

IN THE MATTER OF A COMPLAINT SUBMITTED TO WRESTLING CANADA LUTTE  
UNDER THE TERMS OF ITS DISCIPLINE POLICY

BETWEEN:

DON RYAN (the “Complainant”)

And

MARTY CALDER (the “Respondent”)

Collectively (the “Parties”)

REASONED DECISION

**Discipline Panel:**

Carlos Sayao

**Hearing Dates:**

November 18-20, 23, 2020

**Written Closing Submissions Delivered:**

February 26, 2021 (Complainant), March 26, 2021 (Respondent), May 10, 2021  
(Complainant’s Reply)

**Decision Date:**

June 4, 2021

*Counsel: Jordan Goldblatt for the Complainant  
Clive Llewellyn for the Respondent*

## OVERVIEW

1. This is a disciplinary proceeding against Marty Calder, Head Coach of the Brock University wrestling program and one of Canada's most celebrated wrestling coaches. The proceeding is brought pursuant to Wrestling Canada Lutte's ("WCL") Discipline Policy (the "**2018 Discipline Policy**" or the "**Policy**").
2. On or about February 19, 2019, Don Ryan, in his capacity as President of WCL, filed a complaint against Mr. Calder (the "**Complaint**"). Since that time, two different Panels have presided over the matter, which experienced various delays due to a series of preliminary motions as well as the COVID-19 pandemic. The Panel has issued seven reasoned Preliminary Decisions and two Procedural Directions. These preliminary matters are summarized in the Procedural Background section of this Reasoned Decision.
3. By the time the four-day evidentiary hearing concluded on November 23, 2020, the remaining allegations to be determined by the Panel had been narrowed to the Respondent's involvement in the alleged hazing and/or assault of an athlete, Jevon Balfour, in December 2015 on the occasion of the Olympic Trials in Edmonton, Alberta (the "**2015 Edmonton Incident**" or the "**Incident**").
4. For the reasons set out below, the Panel dismisses the Complaint in its entirety. Given the evidence adduced at the hearing, the Complainant has not met its burden to establish that the Respondent's conduct during the 2015 Edmonton Incident is sanctionable pursuant to the terms of the 2018 Discipline Policy.

## PROCEDURAL BACKGROUND

5. On or about February 19, 2019, Don Ryan, in his capacity as President of WCL, submitted the Complaint pursuant to WCL's 2018 Discipline Policy. The Complaint concerns Mr. Calder's alleged:
  - i. involvement in the hazing and/or assault of Mr. Balfour in December 2015 on the occasion of the 2015 Olympic Trials (defined above as the "**2015 Edmonton Incident**" or the "**Incident**"); and
  - ii. attempts to undermine an investigation into WCL's coaching culture that was commissioned in July 2018 and led by David Bennett (the "**2018 Investigation**").

6. The Complaint was heard by videoconference on November 18-20 and 23, 2020. In period between March 2019 and early-November 2020, several preliminary and/or procedural matters were raised by the Parties and dealt with by the Panel. Over that 19-month period, the Panel issued five reasoned Preliminary Decisions in this matter, which can be summarized as follows:
- a. In Preliminary Decision 1 dated May 16, 2019, the then-Panel<sup>1</sup> ordered the production by the Complainant of certain documents (which were subsequently produced on May 28, 2019);
  - b. In Preliminary Decision 2 dated October 14, 2019, the then-Panel ordered:
    - i. that the time period for receipt of the Complaint be extended pursuant to Section 12 of the 2018 Discipline Policy; and
    - ii. that the time period for the Complainant to file evidence in support of the Complaint be extended.
  - c. In Preliminary Decision 3 dated March 4, 2020, the Panel set aside a decision by WCL that Mr. Calder not be accredited for any international participation until the completion of the Complaint process, among other relief.
  - d. In Preliminary Decision 4 dated March 16, 2020, the Panel:
    - i. denied the Respondent's request to dismiss the Complaint based on an alleged lack of evidence provided by the Complainant to support the allegations pleaded;
    - ii. denied the Respondent's request that the Complainant deliver to the Respondent more detailed will-say statements in advance of the hearing; and
    - iii. issued a form of Invitation to Witnesses that the Parties would be permitted to send to their respective witnesses in connection with participation in the hearing.

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<sup>1</sup> David Master was originally appointed as Discipline Panel in this matter. In January 2020, I was appointed to replace Mr. Master as Panel.

- e. In Preliminary Decision 5 dated November 5, 2020,<sup>2</sup> the Panel (among other things):
- i. Denied the Respondent's request to dismiss the Complaint as it relates to the 2015 Edmonton Incident by way of a "non-suit" motion (the Respondent had asserted that the Complainant did not disclose evidence sufficient to support the particulars of the alleged 2015 Edmonton Incident);
  - ii. Denied the Respondent's request that the Complainant be ordered to provide further and more detailed disclosure from the sole witness the Complainant intended to put forward in respect of the 2015 Edmonton Incident, namely Cara Nania; and
  - iii. Denied the Respondent's request to dismiss the Complaint as it relates to the 2018 Investigation by way of a non-suit motion (the Respondent had asserted that the Complainant provided no evidence in respect of the 2018 Investigation allegations).
7. During the hearing the Respondent again brought separate non-suit motions to dismiss the allegations in respect of each of the 2015 Edmonton Incident and the 2018 Investigation. The Panel granted the Respondent's non-suit motion to dismiss the Complaint as it relates to the 2018 Investigation by oral decision delivered during the hearing, but reserved its decision on the Respondent's non-suit motion in respect of the 2015 Edmonton Incident.
8. On January 5, 2021, the Panel issued a Reasoned Decision denying the Respondent's non-suit motion in respect of the 2015 Edmonton Incident (and confirming the Panel's oral decision dismissing the Complaint as it relates to the 2018 Investigation).
9. On or around March 17, 2021, before the Respondent delivered his written closing submissions, the Complainant expressed an intention to bring a motion to stay these proceedings (the "**Stay Motion**"), indicating that a Statement of Claim had

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<sup>2</sup> In mid-March 2020, the in-person hearing of the Complaint was postponed due to the COVID-19 pandemic. In July 17, 2020, after receiving written submissions from the Parties, the Panel issued a Procedural Direction (with reasons) directing that the Complaint proceed by way of a hybrid hearing allowing for both in-person and videoconference testimony, with the evidentiary phase to be completed before November 30, 2020. In August 2020, the Panel approved the agreement of the Parties to hold the hearing in St. Catharines, Ontario; however, in mid-November 2020, the Panel determined, after hearing from the Parties, that the Complaint would proceed entirely by videoconference in light of COVID-19 measures then in effect in Ontario.

been filed by the Respondent in the Alberta courts. The Complainant subsequently formalized the Stay Motion by way of Notice of Motion delivered to the Panel.<sup>3</sup>

10. After receiving written submissions from the Parties in respect of the Stay Motion, the Panel dismissed the Stay Motion by way of a Reasoned Decision dated April 28, 2021.

## THE 2018 DISCIPLINE POLICY

11. Pursuant to sections 11 and 12 of the 2018 Discipline Policy, Complaints can be initiated by an “Individual”, which is defined in section 1(e) as follows:

*All categories of membership defined in the Wrestling Canada Lutte Bylaws, as well as all individuals employed by, or engaged in activities with, Wrestling Canada Lutte including, but not limited to, athletes, coaches, convenors, referees, officials, volunteers, managers, administrators, committee members, directors and officers of Wrestling Canada Lutte.*

12. The 2018 Discipline Policy applies to “discipline matters that may arise” during WCL “business, activities and events.” Specifically, section 4 states:

*This Policy will apply to discipline matters that may arise during the course of Wrestling Canada Lutte business, activities, and events including, but not limited to, matches, practices, tryouts, tournaments, training camps, travel associated with Wrestling Canada Lutte activities, and meetings.*

13. The nature of “conduct” or “incidents” that can give rise to disciplinary sanctioning under the Policy is defined as follows (sections 1(f) and 2):

### **DEFINITIONS**

1. *The following terms have these meanings in this Policy:*

*[...]*

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<sup>3</sup> The Respondent objected to the Stay Motion being heard by this Panel due to concerns that this would cause him prejudice. After receiving written submissions from the Parties on whether this Panel should hear the Stay Motion, the Panel issued a Procedural Direction (with reasons) dated April 1, 2021 directing that this Panel shall hear the Stay Motion.

