

**IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)**

**AND IN THE MATTER of a complaint before the
British Columbia Human Rights Tribunal**

BETWEEN:

Glynnis Kirchmeier – and – Glynnis Kirchmeier on behalf of others

COMPLAINANTS

AND:

University of British Columbia

RESPONDENT

**COMPLAINANTS' FINAL SUBMISSIONS - REPLY
August 26, 2026**

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I. FACTS

i. Our Response on Facts is Limited

1. The University has provided a summary of the evidence as they see it. We do not agree with their summary and say that in many ways it is selective, inaccurate and misleading. As we say that the response to their summary of the evidence is the evidence as a whole, we have not considered it useful or proportionate to engage in a general rebuttal of their evidence, although we do address a number of discrete points, below. This should not be taken to mean that we agree with their summary as we do not. We understand that the Tribunal will review and take into account the evidence as a whole in making its decision.

ii. Third Party Complaints to University and Tribunal

2. A key difference between the parties arises from the University's position that it should never take account of or act on an allegation of sexual misconduct unless it comes from the person directly affected by the sexual misconduct or with that person's express permission. The University describes this as a necessary best practice in relation to persons who may have been traumatized by their experiences and claims that this is an essential principle of "survivor autonomy". The University says that those who are directly affected by sexual misconduct must control their own stories, and must wholly decide how their experiences will be addressed, if at all, by the University. The University claims that "survivor autonomy" is central to a trauma-informed process (Submissions [39]).

3. The University cites the Tribunal's decision in *Hale No. 5* for these propositions. In *Hale No. 5*, the Tribunal found that choice and control were key pillars of "trauma informed practice" (para. 231), but did not find that these were the only values at play. *Hale* was a case about an individual complaint, not the community impact of sexual misconduct and the University's obligation to address that potential or actual community impact. *Hale No. 5* found that complainants should retain control over the allegations they made (para. 245). It does not address the circumstance where allegations are being made by others.

4. Moreover, in *Hale*, the University proceeded with the NAM process without Ms. Hale when she declined to participate. It justified doing this on the basis that it was *required* to do so for the safety of the community (para. 298). For its part, the Tribunal found that the University was entitled or "even obliged" to proceed with the NAM hearing without Ms. Hale for this reason (para. 300), but was still required to complete its investigation of *Ms. Hale's* evidence. These findings, arising in the context of an *individual* complaint, are inconsistent with the University's claim here that the University's only obligation is to follow the directions of a complainant in every case, whether or not the allegations being made have been made by an individual survivor.

5. The evidence here did not show the University seeking direction from complainants fully informed of all their options, or procedures to that end, or

consistent documentation practices of those procedures, all of which must exist to meet the purported obligation to follow the direction of complainants.

6. We also note that the University's position that those who are affected must control their own processes is also contradicted by Policy 3, which states at s. 3.8 of the Procedures (Exhibit 1, Page 53) that, "Complainants may withdraw from the complaint proceedings at any time. However, the University's responsibility to provide an environment free from Discrimination and Harassment may obligate the University to proceed *regardless of the complainant's withdrawal.*" (*Emphasis added*).

7. We argue by contrast that sexual misconduct has both a personal and a community impact, and that since the University is responsible for ensuring a discrimination-free environment in the University *community* as well as for individuals, it is not open to it *not* to act on sexual misconduct coming to its notice, whatever the position of the person directly affected may be. We say that survivors should be permitted to decide for themselves to what degree, if at all, they will be involved in any response to an incident of sexual misconduct arising from their allegations, including whether they will report it at all, but that the University must still respond to the degree it is able even if the person directly affected chooses not to participate in that response. In this respect, we strongly disagree with the University's contention that survivors of sexual misconduct must be considered to "own" their own stories. We say that survivors should have as much choice, control and participation as possible, but that this value is not unlimited because there are also strong community interests at play, as was plainly recognized by the Tribunal in *Hale*.

8. In support of this position, we note the University's own observation in its Statement on Respectful Environment for Students, Faculty and Staff (Exhibit 1, P253, C. Activities Harmful to a Respectful Environment):

Personal harassment, which is sometimes referred to as psychological harassment or bullying, is harmful to a respectful environment and therefore has no place at UBC. It is not only a direct attack on the dignity and worth of the individual or group at whom it is directed, *it undermines the freedoms of the whole community.* (*emphasis added*)

It is our position that personal harassment includes harassment that violates the *Code* because its impacts relate to personal characteristics in some way.

9. We say that the University's obligation to act to protect community interests is consistent with the approach of entities with regulatory authority in other contexts. For example, the police do not insist that they can only prosecute dangerous driving causing an accident if the person directly harmed by that accident consents or wants this outcome. This is a necessary and logical position, because dangerous driving by the driver involved creates direct risk for others, and creates an environment in which other drivers may feel at liberty to drive dangerously as well. Responding to dangerous driving has both a direct impact on dangerous driving itself, and a symbolic and environmental effect that is beneficial to the safety and comfort of the community as a whole, including because it reinforces for all that safe driving is an important value.

10. We say that the evidence in this case, particularly the evidence relating to the actions of Mordvinov, shows that when sexual misconduct is not addressed, there can be harm of differing sorts to the whole community, and that this harm can extend well beyond direct victims and potential future victims. In this case, there was general harm to the values of trust and confidence in the community, to the sense that the interests of all in safety and security were equally valued, including in comparison to Mordvinov's interest in continuing his program. These harms were ultimately experienced both by those with considerable institutional power, and those with less. These community effects cannot be prevented if the University takes the position (directly contrary to the position it took in *Hale*), that it only needs to respond to sexual misconduct if the specific survivors of the sexual misconduct want the University to act. This approach does nothing for the confidence, security and safety of those aware of sexual misconduct but not personally survivors of it to date.

11. Our position in this respect is supported by the evidence of Dr. Brown and her emphasis on the need for the University to act to prevent harm from institutional inaction. It is also supported by the evidence of Ms. Israel who, while clearly articulating that individual survivors should be centered in any response process, that they must have a say in how what they share about their experience is used, and that they must not be forced to participate in any response, also emphasized the need to change the conditions that allowed the harm to occur in the first place, which may include accepting third party reporting.

12. We say that the questions of trauma-informed practice relate primarily to how the University handles persons who come forward with their own complaints. We say that these principles are less applicable when the survivor has not made their own complaint, and where concerns are not just about individual survivors, but also about others who may have issues with the same perpetrator.

13. The University places third party reporting without explicit consent at odds with survivor autonomy, claiming that it removes the survivor's agency, potentially retraumatizes them, and disregards their boundaries. They claim that persons who are not direct survivors should not be complainants because this involves them inserting themselves in the complaint processes of others without their knowledge or consent (Submissions [42]). We respond that this view does not accord any weight to community integrity, and the ability and need for the community to respond to harmful actions as directed by the *Human Rights Code*.

14. The University claims that recovery and empowerment are undermined by another person reporting a survivor's experiences and asking the University to respond (Submissions [43]). We say this is a purely ideological position and that there is no evidence here of any person's recovery and empowerment being *undermined* by another person reporting a survivor's experiences and asking the University to respond. The University says were the University to act on third party reports, the survivor would be subjected to a process that was initiated without their consent and that this would interfere with their sexual autonomy and right to set boundaries. We say there is no evidence here that any person was

subjected to a process within UBC initiated without their consent or that this interfered with their sexual autonomy or boundaries. We say there is no evidence here that any person's "inherent rights to dignity, agency and self-determination" were violated.

15. As a result of its claims, the University asks the Tribunal to place little or no weight on Jane Doe complaints in which the Jane Does involved did not testify. We respond that there are community interests at play in these matters. We say that in the public process that is this complaint, there has been a purposeful balancing of the interests of individuals and the community. In particular, we note that every Jane Doe was given the right to opt out of the complaint, and that some did. We have not relied upon the stories of persons who opted out. Anonymity has also been granted to all of the Jane Does. We submit that for the Tribunal to disregard information about Jane Doe files in which the Jane Does have *not* opted out would itself run the risk of disregarding the personal autonomy of the Jane Does involved who did not opt out, potentially thwarting *their* desire for change and accountability inherent in the fact that they did *not* choose to opt out.

