners. You're, you, that that's a big deal it goes a long way. And we wanna protect and, and help the cop partners, and people that are close to us and my concern is again, if this is a situation where it's not how it happened as you're saying and, and you found yourself either [Cst. M] had suggested how it might've happened and you're supporting him in that. Or and y-you're shaking your head no so you're saying that's not the case and so...

Member: Yeah.

Interviewer: ...okay and that, and, and I'm not like again I'm not gonna belabour that back and [forth], it's just my, I, I would hate to see an arbiter or someone look at this and read the report and see it happening the way it s- I, I, I'm suggesting that it's unfolded and you guys find yourselves in situations where you know there's, there's a deceit allegation now on top of this or whatever the case may be so, so taking this opportunity to, to correct or amend or to change something would now be a great time to do that right...

Member: Yeah no I appreciate it. ..., first of all the video has no audio. So...

Interviewer: Correct..

Member: ...you can't hear what's being said...

Interviewer: Right, right.

Member: Ah, second of all, um like I said, I was in very close proximity of, of [Cst. M]...

Interviewer: Mm-hmm...

Member: ...and so I heard the conversation...

Interviewer: Mm-hmm.

Member: ...because as she's walking by...

Interviewer: Mm-hmm.

Member: ...she's the one who initiated the conversation...

Interviewer: Mm-hmm.

Member: She's the one who said, hey how are you, how's it going?...

Interviewer: Mm-hmm...

Member: ...to [Cst. M].

Interviewer: Mm-hmm.

Member: As she's walking by. He says, ah fine how are you. She continues to walk and she's like, oh what are you doing. And he says, in a joking manner oh just ah looking forward, talking about ah to find a place to go have a beer. Laughingly. Jokingly...

Interviewer: Mm-hmm, mm-hmm.

Member: She continues to walk 10, 15 feet away, she turns around. They both turn around, both crown counsel turn around and she says, are you staring me down? Are you staring at me? And, and she said it in that really...

Interviewer: Mm-hmm.

Member: ...sorta angry kind of a tone. And I'm looking around and, and [Cst. M]'s like taken back and, and he goes are you talking to me?

Interviewer: Mm-hmm.

Member: Like you must be mistaken. And then, and ... [the colleague], injects and says, hey you better turn around. 3

Interviewer: Mm-hmm.

Member: Like in a very forceful...

Interviewer: Mm-hmm.

Member: ...sorta tone. You better turn around and I'm looking like what the heck's just going on here.

Interviewer: Mm-hmm.

Member: Like nothing was said by [Cst. M] to either of them.

Interviewer: Mm-hmm.

Member: Anything that would, would be interpreted as threatening or ..., menacing or intimidating. There was nothing of that sort. And it's, it actually pisses me off...

Interviewer: Mm-hmm.

Member: ...that we're sitting here and we're wasting so much time going over this because it just did not happen.

Interviewer: Mm-hmm.

Member: D-I wish the video had audio. And this would put this whole situation to bed.

Interviewer: Mm-hmm. Okay. Um, you just had said that ah, after you learned the outcome of this investigation...

Member: Yes.



Interviewer: ...something ah may or may not ..., be done with a complaint against [the Complainant].

Member: Ah, I'm seeking. I will be seeking a complaint against [her] yes.

Interviewer: So, does this investigation have any basis on that?

Member: Absolutely.

Interviewer: Okay so if, if [Cst. M] is exonerated, what happens?

Member: I will be lodging a complaint.

Interviewer: If he's not exonerated what happens?

Member: I'll still be lodging a complaint...

Interviewer: Okay just wanted to clear that up.

Member: Yup.

Interviewer: Why wait so long?

Member: I wanted to wait until this Police Investigation's concluded.

Interviewer: What possible bearing would it, would it had if (INDECIPHERABLE)...

Member: Well because I believe that he's gonna be exonerated.

Interviewer: But either way you're still going to file a complaint.

Member: Yes.

Interviewer: Um, so why wait?

Member: So that I, we can use this investigation as part of the evidence to show ... the Law Society that this gentleman did absolutely nothing wrong and this woman lied in court.

Interviewer: Okay. Okay no fair enough, I just wanna clear all that up. Nothing else? No.

Interviewer: No.

Interviewer: Okay it is, ... 11:22 and the interview is concluded

[116] As noted, in December 2018, the Member was added to the investigation as a subject officer. He was reinterviewed on March 11, 2019, when the following exchange occurred:

Interviewer: ... Now uh you've had an opportunity ... to review your... previous statements and your duty reports. Is ther-, is there anything that you think needs to be clarified or ... emphasized or, or changed as a result of uh, having a chance to see it in black and white?

Member: Hm-mm. Well, ah, since December of 2018, since I been ... now subject officer

Interviewer: Yes.

Member: -um I've obviously been sidelined as to my regular duties. So in the last three and a half, almost four months I've been racking my brain, and replaying the scenario, ah over and over again. And, and trying to make sense of, what actually transpired.

Interviewer: Yes.

Member: ... at that time.

Interviewer: Yes.

Member: ... I'm of the strong belief, um after I've, again, like I've gone through the scenario, many, many times over in my head, and I'd like to give [the Complainant] the benefit of the doubt. As to the fact that, whether she embellished or lied in court. I don't know if that is true. Um, so I'd like to give her the benefit of the doubt for that.

Interviewer: Yes.

Member: ..., where I'm going with this is, is I, I truly believe that she mistakenly, or misinterpreted what either [Cst. M] said to her. ..., which made her feel either intimidated ... at that time. I truly believe that's, that's the case here. ... the facts that um I've written in my duty report are, are true and accurate to the best of my ability. ... as far as my recollection is concerned. ... the interviews that I've had with you, the two subsequent interviews that I've had with you, ..., I've been truthful. Hundred percent. ... I haven't lied. I haven't [misled] you in any way. ..., but, like I said, I've been racking my brain for the last three and a half, four months, and I truly believe that this whole situation, she mistook, or misinterpreted what was said by [Cst. M]. That's my honest belief.

[117] During this interview, as noted by Commission Counsel, the Member retreated from suggestions of perjury to suggestions that the Complainant could have misunderstood the situation. He was asked if the incident was discussed in detail among the group after it happened, and he said it was mostly just the group reacting and wondering what had happened, not a "playback," as everyone had been there. The Member maintained that he had actually heard the friendly part of the exchange, from three feet away, and reiterated his description of it. He suggested that the Complainant had profiled Cst. M based on his casual appearance.

[118] He was shown the video again, and the following exchange ensued:

Interviewer: ..., that you know you, may or may not have se-, seen him make that turn, ... outwards.

Member: Yeah I, I mean ... honestly cause, I did have my back

Interviewer: Yeah.

Member: - I didn't, I didn't see him, blocking her in anyway. ... and even if I look the video, I see him turn.

Interviewer: Yeah.

Member: But he doesn't directly block her path. From the video, I don't see him actually blocking her ... path

Interviewer: Well, well let's, let's look at that again.

Member: -and she has to move around. Around him.

Interviewer: Let's look at this again.

Member: ....

Interviewer: ... Just one second here.

Member: Yeah.

Interviewer: So we're gonna start here. ... just before she gets there. Now, if I were to take, you know have a, a ... person stood there and draw a straight line as to where she was gonna be walking. And you can see as she walks along, she's walking in a fairly straight line. Now, she could almost at that point, you they, they would've rubbed shoulders.

Member: Yeah we'll they've, I think she woulda probably hit our group if she woulda ke

Interviewer: Right.

Member: -walked straight.

Interviewer: If she, if she went straight.

Member: Yeah.

Interviewer: But you'll see at some point right about here, now he's full on, in her path. He would walk, she would walk straight into the front of him if she continued. So his movement has caused her way to be blocked. Would you agree with that?

Member: ... yeah at that point.

Interviewer: Right.

Member: Yeah.

Interviewer: Okay. ...

Member: But she's about

Interviewer: The

Member: -I don't know

Interviewer: -that's ...

Member: -eight, eight

Interviewer: Eight to ten feet

Member: -feet

Interviewer: -feet

Member: She's, she's ten feet away.

Interviewer: I w-, and you know, ah I've been out there, had a look. I haven't taken out an actual measurement ...

Member: Okay.

Interviewer: But ...

Member: Yeah.

Interviewer: -had a peak(sic) there.

Member: Yeah.

Interviewer: ... so but, and your back is still to her

Member: Yes.

Interviewer: -at that point?

Member: Yes.

Interviewer: Now, so we would agree then that she's unable to com-, cle-, continue walking in her straight line.

Member: Yeah. She, she would

Interviewer: Right?

Member: -she would hit [Cst. M].

Interviewer: She has to move to the left. She would hit

Member: Yeah.

Interviewer: -[Cst. M]. Okay. Now, ... at what point does the conversation start?

Member: It's as, as she's approaching [Cst. M]. I mean I, I can't say for sure if it's happening now. Like when the video's still, (INDECIPHERABLE) now, but it's as she's approaching the group. I hear her say hello, or hi to [Cst. M]. He says hi back. I can't

remember if it's happening now, right now. Or, a couple of seconds from now. But it happens as she's approaching us.

Interviewer: Right.

Member: And as she's walking by the group, that's when she says or asks, you know, what are you doing? What are you guys up [to]? And he's like, we're just talking about where to go for a beer.

Interviewer: Right.

Member: And then she continues to walk past and then she stops.

Interviewer: Okay. So I mean, an-, anywhere there ..., did you, do you remember hearing any conversation ... before Cst. M turns?

Member: Y-, I honestly can't remember. There, there may have been.

Interviewer: Okay.

Member: But again, the conversation that I remember is exactly that. Her saying hello to Cst. M, first. Him saying hi back. And then she asks, are you, you know, what are you doing? Or what's going on? And he replies, says, just looking to find a place to go have a beer. That's all, and that's, what I remember

Interviewer: Right.

Member: -the conversation. The gist of it. (INDECIPHERABLE).

Interviewer: So ..., you know I was thinking about uh, you know actually in your statement you said what are you doing? ... I believe that's what you said in your statement. The two things you said is uh, what are you doing? What's going on?

Member: Yeah. What's going on?

Interviewer: Right.