*f) “Complaints” - Complaints are considered to be incidents of failing to achieve expected standards of conduct that have the potential to result in harm to others, WCL or to the sport of wrestling.*

## **PURPOSE**

*2. Wrestling Canada Lutte is committed to providing an environment in which all Individuals involved with Wrestling Canada Lutte are treated with respect. Conduct that violates the values and integrity of Wrestling Canada Lutte may be subject to discipline and sanctions pursuant to this Policy.*

14. Accordingly, in situations where the Policy applies, if an Individual engages in behaviour that “violates the values and integrity of Wrestling Canada Lutte” or “fail[s] to achieve expected standards of conduct,” and the Individual’s behaviour “has the potential to result in harm to others, WCL or to the sport of wrestling,” the Individual may be subject to a disciplinary sanction under the Policy.

## **NATURE OF THE ALLEGATIONS IN RESPECT OF THE 2015 EDMONTON INCIDENT**

15. The 2015 Edmonton Incident concerns alleged actions by Mr. Calder during the 2015 Olympic Trials in Edmonton in December 2015. Specifically, the Complaint alleges that Mr. Calder:
- a. directed other athletes to give Mr. Balfour the so-called “birthday beats” (which, as described in more detail below, is a practice whereby an individual receives one slap or “paddywhack” on the buttocks from various people, to mark the occasion of the individual’s birthday);
  - b. pulled down Mr. Balfour’s “pants and underwear so that his buttocks was exposed”; and
  - c. placed a bottle “between [Mr. Balfour’s] butt cheeks, in or against his anus”.
16. The Complaint alleges that, in engaging in this behaviour, Mr. Calder:
- a. organized, participated in, or condoned a hazing incident against Mr. Balfour; and
  - b. assaulted Mr. Balfour.

## THE EVIDENCE

17. The evidence revealed that the 2015 Edmonton Incident occurred in a hotel room during the evening of the second-last day of the Olympic Trials, which were held outside Edmonton in early-December 2015.
18. The Complainant called one witness to testify, Cara Nania.
19. Ms. Nania is a former wrestling athlete for the Dinos Wrestling Club in Calgary and former member of the Canadian national wrestling team. She was also a former coach of the University of Calgary women's varsity team.
20. Ms. Nania was present in the hotel room at the time of the Incident.
21. The Respondent adduced evidence from 18 witnesses. Of these 18 individuals, the following seven were present in the hotel room at the time of the Incident:
  - a. Mr. Calder: Mr. Calder has been Head Coach of Brock University's wrestling program for approximately 20 years. He is one of Canada's most celebrated wrestling coaches, having received numerous coaching awards, including Coach of the Year in the Canadian university sport system on 36 occasions. Prior to coaching, Mr. Calder was an elite wrestling athlete who won multiple medals at international competitions and represented Canada at two Olympic Games. Mr. Calder has been inducted into the WCL Hall of Fame, and both the St. Catharines and Brock University Sports Halls of Fame.
  - b. Mr. Balfour: Mr. Balfour was 21 years old at the time of the Incident. Mr. Balfour wrestled for five years at Brock University starting in 2012 and won the Canadian University Championships each year. He was also Brock University's male athlete of the year. Mr. Balfour has competed internationally for Canada at the Pan Am Games, Commonwealth Games, and World Championships. Mr. Balfour graduated from Brock University with a degree in Social Sciences. He is still wrestling competitively at the elite level.
  - c. Dave Collie: Mr. Collie is Co-Coach of the Brock University wrestling program with Mr. Calder. He has been a wrestling coach for 34 years at Brock University and the Beamsville High School, where he was a teacher for approximately 30 years. Prior to that, Mr. Collie was an accomplished wrestler at Brock University and represented Canada internationally. Mr. Collie coached and mentored Mr. Calder, both as a high school athlete and at Brock University.
  - d. Chris Prickett: Mr. Prickett has been Assistant Coach of the Brock University wrestling program for seven years. Before that, he was an accomplished

wrestler at Guelph University and the Guelph Wrestling Club, winning several national titles. He was a medalist at the 2010 Commonwealth Games and an alternate for the 2012 Olympic team.

- e. Tonya Verbeek: Ms. Verbeek has been Head Coach of WCL since 2016 and was WCL's Talent Identification Coach from 2013 to 2016. At the time of the hearing, she was completing her Advanced Coaching Diploma (i.e., Level 5) with Coach Canada. Before coaching Ms. Verbeek was a highly accomplished wrestler at Brock University and for the Brock Wrestling Club. Ms. Verbeek was Canada's first-ever Olympic medalist in women's wrestling and won medals at three Olympic Games (2004, 2008 and 2012). Ms. Verbeek has a Masters degree in education and has worked as a teacher at both the elementary and secondary school level.
  - f. Korey Jarvis: Mr. Jarvis is a recently retired wrestler who wrestled for the Guelph Wrestling Club for most of his career. Mr. Jarvis won medals at three Commonwealth Games and at three Pan Am Games. He also represented Canada at several world championships and at the Olympic Games.
  - g. Jessica Brouillette: Ms. Brouillette wrestled for five years at Brock University starting in 2013. She won a bronze medal at the World University Games in 2016 and was the female athlete of the year at Brock University in 2017-2018. Ms. Brouillette graduated from Brock University in 2018 with a degree in sociology. She works at a YWCA women's homeless shelter.
22. The Respondent also called as witnesses eleven individuals who were not present in the hotel room at the time of the 2015 Edmonton Incident. All of these witnesses are current or former athletes who wrestled at Brock University and had participated in the "birthday beats" on previous occasions. Many of these witnesses are or were highly accomplished athletes who represented Canada internationally, including at the Olympic Games.
23. The Panel considers the testimonies of the witnesses who were not present for the Incident to be of limited assistance, subject to two exceptions. First, their evidence corroborated the testimony from other witnesses as to the general manner in which the birthday beats were conducted at Brock University, which provides important context for the Incident. Second, certain parts of the evidence of those not present in the hotel room has relevance to the potential harms, if any, flowing from the Incident, depending on the degree of similarity between the Incident and the so-called "normal" birthday beats that occurred at Brock. The evidence that the Panel found useful in this regard is discussed later in this Reasoned Decision.

24. The evidence of the witnesses who were present for the Incident is summarized immediately below.

### ***Complainant's Evidence***

#### **Cara Nania**

25. The Complainant's only witness, Ms. Nania, testified that she attended the Olympic Trials held outside Edmonton in December 2015 as an observer but did not compete. At that time, she was "good friends" with Mr. Balfour.
26. Her evidence about what happened the night of the Incident can be summarized as follows:
- a. On Saturday December 4 or 5, 2015, she and Mr. Balfour went to a hotel room in the Clarion Hotel a few hours after Mr. Balfour competed at the Trials.
  - b. Mr. Balfour had gotten a text message to drop by the room quickly before going out to a pub across the street.
  - c. The Clarion Hotel was connected to the athletic complex where the Trials were being held, and most of the participating athletes were staying there, including Mr. Balfour.
  - d. At that point in the Olympic Trials, Mr. Balfour and most athletes were done wrestling.
  - e. Mr. Balfour had lost in the finals earlier that evening and he was "devastated."
  - f. She recalled about ten people being present in the hotel room when she and Mr. Balfour entered, but did not recall the identities of many of the attendees.
  - g. She specifically recalled the following people being in the hotel room: Mr. Calder, Mr. Prickett, Ms. Verbeek, and Mr. Jarvis. She did not recall Mr. Collie or Ms. Brouillette being present.
  - h. She observed people drinking alcohol and "hanging out" in the hotel room, which she said often occurs after tournaments.
  - i. Soon after she entered the hotel room, she observed Mr. Jarvis and Mr. Prickett pin Mr. Balfour face down on the bed.