16. The University returns to its view that the Tribunal should not adjudicate the cases of General Class complainants who did not testify at a later point in its submissions as well. It describes this as respecting the privacy and autonomy of those complainants (Submissions [1096]). It says that adjudicating the complaints of General Class complainants will "violate" their autonomy.

17. In this section of its argument, the University claims that the Tribunal did not create a process whereby UBC was to directly contact potential class complainants in all circumstances, or to notify them of the complaint (Submissions [1097], see also [1491]). Instead, it now says, notice was to go to staff who may be aware of student complaints. These claims are patently incorrect. The University was *expressly directed* by the Tribunal to identify potential class members and to send each of them Kirchmeier's original communication which included the right to opt out (*Kirchmeier No. 2*, 2017 BCHRT 186, para. 56. See also letter decision of November 14, 2017 from Member Trerise.) There was discussion about whom the University should canvas to find the names of likely class members. However, once class members were identified, the University was *positively required* to communicate with each person directly.

18. The University's submissions now denying this responsibility and claiming that "whereby no fault of the Respondent, class complainants are not aware of the complaint" ([1097]) gives rise to *very* significant concern that General Class complainants have not been communicated with as required by the Tribunal. We have asked the University a number of times to confirm that all General Class complainants were communicated with through dissemination of the initial letter. It is unclear if present counsel actually know the answer to this question, but certainly they have not answered it.

19. Kirchmeier proposed that the University advise her of the identities of the class members. The University successfully argued that it should not be required

to do so in order to protect the privacy interests of the class members (*Kirchmeier No. 2*, paras. 48(a) and 57). As a result, Kirchmeier, as the representative complainant, was not permitted to know the identity of any Jane Doe complainant who did not positively permit their name and contact information to be provided to Ms. Kirchmeier. This was obviously a critical impediment to inviting and supporting those individuals to testify. The University has never confirmed that it has communicated with all of the Jane Doe complainants as it was required to do.

20. It remains our submission that the Tribunal's decisions were intended to and did balance the interests of individuals with the community interests in this complaint. If complainants have not been identified and communicated with, this is squarely the fault of the University. It would not protect complainants to now exclude their cases from adjudication when this is not how the case has been organized since its early days. Doing this would, however, protect the University's interests. In considering the University's alarmist submissions about retraumatization (Submissions [1099]), the Tribunal should note the University's obvious conflict of interest in suggesting that General Class complainants should be excluded from adjudication altogether.

21. Finally, we note that despite its many, many claims about how wrong it would be for the University to ever act without express consent from the person directly subjected to sexual misconduct, we note that the University submitted no expert evidence to support this view.

iii. Evidence of Stephen Hay

22. The University's hostility to third party reporting was particularly evident in its summary of Stephen Hay's evidence. In its Submissions, the University is extraordinarily critical of Hay and his motives. We submit that their approach to Hay is overtly hostile and one-sided, and is sharply inconsistent with the actual evidence from Hay and others about Hay's actions.

23. We note first that Hay's actions are not on trial here. He is neither a respondent nor a complainant. While he was not neutral, having aligned himself with the interests of those raising issues about Mordvinov and the safety risk Mordvinov posed, he was also not an interested party. As such, his narrative about the need for an extraordinary level of action to get the University to act is compelling evidence in support of the concerns raised by members of Mordvinov Class. His evidence about all the steps that students and others had to take to ensure that Mordvinov did not continue to harm people connected to the University amounts to a sustained critique of UBC's inaction. Rather than acknowledging or addressing this, the University is instead extraordinarily critical of Hay.

24. The University claims, for example, that Hay acted without clear, documented consent from "actual" complainants in forwarding sensitive information and communications to University officials "and journalists" (Submissions [547]). It is unclear what the University is referring to in this

comment, but we respond first, that Hay is a fellow student and not a service provider and was under no obligation to “document” consent from other students. In particular, Hay testified that he had consent to bring forward Student C’s account to Hyson, and there is no evidence that he did not. We say second, that the evidence is in fact that Hay was exceptionally discreet when bringing forward his observations and was very careful to respect the autonomy and privacy of the women involved. For example, he did not name Student B when he first spoke to Green College about rough-housing he had witnessed, and was extremely careful in relation to Student C not to mention her to Green College officials in 2013 when she first raised her concerns with him. He was also very careful not to name her to Hyson in 2015 until she was ready. Hay never named a *further* student at Green College who had allegations against Mordvinov, including in his evidence at the current proceeding, because he did not feel he had permission to do so.

25. The University criticizes Hay’s actions on the basis that he was not a trained professional or an official support person. We say that its criticism of Hay simply underscores the central problem that the University’s own inaction on the profound concerns about Mordvinov pushed Hay and women whose interests he was supporting to act, irrespective of their training or capacity to do so. Hay’s actions do not speak poorly of Hay; they speak poorly of the fact that the University’s failures to act created significant negative consequences for others, including him.

26. The University criticizes Hay for “casting himself in the role of victim within the narrative” (Submissions [548]). We respond that his testimony provides clear evidence of the harm that arose from the University’s inaction to individuals in the community beyond those who were directly the focus of Mordvinov’s conduct. Hay’s evidence shows the breadth of the harm caused by the University’s inaction and is important for this reason. It was not wrongful in some way for Hay to speak about this. His evidence is an important part of our case that the University’s failure has wide-ranging consequences, underscoring the objectives of the *Code* (Section 3), which are not just for the benefit of complainants but rather society as a whole.

27. UBC claims that “Mr. Hay’s repeated centering of his own suffering risks minimizing or overshadowing the actual harm experienced by the women who were directly assaulted or harassed. This self-identification as a victim may have shifted focus away from the complainants and undermined the survivor-led nature of the process, making the situation more about his own grievances with UBC than about supporting those who were harmed.” (Submissions [548]). We say there is no basis in the evidence at all to suggest that Hay shifted focus away from the complainants and towards his own grievances. This is especially true because UBC was not privy to the harm to Hay at the time. Hay’s communications with UBC at the time were not about the harm to him; they were about the harm and potential harm to others.

28. The University claims that Hay used the experiences of others as leverage in his campaign against UBC rather than prioritizing the safety and preferences of actual survivors (Submissions [549]). We say there is also no evidence of this. The

University claims that Hay facilitated contact between survivors and journalists, sometimes, it says without clear, explicit, and informed consent. It is unclear whom they are speaking about in this respect, and we say there is again no evidence for this claim.

29. The University also attempts to suggest that Hay was not trauma-informed or survivor-centred (Submissions [550]). We say that this claim is groundless. On the evidence, Hay showed a high degree of concern and caution about how he raised issues involving the women he was supporting. The University also claims that Hay “pressured survivors to come forward or participate in advocacy efforts”. We say again that there is no evidence of this, or evidence that his efforts were unwelcome.

30. The University claims that Hay had an aggressive advocacy style, that he failed to work through “established channels”, and that “by making himself the focal point of advocacy and conflict, he arguably exacerbated divisions and made it more difficult for the department and/or other units involved to address underlying issues collaboratively” (Submissions [551]). We say these claims have no basis in the evidence at all. We say that what we saw with Hay was that he was very respectful and process-oriented until the point where he could see an imminent risk that the harm that had come to Student B in 2014 was about to come to another woman in 2015 in connection with next year’s version of the same conference. At this point he acted with significant urgency to try to address this harm. This did not result in “exacerbated divisions”; it resulted in the University finally taking some sort of action, even if that action did not protect its students at conferences with Mordvinov.

31. The University says that Hay tended to “blur lines between support and self-promotion” (Submissions [553]). We say there is no evidence of self-promotion in relation to Hay’s actions. In fact, the evidence is that Hay harmed his own academic and psychological interests by the work he undertook on behalf of survivors and on behalf of safety in the University community.

32. The University also engages in rank exaggeration about Hay engaging in the same rough-housing as Mordvinov, and thus lacking authority or credibility to speak (Submissions [552]). In fact, Hay’s evidence was that he once tried to demonstrate to Mordvinov how his actions might feel to others in an action (tying Mordvinov to a tree) that was intentional and pointed, and therefore the antithesis of rough-housing.