Member: Yeah.

Interviewer: So I mean I, I'm reminded of the radio commercial recently, where you know the, I don't know if you heard the Rona commercial where they're talking about dad you built or dad

Member: Hmm.

Interviewer: -you built this?

Member: Yeah.

Interviewer: I mean, so those comments ..., was the question, or the comments ..., do you believe it was more of a ... informal thing? Or was she challenging him on what are you doing blocking my way? What's going on?

Member: ..., I didn't interpret it as a challenge. I

Interviewer: Okay.

Member: - it was more of an i-, inquisitive, I, I honestly thought they knew each other. The way they were, the way they have their little greeting. I thought well maybe

Interviewer: Right.

Member: -they worked a file together

Interviewer: Yeah, and

Member: -or some

Interviewer: -and we

Member: -thing.

Interviewer: -we

Member: I honestly, felt that.

Interviewer: We've heard that from other people. And that is, you know, kind of the question I've asked was, now that you know that you don't, do you have any opinion on, on what happened there based on the fact that they don't know each other?

Member: I, I thin-, I honestly don't. I, I can't say<sup>72</sup>

[119] The investigator went on to suggest to the Member that he was having trouble "marrying up" the various versions of the interaction described by the witnesses, and said, "you've been in our shoes before. You know doing the investigation. You talk to a number of people."<sup>73</sup> The following exchange ensued<sup>74</sup>:

And again, like I've been trying to rack my brain and to figure out, obviously she, she felt something.

Interviewer: Yeah.

Member: She must've felt something otherwise she wouldn't have said what she said in the courtroom.

Interviewer: Right.

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<sup>72</sup> CBOD, pp. 635 - 639

<sup>73</sup> CBOD, p. 643

<sup>74</sup> CBOD, p. 642 - 647

Member: And she would've not made a complaint. But, as a Senior Crown Prosecutor, who's well versed in the Criminal Code, when somebody intimidates you in a courthouse, that's a Criminal Code offense.

Interviewer: Hm-mm.

Member: Why was it not investigated by the RCMP? Criminally? I've been involved with Crown Prosecutors who have been threatened

Interviewer: Yeah.

Member: -and we investigate it criminally. Why wasn't the RCMP notified? And this, this file being, not being investigated criminally, what, why did she wait two weeks, to go online with the OPCC website to make a complaint?

Interviewer: Yeah, well, you know, I don't know that answer. It's, it's a go-, I, I understand your question. You know? But uh, so do you have any other questions?

Member: Ah and sorry, can I

Interviewer: Yeah.

Member: -can I

Interviewer: Absolutely.

Member: -(INDECIPHERABLE). Ah. I have, I have a couple more things

Interviewer: Yeah.

Member: -to, to say about this. ... when [Cst. M] does engage her in that verbal interaction that they had

Interviewer: Yes.

Member: -he, I remember him saying, listen lady you don't know who I am, or what I do for a living.

Interviewer: Yes.

Member: Before she goes into the courtroom.

Interviewer: And I've been thinking about that. Quite a bit. I'm like, okay if you're a Crown Prosecutor, and I'm sure she has had some history where she has been intimidated or threatened. She's a Senior Crown, I'm sure she's dealt with these types of things in the past. Where she's had experiences with other people, other bad guys.

Interviewer: Yeah.

Member: That maybe look at her, or gesture, or make some sort of gesture to her. I don't know, her background, but I'm sure she has in the past. When he says, and I remember it, I recall this. He, he says to her, you don't know what I do for a living. Cause he's upset.

The way sh-, she's reacted. He's upset. As I would be. If she yelled at me in a rude manner I'd be upset too. So when he says that, and again I don't know what's going on in her mind, but if I was in her shoes I'd be thinking is this guy, is he, is he thr-, making a veiled threat? Not knowing who he is. Or what he does for a living. You know it's, I'd be like, is this guy making a, I think he might be making a threat. Or, a veil-, intimidation. Which is why I think she felt the way she did and that's the reason why I believe she makes that comment in court.

[120] At this point, the investigator's colleague engaged with the Member<sup>75</sup>:

Interviewer: So, what I'm hearing and I, I've just gotta, I, I made the note actually almost the first couple of sentences that you said, that you're hung up on the idea of what he said. And, I think wo things, ... to go back to your question about why you ... think the RCMP didn't investigate it, because she didn't want it to be investigated criminally. She's not trying to screw over a bunch of ... other cops and stuff like that, right? She, I think at the end of the day, if she'd had, if she'd had an apology ... in some form, and this is from, I'm not, I haven't spoke to her, I'm not, ... I'm just making inference, ... I think in her mind, ... she felt something happened that she wasn't happy about. Clearly ..., as, as you ... articulated as well. And I think, had she received some sort of apology in her mind, I think that would have been the end of it and move on. She did not see this as something she, she's been around the block. ... you said you know her, so you... -

Member: Uh, uh

Interviewer: -know that.

Member: -actually I don't know her.

...

Member: I, I know, I know the fact that she's a Senior

Interviewer: Okay.

Member: -Crown.

Interviewer: Yeah, so she's been around. Trust me. She can absolutely hold her own in any courtroom and or outside any courtroom. ..., so ..., that being said, ..., she, she didn't, like she didn't w-, want this to become a criminal investigation. Right? She just wanted the, the mannerisms that Cst. M was portraying, addressed. And that, that she felt threatened by. Right? ... and so what, what that was, and tha-, that takes me back to my initial comment is, ..., I, I, I feel like your, you've used the words ..., mistook what Cst. M said, right? And it, the, the conversation is secondary if not even a factor in this. It's, when you watch the video and that, and that's what the, the, the disciplinary authority

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<sup>75</sup> CBOD, pp. 645 - 648



will, they look at. And they'll be making their decision al-, all the rest of it and anyone else who's looking at, it's the, the mannerism and the way he portrays himself, in, in, in his actions, not his words. In, in that situation. Right? And so that's, that's what, that's, that's more about what this is about, and that's what she addressed as she walked past, was, what do you think you're doing? A what, what are you, right? It, it was more about his action of, of stepping outside the group. *The crossing of the arms*. The following her as she passes. Those are, in some form and another, those are, one could argue, um mannerisms that are not, not conducive to friendliness and or um, uh conversation uh in any sort of positive way. Right? That, uh anyone and it's open for interpretation, and that's what's gonna happen in this situation, I get that. But looking at it from an objective point of view, when you watch and as you see it frozen here right now, there's a clear decision made by Cst. M and it, you can call it whatever you want, but there was absolutely a clear decision for, I don't know, you don't know, no one here knows what Cst. M's frame of mind was, or what he was thinking, or what he wanted to do or his intent, but there was a clear decision by him to step out in front of her. For whatever reason, and as she passes he chose, chooses to, to *cross his arms*, and follow her as she passes. Right? Not with, not with just his head, but he, he turns and follows her with, with his, with his gaze and his look. So, that, that action in any circle of human behaviour, is not one conducive to friendliness, positivity or, and, and again you're looking, and I, I know what's going through your mind right now I think is, I, I'm not, I'm not the adjudicator in this situation. I'm not the, the disciplinary authority. It, it, it doesn't matter what I think ultimately, I'm just being honest in as far as an objective person looking at what I'm seeing. I wasn't there, I didn't hear the conversation. And it's, and it's still honestly, it's up for debate as to, cause we have other people, the part of that group, ... including the uncle. ... who we just recently spoke to who we hadn't spoken to in the past. Who was actually quite excellent ... who doesn't recall any conversation happening until she turns after she's passed. Right? So, ... and there, ... so there, there are some discrepancies in, in, in that in and of itself. Will we ever know exactly? No, probably not. Right? But ... the bottom line is it's more about not what he said, but about his actions and how he was portraying himself as, as she passed. Right? And so that's, that's kind of the big issue at hand here. And then, of course it's everything that's come from that since. Which is unfortunate at the end of the day. Right? Because this probably all could've been dealt with quite simply i-, i-, in the end with a, but, this is where we are and this, that's the realit-, but I just wanted to draw your attention to that. It's not, it's not so much about what was said or what Cst. M said that would've upset her or , or set her off, s-, so to speak. It, it was, as you watch her pass, how he related himself to her. How he, and how he carried himself and presented himself as she passed. And in her mind, she felt it to be in a, in a, for lack of a better term, a threatening or intimidating manner. So that's, I, Member: And I appreciate what you're saying...

Interviewer: Yeah.

Member: And I understand what you're saying.

Interviewer: Yeah.

Member: But I have to disagree with you.

[Emphasis added.]

[121] It should be noted that the interviewer suggested twice that Cst. M crossed his arms when he turned to face the Complainant, which is not the case.

[122] It is probably sufficient to observe at this point that despite a vigorous challenge by this interviewer, the Member was unshaken in his description of the interaction during the remainder of the interview, and offered to take a polygraph. At points he suggested that the Complainant may have been under a lot of stress arising from the proceedings and the tensions between the parties. At no time did he agree that he could have been mistaken about whether the Complainant had initiated the interaction with Cst. M. He stated that he and Cst. M were friends but neither would go to the length of lying for the other.

[123] The Member testified at the discipline proceeding on October 6, 2019.<sup>76</sup> He stated that he had asked Cst. M to attend the trial because there had been tension with supporters of the deceased confronting and trying to film members of the accused's family. The Member believed it would be helpful to "show some strength by numbers." He did not ask him to come as an intimidating presence. They had been partners in 2002 for a couple of years and had remained in touch to the extent of having contact two or three times a year.<sup>77</sup> He stated that he would not jeopardize his career by lying for Cst. M even if he had perceived that he acted as described by the Complainant. He said he had been truthful in all of his statements within the investigation.

[124] The enhanced video, which is an enlarged but less clear version of the 9 seconds preceding the Complainant's first turn, was played while the Member testified. He identified himself as the person closest to Cst. M on his right side. He agreed that he appeared to have turned his head as the prosecutors approached but did not remember doing that and could not say

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<sup>76</sup> Transcript of Disciplinary Proceedings, November 6, 2019, pp. 8 – 46. [CBOD Tab ?]