- j. She observed Mr. Jarvis holding down Mr. Balfour's legs and Mr. Pricket holding down Mr. Balfour's upper body.
  - k. She observed Mr. Calder pull down Mr. Balfour's pants and underwear so that his "full butt" was exposed.
  - l. She observed Mr. Calder followed by various other individuals slap Mr. Balfour's bare butt while he was pinned down on the bed.
  - m. She observed Mr. Calder poke around Mr. Balfour's "butt crack" with an "object", but the object did not touch or go inside Mr. Balfour's anus.
  - n. She did not recall what the object was that Mr. Calder was holding.
  - o. She observed Mr. Balfour "flailing around", "resisting", and "definitely trying to get out of it."
  - p. She did not observe Mr. Calder or anyone else try to put a stop to the Incident.
  - q. She heard someone say "happy birthday" to Mr. Balfour afterwards but did not recall anyone sing him "happy birthday."
  - r. After leaving the hotel room and on the way to the pub, she spoke briefly to Mr. Balfour about what happened, indicating that she thought it was "weird" and asked him if he was okay. He told her not to worry about it.
  - s. She did not speak with Mr. Balfour about the Incident once they arrived at the bar.
27. Although Ms. Nania testified that she observed "birthday beats" being given to Mr. Balfour in the hotel room, she admitted that birthday beats was not practiced at the University of Calgary wrestling program and that she was unfamiliar with how birthday beats were typically carried out at Brock University.
28. Ms. Nania considered that Mr. Balfour was very close with Mr. Calder, but if the Incident had happened to another athlete it could have been a bigger issue.
29. Ms. Nania testified that she had "completely forgotten" about the Incident until June or July 2018 when she was contacted by lawyers conducting the 2018 Investigation, namely Mr. Bennett and Ryan Hilborn. She testified that she did not

- think about the Incident in the intervening two-and-a-half years because Mr. Balfour had reassured her that he was “fine.”
30. She testified that she found it “strange” that the investigators wanted to interview her and she did not know the subject of the interview in advance.
  31. Ms. Nania stated that the investigators “had all of the information about the incident already, and were questioning me in a confirmatory way.” She testified that they did not ask her to do “open-ended recall” but instead asked her a series of “leading” questions based on information they had previously obtained from another source. One of the leading questions the investigators asked Ms. Nania was whether Mr. Calder was “poking [Mr. Balfour’s] ass”, which Ms. Nania found “weird”.
  32. Ms. Nania produced and was examined on a series of text messages she exchanged with Mr. Balfour on December 13, 2018 regarding the Incident and her interview with the investigators.

### ***Respondent’s Evidence – Witnesses Present in the Hotel Room***

#### **Jevon Balfour**

33. Mr. Balfour testified that he has “a great relationship” with Mr. Calder, who has been his wrestling coach since Mr. Balfour joined Brock University in 2012. Mr. Balfour stated that Mr. Calder is a “father figure” to him and that Mr. Calder is there for him since his own father is not around.
34. Mr. Balfour gave evidence as to his prior experience with birthday beats. He had engaged in birthday beats with his family as early as when he was four or five years old. Birthday beats were done on his high school wrestling team. At Brock University, the wrestling team would regularly engage in birthday beats, which he described as follows:
  - a. Someone would announce that it was a team member’s birthday, usually at the end of practice.
  - b. The person whose birthday it was would lay down on or be wrestled to the floor, and other people would each take turns smacking the person’s buttocks once, after which happy birthday was sung.
  - c. Birthday beats were never given with the person’s pants or shorts pulled down or on bare skin.

- d. A few people on the team would not participate, particularly those in their first year who were still “a little bit timid”.
  - e. The activity was mostly led by athletes. Coaches would sometimes participate but never pressured athletes into taking part.
  - f. Birthday beats were done for “fun” and to “build camaraderie”.
  - g. After the 2018 Investigation report was released, the coaches at Brock University told the athletes to stop giving birthday beats.
35. Mr. Balfour stated that he enjoyed participating in the birthday beats ritual. He himself had given and received birthday beats while at Brock University, and had even given the birthday beats to Mr. Calder.
36. In respect of the 2015 Edmonton Incident, Mr. Balfour testified that he lost in the finals of the 2015 Olympic Trials and was “super devastated”. He had failed to qualify for the 2016 Rio Olympic Games.
37. He went back to his room at the Clarion Hotel, spoke to his mother over the phone, and did not want to go out as he was in a “dark place”. However, many other wrestlers began texting him encouraging him to go out, including Ms. Nania and Mr. Jarvis.
38. Mr. Jarvis texted Mr. Balfour with words of encouragement. Mr. Jarvis told Mr. Balfour he was in the “coaches’ room” and that Mr. Balfour should stop by to make plans to go out. Mr. Balfour testified that Mr. Jarvis was his strongest connection on the national wrestling team.
39. Mr. Balfour got changed and met Ms. Nania at the hotel. He suggested they go to the coaches’ room to meet Mr. Jarvis.
40. Mr. Balfour’s evidence as to what happened next can be summarized as follows:
- a. He and Ms. Nania entered the coaches’ hotel room and there were about 20 people inside, including Mr. Calder, Mr. Collie, Mr. Prickett, Ms. Verbeek, and Mr. Jarvis.
  - b. Mr. Jarvis looked up from a conversation and yelled out that it was his birthday.
  - c. People started crowding around him and guided him to the bed. He testified that he was not wrestled to the bed.
  - d. He was held face down on the bed and was “squirming” because he knew he was going to be smacked, but he testified that he “didn’t object” and that he “for sure” could have gotten off the bed if he wanted to.

- e. At that time, he was wearing a black bomber jacket, black jeans, running shoes, a shirt, a belt, underwear, and socks.
  - f. He testified that his pants “might have been pulled down because he was squirming,” such that the top lining of his boxers was exposed, but his underwear was “definitely” not pulled down and his buttocks were not exposed. He denied that Mr. Calder or Mr. Jarvis pulled or adjusted his belt or lowered his pants.
  - g. He testified that no one poked his buttocks with any object.
  - h. He testified that the people in the room each slapped his butt, consistent with the “tradition” of birthday beats practiced at Brock University’s wrestling program.
  - i. After the birthday beats were finished, the people in the room sang him happy birthday and several people gave him a hug.
  - j. He then went to the bar with Ms. Nania, where he hung out with Mr. Jarvis but did not talk about the Incident.
41. Mr. Balfour testified that the Incident did not cause him any concern, and described it as “insignificant”. He said he felt as though it was intended to “lift his spirits”, and that it had achieved its intended purpose.
42. Mr. Balfour testified that he was interviewed by Mr. Bennett in or around September 2018 regarding the Incident. He testified that Mr. Bennett asked him “toxic, weird questions”, including whether there was a bottle involved and whether the bottle touched his butt. Mr. Balfour said he told Mr. Bennett “that never happened”.
43. The Complainant asked Mr. Balfour to consent to the disclosure in this proceeding of Mr. Bennett’s investigative notes of what Mr. Balfour told Mr. Bennett during the course of the interview. Mr. Balfour refused to provide his consent.
44. Mr. Balfour testified that in December 2018 he was contacted by the RCMP and also had a discussion with the Athletic Director of Brock University concerning the Incident. In both discussions Mr. Balfour denied that a bottle was involved and stated that he did not want the matter to be pursued any further. Neither the RCMP nor Brock University took any action against Mr. Calder in respect of the Incident.

#### Marty Calder

45. Mr. Calder testified that he was an “uncle figure” to Mr. Balfour. According to Mr. Calder, he had several “commonalities” with Mr. Balfour, including that they both

came from “broken homes”. Mr. Balfour’s mother asked Mr. Calder to be there for Mr. Balfour, and Mr. Calder agreed to take on that responsibility.