33. We submit that it is highly problematic for the University to be attempting to cloak itself in virtue by claiming to be looking out for interests of women by criticizing Hay for assisting women the University *itself* had wholly failed to assist in an effective or timely way.

34. UBC says that Hay’s actions courted “institutional backlash”. Any “institutional backlash” was the University’s *own* negative reaction to having issues of sexual misconduct repeatedly and pointedly raised with it. Such “institutional backlash” is surely something the University should be taking responsibility for,

not blaming on Hay. We say the University's concern about survivors would be far better directed to ensuring that people are encouraged to come forward, and actually believed and treated well when they do (thinking in particular of Student E in the first instance and Student B throughout), rather than criticizing Hay.

35. Ultimately, we say that criticism of Hay for "failing to respect the fundamental principles of survivor-led advocacy and confidentiality" (Submissions [553]) shows UBC's true colours. The University does not want advocacy or allyship from any third parties. It wants the whole burden to be on survivors themselves. We suggest that the University knows from experience that this burden is often too great and that survivors disabled by trauma, uncertainty about how to proceed, and fear of retaliation are not able to bring sustained pressure on UBC to act. We say UBC is using the narrative of survivor autonomy and preferences to isolate survivors because UBC knows that survivors will often lack the capacity and stamina to hold UBC to account.

36. In this sense, we observe that UBC has an institutional interest in dissuading allyship and third party reporting, and in inducing the Tribunal to cast doubt on or criticize allyship and third party reporting even though this was in fact critical to effective steps being taken in relation to Mordvinov's conduct in particular. We say that alleged "respect" for wishes of survivors can be an excuse for inaction, and that real concern arises that UBC's claims of fidelity to this principle has been adopted to shelter its own inaction. We also note that neither Hyson nor Morrison were willing to take Kirchmeier's reports about Student A forward because she was a third party, but that neither was forthright with her about this.

37. Ms. Israel was asked about third party reporting specifically, and whether institutions should permit or respond to reports of sexual misconduct from witnesses and third parties. Ms. Israel testified that institutions should do so as long as there is a plan to attend to the harm that does not force or require the person experiencing the harm to participate, and does not require emotional labour from the non participant survivor.

38. We say that the value and importance of allyship and third party reporting is a key takeaway in this case. The facts here in relation to Mordvinov in particular underscore the importance of allyship and others becoming involved to ensure that survivors are supported and effective action is taken in response by the University. We say that a challenge for the University arising from this case is to recognize the importance of allyship and third party reporting, to recognize the importance of community safety and not just responses to individuals, and to devise means of supporting allyship and third party reporting. It is critical, we say, that in providing its decision here, the Tribunal not dissuade or hamper the important support arising from allyship and third party reporting, but instead require the University to effectively integrate and respond to third party reporting, and support allyship.

iv. Evidence of Glynnis Kirchmeier

39. The University addressed Kirchmeier's evidence about Student A in the context that she did not consult with the survivors at the time she wrote her email to Prof. Ducharme (Submissions [104]). The University's summary of her evidence is inaccurate and misleading. For example, Kirchmeier did not say that Student A did not want to talk to anyone, she said that Student A did not want to talk to Dr. Wang, their mutual supervisor. She also did not say that she did not consult with other survivors before emailing Prof. Ducharme because she wanted to see what the University process was first.

40. Our notes of Ms. Kirchmeier's evidence are as follows:

Q. Did you ever observe behaviour from DM that concerned you?

A. Yes
my first semester – teaching with Wang
co-TA was Student A
resident of Green College as well
at parties, HGSA event, Thanksgiving
observed them in the same room together
touching her in way made her uncomfortable
sitting together – she was trapped against wall
he had arms around shoulders
shoulders and arms hunched forward
unhappy look on face
after first incident saw together touching her I spoke to her
she said he touches me every single day
lived together at GC – communal meal room
I said why don't we approach Wang about this – see if get stopped
she said did not want to approach Wang
I did not know what to do

at later party
he was large person – over 6 feet
she was my size
physical element
saw touching – not breasts
he does this frequently – not consensual – don't want to say anything

my attitude was callous – need to stand up for self
he was young – 23, 24
I presumed had never lived anywhere but Russia
I had some familiarity with Russian culture
I thought she was being door mat
even though touching her non-consensually – did not hold it against him

41. Kirchmeier agreed that she did not seek Student A's consent to bring forward concerns about Mordvinov's actions toward Student A in January 2014. Ms. Kirchmeier testified that she acted in 2014 because concerns about Mordvinov were escalating, and the matter had moved beyond a private matter between Student A and Mordvinov. She testified that in 2011 she respected Student A's wishes, but by the summer of 2014 another event had occurred that merited action by others to restrain Mordvinov. Kirchmeier testified that circumstances had changed. She noted that there was wide knowledge that Mordvinov had raped at

least one woman, and that he had conducted his behaviour with Student A in public.

42. Re Submissions [99], Kirchmeier did not attempt to initiate dates with Mordvinov in December 2013. This occurred two years earlier in 2011.

43. Re Submissions [120], [122] and [1009], the University has not anonymized Student D.

44. Re Submissions [129], Kirchmeier had involvement with the University again in December 2014 (not 2015).

45. Re Submissions [133], Kirchmeier was concerned that Kay had not taken notes of the information she provided in February 2014 (not July 2014). Re Submissions [139], Kirchmeier had a call with Dr. Wang, not an email. Kirchmeier's evidence about her call with Dr. Wang was as follows:

Q. Why did you talk to Prof. Wang at this time?

A. I was concerned that was not apparently urgency on part of University to deal with threat posed – EIO tells History can't do anything – routed through us – aware rape, Student A, incident with Cunningham – nothing appears to have happened – no restriction seen – not getting clear info
said what University done so far
MK had dissuaded me as third party reporter, don't have stake
I disagreed with that
I looked at Policy 3 – felt History Dept could do something
Dept distributes money – gives out research, TA positions
makes decisions consequential re progress of degree
did not accept that could do nothing – should not be giving money to Mordvinov if he was sexually harassing History students, people in general
temperature check – not crazy to believe action needs to be taken
Wang provided support
Thrush less so in our conversation
Wang spoke to Tina Loo
Jessica Wang is married to Alexei Kojevnikov – DM's supervisor
I did not think she would be telling Kojevnikov anything – I don't think she spoke to anyone else about our conversation

She did tell me that she reviewed University policy – Wang disagreed that I was not a member of university – alumni are parts of University so are equal participants – did not disqualify my complaint

She expressed that view to Loo – appropriate to bring to Ducharme – should have been conversation with DM way back when – she said that Tina Loo responded well to discussion

46. Re Submissions [154], Kirchmeier testified that Hay forwarded his email to Student A to Kirchmeier (Exhibit 6, P700) and that she understood that Student A had said that she would think about it. From this, Kirchmeier testified that she understood that Student A did not want to speak with *her*. However, there is no evidence that Student A actually said this to Kirchmeier or Hay.

47. Re Submissions [165], we note that Morrison testified that he never took information directly from students and would not go outside the Statement of Allegations that had been sent to him by Hyson. Hyson's action in referring Kirchmeier to Morrison was therefore certain to fail.

48. Re Submissions [167], Kirchmeier's September 9, 2015 email to the NAM Committee is the document at Exhibit 6, P849. Morrison's email to Kirchmeier is Exhibit 6, P844.

49. Re Submissions [192], Kirchmeier had her baby in 2020. We note that the University's dates are not always accurate.

50. Re Submissions [196], Kirchmeier's salary at the end of her work was different from her earlier work and should be calculated from the paystub for her last days of work.