<sup>77</sup> Transcript, p. 14

what prompted it. He was directed to his statement where he said someone may have said the prosecutors were coming, and said that was speculation on his part and he did not recall hearing that. He said he first heard the Complainant's voice to his right, when she was behind his right shoulder. The Discipline Authority stopped the video at what is described as ".03 seconds elapsed time."

[125] The Member stated that he did not recall seeing Cst. M make a turn toward the prosecutors as they approached. He recalled seeing him turn and face the Complainant, as she and her colleague passed by. He confirmed that was the turn he referred to in his statements, which occurred after or in response to the initial exchange. He confirmed that he had not viewed the video before he wrote his duty statement, and in his duty statement he referred to the second turn depicted on the video when he said that "[Cst. M] turned and said, oh hey, not bad, how are you. They exchanged pleasantries." It was after that the Complainant said, what are you doing, and Cst. M made the beer comment.<sup>78</sup> The Member identified a point on the video where he bent his knees which he believed may have been in response to the beer comment being funny.

[126] In relation to the Member's suggestion that he would pursue a complaint against the Complainant, he stated at the discipline proceeding that the suggestion of perjury came from the investigator, and he adopted it because he was alarmed by his belief that the prosecutor had misled the court. He maintained his belief that she had gotten it wrong, pointing to the incident the next day where she pointed him out as "trouble," in support of her being mistaken. He had come round to the view, by the discipline proceeding, that she was not intentionally being untruthful or that she would be, given her position; but added that nor would he, as a police officer.

[127] In response to a question by the Discipline Authority, the Member said he did not believe he had told Cst. M about the dynamics that caused him to invite him to attend the trial. The Discipline Authority also asked some questions about the "beer conversation" in which he suggested no other witnesses had heard that exchange, or that the witness who had mentioned it

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<sup>78</sup> p. 22

had been in the bathroom at the time. Counsel for Cst. M corrected the Discipline Authority on that point.

#### **h. Final Investigation Report**

[128] In his Final Investigation Report the investigator commented as follows on the Member's evidence<sup>79</sup>:

[The Member] is standing immediately to the right of [Cst. M]. His back is to [the Complainant] as she approaches the group. A few moments prior to [the Complainant] and [her colleague] reaching the group he glanced towards them which places his back to Cst. M. As [the Complainant] passes by [the Member's] back is to her. [The Member] is in a position to see Cst. M turn his head and follow [the Complainant's] movement through the hallway.

The Member's statements regarding the casual conversation reportedly started by [the Complainant] do not make sense. [The Complainant] and Cst. M were unknown to each other. [The Complainant] was in a conversation with [her colleague]. There is no reason for [the Complainant] to break away from her conversation ... to find out what Cst. M was doing. [The Complainant] passed at least ten other people in the hallway and did not enquire about those [people's] activities for the day. It is not rational that she would suddenly take an interest in Cst. M. [The Complainant] did not know Cst. M was a police officer at this point so there is nothing to distinguish him from the other people in the hallway. In fact there is a disincentive due to the relationship between the group and the accused in her trial.

The Member was asked about his reaction to [the Complainant's] statement to the judge as being perjury. [He] took no steps to report the comments as an offence against the court. His comment that he was waiting until the Police Act investigation was completed is self-serving having been called on it during the second interview. If the comments made by [the Complainant] were not true, [the Member], as an on duty police officer and as a non-commissioned officer had a responsibility to report the comments if he knew they were false. He did not. He mentioned it to defence counsel who suggested they wait until the trial was over. He did not follow up. Some six months after the event [the Member] has not been contacted by anyone about any investigation. As a seasoned police officer and a supervisor he ought to have known there was no investigation of his allegation.

[The Member's] duty statement, and his first and second statements are all consistent with each other. [His] statement is inconsistent with the statements of those of [the family

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<sup>79</sup> Final Investigation Report, p. 47, CBOD, p. 48

friend and the fourth witness], [the Complainant and her colleague]. The Member and Cst. M are friends. Cst. M attended court to support [the Member] and now finds himself subject of a Police Act investigation.

[129] The investigator created some still photos from the video, and as noted earlier, he observes in relation to Photo 185, which depicts Cst. M before the first pivot, that "Cst.M begins to turn towards the Complainant who is approximately 15 to 20 feet away. According to Cst. M's statements the Complainant has already started a conversation at this point."<sup>80</sup>

[130] In his analysis pertaining to the Member's statement, the investigator states<sup>81</sup>: [The Member] believes the conversation started before [Cst. M] turned to face [the Complainant]. [The Member] had his back to either [Cst. M] or [the Complainant]. He could not observe them at the same time. [The Member] could not possibly state where [the Complainant] was when the alleged conversation occurred as he was not facing them. His statement is based on when he heard the conversation stating that the conversation took place prior to when [Cst. M] turned to face [the Complainant]." The investigator finds this evidence contradictory to all of the witnesses except Cst. M and the Member's brother.

[131] It appears from these passages that the investigator maintained a view that both the Member and Cst. M stated that Cst. M made the first pivot in response to a comment by the Complainant. This is not the interpretation I place on their evidence. As I interpret it, both the Member and Cst. M were consistent about the exchange occurring while or immediately before the Complainant passed by Cst. M, in response to which, he made the second turn.

[132] The investigator concludes<sup>82</sup>:

I submit that the evidence demonstrates on a balance of probabilities that [the Complainant] did not start a conversation with [Cst. M] prior to [Cst. M] turning to face [the Complainant]. If so then the entirety of [Cst. M's] version of the event cannot be trusted and should not be believed. If there is a finding that [the Complainant] did not start a conversation before [Cst. M] turned to face her then it follows that [Cst. M]'s evidence contained in his statement and duty report is fictitious and therefor deceitful and

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<sup>80</sup> Final Investigation Report, p. 33 - 35, CBOD, p. 34 - 35

<sup>81</sup> FIR, p. 50, CBOD, p. 51

<sup>82</sup> FIR, p. 52, CBOD, p. 53

that the purpose of [Cst. M]'s turn was to block the path of [the Complainant] and intimidate her as she returned to court.

**i. Disciplinary Decision<sup>83</sup>**

[133] After a summary of the two opposing versions arising from the evidence, the Discipline Authority recited the factors he believed important to consider in resolving them: the context of the incident; the video from the courthouse corridor; the statements of the complainant, members and witnesses; the reactions of individuals immediately after the incident; the evidence from the disciplinary proceeding; and the logic underpinning each version of events.<sup>84</sup>

[134] In relation to context, the Discipline Authority cited the pre-existing animosity between the two sides in relation to the criminal trial, including reactions in court on the part of the deceased's family to the Complainant's cross-examination of the accused prior to the incident.

[135] The Discipline Authority next provided a description of the events on the video, with the timing of them. He notes that Cst. M and the Member are standing in a circle of men supporting the accused. He observes that they glance toward the prosecutors as they approach, at 3:09:58, and that the Member turns back to the circle. He states that Cst. M "takes a step back 90 degrees to his right, away from the circle, and into the pathway" of the Complainant. He notes that Cst. M's feet are squared (and later, "planted") and his hands are in his pockets, and that due to his pivot, he occupies the middle of the corridor. He describes Cst. M's head as oriented "directly at" the Complainant, and concludes, "He stepped into the path of [the Complainant] and does not step aside as she draws near."<sup>85</sup>

[136] While the Discipline Authority's description of the video in the above statements is not inaccurate, it appears to somewhat colour Cst. M's actions with an intentionality which may not be apparent from the video itself. The timing of Cst. M's pivot toward the middle of the corridor, while it follows the Member having apparently glanced toward the prosecutors, occurs just 3 seconds or so prior to them reaching his location. He essentially pivots to face toward them as the Member is still looking behind him. As Cst. M completes this move, he appears to lean or

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<sup>83</sup> Notice of Decision Following Disciplinary Proceeding, February 13, 2020, CBOD, Tab A 2 ["Decision"]

<sup>84</sup> Decision, p. 6.

<sup>85</sup> Decision, p. 8

look very slightly back to his left, perhaps as he spots the two walking in the path which he has just occupied. At the same time, he raises his hand to his face in almost a “what have we here” sort of gesture. Both hands are in his pockets for a fraction of a second before that. They are not crossed. It must also be observed that this pivot action is consistent with similar movements Cst. M makes at two or three prior points in the video.

[137] The description of Cst. M's feet as squared, or planted, also appears to be more qualitative than a plain observation would support. The pivot onto his right side to open his body is, as described by the Member in his evidence on the discipline proceeding<sup>86</sup>, a “casual” move, and his feet are not visible in the video until after the Complainant has passed, at which time he has his left leg extended in a relaxed fashion, and appears to be putting his weight on his right side, just before he takes a step with his left and then his right foot to pivot further to his right as the prosecutors pass by.

[138] The Discipline Authority goes on: “At 3:10:01 [the prosecutors] begin walking to their left so [the Complainant] does not collide with [Cst. M]. [Cst. M] places his left hand near his lower face. [The Complainant]'s head continues to be oriented straight ahead. She does not turn her head in the direction of [Cst. M]. She does not appear to slow down or speed up her pace.” The Discipline Authority notes that the colleague turns toward Cst. M as they pass, and Cst. M “twists his body” to match the position of the Complainant. She tilts her head slightly to the left, away from Cst. M. Cst. M follows their movements by turning to his right, and then rejoins the group, as the prosecutors move back to their left, toward the center of the hallway.

[139] While Cst. M's movement to the right as the pair pass the group can aptly be described as “following” their movement, his movement is perhaps more fluid and less dramatic than the Discipline Authority's term, “twisted.” The motion is a quarter turn to his right from facing down the length of the corridor to following the direction of the prosecutors to his right. It lasts less than three seconds, and he turns back to the group before the Complainant turns back for the first time.

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<sup>86</sup> Transcript, p. 25, ll. 19-31

[140] The overall timing and appearance of Cst. M's movements in the video are not in my view entirely captured by some of the qualitative terms used by the Discipline Authority, and a neutral observation may not support a conclusion that Cst. M made a calculated attempt to occupy the path of the prosecutors, or to "stare" at them as they passed. Perhaps at its strongest the video can be said to be inconclusive as to the nature of the interaction.