46. Mr. Calder considers Mr. Balfour to be a “protégé.” Mr. Calder and Mr. Balfour have discussed Mr. Balfour staying on as a coach at Brock University because he possesses the skill set to be a leader.
47. After Mr. Balfour lost in the finals of the 2015 Olympic Trials, Mr. Calder told him that he was “so proud” of him and that “his days were to come”. Mr. Calder explained that he tried to put things in perspective for Mr. Balfour, who was still quite young to be achieving that level of success on the national and international wrestling stage.
48. Mr. Calder’s evidence as to the Incident can be summarized as follows:
  - a. After leaving the competition venue, he and Ms. Verbeek went to the liquor store on the way back to the hotel and purchased alcohol to bring back to his hotel room.
  - b. When he returned to his room, which he was sharing with Mr. Collie, a number of people were socializing and drinking before going out for dinner.
  - c. He recalled the following individuals present in the room during that evening: Mr. Collie, Mr. Prickett, Ms. Verbeek, Mr. Jarvis, Paul Harrison (a former Brock-based wrestler and current coach in Toronto), Christine Nordhagen (a former Calgary-based wrestler), and Kevin Iwasa-Madge (from the University of Guelph). He did not recall Ms. Nania or Ms. Brouillette being present in the room.
  - d. When Mr. Balfour arrived in the room, Mr. Jarvis announced that it was his birthday.
  - e. He did not know that it was Mr. Balfour’s birthday or that Mr. Jarvis had planned for Mr. Balfour to receive the birthday beats.
  - f. Mr. Balfour smiled, “gave it up”, and went to lie down on the bed where Mr. Calder was sitting, with Mr. Jarvis holding Mr. Balfour’s arm and shoulders.
  - g. He and the others in the room proceeded to each slap Mr. Balfour once on the buttocks, during which Mr. Balfour was not protesting or trying to get out of it. His hand made contact with Mr. Balfour’s pants, not his underwear.
  - h. About an inch of the top of Mr. Balfour’s underwear was exposed because “it’s the way he wears his pants that were loose”, but neither he nor anyone else pulled down Mr. Balfour’s pants and underwear such that his full buttocks were exposed.

- i. Neither he nor anyone else poked Mr. Balfour's buttocks with an object.
  - j. After Mr. Balfour received the birthday beats, he and the people in the room sang him happy birthday.
  - k. At that point in the night, he was drinking a rum and coke out of a hotel glass.
49. Mr. Calder explained that the incident proceeded in exactly the same way as the birthday beats are normally given at Brock University, which he described consistently with Mr. Balfour's evidence.
50. He stated that if Mr. Balfour had been protesting or wanting to get off the bed, or if anyone would have lowered Mr. Balfour's pants and underwear, he would have intervened and put a stop to it.
51. Mr. Calder testified that after the Complaint was issued, he brought it to the attention of Brock University's Athletic Director. The Athletic Director conducted his own review and interviewed Mr. Balfour. Mr. Calder stated that the Athletic Director determined that no sanction would be imposed against Mr. Calder in respect of the allegations in the Complaint.

Chris Prickett

52. Mr. Prickett testified that he first experienced the birthday beats "as a kid growing up in wrestling." They were given on his high school wrestling team.
53. His evidence as to the manner in which birthday beats were conducted at Brock was consistent with Mr. Balfour's testimony. Mr. Prickett had both given and received birthday beats at Brock.
54. Mr. Prickett's recollection of the Incident can be summarized as follows:
- a. There were 15 to 20 people in the hotel room having drinks, mostly coaches and Mr. Jarvis, who was a "good friend" of his.
  - b. When Mr. Balfour arrived, Mr. Jarvis announced that it was his birthday.
  - c. He and Mr. Jarvis "corralled" Mr. Balfour onto the bed, and "positioned him" face down, but he could not recall whether he was holding Mr. Balfour's arms or legs.
  - d. Mr. Balfour was not resisting or flailing.
  - e. He and others proceeded to each slap Mr. Balfour's buttocks once.
  - f. He did not see anyone lower Mr. Balfour's pants and did not recall seeing his underwear exposed.
  - g. No one poked Mr. Balfour with any object.

### Dave Collie

55. Mr. Collie testified that the birthday beats were around since he was a wrestler more than 40 years ago. He explained that in his family, the activity was known as the “paddywhacks” and one hit was given for each year of age, “plus a pinch to grow an inch.”
56. His evidence as to how the birthday beats were practiced at Brock was consistent with that of Mr. Balfour. He added that an “outsider” might see the birthday beats differently than someone inside the wrestling community.
57. Mr. Collie’s evidence regarding the Incident can be summarized as follows:
  - a. About 15 to 20 people were convened in his hotel room before going out. He recalled Mr. Calder, Mr. Prickett, Mr. Jarvis, Ms. Verbeek, Ms. Nordhagen, and Mr. Harrison being present in the room, and that Ms. Brouillette “came in to say hi.”
  - b. He recalled people drinking beers and he had a few beers before going out.
  - c. When Mr. Balfour arrived, he heard someone say it was his birthday and then Mr. Jarvis grabbed him and pulled him down onto the bed.
  - d. Mr. Jarvis held down Mr. Balfour’s arms and upper body and Mr. Prickett held down his legs.
  - e. He gave Mr. Balfour a slap, as did about 12 to 15 other people in the room.
  - f. He did not observe Mr. Balfour resisting or flailing.
  - g. Mr. Balfour’s pants were not pulled down, nor did he see anyone poke him with an object.

### Korey Jarvis

58. Mr. Jarvis explained that he had experienced birthday beats as a high school wrestler. In his experience the person whose birthday it was would go to the center of the wrestling mat and everyone would get a turn slapping the person on the butt.
59. He stated that he had observed the birthday beats occur at the Brock Wrestling Club when he was there for training sessions. However, Guelph University’s wrestling program did not have a tradition of giving birthday beats. He testified that he had never seen the birthday beats administered on bare skin in a sporting context.
60. Mr. Jarvis’s evidence regarding the Incident can be summarized as follows:

- a. He recalled about 12 people being in the hotel room but could not remember exactly who was there.
  - b. He was not drinking that night because he still had to compete in the Olympic Trials the following day.
  - c. When he observed Mr. Balfour enter the room, he discussed with someone that it was his birthday and that they should give him birthday beats. He testified that this was not planned in advance.
  - d. He thought the birthday beats would cheer up Mr. Balfour after his loss in the finals and missed the Olympic team.
  - e. When he first grabbed Mr. Balfour, he resisted and tensed up slightly because he knew he was going to get smacked.
  - f. He held Mr. Balfour down “for some of the time” while on the bed but Mr. Balfour was not struggling.
  - g. He recalled Mr. Balfour wearing his pants “down slightly” with a belt on, and he could see Mr. Balfour’s black underwear.
  - h. He moved Mr. Balfour’s belt without undoing it, and then he pulled Mr. Balfour’s belt and pants down “across or just below his butt.”
  - i. He slapped Mr. Balfour’s buttocks on his underwear and observed some other people in the room do the same.
  - j. He could not recall what Mr. Calder did or whether or not Mr. Calder had a bottle.
61. Mr. Jarvis recalled being interviewed by Mr. Bennett. He said various coaches and athletes were brought up during the interview, including Mr. Calder. However, Mr. Jarvis could not recall specifically what he discussed with Mr. Bennett.

Tonya Verbeek

62. Ms. Verbeek testified that birthday beats were a “cultural thing” in the sport of wrestling. She had seen a variation of the practice done in Sweden and in Korea.
63. She experienced birthday beats as an athlete at Brock before Mr. Calder started as head coach. Her testimony as to the practice of birthday beats at Brock was consistent with that of Mr. Balfour (and others from the Brock program).
64. Ms. Verbeek’s testimony regarding the Incident can be summarized as follows:
- a. She and Mr. Calder grabbed drinks on the way back to his hotel room from the competition venue.

- b. She recalled about 20 people pass through the room that evening before she left for dinner.
  - c. Soon after Mr. Balfour arrived, Mr. Jarvis said something like “it’s his birthday, let’s make him feel better” because he had lost in the finals. She did not know it was Mr. Balfour’s birthday.
  - d. Mr. Jarvis and Mr. Prickett wrestled Mr. Balfour to the bed.
  - e. She and various others in the room slapped Mr. Balfour on the buttocks. She recalled making contact with his jeans.
  - f. Mr. Calder did not pull down Mr. Balfour’s pants or underwear or poke his butt with an object.
  - g. They then sang Mr. Balfour happy birthday and she gave him a hug and reassured him that he had a long career ahead of him.
65. Ms. Verbeek testified that she was interviewed by Mr. Bennett about the Incident. She said she told him that it was not inappropriate and did not involve Mr. Balfour’s bare butt or any poking with a bottle. She testified that Mr. Bennett’s questions were “direct and uncomfortable”. She refused the Complainant’s request to produce Mr. Bennett’s notes of the interview because she thought the interview was “unprofessionally done” and she “won’t stand behind it.”
66. Ms. Verbeek testified that she has been in a committed relationship with Mr. Calder for the past three years, but they were not in this relationship in December 2015.