51. In their Submissions, the University repeatedly emphasizes that Kirchmeier "rescinded" her allegations to Prof. Ducharme in January 2014 (for example, [1215]). They later claim this means that Kirchmeier's report cannot be used to establish delay by the University (Submissions [1258]). This is an overt attempt by the University to lessen their liability by setting out a version of the evidence that is simply untenable. In her email to Prof. Ducharme (Exhibit 6, P134), Kirchmeier was clear that she was pursuing her *allegations*, but that she was not seeking *formal discipline* at that point. There are examples of the University acting without a formal complaint in the Jane Doe files. Prof. Ducharme responded that he was troubled by the allegations, and that there was a need *to do something* about them (Exhibit 6, P134). Prof. Ducharme *forwarded* the allegations to Kay (Exhibit 6, P134). Kirchmeier *pursued the allegations* with Kay in their February 2014 conversation. Kirchmeier attended the meeting with Kay and Loo in July 2014. Kirchmeier further pursued the allegations in her December 2014 conversation with Kay. This sequence of events is not consistent with the view that Kirchmeier "rescinded" her allegations at any point.

v. Evidence of Caitlin Cunningham

52. In relation to Cunningham's concern that the NAM Committee might move forward without her (Submissions [263]), we note that this actually occurred in Ms. Hale's case and it was therefore not unreasonable for Cunningham to be concerned about this.

53. In relation to the request to Cunningham for more information just before the NAM hearing (Submissions [273]), Cunningham testified in cross-examination:

only last moment indication that necessary piece – seems be something Kay or Hyson should have told me in February [2015] meeting or Hyson should have told me in August meeting – any time prior to this point

how this email coming to me – gearing up to participate in a challenging process – people keep saying that to me – actions suggest not really creating least distressing process – not trying to hurt me – very late in game request – pretty involved info – by

point his clarification – did feel brash, cavalier – did not line up with all words about safe and respectful process

This is substantively different than the summary provided by the University (Submissions [273]).

54. In relation to the 4 occasions in which Cunningham was required to tell her story (Submissions [301]), the fourth was the details she had to provide to Morrison just before the NAM Committee hearing.

vi. Evidence of Student E

55. We take issue with the University describing Student E as a “poor historian”. Given the evidence we have, including from Dalya Israel in answer to question 6(a), about the effect of trauma including on a person’s capacity to obtain, maintain and process information, this description fails to acknowledge and account for Student E’s traumatic experiences with Mordvinov, and with learning about Mordvinov’s sexual assault of Student B.

56. In relation to Student E’s expectations arising from her meeting with Lundeen where she set out what had happened with Mordvinov, Student E testified not that she had no understanding of what would happen next (Submissions [311]), but that she was expecting nothing to happen and Lundeen told her there was “not really anything they could do”. We know this description of what Lundeen told her is accurate from Lundeen’s emails to Student E on May 2, 2024. This is very different than Student E saying that she did not want anything else besides education to happen, as the University claims.

vii. Evidence of Student B

57. In relation to Submissions [378], we note that if the University thought it had no jurisdiction over Student B’s complaint, it is unclear why it offered her mediation.

58. Biographic information provided by the University about Student B’s actions is incorrect (Submissions [369]). She continued with her articles. She made the decision near the end of her articles not to seek to be kept on by the firm she was articling with (in the “hire back process”), and instead decided to do an MA in Law at Berkley.

viii. Evidence of Caroline Grego

59. Re Submissions [406], we confirm that an offer of support and counseling services from Ashley Bentley is not an offer from UBC as SASC is not a division of the University but rather is run by the AMS, a wholly separate entity from the University.

60. Re whether Grego was in a service relationship with the University in 2014 and 2015 (Submissions [410]), Grego was no longer a student then, but when she provided information to the University about events that had happened when she

was a student, this action carried her expectation that the University would receive, acknowledge and act on her information. These expectations re-established a service relationship between the University and Grego.

ix. Evidence of Kaitlin Russell

61. Re Submissions [431], Russell testified about becoming “secondarily” aware of the NAM process at around the time she became aware of the work Kay’s office was doing.

62. Re Submissions [442], Russell described the frustration she experienced following comments by Kay about not talking about her concerns about Mordvinov. Russell testified in direct, “I likely expressed frustration at feeling like I was being told by Kay to be quiet and not to speak about my concerns with other graduate students and Faculty members in relation to Mordvinov or safety in the department.” This frustration did not arise from an email Dr. Loo to Kay which Russell would not have seen, as alleged by the University.

63. Re Submissions [443], Russell’s evidence about Dr. Paris was that she was reluctant to speak with Dr. Paris *because* Dr. Paris was a “formidable” feminist historian and Americanist. Russell also said that she did not know Paris as long or as well as Myers, and that Paris had not been as explicitly supportive in relation to the Russell’s challenges with her studies, mental health and family situations.

x. Evidence of Sarah Thornton

64. Re Submissions [505], Thornton’s evidence was that she had a conversation with Myers who said that the HGSA had done the boycott of the Department Faculty meeting improperly. It is not clear that this was a position that Myers discussed with anyone else in the Department.

65. Re Submissions [511] regarding the changes that were made in the HGSA Statement on Harassment, we note that various drafts of the Statement are in evidence. Thornton was asked about the change from language which said that harassment had occurred to language which said harassment had been alleged. She agreed this was a substantive change.

xi. Evidence of Dr. Kojevnikov

66. Re Submissions [564], Dr. Kojevnikov also testified that Prof. Jessica Wang switched to the Geography Department from History because she also was not getting students.

xii. Evidence of Dr. Krause

67. The University’s claim that Dr. Krause emailed Dr. Loo to say that the Department should warn students about Mr. Mordvinov is untrue (Submissions [575]). Dr. Krause specifically noted that the identities of the students involved should be protected (Exhibit 6, P226).

68. It is also factually incorrect to say that the Departmental or NAM processes were active in the fall of 2014. The evidence is that nothing was happening in relation to the NAM process at all in the fall, and that nothing happened in the Department once the training session proposed did not proceed.

69. The University makes claims about a History graduate student volunteer at SASC (Submissions [586]) that are not supported by the evidence. This person was not named. Dr. Krause's evidence about this person was very limited:

Q. In January 2015, you had discussion with history grad student volunteer at SASC?

A. I may well have had such a discussion.

Q. You told her about the complaint – she did not know about it – recall that?

A. No, I don't

No such volunteer testified. Further, the document the University cites about the SASC volunteer issue are Dr. Loo's notes. They do not seem to refer to a discussion regarding Dr. Krause and the History student volunteer. A second document cited are notes of Kay's August 28, 2014 meeting with students where representatives from SASC, Campus Security and Counselling Services came to speak. Dr. Krause did not attend this meeting and the notes do not reference him.

70. In relation to Submissions [596], only Russell objected to the Krause email.

71. In relation to Submissions [598], the grievances Dr. Krause raised in his evidence arose after he supported the students in relation to events regarding Mordvinov. We say this evidence is part of the evidence of harm arising from the University's failure to act in a timely and effective way in relation to concerns about Mordvinov, and that this evidence helps to show how wide-ranging those impacts were. We say this is evidence the Tribunal can take note of with respect to why it is important for the University to respond in a timely and effective manner to allegations of sexual misconduct, including allegations from third parties. We also say that being disregarded at retirement after a multi-decade academic career in which Dr. Krause had been an engaged and influential professor was not a "trivial interpersonal slight". We also say that there is no evidence that Dr. Krause's evidence was not factual or was "coloured by personal resentment".

xiii. Evidence of Monica Kay

72. In relation to Submissions [606], Kirchmeier did not emphasize confidentiality. Her evidence was that Kay emphasized that.

73. In relation to Submissions [607], Prof. Ducharme told Kirchmeier that Kay told him that he was not the person Kirchmeier should be talking to about the issues she raised with him in January 2014 (Exhibit 6, P137, Para. 2).

74. In relation to Submissions [609], Kay did not ask if she could disclose the information re Student E or Student B, she simply assumed she could not. This led to the siloing of information between Green College and the History Department. UBC has acknowledged that Student B waived her privacy rights (Submissions [386]).

75. In relation to Kay's account of questioning Cunningham about whether Mordvinov's actions towards her were "inherently sexual", Kay said that after Cunningham responded "no" she did not question Cunningham further because she realized that she did not know who was in the room, and it was therefore not appropriate to question Cunningham further. This evidence seems to acknowledge that Kay recognized Cunningham's answer might not have been a full answer.