[141] Turning to the Discipline Authority's review of the Complainant's evidence of the interaction, he states that she saw the group before she passed them, and "as they were associated with the accused, she attempted to ignore them." As I have noted in my review of the Complainant's single statement about the interaction, it is in fact not clear that she recognized the group as affiliates of the accused while she was approaching them. Her later remark that she did not look at the group at all as she approached or know who was in it could suggest otherwise. The Discipline Authority points out that the Complainant does not alter her gaze from either straight ahead or slightly toward her colleague, as she travels down the corridor and past the group, which is consistent with her not observing the makeup of the group as she approached while carrying on a conversation with her colleague.

[142] I note that the path she and her colleague were following was slightly right of the centre of the corridor, almost along the centre line. Until she reaches about 6 paces from the group, Cst. M is not directly in her path, but he is just to the right of the centre line, and she likely would have had to move slightly left to avoid him. One might have expected, if she recognized the group, she might have been walking further to her left at an earlier point.

[143] Cst. M's pivot moves him perhaps a foot to his left, and places him directly in front of the Complainant; however, it is not possible to ascertain from the video where either of them is looking. At one point as the Complainant passes him, he appears to look slightly to his left, away from the Complainant and in the direction of the Member, before he turns to watch the Complainant pass. Notably, the Complainant's face is away from the camera, and all that can be said about her is that she appears to be engaged in conversation with her colleague, and there is no indication she is looking in the direction of the group at any point before she essentially comes face to face with Cst. M. Even at that, she veers just enough to clear his shoulder by about



4 inches; again, not entirely consistent with recognition, and certainly not, at that point, with intimidation.

[144] The Discipline Authority recounted the Complainant's description of Cst. M turning and facing her, staring at her with a look of hostility and impeding her, causing her to walk around him, as he followed her with his eyes. He noted that she perceived his body language as aggressive and hostile, and her description of him as very large compared to her. He noted that the Complainant said there were no words exchanged as she approached, or as she walked past. After passing the group, she turned to ask, "What do you think you are looking at? She said he replied with a denial, and she told him his behaviour was inappropriate. She left and went to find a sheriff to report the incident.

[145] The Discipline Authority observed that the Complainant reported that she "tried not to make eye contact and had no verbal interaction with the male prior to asking him 'What do you think you are looking at?'" Her statement does not suggest that she "tried not to make eye contact," although she did state that she had no eye contact with anyone in the group.

[146] In relation to Cst. M's evidence, the Discipline Authority observed that he was consistent throughout his interviews, and maintained that he did not know the Complainant was the prosecutor in the case he was observing until after the incident, as he had not been paying close attention in the courtroom. He said he only turned to face her because she spoke to him, as she approached. He continued looking at her as she passed by, out of respect. He put his hand on his face, which he said reflected his mindset of trying to determine who she was. In summarizing the evidence of the Member, the Discipline Authority noted that his statements were internally consistent, and mostly consistent with the evidence of Cst. M. He noted that both members had glanced down the hall before Cst. M turned to face the prosecutors.

[147] The Discipline Authority then reviewed the evidence of those present for the interaction, noting similarities and inconsistencies between their versions and those of the members; in particular, he noted that three witnesses were mostly consistent with the members regarding the Complainant initiating a friendly exchange, the beer remark, and their surprise at her later reaction. He noted that the Complainant's colleague believed the accused was with the group, that he perceived Cst. M's action as an intimidation tactic, and that he "stated that no words were

spoken between the group and [the Complainant], or himself, prior to [the Complainant] asking the male what he was staring at,”<sup>87</sup> and that they were conversing together and would not have spoken to anyone in a group that included the accused without the lawyer present.

[148] The Discipline Authority also noted that the two deputy sheriffs indicated that when she first approached them, the Complainant stated that Cst. M had “stood in her way,” “would not let her pass,” and that “she asked him to move.” The Discipline Authority observed that these aspects of the interaction were not included in the Complainant’s statement to the investigator, and concluded that “much like some of the variations in the accounts of the four corridor witnesses, and some of the minor variations in the accounts of [the members], the discrepancies between these two Sheriffs[’] accounts and [the Complainant] are not significant; particularly when the discrepancies are based on third hand recollection.”<sup>88</sup>

[149] The Discipline Authority goes on to consider the third of his listed aspects, the parties’ reactions immediately following the incident. He notes that the Complainant appeared upset, took action with the sheriffs, made a statement to the court, and filed a complaint with the OPCC. He noted that the Member said he was upset by the remarks the Complainant made to the court, spoke to a sheriff about retrieving the video, spoke to the accused’s lawyer about his concerns, made immediate notes of the incident, and while he “used the word perjury” in his first interview, he later said the interviewer had suggested that word. He spoke of complaining to the Law Society but by his third interview, after the allegations were raised against him, said he believed that the Complainant may have been mistaken. The Discipline Authority then noted that there was no evidence the Member took any steps to report the prosecutor’s conduct to anyone after the incident. He notes as well that Cst. M appeared to have just gone home.

[150] In summarizing the evidence at the discipline hearing the Discipline Authority stated that it was important to note the “attitude of assuredness” displayed by the members during their testimony: “They were certain that they were not mistaken in their version of events.”<sup>89</sup>

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<sup>87</sup> Decision, p. 14

<sup>88</sup> Decision, p. 15

<sup>89</sup> Decision, p. 16

[151] The Discipline Authority then turns to the heading “Logic Underpinning Each Version”. He states that the version advanced by the Complainant appears sound, including the context, the video, her statement and her actions afterward. He states that the version advanced by the members, in the context, is less so. He notes the improbability that the prosecutor would initiate a pleasant conversation in the context of the trial, and then immediately become antagonistic, and the improbability that Cst. M would not have recognized the Complainant as the prosecutor in the trial against the Member’s nephew, given his experience as a veteran police officer who had attended court many times and his role in attending as support. He observed that the suggestion that the Complainant’s angry admonishment, which clearly happened, followed a friendly exchange, was illogical.

[152] The Discipline Authority then instructs himself that “arriving at conclusive findings on these allegations requires the resolution of the two different versions.” He finds the evidence “sufficiently convincing, clear, and cogent, on the balance of probabilities to support the version of events described by the complainant.” He goes on to specifically find that “the conversation between the Complainant and Cst. M only started when she turned to admonish him for staring.”

[153] In doing so, he relied on findings that:

- a. the [Member’s] family members were upset by the cross-examination of the accused;
- b. the members “spot” the Complainant and her colleague walking down the corridor
- c. Cst. M “deliberately turned away from the group” into the Complainant’s path, and did not move, causing her to change her path;
- d. the Complainant’s head and body language were not consistent with her having a passing conversation with Cst. M while Cst. M’s body language including his hand near his mouth were consistent with him trying to intimidate her;
- e. the video shows the Complainant turning back to confront Cst. M after the incident;
- f. the statements of both prosecutors that they believed Cst. M was trying to intimidate the Complainant by blocking her path and following her movement as she passed by; and
- g. the fact that both members asserted that the Complainant had initiated the interaction and made no allowance for another version of the events.

[154] He noted as well that the members of the group appeared to have been coached to say that the Complainant had initiated the conversation “even when evidence to the contrary was presented,” and that in the case of the elderly uncle, he changed his version to align with that of the prosecutors after viewing the video.

[155] The findings of the Discipline Authority in relation to Cst. M were that he had committed discreditable conduct by deliberately attempting to intimidate the Complainant, and made “false assertions that [the Complainant] initiated a conversation with [Cst. M] as she approached, and that he continued the conversation with her as she walked past, [that] were put forward as deliberate attempts to mislead the *Police Act* investigators away from his intimidating behaviour.”

[156] In relation to the Member, the Discipline Authority found that he clearly made false statements and, “Despite having been shown by *Police Act* investigators that his version of events was illogical, and that he was mistaken, ... continued to provide false information in order to mislead the investigators about Cst. M's intimidation of [the Complainant].”<sup>90</sup>

## 5. Member's Submissions

[157] The Member's request for a public hearing under Section 137(1) filed on April 16, 2020, stated as follows<sup>91</sup>:

On November 06, 2019, both members attended a Discipline Proceeding. [The Member] chose to give evidence and be subject to cross-examination by Mr. Woodall and the D.A. In his evidence, [the Member] denied that he had committed deceit at any time, consistent with his previous evidence. He was not shaken on cross-examination in any regard.

[158] In the Section 137 letter the Member took issue with the Discipline Authority's treatment of the evidence of supporters of the Member, and of the courthouse sheriffs who were involved after the incident. He highlighted the following paragraph of the Discipline Authority's decision:

All four witnesses' accounts were mostly consistent with [the two officers] on another significant aspect of the incident. They all expressed surprise and confusion about what took place after [the Complainant and her colleague] passed the group. In particular, they

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<sup>90</sup>Decision, p. 20

<sup>91</sup> 14493 2020.04.16.LTR to OPCC s. 137

did not explain why, seconds after initiating a friendly, pleasant conversation ... [the complainant] would suddenly begin yelling at [Cst. M] about staring her down.

[159] The Member submitted, "The last sentence of the above paragraph is particularly troubling because it would require these witnesses to get inside [the Complainant's] mind and speak to her thoughts and emotions. How could the D.A. require these bystander witnesses to explain what [she] was thinking, and precisely what she was reacting to?"

[160] In relation to the evidence of the sheriffs, the Member said this in his letter:

One of the most critical issues in this case is whether there was any conversation between [the Complainant and Cst. M as she] approached and passed by [him] and the group. Crown counsel deny words were spoken, but Sheriffs Brar and McIsaac both stated that words were exchanged. Significantly, it was [the Complainant] who shared this critical and specific detail with the sheriffs, but [she] did not include these details in her interview with the investigator. No follow-up interviews with [her or her colleague] were ever conducted, despite the Progress Reports indicating that this would occur.

[161] The Member noted that the Discipline Authority characterized this evidence as "not significant" and a "third-hand recollection", and submitted that, to the contrary, it supported the members' evidence that words were exchanged at that point, and thereby refuted deceit.