Jessica Brouillette

67. Ms. Brouillette explained that she had experienced birthday beats on her high school wrestling team and at Brock. Her evidence as to the manner in which the birthday beats were conducted at Brock was consistent with that of Mr. Balfour (and others from Brock).
68. Ms. Brouillette’s evidence regarding the Incident can be summarized as follows:
- a. She recalled five to ten people in the hotel room and that people were coming in and out.
  - b. When Mr. Balfour arrived, Mr. Jarvis said it was his birthday and tackled him onto the bed.
  - c. She and five or six others in the room each slapped Mr. Balfour’s buttocks once. She recalled hitting him on the pants.

- d. She did not see Mr. Balfour's underwear or bare butt exposed, nor did she see Mr. Calder poking him with anything.
- e. The people in the room then sang Mr. Balfour happy birthday.

## ANALYSIS

69. It is important to note that I considered all of the evidence and arguments put forward by both Parties, even if certain evidence or arguments are not mentioned in this Reasoned Decision.

### *Burden and Standard of Proof*

70. The burden of proof lies with the Complainant in this proceeding. The specific elements that the Complainant is required to establish pursuant to the 2018 Discipline Policy are discussed later in this Reasoned Decision.
71. The standard of proof to be applied to the evidence is the civil standard of a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53 [*McDougall*], the Supreme Court of Canada unequivocally pronounced on the standard of proof to be applied in all civil matters: "I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities" (at para 40).
72. The Supreme Court rejected various alternative standards that had previously been applied in situations where "morally blameworthy conduct is alleged." The Supreme Court expressly rejected the suggestion that the evidence should be scrutinized with greater care if the allegations against an individual are "serious" (at paras 40, 45).
73. In applying the balance of probabilities standard, the Panel's job is to "determine whether it is more likely than not that an alleged event occurred" (*McDougall* at para 49). The Panel is cognizant of the requirement that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at para 46).

### *Credibility and Reliability of Evidence*

74. The Parties made various arguments as to the credibility and reliability of witness testimony in light of certain material inconsistencies between Ms. Nania's evidence and the evidence adduced by the witnesses who testified for the Respondent. These inconsistencies include the following:

- a. Ms. Nania stated that Mr. Calder pulled down Mr. Balfour's pants and underwear so that his full buttocks were exposed. Conversely, Mr. Jarvis admitted to pulling down Mr. Balfour's pants "across or just below his butt" (but not his underwear) and Mr. Calder and all other witnesses in the room deny that Mr. Calder or anyone else pulled down Mr. Balfour's pants or underwear.
- b. Ms. Nania stated that Mr. Calder poked Mr. Balfour's buttocks with an object, whereas Mr. Calder and all other witnesses in the room either deny that Mr. Calder did so or do not recall such conduct.
- c. Ms. Nania stated that Mr. Balfour was resisting and trying to avoid getting his buttocks slapped. Conversely, Mr. Balfour testified that he was not resisting and did not object to receiving the birthday beats, and most other witnesses in the room denied observing Mr. Balfour resisting.

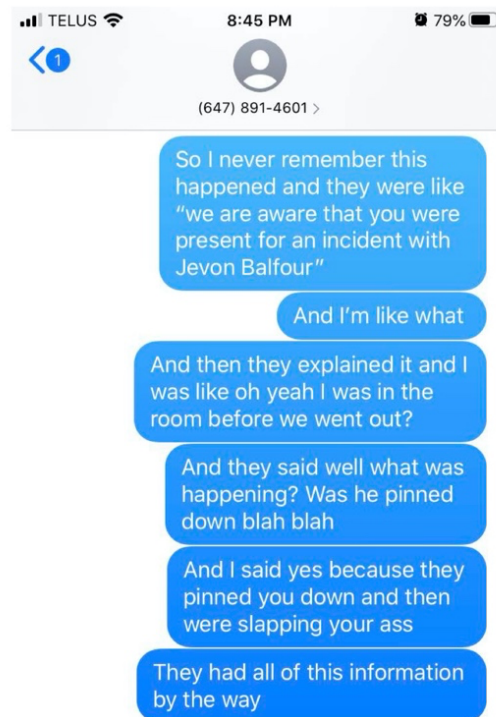
75. These inconsistencies require a careful assessment of the witness' credibility and the reliability of their evidence. The distinction between credibility and reliability has been explained by the Ontario Court of Appeal in *R. v. Morrissey*, [1995] OR (3d) 514, as follows:

*Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony.*

76. The Panel considered that Ms. Nania was generally a credible witness in that she testified in a forthright manner during the hearing. However, the Panel has

concerns with the reliability of her evidence due to her participation in the 2018 Investigation.

77. Ms. Nania admitted that she had “completely forgotten” about the December 2015 Incident until she was contacted by Mr. Bennett in the summer of 2018. This is understandable given that more than two-and-a-half years had passed since the Incident and Mr. Balfour told her that it was “not a big deal” immediately afterwards. However, when Ms. Nania was contacted the investigators, they already had a “story” from other sources. Ms. Nania conceded that she did not bring up the Incident to the investigators, but rather the investigators presented their story to her through confirmatory and leading questions.
78. The following excerpts from Ms. Nania’s text messages exchanged with Mr. Balfour in December 2018 are of particular relevance in this regard:





79. These text messages reveal that the investigators asked Ms. Nania “about [Mr. Calder] poking [Mr. Balfour’s] ass.” Moreover, Ms. Nania admitted during the hearing that the investigators asked her whether a bottle “touched [Mr. Balfour’s] anus”. The fact that these types of questions were being asked during the 2018 Investigation was corroborated by Mr. Balfour, who testified that was asked by the investigators whether “there was a bottle involved, and did it touch my butt.”
80. The Panel shares the Respondent’s concerns that Ms. Nania’s memory of what transpired in the hotel room in December 2015 may have been influenced by what the investigators told her during her interview for the 2018 Investigation or by what was implied to her during that interview or afterwards.
81. The Respondent has referred the Panel to numerous authorities regarding assessments of witness memory, including the Thomas Sophonow Inquiry conducted by former Supreme Court Justice Peter Cory (2001)<sup>4</sup> and the Federal Provincial Territorial (FTP) Heads of Prosecutions Committee Report of the Working Group on the Prevention of Miscarriages of Justice (2004).<sup>5</sup> These authorities caution that witnesses may develop false or distorted memories concerning past events based on more recent external information provided to them, such as during interviews with investigators or the police. Indeed, the FTP Report recommended that police officers “should be specifically instructed on the dangers of unnecessarily communicating information (known to them) to a witness,

<sup>4</sup> Available online at: <https://legislative.mb.ca/catalogue/libraries.coop/eg/opac/record/107432169>

<sup>5</sup> Available online at: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmi-pej/pmi-pej.pdf>

where such information might colour that witness' account of events" and that "questioning of the witness should be non-suggestive" (at pages 43-45).