76. In relation to Submissions [613], the introductory comments to the August 28, 2014 meeting are at Exhibit 6, P274.

77. In relation to Submissions [614], the evidence is not clear that Kay talked about NAM process at the meeting. What she said was that she could be a bridge to Chad Hyson:

Q. Did you provide info about processes available to take concerns forward?

A. I believe I made it clear I did not do investigations – could bridge to agency – could have mentioned Hyson by name – there was no blow by blow description because I was not familiar with it

Kay did not record what was said at the meeting and she was not clear in evidence about what she said. The claim that Kay spoke about anything substantive is not supported by the introductory comments preparation notes in evidence (Exhibit 6, P274).

78. In relation to Submissions [626], the University's recitation of Kay's evidence about McBryan is very incomplete. In her evidence, Kay admitted that she should have taken the matter further.

79. In relation to Submissions [628], Kay noted situations in which she might be obliged to breach confidentiality but did not testify that such situations ever arose in relation to matters covered by the complaint.

80. In relation to the University's summary of Kay's actions (Submissions [631], McBryan testified that she was dissatisfied with Kay, and Kay acknowledged that more could have been done for McBryan. We say that the claim that Kay consistently checked in with the Jane Does is not established by the evidence. What we see is that she was initially involved in a number of files and then there is nothing more recorded, which we say indicates that Kay did not check in and was waiting to hear again from complainants.

81. We also dispute that Kay consistently asked for the wishes of Jane Does or accurately recorded them (Submissions [636]). The purest example of this is

McBryan whom Kay stopped communicating with even though she clearly had ongoing concerns.

82. We also dispute the University's claim that there is no evidence of dissatisfaction with or harm from Kay's actions. We note that there was evidence of dissatisfaction with the March 2014 session (see Kay notes of July 23, 2014, Exhibit 6, P215), the July 2014 meeting, the August 2014 meeting and the December 2014 meeting. As well, we say that inaction in January and February 2014 meant there was not action towards Mordvinov before his sexual assault of Student B at the end of May 2014.

xiv. Evidence of Clark Lundeen

83. Re Submissions [646], we firmly dispute that Student E indicated that she *preferred* an educational approach. The evidence from the email chain on May 2, 2014 is clear that Lundeen said nothing direct could be done with respect to Mordvinov before he discussed an educational approach. Lundeen foreclosed doing anything direct with Mordvinov, not Student E. In relation to the claim that Lundeen did not seek permission from Student E to confront Mordvinov directly (Submissions [647], the evidence is that Lundeen did not want to pursue anything with Mordvinov.

xv. Evidence of Mark Vessey

84. Re Submissions [727], we note again that the plain language of the emails of May 2, 2014 does not show that Student E preferred an educational route, but rather that that is all that was offered to her by Lundeen.

xvi. Evidence of Steve Bohnen

85. Re Submissions [740], we disagree with the University's chronology. The initial report on June 5, 2014 was only about Student B; Student E's information was added on June 12, 2014, even though Student E's report to Green College/Lundeen was made first on May 1, 2014 (Exhibit 6, P176).

86. Re Submissions [742], the University's claim that Bohnen referred all relevant information to relevant parties is untrue. Bohnen interviewed Student B but contrary to his usual practice did not make notes of this crucial conversation.

87. Re Submissions [743], Bohnen did not say that he received a vague report from Student E, that was Lundeen's claim. Bohnen did not document Student E's complaint or create an IR summarizing his phone call with Student E. All we have is Bohnen's brief email referring Student E to Hollinshead (Exhibit 6, P201), his documentation of *Lundeen's* email about Student E's complaint, and Student E's email to Bohnen with her Facebook communication with Mordvinov.

88. Re Submissions [745], we firmly disagree that Bohnen testified that he received Kirchmeier's January 2014 complaint from Kay and escalated it to

management. Bohnen's testimony was that he first heard about allegations about Mordvinov from Lundeen in June 2014:

- Q. Did Kay tell you about any complaint or concerns from Kirchmeier in January 2014?
- A. I don't recall – I heard about somehow along the line in process – I think Ali Mojdehi went in and consulted with them - I can't say when
- Q. When you started communicating with Kay about Mordvinov in June 2014, did she mention this to you?
- A. I can't recall that – the first contact was referring Lundeen to me – because of the situation at Green College – allegations of sexual misconduct – I don't recall a previous thing in History – I don't recall
- Q. Did she mention prior concern it at any point?
- A. I did learn of it at some point
I don't know when
I don't know from whom

89. The question we asked Bohnen was *if* the allegations had come to him in January 2014, what would he have done:

- Q. If allegations had come to you at that time (January 2014) from Kirchmeier as former student – what if anything would you have done?
- A. fact that Kirchmeier not a student not as germane
quite a crowd of witnesses
first thing would done – alert management
requested them to reach out to History Dept, whether they felt they had it in hand
sense – might need some assistance
what Kirchmeier relaying – long standing pattern – people not comfortable talking about – would alerted mgmt – seeking direction – bit of bombshell – not as much as sexual assault or drink spiking – looks to me like could be reaching out to these guys by this point in time – already quite clear to me that he wanted reach outs from our department – come from mgmt side – not just side of Union – I am still in Union role – out of uniform – not out of Union – clear reference
- Q. Would this have led to creation of incident report
- A. I believe so – I should think so
- Q. What further steps, if any, would you have taken regarding such a report at the time?
- A. Dependent on – out of my hands – acting as escalator – consultation would been appropriate – without doubt student conduct would come out of it – would not been to take unilateral action
came from Ducharme – still would told mgmt – to alert department – departmental response – History Dept – could used some help
- Q. If a report was regarding a resident of Green College – what was practice at that time regarding bringing the report to the attention of the residence as well?
- A. escalate to mgmt – let them consider all elements
had this come to me – no recollection – I would not take unilateral action
did they want me to take further action or were they going to take further action

if need me to do anything – do you need me to search incident reports
 my function – can you look and see if incident reports about individual, complainants,
 History Dept
 see if anything on file
 background and inform my mgmt to more appropriately respond
 any previous contact with Mordvinov – typical role would been asked to do
 don't recall seeing this
 I don't know what going on with History Dept
 when knew, what actions taking
 escalate to mgmt – reach out to history – drop dime on Michel Ducharme – came by –
 sounds serious – anything like help with – lots people on academic sides not lot
 experience dealing with conduct complaints
 get jobs because brilliant academics but not Human Resources people

Q. GK testified that she told Kay she wanted someone in History Dept to talk to
 Mordvinov and tell him to stop his behaviour – would that have changed your
 answers?

A. I don't believe so
 not change answer – still be referral to mgmt – serious situation – allegations pattern
 conduct for long time – made lots women uncomfortable – put people in – made men
 uncomfortable – more recent years of this work
 I was involved in white ribbon campaign
 being older does not hurt
 direct referral to mgmt – would not change really request to get someone to do
 something

90. Re Submissions [752] regarding **Jane Doe 5**, Exhibit 82 documents NAM
 findings that led to a President's letter of June 2014. The disciplinary action at that
 time was no contact with Jane Doe 5. Specific limitations about where JM could
 go came later. They were put in place when there were again issues, and a second
 NAM process was suggested, but instead specific restrictions were added about
 where JM could go.

91. Re Submissions [753], the University's description of when priority
 response escorts were provided is incorrect. These were actions that were taken in
 2012. See Exhibits 94, 95, and 96.

92. Re Submissions [754], the claim that Bohnen regularly monitored the JM
 file between 2012 and 2015 is incorrect. Campus Security provided support in
 2012 in the form of priority response rides, but otherwise did not escalate the file
 in any way. The file was then inactive until Jane Doe 5 came forward in 2014.

93. Re Submissions [756] re **Jane Doe 3A**, we say the University's narrative is
 incorrect. We refer the Tribunal to our original submissions which set out the
 narrative in detail, together with supporting documents.

94. Re Submissions [757], we say the evidence in fact is that Bohnen was
 pushing Jane Doe 3A and Jane Doe 3B to report to the police.

xvii. Evidence of Tara McBryan

95. Re Submissions [771], we say McBryan's evidence was that Student X did carry her upstairs.

96. Re Submissions [772], the University omits that Student X told other students in Zoology on campus about the sexual assault of McBryan by the woman in Seattle, and made fun of McBryan about it in front of them.