[162] In his thorough written submissions on the Review, Counsel for the Member submits that the Discipline Authority failed to properly weigh and assess whether the evidence established deceit; and failed to consider and apply the correct test for deceit. He says the Discipline Authority fell into error by failing to recognize that the evidence regarding the incident was equivocal, in finding on a balance of probabilities that the version of the Complainant was "more likely than not" to have occurred, and in basing a finding of deceit on that conclusion.

[163] Member's Counsel submits that the test on the review requires the Commissioner to prove misconduct on balance of probabilities, based on evidence that is sufficiently "clear, convincing and cogent." He cites the well-known case of *F.H. v. McDougall*, 2008 S.C.C. 53, at para. 48.

[164] In relation to the application of the standard of correctness, the Member relies on the following passage from the 2019 Supreme Court of Canada decision of *Vavilov*<sup>92</sup>:

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

[165] Counsel for the Member submits that if there is insufficient evidence to decide the case, it must be resolved in favour of the member. He submits that the Discipline Authority accepted the evidence of the Complainant and her colleague without subjecting it to the same scrutiny as that of the members, and points out discrepancies in their evidence that he submits support a conclusion that the preponderance of evidence did not weigh in favour of a finding of deceit. In particular, he points to the Complainant's statement on the record immediately after the incident that Cst. M "blocked" her way, which he says is inconsistent with the video; and the discrepancies between the Complainant's statement to the investigator and the various statements the sheriffs attribute to her. He points to the Complainant's assertion that Cst. M was with the accused when she pointed him out to Deputy Sheriff Brar, which he says is "plainly wrong."

[166] The Member's Counsel also points to the rationale provided by the prosecutors for not initiating conversation with the group, that they were affiliated with the accused, as being inconsistent with them later having admonished Cst. M verbally rather than simply reporting him.

[167] Counsel takes issue with the Discipline Authority's treatment of the Member's actions after the incident as not supportive of his version, while accepting that the Complainant's were. He points to the Discipline Authority's use of the term "evidence to the contrary" in relation to the video, which he says was at best equivocal, and he takes issue with portions of the Discipline Authority's description of actions depicted on the video, such as the direction of the Complainant's head. The Member challenges the Discipline Authority's apparent rejection of the evidence of members of the group on the basis that they were sympathetic to the Member, and

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<sup>92</sup> Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 (CanLII), [2019] 4 SCR 653, para.54

takes issue with the Discipline Authority's comment that these witnesses "did not explain" why the Complainant would have challenged Cst. M, if his version of events were true. Based on these frailties in the evidence Counsel submits that the finding of misconduct was unreasonable.

[168] In relation to the test for deceit, it is submitted on behalf of the Member that the evidence does not establish firstly that the Member's statements were false, and secondly, that he made them with actual knowledge that they were false. Counsel cites the following passage from *Burgess and St. Thomas Police Service*<sup>93</sup>:

The above-noted statements which constitute the heart of the charge of deceit can reasonably said to be inaccurate or incomplete. It is a long mile, however, between the point at which one can find a statement inaccurate and the point at which one can find a statement was made with intent to mislead or deceive.

[169] In relation to the mental element, Counsel for the Member submits that the Discipline Authority's use of the "attitude of assuredness" in support of a finding of knowledge was improper; in fact it supported a conclusion that the Member had a genuine belief in the truth of his statements. He submits that the Member's actions after the incident are either consistent with that belief, or indicative of an "elaborate scheme" to concoct a version that would refute intimidation on Cst. M's part. He points to OPCC case law<sup>94</sup> in support of his assertion that there must be positive proof of knowledge and intention to deceive, which he says is absent in this case.

## 6. Police Complaint Commissioner's Submissions

[170] In his able submissions on behalf of the Police Complaint Commissioner, Commission Counsel articulates the correctness standard as requiring the adjudicator to consider the evidence afresh rather than scrutinizing the reasons of the Discipline Authority, relying on a prior review-on-the-record decision contained in the OPCC website<sup>95</sup>.

[171] I will observe that to the extent that the test articulated in the 2019 case of *Vavilov*<sup>96</sup> cited by the Member differs from that which was previously applicable under *Dunsmuir v. New*

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<sup>93</sup> (1989), 2 O.P.R. 822 (O.P.C.), at page 828

<sup>94</sup> *Thandi v. The Police Complaint Commissioner of British Columbia*, 2022 BCSC 77, at para. 38

<sup>95</sup> [14260-2019-05-17-McCluskie-ROR-Reasons.pdf-May-28\\_Redacted-FINAL.pdf \(opcc.bc.ca\)](#)

<sup>96</sup> *Supra*, footnote 51

*Brunswick*<sup>97</sup> and applied in prior OPCC cases, the test in *Vavilov* would of course govern. In a case under Section 141 where the issue is reasonableness or sufficiency of the evidence, it will be instructive for an adjudicator to consider how the Discipline Authority perceived and weighed the evidence, bearing in mind that both he or she and the investigator had the experience of seeing and hearing at least some of the witnesses in person. I will say more about the review process in Part 7 of these reasons.

[172] Commission Counsel supports the decision of the Discipline Authority. He points to inconsistencies in aspects of the Member's evidence and a willingness to speculate and mount "baseless attacks" against the Complainant that support a finding of deliberate untruthfulness. He points to the improbability that the Member mistook Cst. M's *silent* acts of intimidation toward the Complainant for a friendly conversation.<sup>98</sup>

[173] Counsel points to the Complainant's report that she "encountered [Cst. M] standing with [the Member] and other members of the accused's family in the corridor of the courthouse," that Cst. M "stood in front of her and impeded her path, stared at her menacingly, and as she walked around him, he followed her visually."<sup>99</sup>

[174] Commission Counsel's submissions also provide a thorough summary of the evidence, starting with the video, noting that after Cst. M and the Member turn to face the direction from which the prosecutors are approaching, the Member turns back, and Cst. M "takes a step back 90-degrees away from the circle into the pathway of the Complainant. He does not step aside as she approaches."

[175] The submission continues:

The Complainant faces straight ahead as she approaches [Cst. M], and does not turn her face in his direction. Nor does she slow down or speed up her pace. The Complainant and [her colleague] move to their left to avoid the Complainant colliding with [Cst. M]. [Cst. M] raises his left hand near the lower part of his face. As the Complainant passes the group, Cst. M twists his upper body and head to follow the position of the Complainant. Cst. M continues to appear to follow the Complainant's movements. He takes another 90-

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<sup>97</sup> 2008 SCC 9 (CanLII)

<sup>98</sup> PCC Submissions, p. 1

<sup>99</sup> PCC Submissions, p. 2



degree step back to his right, slightly tilts his body towards the Complainant, and appears to look towards her back. The Complainant continues to face straight ahead. Once the Complainant is [past] him, Cst. M turns to face the group.<sup>100</sup>

[176] After reviewing the evidence of the Complainant, Commission Counsel turns to that of her colleague, noting that he perceived that Cst. M “puffed out his chest,” “[s]tared directly at her,” and assumed “an aggressive stance, ... like a “gangster” or a “police officer.” He also noted that she had to “move slightly out of the way to get around” Cst. M.<sup>101</sup>

[177] Commission Counsel then turns to the Member's evidence, noting firstly that he was inconsistent about whether he had viewed the video before writing his duty statement.<sup>102</sup>

[178] The exchange with the interviewer in that respect in the September 12, 2018 interview was as follows<sup>103</sup>:

Interviewer: ...on April 5th, 2018 you provided a Duty statement regarding this event. Did you see the video prior to reading your duty statement?

Member: I believe I did.

Interviewer: Okay. Um, and have, you have a copy of your duty statement, you had a chance to review it?

Member: Yes I have.

Interviewer: Okay thank you. ... and t-today's opportunity to see the video, refresh your memory of the events.

Member: Yes

(Emphasis added)

[179] At the Discipline Proceeding the exchange was as follows<sup>104</sup>:

Q At the time that you wrote your Duty Statement, had you watched the video that we've seen today?

A No, I had not.

Q You haven't, hadn't watched any video?

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<sup>100</sup> PCC Submissions, pp. 6-7

<sup>101</sup> PCC Submissions, pp. 7-11

<sup>102</sup> PCC Submissions, p. 12

<sup>103</sup> CBOD,

<sup>104</sup> Interview of [Member], September 12, 2018, lines 285-289, FIR, p. 597

A No, I had not...

[180] I do not interpret these statements as an inconsistency about whether the Member had viewed the video before writing his duty statement because it is not clear from the September interview what the interviewer was asking about the video, i.e. whether he was asking if the Member had viewed it prior to “reading” his duty statement or prior to writing it. It only appears clear that the Member had had an opportunity to view it on the date of the September 12, 2018 interview, before the interview.

[181] Counsel goes on to point out that the Member could not explain why the friendly exchange would have happened if Cst. M and the Complainant did not know each other, and expressed that he was “puzzled and confused,” by her subsequent conduct.<sup>105</sup> Counsel points to the Member’s unwavering consistency in maintaining his version of the events, that the Complainant initiated the conversation, when offered opportunities to revisit that based on the evidence of other witnesses and the video, as “doubling down”. Counsel submits that the Member’s willingness to speculate about why he and Cst. M appear to turn their heads in the direction of the approaching prosecutors before the interaction, as being perhaps because someone had commented that they were approaching, is inconsistent with Cst. M’s evidence that he did not know the Complainant was the prosecutor in the trial they were watching.

[182] Commission Counsel takes issue with the Member’s suggestion in the third interview, on March 14, 2019, that the Complainant was “profiling” Cst. M. Counsel says this was raised late in the process, and is inconsistent with the Member’s asserted belief that Cst. M and the Complainant knew each other. Counsel notes that Cst. M asserted the profiling concern for the first time in his April 2019 interview and takes the position that the profiling comments were raised to explain an otherwise inexplicable change of attitude by the Complainant after the initial exchange.

[183] Counsel for the Commissioner points to an inconsistency in the Member’s description of what he was doing when he was pointed out by the Complainant on the day after the incident. In

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<sup>105</sup> PCC Submissions, pp. 12-13

his duty statement he states that he was talking with a sheriff, and in his first interview he said he was standing by himself looking at his phone, checking emails.<sup>106</sup>

[184] Counsel points to the softening of the Member's position regarding the Complainant's remarks during the third interview, accompanied by his failure to accept invitations to correct his statements, as detracting from his credibility.