82. The Panel notes that neither Party adduced the 2018 Investigation report into evidence. Neither Mr. Bennett nor Mr. Hilborn was called as a witness to testify in this disciplinary proceeding. As such the Panel's consideration of what transpired during interviews conducted for the 2018 Investigation is limited to the evidence provided by the interviewees who testified at the hearing.
83. For these reasons, the Panel does not place significant weight on Ms. Nania's evidence that Mr. Calder pulled down Mr. Balfour's pants and underwear and poked around his buttocks with an "object" (which Ms. Nania testified has "been remembered [as] a beer bottle"). The Panel notes in this regard that her text messages confirming this evidence were sent in December 2018 and therefore were also likely to have been coloured by her interview during the 2018 Investigation.
84. The Panel considered Mr. Jarvis to be a credible witness based on his demeanour during his examination. Moreover, Mr. Jarvis is a retired wrestler who never competed for Brock University, meaning his evidence is unlikely to be influenced by a desire to protect Mr. Calder for his own benefit. The Panel places significant weight on Mr. Jarvis's evidence, particularly his admission that he himself pulled Mr. Balfour's pants (but not underwear) down so that his belt was "across or just below his butt."
85. The Panel also found Mr. Calder and the other witnesses that testified in his support to be mostly credible in the manner in which they gave evidence at the hearing.
86. The Complainant raised concerns that these witnesses colluded based on portions of their witness statements being virtually identical. The Panel also noted close similarities in portions of the direct examinations of these witnesses. The Panel considers that the written and indeed some of the oral evidence of these witnesses may have been somewhat coached or coordinated. As such, the Panel has proceeded with caution in assessing the weight to be attributed to those portions of the evidence from Mr. Calder and his witnesses that featured significant similarity.
87. The Complainant argues that many of Mr. Calder's witnesses have significant personal relationships with him and stand to gain from his success in these

proceedings, such that their evidence should be viewed with caution. However, each of these witnesses expressly denied altering their testimony to protect Mr. Calder. In addition, much of their evidence was corroborated by Mr. Jarvis, who the Complainant conceded did not possess such bias.

88. Regarding Mr. Balfour, the Complainant asked the Panel to draw an adverse inference based on his refusal to consent to disclosing his statements made to Mr. Bennett during the 2018 Investigation. The Panel understood the Complainant to suggest that Mr. Balfour told Mr. Bennett the truth about what happened in the hotel room but then changed his evidence during the hearing in order to support Mr. Calder. However, as stated above, the 2018 Investigation report was not in evidence before the Panel and neither of the two investigators testified at the hearing.
89. The Panel declines the Complainant's invitation to draw an adverse inference. On cross examination, Mr. Balfour expressly denied multiple propositions put to him as being statements he gave Mr. Bennett. The Panel considered Mr. Balfour to be genuine and truthful in his testimony.
90. Moreover, the fact that Mr. Balfour told both the RCMP and Brock University's Athletic Director in late-2018 that he did not wish either organization to pursue action in respect of the Incident supports the reliability of Mr. Balfour's testimony at the hearing.

### ***Key Findings of Fact***

91. Having regard to the Panel's assessment of the credibility and reliability of the evidence adduced at the hearing, the Panel makes the following findings of fact, on a balance of probabilities, in respect of the conflicting evidence as to what occurred during the Incident:
  - a. Mr. Jarvis initiated the "birthday beats" on Mr. Balfour without the prior involvement of or direction by Mr. Calder.
  - b. Mr. Jarvis grabbed Mr. Balfour, wrestled him to the bed, and then proceeded to hold Mr. Balfour's upper body down on the bed while Mr. Prickett held down his legs.
  - c. Mr. Jarvis pulled Mr. Balfour's loosely fitting jeans down slightly so that his belt was across his buttocks, but did not pull down his underwear.

- d. Mr. Jarvis and certain others in the room slapped Mr. Balfour's buttocks above his belt in the area where his underwear was partially exposed.
  - e. Mr. Calder and certain others in the room (including Mr. Verbeek and Ms. Brouillette) slapped Mr. Balfour's buttocks below his belt, making contact with his jeans in the area where his underwear was not exposed.
  - f. Mr. Calder did not pull down Mr. Balfour's pants or underwear at any time, nor did he poke Mr. Balfour's body with a bottle or other object.
  - g. Mr. Balfour initially tensed up when he was grabbed by Mr. Jarvis, but then did not struggle or flail around or otherwise protest while receiving the birthday beats.
  - h. Mr. Jarvis did not hold Mr. Balfour down on the bed for the entire duration of the birthday beats.
92. The Panel bases its legal conclusions in this case on these key factual findings as well as other evidence referred to below.

***The Elements for a Complaint to be Established under the 2018 Discipline Policy***

93. The Respondent submits that the 2018 Discipline Policy prescribes "five definitional or essential elements" that the Complainant must prove for the Complaint to succeed:
- a. A complaint must be brought by an "Individual" as defined in the Policy;
  - b. A complaint must be brought against an "Individual" as defined in the Policy;
  - c. The matter giving rise to a complaint must occur during the course of WCL business or a WCL activity or event;
  - d. There must be a failure to achieve expected standards of conduct; and
  - e. The conduct must have the potential to result in harm to others, WCL, or the sport of wrestling.
94. The Panel will address each of these five elements in turn.

### ***Element 1 - Who Can Bring a Complaint?***

95. As stated at paragraph 11 above, the 2018 Discipline Policy permits complaints to be filed by “any Individual” as defined in section 1(e) of the Policy. In addition, section 13 of the Policy states, “Anonymous complaints may be accepted at the sole discretion of the Panel.”
96. Given the potential for anonymous complaints to be accepted under the Policy, the Panel does not agree with the Respondent that a complainant need prove that they are an “Individual” as defined in the Policy in order to advance a complaint. The very nature of anonymous complaints is that the identity of the complainant would not necessarily need to be proven at a hearing.
97. Moreover, and in any event, the Panel agrees with the Complainant that the screening process pursuant to section 16 of the Policy is meant to address whether the complaint is brought by a proper complainant (which might include an anonymous complainant). In the present proceeding, the then-Panel decided to accept the Complaint in its Preliminary Decision 2 dated October 14, 2019 (see also Preliminary Decision 4 at para 36). As such, the Panel finds that issue of whether the Complainant is a proper complainant under the Policy has already been decided and cannot be revisited.

### ***Element 2 – Against Whom Can a Complaint be Brought?***

98. The Parties both submitted that there can be no sanction under the 2018 Discipline Policy unless the Respondent is an “Individual” as defined in the Policy. The Panel agrees.
99. The definition of Individual pursuant to section 1(e) of the Policy, reproduced at paragraph 11 above, is broad. It includes not only persons formally affiliated with WCL, but also anyone “engaged in activities with” WCL.
100. The evidence adduced at the hearing leads the Panel to conclude on a balance of probabilities that the Respondent fits this broad definition of Individual. Mr. Calder was a wrestling coach with Brock University and the Brock Wrestling Club at the time of the Incident in December 2015, and was attending the 2015 Olympic Trials competition, a WCL national team-selection event. It is more likely than not that Mr. Calder was at that time a person “engaged in activities with” WCL.

***Element 3 – When and Where Must the Subject Matter of a Complaint Occur?***

101. As noted at paragraph 12 above, pursuant to section 4 of the 2018 Discipline Policy, the Policy applies to “discipline matters that may arise” during WCL “business, activities and events,” including “travel associated with” WCL activities or events.”
102. The Panel finds that the Incident meets this definition such that the 2018 Discipline Policy applies. Specifically, the 2015 Olympic Trials was a WCL team-selection event and the evidence revealed that the Incident occurred:
- a. at the Clarion Hotel, which was connected to the competition venue where most participating athletes were staying;
  - b. just hours after Mr. Balfour had finished competing at the Trials and at a time when not all athletes were finished competing such that the Trials were still ongoing; and
  - c. during a gathering attended exclusively by individuals from the Canadian wrestling community and who were involved in WCL activities and events, including coaches (one of whom was Ms. Verbeek, WCL’s Talent Identification Coach at the time) athletes, and officials.
103. The Respondent argues that the Policy does not apply to the Incident because it occurred during a “private gathering” after Mr. Balfour and Mr. Calder finished participating at the Trials.
104. The Panel disagrees with this position. First, at the time of the Incident, the Trials were still in progress. Indeed Mr. Jarvis who was present in the hotel room was competing in the Trials the next day. Moreover, the evidence revealed that the gathering was held at the hotel connected to the Trials venue where most of the athletes were staying, in a room where participants in the Trials could, and in fact did, come and go as they pleased. The Panel considers that the Incident occurred “during the course of” a WCL activity or event, namely the 2015 Olympic Trials, or during “travel associated with” the Trials, as provided in section 4 of the 2018 Discipline Policy.
105. The Panel’s conclusion is not affected by the Respondent’s further arguments that the Trials was “an open event” and that it was Brock University, not WCL, who paid for Mr. Calder to attend the Trials. What matters is that the Trials was a WCL activity or event – in this case, it was a major event as it was WCL’s Olympic team-

selection competition. The Panel considers the fact that “unattached” athletes could participate in and that WCL did not pay Mr. Calder’s way to the Trials irrelevant to the applicability of the 2018 Discipline Policy given the broad wording of section 4.