97. Re Submissions [781], we say the evidence was that things did *not* work out in terms of sharing fish, and that McBryan had to change to a fish that was less relevant to industry. We say the evidence as presented by the University is incomplete and inaccurate.

xviii. Evidence of Lauren Fisher

98. Re Submissions [796, 797], we note that SASC is not a University office. It is wholly run by the AMS which is a separate non-profit society and not part of the University.

xix. Evidence of Dalya Israel

99. Re Submissions [800], the University repeats the objections it made at the outset to Ms. Israel's evidence. We say that the admissibility of Ms. Israel's evidence has been determined. We will not repeat our submissions here but rather rely on the submissions we made at the hearing, including with respect to the argument that Ms. Israel was not asked to speak to the facts in this case. The University notes [801] that Ms. Israel's report was found to be admissible. Ms. Israel expanded on the written summary of her evidence in her oral evidence.

100. The only question that remains at this time is the *weight* to be given to Ms. Israel's evidence. The University says that Ms. Israel's evidence should not be considered by the Tribunal because she has no experience with educational institutions, and as an advocate for WAVAW, is not impartial but rather "an open advocate for Ms. Kirchmeier's cause" (Submissions [812]). The University does not set out what it takes to be "Ms. Kirchmeier's cause".

101. We respond that the information Ms. Israel has gleaned while dealing with a large number of survivors of sexual misconduct has arisen in a wide variety of environments and has general application to survivors. Her understanding of survivor needs is not relevant to only certain specific environments. We respond further that Ms. Israel testified about the work she had done with Vancouver Community College, using money from Status of Women Canada, to create a strategic plan about how to increase the institution's capacity to respond in a survivor-centric way to complaints of sexual misconduct. She has therefore had an opportunity to specifically consider the applicability of her body of knowledge to a post-secondary educational context prior to testifying here. We say that Ms. Israel does have the background and qualifications to speak to practices in relation to managing allegations of sexual misconduct, as the Tribunal has already found.

102. In relation to their claim that Ms. Israel lacks impartiality because she works for an advocacy organization and is an “open advocate for Ms. Kirchmeier’s cause”, the Tribunal addressed this in the context of accepting her evidence as admissible, finding that Ms. Israel had affirmed that her evidence was true, independent, objective and free of bias.

103. In *McKay*, the Ontario Human Rights Tribunal set out the factors that should be considered when such concerns are raised:

[94] There is no question that an expert witness must be objective. See *R. v. D.D.*, *supra*. However, objectivity does not mean that an expert is devoid of community connections and/or derives opinions in abstraction absent any familiarity with the parties or their counsel. Experts are proffered precisely because they have expansive or deep knowledge of the field and respected reputations and affiliations, which sometimes may relate to, or overlap with, a party, particularly if the dispute comes out of a small or specialized industry. Further, in the human rights context, I am sensitive to the access to justice concerns for marginalized and equity seeking groups that may arise if rules of evidence are rigidly applied to exclude potential experts that have worked within or on behalf of such groups. A Tribunal’s inquiry with respect to (im)partiality should focus on whether, considering the nature and degree of association, the expert is able and willing to provide independent, objective and authoritative evidence, not argument, to assist the decision-maker regardless of which side the information favours. (Para. 99.)

* * *

[96] As noted in *Ericson v. Collagen Canada Ltd.*, [1999] B.C.H.R.T.D. No. 13 (QL) [CHRR Doc. 99-050], an expert should not be intent on supporting one party’s case; an expert should assist the Tribunal by offering impartial evidence. Failure to provide impartial evidence will affect the weight to be given to such evidence (para. 79).

104. Ms. Israel’s expert evidence was provided on her own behalf, not that of WAVAW. The fact that WAVAW acts as an advocacy organization within the arena of sexual assault reporting does not make Ms. Israel partial in the context of her evidence at this hearing. Ms. Israel’s evidence set out what she had observed and learned over time about the needs of sexual misconduct survivors in relation to the processes set up to respond to their complaints of sexual misconduct. This does not make her partial as between the University and the Complainants in this matter, since the University is required to, and says it does, make every effort to take account of the needs of survivors.

105. Ms. Israel’s evidence was about those needs. She did not specifically address any ways in which the University’s actions did or did not meet those needs. The University has pointed to nothing in Ms. Israel’s evidence that indicated that she was biased against the University or interested in any outcome other than the best possible processes for survivors of sexual misconduct. In that sense it is helpful that she was not asked to give evidence about the specific circumstances in this case.

106. We say her evidence provides helpful contextual information for the Tribunal and can be relied upon by the Tribunal in making its decision.

xx. Evidence of Dr. Brown

107. The Tribunal has already determined that Dr. Brown's evidence is admissible. The only question at this point is what weight should be given to the evidence.

108. The University says that little weight can be placed on the evidence of Dr. Brown because she was not provided with the facts of the current case and asked to comment on them. We say that Dr. Brown was called to give evidence on research that is being done on the harm that can result when institutions and officials within them do not live up to the promises they make about how they will respond to harms or risks to safety.

109. The University says that the concept that the manner in which institutions handle reports of sexual misconduct can have an effect on a complainant is not something beyond the scope of the knowledge and experience of a Tribunal member. We reply, first, that suggesting Dr. Brown's evidence says nothing new amounts to an admission that the University's response can have a significantly adverse impact on survivors, as Dr. Brown testified. We say the Tribunal can rely on that admission.

110. We reply further that specific information about this harm, the depth of the harm that can be caused, and why a limited or unhelpful response is so harmful is not within the knowledge of the Tribunal. Dr. Brown's evidence assists the Tribunal to understand the depth of harm that can be caused, to appropriately value the harm testified to by the Complainants' witnesses, and to consider the harm that is likely to have arisen in circumstances where the University's response was been incomplete or the person was exposed to further adverse events because of it. As such, the evidence is necessary. We say the Tribunal can and should rely on Dr. Brown's report which places before it a body of evidence and information about a specific modality of harm that has not been greatly explored by the Tribunal in the past (although there is mention of institutional betrayal in *Hale*).

xxi. Evidence of Chad Hyson

111. In relation to the University's claim that Hyson was moving on banning Mordvinov from campus before Hay wrote his urgent emails about Mordvinov in April 2015 (Submissions [845]), we note that there is no documentary confirmation of the timing of Hyson's actions in this respect, including any emails between Hyson and his superiors, or Hyson and the History Department inquiring whether it would be an issue for Mordvinov's academic progress if he could not return to campus. There is no documentation of Hyson's recommendation that Mordvinov be banned from the UBC Point Grey campus as an interim measure.

112. In his evidence, Hyson clearly stated that he would not take a third party report forward to the NAM process. This is missing from the University's summary of his evidence (Submissions [854]).

113. In relation to **Jane Doe 5**, the University's summary is confusingly brief and non-chronological (Submissions [882, 883]). In particular, the brevity of the summary obscures the fact that no action was taken against JM in 2012, that the outcome of the NAM process in 2014 did not prevent JM from having further interactions with Jane Doe 5 when she returned to campus in 2015, and that no restrictions were created under Policy 14 until 2015.

114. In relation to **Jane Doe 31**, we note the extreme brevity of the University's summary of Hyson's evidence, and, in particular, its failure to include Hyson's role in the NAM process because Mr. Morrison had stepped down as chair of the NAM Committee.

xxii. Evidence of Robbie Morrison

115. The University claims that "affected parties" are entitled to disclosure of the documentary or verbal evidence the decision-makers rely on, citing Rule 10 of the Rules for the President's UBC Vancouver and UBC Okanagan Non-Academic Misconduct Committees (Exhibit 1, P310) (at Submissions [976]). The Rules refer to "the student" and "witnesses"; the Rules do not use the term "affected parties". We say that complainants to the NAM Committee process are "affected parties" along with the student respondent, and that complainants certainly were not entitled to disclosure of the documentary or verbal evidence the NAM Committee would be relying upon, as was discussed by witnesses in relation to multiple NAM processes.

116. The University claims that NAM Committee panels consisted of a faculty member, a student and a staff member (Submissions [978]). It is unclear that this is true. NAM Committee panels appeared to consist of a Chair and a number of student members, usually 3 or more.