[185] Counsel relies on the well-known BC Court of Appeal case of *Faryna v. Chorny* (1951)<sup>107</sup> in support of the importance of context and consistency with the preponderance of possibilities in assessing credibility. He submits that the nature of the trial, the fact that the Complainant and Cst. M did not know each other, and the fact that Cst. M was standing in a group of supporters of the accused all negate the possibility that the Complainant would have initiated a conversation with Cst. M. He says it is unrealistic that the Complainant would have said, "hi," to Cst. M and equally unrealistic that she would admonish him right after that. He submits that her willingness to address the group after the fact is not inconsistent with her reasons for not initiating a conversation. He submits that the video supports the evidence of the Complainant and is inconsistent with the Member's evidence. It clearly shows Cst. M impeding the Complainant's path and the Complainant keeping her head straight ahead as she tries to pass by him.

[186] Commission Counsel takes issue with the suggestion that the term "blocking" was inapt, and says the Complainant's statements as reported by the sheriffs do not detract from her credibility. He says the passage challenged by the Member about "third hand recollection" shows that the Discipline Authority addressed his mind to those statements. He points out that the evidence does not establish that Cst. M was not standing with the accused when the Complainant pointed him out. Finally, he submits that the Member's evidence shifted over time regarding whether the Complainant had lied to the court, and whether someone in the group had said the prosecutors were coming; and this demonstrated a willingness to speculate about the

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<sup>106</sup> PCC Submissions, p. 16

<sup>107</sup> [1952] 2 D.L.R. 354, <https://canlii.ca/t/gc4lv>

Complainant's stress level and prior experiences as an explanation for her reaction to the interaction.

[187] Commission Counsel says the Member cannot have been honestly mistaken because there is no plausible explanation for how he could have mistaken *silence* on the part of the Complainant for a friendly exchange.

## 7. Analysis

### a. Applicable Standards

[188] Counsel agree that the question raised by Section 141(10)(a), whether misconduct has been proven, imports proof on a balance of probabilities, and that my task is to assess the evidence on that basis. It is well established that this standard requires sufficient "convincing, clear and cogent evidence," and the civil standard does not vary with the type of case.<sup>108</sup>

[189] In addition, as I have noted, Section 141(9) specifies a review standard of correctness, which, pursuant to *Vavilov*,<sup>109</sup> includes consideration of the disciplinary decision. Those two tests may appear somewhat at odds, and may raise a question of the degree of deference that is owed to a discipline authority if his decision is not plainly in error, if an adjudicator takes a different view of the evidence.

[190] I have already noted that the Discipline Authority and the investigator in this matter each had the opportunity to observe some of the witnesses at interviews and the discipline proceeding. Where a case, such as this one, turns largely on credibility, arguably deference should be accorded to the prior decision-makers, and credibility findings should not be lightly overturned.

[191] While not the same as an appeal standard, given the legislative context, my view is that to reverse credibility findings made at first instance by two, or perhaps three, experienced police officers, I should consider firstly whether the finding of the Discipline Authority was incorrect, and if I take a different view, explain how I believe he fell into error. This accords with the

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<sup>108</sup> F.H. v. McDougall, cited at footnote 1, <https://canlii.ca/t/20xm8>

<sup>109</sup> Op cit, footnote 70, <https://canlii.ca/t/j46kb>

passage from *Vavilov* cited by Member's Counsel<sup>110</sup>, and notably, is the approach taken by the BC Court of Appeal in applying the correctness standard to the judicial review<sup>111</sup>.

[192] I note that the use of a blended standard on a review of a discipline decision was discussed in the context of lawyer discipline in a line of cases of which *Harding v. L.S.B.C.*<sup>112</sup> is an example. Cases in the sphere of professional discipline also discuss the error of a decision-maker "choosing between two versions" in a case that turns on credibility.<sup>113</sup> Whether those cases and sentiments are applicable in the field of B.C. police discipline has yet to be decided. *F.H. v. McDougall* made it very clear that there is only one standard of proof for civil matters, a balance of probabilities, and there is no requirement that a decision-maker instruct himself along the lines of *W.(D.)*<sup>114</sup>, which applies only to criminal cases. Nonetheless, this line of professional discipline cases highlights the possibility that a discipline authority who believes the only alternative is to accept one or the other of two versions may fall into error.

[193] As noted, Counsel for the Member relies on Ontario police discipline authority, *Burgess and St. Thomas Police Service*,<sup>115</sup> to the effect that deceit is not established simply by inaccuracy; there must be accompanying knowledge of the inaccuracy. In this respect, counsel do not differ, and knowledge is plainly required by the wording of the applicable section. While the wording of the B.C. *Police Act* differs from the Ontario statute considered in *Burgess*, I think it fair to accept the statement in that case cited by Member's Counsel that, "It is a long mile ... between the point at which one can find a statement inaccurate and the point at which one can find a statement was made with intent to mislead or deceive." Arguably that passage simply provides a reminder that for a finding of deceit under Section 77(3)(f) there must not only be proof that the statement is false, but that it was false "to the member's knowledge," as has been pointed out and acknowledged by both counsel.

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<sup>110</sup> *Supra*

<sup>111</sup> 2024 BCCA 17, para. 69, <https://canlii.ca/t/k2b47>

<sup>112</sup> *Harding v. Law Society of British Columbia*, 2017 BCCA 171 (CanLII), <https://canlii.ca/t/h3hwf>

<sup>113</sup> *Hamilton v. L.S.B.C.*, 2006 BCCA 367, <https://canlii.ca/t/1p1rj>, cited with approval in *Chartered Professional Accountants of Alberta (Complaints Inquiry Committee) v Mathison*, 2024 ABCA 33, <https://canlii.ca/t/k2ggh>

<sup>114</sup> *R. v. W. (D.)*, 1991 CanLII 93 (SCC)

<sup>115</sup> *Burgess and St. Thomas Police Service* (1989), 2 O.P.R. 822 (O.P.C.) at page 828, cited above at para.187

[194] This is a case that rests entirely on findings of credibility, squarely engaging the longstanding concepts established in the case of *Faryna v. Chorny*<sup>116</sup>, as counsel have aptly pointed out. The point to be gleaned from that case is that a witness's evidence is to be tested against the evidence of other witnesses, and also against the preponderance of probabilities that arise in relation to the case being tried. This is of course the civil standard, and may be contrasted with the standard of proof beyond a reasonable doubt which prevails in criminal matters, which requires a higher level of proof than probability. It is clearly a standard to which the Discipline Authority was alive.

[195] The salient passage from *Faryna v. Chorny*<sup>117</sup> is as follows:

...In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[196] As noted, the question as it pertains to a finding of deceit in a *Police Act* misconduct case is wrapped up in the issue of an officer's mindset in relation to the false statement he is alleged to have made. Here, the false statement upon which the findings of misconduct rest is the

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<sup>116</sup> *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), <https://canlii.ca/t/gc4lv>

<sup>117</sup> *Faryna v. Chorny*, supra, at p. 357

Member's assertion that the Complainant said something to Cst. M as she passed by him in the corridor, before she turned back to accuse him of staring her down.

[197] As noted in *Hamilton*<sup>118</sup>, however, and in my view, the question is not simply which version of the interaction is more probable, a question that clearly pits the reputations of two respected members of the criminal justice system against each other, and poses a difficult task for a decision-maker. The question to my mind is whether the evidence leaves room for a finding that one or both of them could have been mistaken. And, because it is the Member who is the subject of these misconduct allegations, and because as noted by the Court of Appeal in the judicial review decision in this matter, they are allegations of serious misconduct<sup>119</sup>, I believe the salient question is whether the evidence supports a conclusion that it appeared to the Member that the Complainant addressed Cst. M in a friendly or cordial manner before the ensuing, undisputed, events.

[198] My view is that while I agree it is an entirely fact-driven issue and that the foregoing thorough review of the evidence therefore had to be performed, the ultimate question is not one mired in an assessment of probabilities as much as it is in whether the onus of proof has been met, bearing in mind that it is for the Commissioner to establish that the Member made a deliberately false statement. If the evidence does not provide definitive proof that the statement is false, that is the end of the matter. If the evidence suggests that the statement is probably false, but the Member reasonably believed it to be true, it is not misconduct.

#### **b. Application of the Standard**

[199] The first question is therefore whether there is clear, convincing and cogent evidence establishing that the Member's statement, that he heard the Complainant make a remark that he took as friendly to Cst. M as she passed by him, is false. The second part of the analysis is whether, if it is false, the evidence establishes that he could not reasonably have believed it occurred. In considering the veracity of the statement, I find that the analysis will inevitably

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<sup>118</sup> *Hamilton v. L.S.B.C.*, supra, footnote 87

<sup>119</sup> *British Columbia (Police Complaint Commissioner) v. Sandhu*, BCCA, supra, footnote 2, at para.93

overlap, or evolve, into an assessment of what the Member may have perceived, and therefore, reasonably believed. I therefore will not consider these two issues entirely separately.

[200] In considering the evidence pertaining to the first part of the interaction, I observe the following. A close inspection of the video supports a conclusion that Cst. M's first pivot was consistent with similar movements he made before the interaction, part of his "fidgety" nature, as observed by one of the witnesses. It is not inconsistent with his explanation of turning toward the Member to continue a conversation, albeit following closely after them both glancing in the direction of the prosecutors. As I have noted, it appears more casual than confrontational. Viewed without interruption, it is more languid than vigilant, and there is nothing about the action itself that supports a characterization of "menacing" or "hostile."

[201] Cst. M had not been present for very long in the courtroom, and it does not seem improbable, to me, that he failed to recognize the Complainant, as he pivoted toward her and her colleague, when he did, with his attention on the group. There is no audio to establish that someone announced their approach and the Member's evidence does not establish that. Certainly, Cst. M lands in the path of the prosecutors, and he does so after apparently looking to see that they were coming, but there is an absence of vigilance or attentiveness that one might expect if the intention was to "menace." In my view, the move into the path of the prosecutors, the "first pivot" is not clearly intentional enough on its own to refute Cst. M's denial of intent to intimidate.