***Element 4 – Was There a Failure to Achieve Expected Standards of Conduct***

106. Having determined that the 2018 Discipline Policy applies to the Incident, the Panel must consider whether the conduct complained of gives rise to a sanction under the Policy. The first part of this analysis is determining whether Mr. Calder failed to achieve the standards of conduct expected of him at the time.
107. The Parties disagree as to the proper analysis in this regard. The Respondent argues that the Complainant must prove the “three particulars” and “two charges” pled in the Complaint, which the Respondent says are the following:
- a. Particular 1: Mr. Calder directed other athletes to give Mr. Balfour birthday beats - a hazing tradition that involves (among other activities) physically restraining the subject, pulling down his pants, and slapping his bare buttocks.
  - b. Particular 2: Mr. Calder pulled down Mr. Balfour’s pants and underwear so that his buttocks were exposed.
  - c. Particular 3: Mr. Calder placed a bottle between Mr. Balfour’s butt cheeks, in or against his anus.
  - d. Charge 1: Mr. Calder violated WCL’s coaching standards, code of conduct, and general principles by organizing, participating in, or condoning a hazing incident against Mr. Balfour.
  - e. Charge 2: Mr. Calder violated WCL’s coaching standards, code of conduct, and general principles by assaulting Mr. Balfour.
108. The Complainant disagrees with this approach, arguing that the Respondent’s attempt to impose a “never-ending series of threshold tests” is inconsistent with the 2018 Discipline Policy. The Complainant states that the “three particulars” raised by the Respondent are not the entirety of what is alleged against Mr. Calder in the Complaint, and that all the Complainant needs to prove is that Mr. Calder “organized, condoned, and participated in a hazing incident” or “assaulted an athlete”.

109. The Panel does not consider that the 2018 Discipline Policy imposes a prerequisite on a complainant to prove each and every factual particular set out in a complaint. Such requirement is not found in the language of the Policy. In the Panel's view, accepting such a requirement would hamper unduly the Panel's jurisdiction and be inconsistent with the Policy's twin purposes to facilitate "an environment in which all individuals involved with [WCL] are treated with respect" and to appropriately sanction conduct "that violates the values and integrity of [WCL]" (at section 2).
110. Of course, this conclusion is premised on adequate notice being provided to a respondent of the alleged misconduct said to give rise to a sanction, as a matter of procedural fairness.<sup>6</sup> Indeed, the Panel has held at various preliminary stages in this disciplinary proceeding that, as a matter of procedural fairness, a respondent must receive sufficient information to provide adequate notice of the case to be met (see e.g., Preliminary Decision 3 at paras 43-48; Preliminary Decision 4 at para 41; Preliminary Decision 5 at para 22)
111. The Panel does not consider that the present case gives rise to any procedural fairness concerns regarding adequate notice (or any other procedural fairness concerns). Indeed, numerous procedural fairness issues were raised by the Respondent throughout the course of this proceeding and dealt with by the Panel in its prior Reasoned Decisions.
112. As such, the Panel considers that its task in respect of Element 4 is simply to determine, on a balance of probabilities, whether the evidence presented at the hearing amounts to sanctionable conduct under the terms of the 2018 Discipline Policy. As stated in paragraphs 13 to 14 above, pursuant to sections 1(f) and 2 of the Policy, conduct is sanctionable if it: (i) violates the values or integrity of WCL or fails to achieve expected standards of conduct; and (ii) has the potential to result in harm to others, WCL or to the sport of wrestling.
113. During the hearing, the Panel was not presented with any detailed evidence on the specific policies, regulations, or codes of conduct of WCL that applied to Mr. Calder in December 2015. That said, the Parties appeared to be in alignment that hazing or assaulting an athlete would fall afoul of this test (although the Respondent argued that the Complainant had not provided evidence as to what

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<sup>6</sup> For example, if a complainant's evidence at the hearing is focused on entirely new or different conduct from that particularized in its complaint, such circumstances might give rise to procedural fairness concerns if the respondent is caught by surprise by the new allegations and is unable to prepare a proper defence.

specific conduct is considered hazing or assault pursuant to WCL's expected standards of conduct).

114. The Panel does not hesitate to conclude that both hazing and assault of an athlete would necessarily violate the standards of conduct expected of Mr. Calder as an elite wrestling coach in Canada as of December 2015. The Panel thus proceeds to consider whether Mr. Calder condoned or participated in the hazing or assault of Mr. Balfour.
115. However, because of the absence of evidence presented at the hearing on the content of the standards of conduct that applied to Mr. Calder at the relevant time, the Panel is not in a position to consider whether, absent any finding of hazing or assault, Mr. Calder's involvement in the Incident would amount to sanctionable conduct under the 2018 Discipline Policy.

#### Hazing

116. The Complainant states that what constitutes hazing must be determined objectively by the Panel. The Panel agrees, and therefore does not give much weight to the evidence of the Respondent's witnesses that they did not consider the birthday beats to constitute hazing.
117. As there was no evidence presented as to WCL's definition of hazing in December 2015, the Panel looks to the authorities referred to by the Parties. For example:
- a. In *R. v. A., B., and C.*, 2019 ONCJ 949, which is the sentencing decision regarding the sexual assault of junior members of the football team at St. Michael's College School in Toronto, Justice Weagant of the Ontario Court of Justice held as follows in respect of what constitutes hazing (at paras 60-61, emphasis added):

*In the case of A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 S.C.R. 567, Abella, J. cited the following definition of bullying as*

*. . . behaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property. Bullying can be direct or indirect, and can take place by written, verbal, physical or electronic means, or any other form of expression. [pp. 42-43]*

*In my opinion, this nomenclature – ‘bullying’ – is a term that reflects the power and domination component of the behaviour. **Hazing, in turn, describes bullying in a specific context**, and although could be perpetrated by a single individual, we most commonly think of it as being the work of a group, and **associated with initiation of new members of a sports team.***

- b. The current Ontario University Athletics Governance Policies define hazing as (emphasis added):

*Any **potentially humiliating, degrading, abusive, or dangerous activity expected of a junior-ranking athlete by a more senior teammate** which does not contribute to either athlete's positive development but **is required to be accepted as part of a team**, regardless of the junior-ranking athlete's willingness to participate. This includes but is not limited to, any activity, no matter how traditional or seemingly benign, that **sets apart or alienates any teammate based on class, number of years on the team, or athletic ability.***

- c. The current Brock University Student Code of Conduct defines hazing as (emphasis added):

*Hazing - Engaging in activities that reasonably can be construed as hazing **for the purpose of initiation, admission into, or as a condition for continued membership in a group, team, or Student Organization.***

118. These authorities demonstrate that hazing in sport involves two components: i) an activity associated with the initiation of new members to a sports team; and ii) behaviour that is intended to cause, or should be known to cause, humiliation or harm. The Panel concludes that both of these components are necessary to be present for an activity to be considered hazing.

119. The evidence at the hearing establishes that the Incident was not done to initiate Mr. Balfour onto any team. Rather, as of December 2015 Mr. Balfour was in his third year as a member of the Brock University wrestling team. He was not a new or junior member of the team. On the evidence adduced at the hearing, the purpose of the Incident was not to initiate Mr. Balfour to any sports team, but rather to mark the occasion of Mr. Balfour's birthday and cheer him up after a devastating loss at the Olympic Trials.

120. As hazing requires the activity be in the nature of initiation to a sports team, the Panel considers that the Complainant failed to prove that the Incident amounted to

hazing. The Panel therefore does not need to consider the second element of the definition of hazing.