117. In summarizing Morrison's evidence, the University did not include his communications with Kirchmeier.

xxiii. Evidence of Dr. Loo

118. Re Submissions [1005], Loo's notes (Exhibit 6, P54) record Bohnen telling her that there was no formal complaint with UBC legal even though by the end of June 2014 Bohnen had been contacted by both Student B and Student E about their complaints. Re Submissions [1009], Loo's notes also say that Kirchmeier and Longstaffe were at the July 31, 2014 meeting with Kay at the EIO.

119. Re Submissions [1005], Kay's notes of July 23, 2014 of her conversation with Loo (Exhibit 6, P215) record Loo advising at this early date that Mordvinov was funded for research and was in full standing as a student.

120. Re Submissions [1034], the workshop held by the History Department was in March 2014 (not January 2014).

121. Re Submissions [1035], Loo's notes (Exhibit 6, P55) only set out her questions to Kay. Loo's timeline provides more information (Exhibit 4, P92). By December 22, 2014, Kay had received complaints from Cunningham and Kirchmeier. In direct Loo testified that, from what she could recall, on December 22, 2014, Kay told her it "looked like" there would be a complaint from Cunningham, but Kay did not provide a firm "yes" that there was a complaint at this time. The timeline notes say that it "appears" that there will be a complaint from Cunningham.

122. Re Submissions [1035], the information about whether Loo could inform colleagues that a complaint involving members of the History Department was being handled by the NAM process, and about drafting Departmental guidelines is recorded by Loo as arising from a meeting with Kay and Mark Trowell on January 5, 2015 (Exhibit 4, P93). According to Loo's notes, Kay advised on January 15, 2015 that she did not get clear answers from Hyson but that Loo should advise that a formal complaint was being handled but not that it was being handled by the NAM process, and that there was a concern that Departmental guidelines might be in conflict with University policy (Exhibit 4, P93). Loo's oral evidence was that Kay advised it would be cleaner if the Department waited to draft guidelines as it was better not to draft guidelines while something was being adjudicated because that could potentially get "messy". Loo also testified that Kay was raising concerns about the Department creating guidelines and suggesting it would be better for the Department to stick to education. This evidence indicates that Kay favoured not being frank with Faculty and a lack of action on Departmental guidelines. The lack of action on Departmental guidelines was a clear precursor to the actions of the HGSA at the end of term.

123. Re Submissions [1038], at the February 2015 Department Faculty meeting, Loo also testified that she said the reconstituted History Equity Committee would move forward on Departmental guidelines in the fall of 2015. This did not happen.

124. Re Submissions [1041], Loo's oral evidence is that complaints were being routed through Kay. She therefore did not receive formal disclosures at any point. About January 15, 2015, Kay confirmed that a formal complaint had been filed about Mordvinov. Loo's evidence that she was not advised about Kirchmeier's January 2014 report or December 2014 complaint in support of Cunningham's complaint is an example of Kay contributing to the siloing of information by not sharing it with Loo even though Loo was the head of the Department.

125. Re Submissions [1042], the University says that Loo understood that the EIO had the expertise and "statutory responsibility" to manage and investigate sexual harassment complaints. The implication is that Loo understood the EIO was handling concerns about Mordvinov. It is unclear what "statutory responsibility" the University is referring to. It is very clear from Kay's evidence that the EIO did *not* have a mandate to investigate anything, including sexual harassment complaints. The University does not address the power Loo had as Administrative Head of Unit under Policy 3 to address sexual misconduct.

126. Re Submissions [1043], Kay's notes dated September 16, 2014 (Exhibit 6, P299) are clear that during the meeting of July 31, 2014, women students raised the concern that Mordvinov was a known sexual predator, that no one was doing anything about it, and that there were rumours about him. She also noted that throughout the summer there was talk and rumour about Mordvinov, as well as growing fear and anger. Kay's response at the meeting was to say that anyone could go to the EIO and open a file and that there were concerns about due process. This remained her view. Kay consistently failed to appreciate that being told of widespread concern about Mordvinov as a result of public allegations about him being a predator was *itself* a concern she should be acting on. As of September 2014, Kay's notes indicate that she did not believe any complaint had been filed about Mordvinov, despite Kay being aware of information being provided to the University by Kirchmeier, Student E, Student B and Cunningham about serious sexual misconduct by Mordvinov. Kay's notes make clear that Loo's understanding that the EIO was handling concerns about Mordvinov's sexual misconduct throughout were incorrect.

127. Re Submissions [1044], the University does not address Loo's evidence about the period after February 2015 at all. The University does not address the fact that although the concerns of the students about Mordvinov were clear, and were not being addressed by the University, particularly in the fall of 2014, Loo took did not raise concerns about this or take any action herself.

xxiv. Evidence of Dr. Paris

128. Re Submissions [1054], our notes do not contain any reference by Paris to "Kirchmeier's approach to handling complaints within the Department". It is unclear what the University means by this phrase.

xxv. Evidence of Vi Addams

129. Re Submissions [1057], the University's summary of Addams' evidence was limited to payments by the *History Department* to Mordvinov. It did not address payments to Mordvinov by other entities such as the Faculty of Graduate studies, which is the principal source of funding for graduate students. As Kay's notes of July 23, 2014 of her conversation with Loo (Exhibit 6, P215) record, as early as July 23, 2014, Loo had determined and was aware that Mordvinov was funded for research and was in full standing as a PhD student.

II. ARGUMENT

i. Scope of Complaint

130. Re Submissions [14], the University says that the "temporal scope" of the complaint is January 8, 2014 to November 6, 2015. This time period comes from the definition of the **General Class** (Submissions [13]). We note, however, that the definition of the **Mordvinov Class** does not contain this date limitation.

131. We note further that even with respect to the General Class, evidence will be admissible with respect to events *prior* to January 8, 2014 if such evidence establishes the context of events *after* January 8, 2014, and to events after November 6, 2015, if such evidence establishes the effect of events prior to November 6, 2015.

132. We also note that the University omitted the word “once” in the General Class definition after the phrase “at least” (*Kirchmeier No. 2*, 2017 BCHRT 186, para. 44).

ii. Credibility

133. UBC cites Member Juricevic in *Boshoff v. Inspired Retreats*, 2014 BCHRT 6 for the observation that the most helpful evidence in the case is the documents created at the time. We note that advancing this position now is at odds with the University’s repeated arguments during the hearing that the Tribunal could only rely on oral evidence, and that any information not provided in oral evidence, including all documentary evidence, was hearsay and should not be relied upon. Our submission is that the Tribunal may rely on both oral and documentary evidence, and will need to do so to have before it a complete view of what happened.

134. We also note the University’s position now that hearsay evidence is admissible (Submissions [35, 36]), but that the hearsay nature of the evidence might make it less reliable. We say there are no fixed rules about use of hearsay evidence in Tribunal hearings, and that the use of hearsay evidence is a matter for Tribunal to consider in the context of all of the evidence heard.

iii. Prima Facie Case of Discrimination

135. The traditional meaning of *prima facie* is “at first sight” or “on the face of it”. In law it is generally considered to mean that taken at face value, a claim has merit. In the human rights context, a *prima facie* case means a case in which three elements are proven: that the complainants suffered adverse impact from events which occurred in relation to the sections of the *Code* named, that the complainants have personal characteristics covered by the *Code*, and that there was a nexus between their personal characteristics and the adverse impact which they suffered (*Moore v. British Columbia (British Columbia)*, 2012 SCC 61, para. 33). Generally in human rights cases, both on applications to dismiss and on final argument, there is dispute about at least some elements of this test which must be overcome to establish a *prima facie* case.

136. The University cites and relies on the following passage from *Ontario (Human Rights Commission) v. Simpsons Sears Ltd. (O’Malley)*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536:

The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a

verdict in the complainant's favour in the absence of an answer from the respondent-employer.

137. We say the phrase “if believed” is ambiguous in this passage. This passage appears to engage the more common usage of the phrase “*prima facie*” to mean “at face value”. “If believed” would then mean “if taken at face value”. However “if believed” could also mean if accepted after all contrary arguments are considered. While it is clearly advantageous to complainants to argue that “if believed” means “if taken at face value”, this is not how human rights complaints are generally argued and decided. We accept that we have to prove the three elements set out in *Moore*, and that we have to do so over whatever objections the University raises on the evidence to any or all three elements of the test.