[202] The casual nature of Cst. M and the Member's stance and movements is indicative more of divided attention than of malevolent laser focus. Certainly, Cst. M remains in the path for a time as the prosecutors approach, but they quickly, and just as casually, change their path to veer very slightly to his right. Again, as I have noted, the Complainant still passed within about four inches of Cst. M's left shoulder, which is not indicative of alarm or even concern, at that point.

[203] I also note the conclusion on the part of the investigator that Cst. M said he heard the Complainant greet him at an earlier point in the interaction, as early as when he first pivoted. The investigator understood that Cst. M had said he turned in response to that, but my interpretation is that he was referring to the second turn. This interpretation on the investigator's part formed a



significant underpinning to his recommendation to the Discipline Authority that Cst. M's version, and indeed, that of the Member, could not be accepted.

[204] It must also be borne in mind that the video clearly shows, and the evidence establishes, that the Member did not see the first pivot, as he was still looking toward the prosecutors. His understanding of the interaction must be interpreted without the benefit of seeing Cst. M move into the path of the prosecutors, and appear to face them as they approached. The Member's evidence is that he heard the Complainant behind his right shoulder, greeting Cst. M, saying hi, or how are you, or perhaps, what are you doing?

[205] The evidence clearly establishes that the Complainant and her colleague were conversing with each other as they approached the group. Cst. M.'s first pivot placed him squarely in the Complainant's line of sight. It seems probable to me that they did make eye contact at some point during those 5 or 6 paces, while the Complainant continued talking to her colleague and they edged around the group. She herself describes them as "face to face," while denying there was any eye contact.

[206] Whether "under stress" or not, the Complainant was no doubt very focused on the conversation and either what had transpired, or what was about to transpire, in the courtroom. The video shows that her attention is on her colleague and, as I have noted, their movement past the group seems more like calm redirection than alarm, and their proximity suggests a lack of recognition of Cst. M as a "menace" at that point.

[207] I can imagine a scenario where the Complainant met Cst. M's eyes while engaged in an intent conversation with her colleague, perhaps absent-mindedly, somewhere in that walk toward the group, as she looked straight ahead in his direction. I can also envision a remark made by the Complainant within that conversation that sounded like a friendly inquiry, or perhaps a pleasantry uttered inadvertently while passing unexpectedly closely to a stranger in the corridor.

[208] To my observation, the brief fixing of Cst. M's gaze upon the Complainant as she passed, as depicted on the video, is not captured by the term "staring her down." As I have noted, the movements of both Cst. M and the Member, and indeed, the prosecutors, appear to be more casual than confrontational, as the prosecutors pass the group, and there is nothing in the video to

support the assertion that Cst. M stared “menacingly” or hostilely at the Complainant at any point.

[209] I note that when the Complainant turned back the first time to verbally confront Cst. M he had not continued looking at her, having returned to face the group. Her admonition to him at that point, to “stop staring at her” would have appeared incongruous to the group, whether or not he had looked at her as she passed. After that initial confrontation he continued to look in her direction, until the second time she turned back, and accused him of staring her down, as did her colleague, who also told him to turn around. Considered in that context, the surprise of the members of the group does not seem entirely unexplained.

[210] I recognize that this is at odds with what the Complainant reported about the incident, and it is important to look more closely at the evidence surrounding the interaction to determine whether it refutes the possibility of a glance of that type, mistaken by Cst. M for friendly attention, and a remark, mistaken for a friendly inquiry.

[211] I note firstly that in her statement on the record, made without the benefit of seeing the video as she did the day after the incident, the Complainant described Cst. M having “blocked” the way of her and her colleague and stared in an aggressive manner. She said they confronted him, and he was problematic, rude and disrespectful. She did not provide further details of the interaction. In her complaint form filed about two weeks later, she stated, “I confronted the man by asking *what he thought he was looking at*. We then exchanged words which I do not recall other than I said his behaviour in the courthouse was unacceptable.” [Emphasis added.]

[212] In her interview, the Complainant stated, “He stared at me ... he had a very hostile ... demeanor.... We didn't exchange any words at all, he didn't say anything to me. I had to physically move around him, as I did so he tracked me ... visually. ... I was so disturbed by that interaction that I turned around and I said to him, “What do you think you're looking at?” She further stated that the incident was very unusual, and that she had gone to retrieve the video, “to evaluate what happened.” She acknowledged that the incident was very brief, and stated “no words were exchanged, but [after viewing the video] it was very clear that, ..., it was a hostile encounter, I think that's the best word I could use to describe it.” She added that she was told by the security advisor for the prosecution service that she would “have to” lodge a complaint.

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Finally, the Complainant accepted the interviewer's suggestion that the actions of Cst. M were related to the fact that she had just cross-examined the accused.

[213] The Complainant's colleague was not definitive about whether words were exchanged while Cst. M was standing in their path, stating "in my recall there were no words" and later, when asked if anyone said, "Hi, how are you?" he said, "Not that I recall."

[214] The assertion by the Complainant and her colleague that no words were spoken as Cst. M stood looking in their direction must be considered in light of the evidence that they were clearly conversing as they walked down the hallway and appeared to continue to do so, as they passed the group. This was in fact pointed out to Cst. M and the Member in their interviews.

[215] As well, the evidence of the Complainant's statement as related by Deputy Sheriff Lister, albeit third hand, to the effect that the Complainant had asked Cst. M to move, aligns better with the Member's version of events that something was said during the first part of the interaction, than with Commission Counsel's suggestion that there was "silence" at this point.

[216] In assessing the credibility of the Complainant on this issue, it is clear, and she candidly admits, that she does not remember the full exchange verbatim, nor did she make contemporaneous notes. The suggestion I took from her wanting to review the video "to evaluate what happened" and from the totality of the evidence regarding the first part of the interaction, was that her ability to perceive, or perhaps her ability to recall, that portion of the incident may have challenged her.

[217] On all accounts, what transpired after the prosecutors passed the group was heated and confrontational. I am inclined to compare it to a traffic incident. Something happened to which people's attention may not have been fully directed, and which resulted in a confrontation, causing them to then cast back to remember the sequence of events. Those reconstructions, if that is not too strong a term, are often coloured by righteous indignance and alarm, and, often, they differ markedly.

[218] It also does not seem impossible that the Complainant did say something to Cst. M, given that she inadvertently came very close to him. While there is no audio to support a conclusion

that she said, "Hi, how are you?" -- and she denies that -- the video also does not refute that something polite or a pleasantry may have come from her at that point. Indeed, if they did not have the respective roles they each had that day, it is not inconceivable that strangers would say something like the described exchange to each other when unexpectedly coming into proximity in a crowded corridor. While the Complainant stated that Cst. M was in the group of supporters of the accused, as I have noted, she was not asked, and did not state, when she first became aware of that. It may be that she reacted out of courtesy and was later alarmed when she realized that Cst. M was a member of an antagonistic group, such that the initial interaction became obscured by the drama of the subsequent events.

[219] I note that the Complainant was only interviewed once, and apart from the complaint form she filled out, was not asked to provide a written statement. She made her statement on the record right after the incident, of course, but it did not substitute for notes of the words spoken or the sequence of events. To be clear, I believe that there is no possibility that the Complainant was being untruthful when she asserted that Cst. M stood in her path and stared at her; in essence, that is clearly what he did. That is certainly how she perceived the interaction. Whether the word, "blocked" aligns with what Cst. M did, it clearly aligns with what the Complainant perceived had occurred. A conclusion of intimidation, in the context as the Complainant understood it, was not unreasonable, and clearly informed her actions after the interaction.

[220] The Complainant was not, however, provided with an opportunity to comment on Cst. M or the Member's version of the interaction, beyond about three questions in the single interview, as to whether words were exchanged; whether she said, "Hi, how are you?" or "How's it going?"; and whether Cst. M responded with the beer comment. The Complainant was definitive in her denial that this exchange occurred; however, I am not convinced she was given enough of an opportunity to consider whether something she said while she was conversing with her colleague may have *appeared* in the circumstances to have been a remark made by her to Cst. M, or indeed, whether she may have been so focussed on her conversation that, surprised by the appearance of Cst. M in her path, she might have said something like, "Hi," "How are you," or perhaps, "What are you doing?"

[221] The Member, on the other hand, was subjected to repeated questions about the veracity of the other witnesses' versions. He continually maintained his version of the interaction, even offering to take a polygraph. One might argue that he took his denials to a point where other members may have accepted an earlier opportunity to graciously extricate themselves from a finding of deceit, or at least gain some favour or negotiate a lesser penalty.

[222] The point that was not made to the Complainant, so I have no way of assessing it, is whether the exchange described by Cst. M and the Member *could have* occurred, perhaps almost absent-mindedly as she focused on the conversation with the colleague, before she became aware of the context and alarmed by Cst. M's apparent gaze at her as she walked closely by him. One available alternative is that the Complainant was startled by how close she came, that her approach was also not perceived by Cst. M until she was upon him; she appeared to speak in his direction; and perhaps, responded cordially at first to the inadvertent proximity.

[223] Then, as the Complainant became aware of his gaze and the group he was standing with, or was perhaps alerted to it by her colleague, she naturally attributed a menacing intent to Cst. M based on the context of the day, while Cst. M may have believed he was responding politely to a stranger whose path he had inadvertently crossed and whom he believed to have spoken a pleasantry.

[224] My view is that in assessing the Member's credibility, too much emphasis may have been placed by the Discipline Authority on the context of the interaction, which led him to presume that Cst. M must have intended his actions to be intimidating, and then, to ascribe knowledge of that intent to the Member. That finding is dependent on Cst. M's recognition of the Complainant as the prosecutor, and he was unshaken, and to my mind credible, in his denial of that.

[225] The prior actions of the deceased's supporters, the role of Cst. M coming to support the accused's side, the respective roles of the four people involved in the interaction (and perhaps their relative stature in the legal community), the timing of the incident in relation to cross-examination of the accused, and the actions depicted in the video, all conveniently lent themselves to the conclusion drawn in the disciplinary decision of intimidation by Cst. M, and solidarity from the Member.