### Assault

121. The Complainant alleges that Mr. Calder assaulted Mr. Balfour, with reference to the offence of assault set out in section 265(1)(a) of the *Criminal Code*. Generally speaking, criminal assault requires the application of force to a person, without that person's consent.
122. The Respondent argues that the Panel does not have jurisdiction to consider whether the impugned conduct in the Complaint amounts to a breach of the *Criminal Code*. The Panel agrees. There are obvious and significant differences between a criminal proceeding and a WCL disciplinary matter, including among many other things the different standards of proof and potential sanctions or penalties. The Panel does not purport to be adjudicating any criminal allegations in this proceeding.
123. However, the Panel considers that it does have jurisdiction to determine whether Mr. Calder struck Mr. Balfour without Mr. Balfour's consent, and if so, whether such conduct is sanctionable under the 2018 Discipline Policy, all pursuant to the balance of probabilities standard.
124. As described above, the Panel has found that Mr. Calder (and many others in the hotel room) slapped Mr. Balfour's buttocks below his belt, making contact with his jeans. Accordingly, the Panel must consider whether Mr. Balfour consented to this conduct in the specific circumstances of the Incident. The Panel agrees with the Respondent that the Complainant bears the burden of proving that Mr. Balfour did not consent, on a balance of probabilities.
125. The Panel is unable to conclude that the Complainant met its burden based on the evidence adduced at the hearing. As stated above, the Panel finds on a balance of probabilities that Mr. Balfour initially tensed up when he was grabbed by Mr. Jarvis but then did not struggle or flail around or otherwise protest while receiving the birthday beats.
126. The Panel finds that when Mr. Balfour realized he was receiving the birthday beats, he consented to the activity. In Mr. Balfour's words, "And I'm just like, all right, well, I'm gonna get my birthday beats, so I'm just gonna go over to the bed and lay down." The Panel accepts this evidence.

127. In making this finding, the Panel also considers the context of the Incident. This was not the first time Mr. Balfour experienced birthday beats. Rather, the evidence shows that he was very familiar with the practice, having given and received the birthday beats at Brock many times previously. As such, the Panel considers that Mr. Balfour generally knew what the specific birthday beats during the Incident was to entail, and was in a position to give his informed consent.
128. Although Mr. Jarvis lowered Mr. Balfour's low-riding pants slightly and people were drinking in a hotel room at the time, the Panel does not consider that the Incident deviated in any significant way from the birthday beats with which Mr. Balfour was familiar and was expecting at the time.
129. The Complainant argues that Mr. Balfour's consent was vitiated because Mr. Calder struck Mr. Balfour's buttocks, citing *R. v. Ekstrom*, 2014 SKPC 195 at para 30.
130. The Panel agrees with the Respondent that *Ekstrom* does not apply. That case involved a recent high-school graduate striking the buttocks of a grade 9 student with a hockey stick. That incident caused the younger student such pain that he was as unable to walk and had to take painkillers for a month (at para 5). The court applied a common law rule articulated by the Supreme Court of Canada in *R. v. Jobidon*, [1991] 2 SCR 714, that "a victim cannot consent to the infliction of serious bodily harm upon himself, unless the assaulter is acting in the course of a generally approved social purpose when inflicting the harm" (at para 27).
131. In the present case, there is no evidence whatsoever that the Incident caused serious (or any) bodily harm. Mr. Balfour testified that the Incident did not cause him any concerns, was "insignificant", was "not a big deal," and left him feeling better after his loss at the Trials. Accordingly, the *Jobidon* principle is not engaged and *Ekstrom* is distinguishable.
132. The Panel finds that the Complainant has not proven that Mr. Calder assaulted Mr. Balfour, in the sense of striking him without consent.
133. To conclude on Element 4, based on the evidence adduced at the hearing, the Panel is unable to conclude that the Complainant discharged its burden to prove that Mr. Calder failed to achieve the expected standards of conduct by condoning or participating in the hazing or assault of Mr. Balfour. The Complaint must therefore be dismissed. However, for completeness, and in case of a potential appeal, the Panel proceeds to consider Element 5 raised by the Respondent.

***Element 5 – Did the Conduct Have the Potential to Result in Harm to Others, WCL, or the Sport of Wrestling?***

134. The Panel agrees with the Respondent that the 2018 Discipline Policy requires the impugned conduct to have the potential to result in harm for a sanction to apply. This requirement is expressly stated in section 1(f) of the Policy.
135. The Panel concludes based on the evidence adduced at the hearing that no actual harm flowed from the Incident. As stated in paragraph 131 above, there was no evidence that Mr. Balfour was harmed in any way by the Incident. Although Ms. Nania stated that she was “bothered” by the Incident, she also testified that she completely forgot about it until being reminded approximately two-and-a-half years later during the 2018 Investigation. Based on the totality of the evidence, the Panel finds that Ms. Nania did not suffer harm. None of the other witnesses who were present for the Incident testified that they were harmed in any way by Mr. Calder’s conduct.
136. The Panel must also consider whether the Incident had the potential to cause harm to “others, WCL, or the sport of wrestling.” The Panel has concerns as to the impacts the birthday beats might have on athletes subjected to this practice, even in circumstances where the athletes consent. Although all of the witnesses who testified for Mr. Calder stated that birthday beats were a voluntary, fun, team-bonding activity, there was evidence that this activity might be unwelcome to some athletes. For example:
- a. Mr. Balfour, Nick Rowe, and Clayton Pye testified that some athletes on the Brock team did not wish to participate in the birthday beats, with Mr. Balfour and Emily Shafer specifying that many first-years on the Brock team do not participate in birthday beats.
  - b. Ms. Verbeek testified that some athletes were “not really into” the birthday beats.
  - c. Various Brock athletes, including Diana Weicker, Michelle Fazzari, Sam Jagas testified that they would occasionally decide not to participate in giving the birthday beats.
  - d. Sam Jagas recalled that his birthday beats were postponed until after an important competition as a risk-avoidance measure to make sure he was “alright” to compete.

137. Moreover, the evidence revealed that the practice of birthday beats was discontinued at Brock in late-2018. Limited evidence was adduced on the reasons and context for this decision, although some witnesses testified that they were told that the practice was seen as inappropriate after the 2018 Investigation report was released.
138. There was no expert evidence adduced on the potential emotional or psychological impacts that the birthday beats tradition might have on athletes, either while still participating in sport or after retirement. The Panel is not in a position to speculate in this regard.
139. Finally, the Complainant submits that the “embarrassment of having a nationally recognized coach smack an athlete’s bottom in a hotel room” meets the test for potential harm. The Panel disagrees in this respect. This was not an isolated occurrence of a coach slapping an athlete’s bottom. Instead, the Incident formed part of a practice that Mr. Balfour (and all of the other Brock athletes and coaches) consented to, had participated in many times before, and considered harmless.
140. Moreover, the evidence suggested that as of December 2015, birthday beats was a common and acceptable “tradition” in wrestling, at least in Southern Ontario but perhaps also in other locations such as Sweden and Korea. Mr. Pye testified that birthday beats also occurred in the sport of rugby. Based on the evidence as to the context in which the Incident took place, the Panel cannot infer that it would cause embarrassment to WCL.
141. Considering the totality of the evidence, the Panel is unable to conclude that the Complainant has proven on a balance of probabilities that Mr. Calder’s conduct during the Incident had the potential to cause harm to others, to WCL, or to the sport of wrestling. As such, no sanction can be imposed under the 2018 Discipline Policy.

## **DISPOSITION AND CONCLUDING REMARKS**

142. For the reasons set out above, the Panel dismisses the Complaint in its entirety.
143. Notwithstanding the outcome of this proceeding, the Panel wishes to make clear that its decision should not be seen as endorsing in any way the practice of “birthday beats” in sport. As stated above, the Panel has concerns as to the potential impacts of this practice, which the Panel notes has since been

discontinued at Brock University. The Panel's decision to dismiss the Complaint is confined to the specific evidence and context at issue in this particular proceeding.

144. Pursuant to section 28 of the 2018 Discipline Policy, "[r]esults of the discipline shall be published on the WCL website unless the Panel orders otherwise." The Panel declines to make such an order and considers that it would be appropriate to publish the results of this disciplinary proceeding.



Carlos Sayao

WCL Discipline Panel

June 4, 2021