[226] However, the first words attributed to the Complainant by her colleague, "what do you think you are doing," are interestingly consistent with what Cst. M and the Member say they heard; "What are you doing," as her second, or perhaps first, remark. This is noted by the co-interviewer during the Member's second interview. That remark may well have been made, in one fashion or another, as the Complainant became aware of Cst. M following her with his eyes, turning toward her as she passed. It could have occurred earlier, as she approached, and could have been interpreted by Cst. M as a cordial question, like "Hi, how are you?" rather than a challenge to his proximity.

[227] As pointed out by Member's Counsel in his submissions, what was not done with the Complainant in her interview, perhaps out of deference, was to subject her to the kind of cross-examination to which the Member was subjected in successive interviews. It cannot be said with certainty what response the Complainant may have provided if questioned to the effect that "two police officers, one a Sergeant" had "staked their careers" on the fact that the Complainant had initiated, or appeared to initiate, a cordial exchange as she came upon them, and whether she was certain enough that did not happen to base an accusation of deceit upon it. It must be noted that the deceit allegations were not initiated by or even put to the Complainant.

[228] Having viewed the video many, many times; listened to the Complainant's interview and those of both members (and others); considered the brief timing of the incident, the length of time before the Complainant was asked to make a statement, the manner in which the investigation unfolded, and the element of alarm that no doubt accompanied the experience -- and having considered the entirety of the evidence against the backdrop of my own experience --, I am not convinced that the Complainant's answer to that question would have been, "Yes, the Sergeant is certainly lying."

[229] The beer remark is worthy of comment. In one sense it is an admission against interest on the part of Cst. M, to offer that he made a flippant, somewhat impertinent comment, when considered in context. It may well itself have garnered a less than pleasant response, even had the interaction started the way he describes it, had it been heard by the Complainant.

[230] The Complainant and her colleague do not confirm that remark was made. However, it is confirmed by the Member and at least two other members of the group, and does not appear

inconsistent with the hand gesture made by Cst. M as the Complainant passed by. Perhaps the hand gesture obscured the remark from those who did not hear it. It seems very unlikely Cst. M and the Member would have volunteered this remark, which does not assist in a denial of inappropriate conduct on the part of Cst. M, if events did not unfold much as they have asserted.

[231] Cst. M's action and the admitted timing of the remark make it appear intemperate and incongruous on the part of a police officer who was at least aware that he was speaking with a lawyer in a courthouse. It was described as "joking" by those who say they heard it. There was no suggestion that going for a beer was in fact being discussed by the group at the time.

[232] It has the ring of a peer-to-peer comment, and it must be borne in mind that Cst. M knew he was a police officer of some stature, and likely felt comfortable conversing with a lawyer in a courthouse. Again, the Complainant denies having heard it, and whatever might be said about Cst. M's motivation in making that kind of remark to a female lawyer he encountered in a courthouse corridor, no intent in relation to it can be attributed to the Member. If it was made, and he heard it, as he states he did, it supports his initial assumption that the Complainant and Cst. M knew each other, and his subsequent surprise at the negative reaction.

[233] In terms of what happened after the incident, the evidence did not establish that the group discussed a "game plan" in relation to how they would respond to the Complainant's accusation. In fact, it tended to suggest that apart from wondering what just happened, immediately after the interaction, there was no further discussion, and in particular, no discussion after the Complainant's statement on the record, about concocting a cordial or joking exchange in an effort to support Cst. M. The many discrepancies between the various descriptions of the interaction among the group affiliated with the Member are less consistent with collusion than with honest issues with recollection, and do not detract from the gist of the group's collective assertion that they were not party or privy to a decision to mount a confrontation of the prosecutors, did not perceive that one occurred, and were surprised by the subsequent actions of the Complainant.

[234] It must be observed that, while the group standing with Cst. M were all relatives or friends of the Member's family, the indications from several of them were that they did not know

Cst. M at all, and some of them appeared from their statements to also not be very familiar with the Member.

[235] The evidence falls short of concoction or collaboration in relation to the beer statement or the friendly remarks attributed to the Complainant. The fact that some of the witnesses added comments about “eye contact” in subsequent interviews does not come close to definitive proof that they hatched a scheme to bolster their stories. Certainly, had any of the witnesses admitted to such a scheme, it would provide an underpinning for falsity on the part of Cst. M and the Member. The fact is, they consistently denied it and confirmed that the only conversation among the group about the interaction was the one that occurred immediately after it. The “eye contact” detail could as easily have come from that as from a subsequent nefarious agreement to collude.

[236] Counsel for the Commissioner points to changes in the Member's statements as he endured the three successive interviews; in particular, his suggestion, in the third interview, which corresponded with a similar suggestion by Cst. M, that the Complainant had “profiled” Cst. M because of his clothing. In fact, the Member queried whether the matter would have proceeded if Cst. M had been in uniform. This response to the continued accusation of untruth on the part of Cst. M and the Member is not surprising; at least, it is as consistent with a belief in innocence as it is with consciousness of guilt.

[237] The same may be said about his change of tune in relation to reporting the Complainant to the Law Society. Much like her firm belief that Cst. M had been intentionally obstructive and stared her down, the Member returned to the courtroom with a firm belief that he had seen an inexplicable overreaction, and that the accusation she made on the record was false. At least, again, his response at that time was not inconsistent with a belief in innocence, and his later softening was consistent with a deep need, which he repeatedly expressed, to find an explanation for the events beyond deliberate falsehood on the part of a respectable member of the legal community. To my mind, it is more consistent with a belief in the version he advanced than with a belief in the version advanced by the investigator.

[238] In order for deceit to be established, in my view there needs to be some kind of separate or independent evidence showing the statements made by Cst. M and the Member to be factually false. While it is very clear that the primary witnesses in this matter perceived the incident very



differently, there is nothing in the evidence that proves definitively that either version is false. As pointed out in the Member's submissions, a "draw" of that kind does not afford proof of deceit on the part of either witness, and must be resolved in favour of the Member.

[239] Of course, the Member is one step removed from the initial interaction, and the motives or actions of Cst. M are not relevant if the Member was unaware of them. It is the belief of the Member that is determinative. Even if the fact of the friendly interaction advanced by Cst. M and the Member is not established on the evidence, the question remains whether the Member's belief in it was unreasonable or ingenuine.

[240] The analysis of the Member's state of mind must commence with the fact that he did not see Cst. M's first turn toward the prosecutors. This much is clear from his second interview, in which he is shown the video after first denying that Cst. M blocked the path of the prosecutors. It is pointed out that he was not in a position to see Cst. M turn to face them, nor would he have been able to see the expression on his face at that point, as he was facing backward to his right while Cst. M made his pivot toward them. He turned in time to see Cst. M make his second pivot as he appeared to follow the two as they passed, and to hold his hand to his mouth. The best assessment of the evidence I can make is that second turn may have coincided with the point at which the Complainant said something to the effect of, "What are you doing?"

[241] Unless that question, or something like it, was voiced in a plainly confrontational manner, there is no basis, up to that point, on which the Member could have concluded that Cst. M had menaced the Complainant in any way. What he would have seen after that point was Cst. M turning (the turn he referred to in his duty statement) to respond to the Complainant's remark. Was it unreasonable for him to conclude that this was a friendly exchange?

[242] One needs at this point to consider the context from the Member's point of view, not that of the Complainant or the investigators. It is his frame of mind that governs the finding of intent. What he knew was that Cst. M was a fellow police officer. In contrast to the Complainant's willingness to assume that Cst. M's actions were related to the cross-examination that had just occurred, the Member would most likely have been unwilling to assume that. As both he and Cst. M pointed out in their interviews, that is not something they would have contemplated doing, in jeopardy of their careers.

[243] The other aspect of the context to consider is that there was some belief within the group that the cross-examination had not gone well, from the perspective of the prosecution. In fact, the accused was ultimately acquitted based on self defence. While animosity was expressed toward the accused in the courtroom by the family of the deceased, the evidence does not support a conclusion that the supporters of the accused had been similarly disruptive. At its strongest, it supports a belief on the part of the Complainant, at the time of the incident, that there might be some retaliation because of points she had made in cross-examination. That belief cannot in any way be ascribed to the Member. No such point was made in any interview.

[244] The Member's mindset at the time of the interaction between Cst. M and the Complainant therefore cannot be painted as retributive, nor is it suggested anywhere in the evidence that was what he understood to be Cst. M's mindset. They were observers in a trial that must have been highly emotional for the Member, but at the same time, they were police officers; the Member, a Sergeant. As he pointed out in one of his interviews, he had been involved in cases, with prosecutors, where threats or intimidation had occurred, and he was fully aware that such behaviour was criminal. This led him to question why the Complainant did not pursue criminal charges, in light of her perception, but in time he came to believe she may have simply been mistaken. Cst. M's description of a "humongous" misunderstanding seems apt.

[245] Again, whatever might be said about Cst. M's behaviour, it is in my view not reasonable to assume that the Member would anticipate that he would "stare down" the prosecutor on her way back to the courtroom. Hearing whatever he heard, whether pleasantries or challenge, as she passed by Cst. M, cannot fix him with knowledge of intimidation on the part of Cst. M, even if that occurred. The fact that he went on to assume it had not happened, and maintained that position throughout a gruelling investigation, is to his credit, in my view, and removes any taint of misconduct on his part in doing so.

[246] The Member's belief in a friendly exchange is not refuted by the evidence, in my view. Even if it did not occur, his belief that Cst. M had not intimidated the Complainant was reasonable based on what he was able to perceive and the context as he understood it. The evidence therefore falls short of establishing that the Member made deliberately untrue statements on any of the occasions giving rise to the allegations.

[247] I draw these conclusions with the utmost respect to the Complainant, as well as to the investigation team and Discipline Authority. What appears to have happened in this matter is that the Discipline Authority felt constrained to choose between two conflicting versions of the events, rather than to consider whether the parties may each, or either, have been genuinely mistaken, or whether the Member may have had a perception of the interaction that negated knowledge that his statements were false.

## **8. Conclusion**

[248] I find that the allegations have not been proven and they are dismissed. It is therefore not necessary to consider the matter of disciplinary or corrective measures.

Dated this 21<sup>st</sup> day of June, 2024.



Carol Baird Ellan  
Retired Provincial Court Judge  
Adjudicator