138. As an example of contested terrain in relation to whether the complainants can establish a *prima facie* case, the University claims that members of the Mordvinov and General classes who are no longer students cannot establish that a service was involved in their relationship with the University such that s. 8 of the *Code* is properly engaged.

139. In *Kirchmeier obo others v. University of British Columbia (No. 4)*, 2021 BCHRT 149, the application to dismiss decision in this case, the Tribunal found that the University did not make any specific submissions about the scope of its services here (para. 97). For the purposes of the decision, the Tribunal adopted the description of the University’s services set out by the Tribunal in *Hale No. 2* (2019 BCHRT 23, (para. 47):

In my view, this case suggests that the services UBCO provides to students in response to allegations of sexual misconduct and other forms of harassment have two streams. The first is providing support including accommodation as necessary to survivors of alleged sexual assault to ensure that they can continue in their studies. There appears to be some recognition of this, at least in the 2016 Protocol, within the materials UBCO has at its disposal to inform its approach to reports of alleged sexual assault. The second is enforcing its policies for providing a safe and harassment free education environment by investigating complaints and disciplining as appropriate those who violate such policies. This complaint involves both of these streams, and I will refer back to them below.

140. The Tribunal’s decision in *Hale No. 2* was upheld on judicial review in *University of British Columbia v. Hale*, 2021 BCSC 729. At para. 103 of the JR decision, the court noted that UBCO took no issue with the identification of UBCO as a service provider within the meaning of s. 8 of the *Code* with an obligation to provide a safe and harassment-free environment. At para. 104, the court stated that UBCO acknowledged the two streams of services UBCO provided to students as described in *Hale No. 2*, as quoted above. The court held that these services were services customarily available to the public as required by *Moore* and s. 8 of the *Code*.

141. Here we say that the complaints made by the Complainants to the University, which complaints make them members of the General or Mordvinov

Classes, also engage the University's services in responding to the complaints, as described in *Hale No. 2*. The University has an obligation to respond to complaints about events when the complainants were students, and doing so is a service of the University that flows from the University-student relationship. Put another way, responding to complaints is a service the University provides because the person making the complaint was a student when the complaint matter arose, and is therefore a service covered by s. 8 of the *Code*.

142. This view is supported by Kay's evidence that when Kirchmeier first came forward in January 2014 and spoke with Kay in February 2014, Kay followed up with Kimberly Beck of UBC Legal to find out whether the fact that Kirchmeier was an alumna rather than a current student would be a bar to addressing her complaint. Kay testified that Beck told her it was not an issue and that the University would deal with a complaint provided the complainant was a student when the facts of the complaint arose. Kay testified that as a result, she did not discourage Kirchmeier or tell her she could not file a complaint.

143. We also say that the Tribunal's decision defining the classes in this case is also confirmation that in this s. 8 case, the individuals named in the classes are in a service relationship with the University. Finally, we say that having run an application to dismiss in this case in which it should have addressed any basic lack of jurisdiction on the part of the Tribunal, the University is now estopped from arguing that a number of Complainants in this case were not receiving services from the University and therefore that s. 8 does not apply. The alleged lack of a service relationship with some complainants should have been raised at the first opportunity (the application to dismiss), and was not. We say it is too late to raise this argument now.

144. The University returns to the elements of a *prima facie* case later in its Submissions ([1129] onwards). In relation to nexus, the University argues that "there must be evidence that the protected characteristic was an operative element in the adverse treatment", citing *Radek* at para. 482. We say this is an incorrect statement of the law. *Radek* (2005) was issued before the Supreme Court of Canada decision in *Moore* (2013). In *Radek*, the Tribunal held that the prohibited grounds needed to be *a factor* leading to the discriminatory *conduct* (para. 482(a)). The Tribunal goes on to say that the prohibited ground or grounds need not be *the* cause of the respondent's discriminatory conduct; it is sufficient if they are *a factor* or *operative element* (para. 482(c)). When a prohibited ground is a factor in the conduct or treatment that is complained of, that is a complaint of direct discrimination rather than adverse effect discrimination. In its decision in *Meiorin (British Columbia (Public Services Employee Relations Commission) v. BCGSEU 1999 CanLII 652 (SCC))*, the Supreme Court of Canada made clear that both direct and adverse impact or adverse effect discrimination are *equally* prohibited by human rights legislation.

145. *Moore* clarified that the inquiry must in fact be directed at whether adverse *impact* is present, not adverse treatment. In considering nexus, *Moore* emphasizes the relationship between the adverse impact which occurred and the protected characteristics alleged to be in play. While that connection may be because the

protected characteristic was part of the reason for adverse treatment or conduct which resulted in adverse impact, which is direct discrimination, this is not the only way nexus can be established. Nexus can also be established by showing that *adverse impact* occurred because of a person's protected characteristic, even if the treatment is neutral or the personal characteristic is not a factor in why the treatment or conduct occurred. This is adverse impact or adverse effect discrimination.

146. The Supreme Court of Canada ("SCC") has described adverse impact discrimination as the disproportionate adverse impact someone suffers from a seemingly neutral law or policy where there is a connection between their protected characteristics and the adverse impact: *Fraser v Canada*, 2020 SCC 28 ("*Fraser*") at para. 30.

147. In *Fraser*, the SCC noted that discrimination is "frequently a product of continuing to do things 'the way they have always been done'" (at para. 31, citation omitted). The SCC warned that it was therefore important for governments – and, in the present case, institutions such as the University – to be "particularly vigilant about the effects of their own policies' on members of disadvantaged groups" (*Fraser*, at para. 31, citation omitted). The Court in *Fraser* recognized that adverse impact discrimination is much more prevalent than direct discrimination, and that addressing adverse impact discrimination is one of the "most powerful legal measures available to disadvantaged groups in society" (*Fraser*, para. 35, citation omitted).

148. The classic example of adverse effect discrimination is access to a building which is limited to stairs. The building was not built that way to deliberately exclude persons who cannot climb stairs because of disability, and the building is the same for all, but persons with disabilities who cannot climb stairs will be adversely impacted by the fact that the building is only accessible by stairs. The adverse impact of being unable to access the building arises because of the person's disability-related limitation in climbing stairs. This *relationship* between the adverse impact and the personal characteristic of disability establishes the required nexus to disability to make the stairs *prima facie* discriminatory. The ability to recognize *adverse impact* and what it arises from, as opposed to what the treatment or conduct arises from, is *essential* to being able to recognize adverse effect discrimination.

149. Women are overwhelmingly the persons against whom sexual misconduct takes place. This was accepted by the Tribunal in *Kirchmeier No. 2* and is not disputed by the University. The Complainants in both classes were concerned about sexual misconduct because of their sex as women, which made them the target of sexual misconduct in their cases, or made them vulnerable to future sexual misconduct from a particular perpetrator, and also made them keenly concerned about sexual misconduct as an issue of safety and security for women in the community and as an issue which the University needed to manage effectively to provide a safe and secure environment for women to work, live and study. When the University did not provide an effective or timely response to allegations of sexual misconduct, this impacted them as women because of these

concerns they had as women. The Complainants brought forward their complaints for reasons related to their sex and their need for personal safety and security, their commitment to community safety and security for women, and their need to see the University taking the safety and security of women seriously.

150. As women making complaints related to sexual misconduct, the Complainants needed and expected the University to have an effective and timely response to those complaints. When it did not, they were harmed as women. As women are disproportionately the targets of sexual assault, if the University's process for responding to sexual assault treats complainants in a manner that is unfair, unreasonable, and/or harmful, nexus can be established between gender and any negative treatment and/or impact arising from the University's response.

151. The University says that "its processes were neutral and applied equally to all students" and that "any procedural flaws or delays [in its processes] are not discriminatory unless linked to a protected characteristic" (Submissions [1146]). It says that the University's actions or inactions were not the effects of "stereotypical beliefs about the Complainants' sex". These are arguments that the University's conduct was not *caused by* the Complainants' sex. These are arguments related to a claim of *direct* discrimination. We are not making a claim of direct discrimination; we are saying that when the University does not respond effectively to allegations of sexual misconduct, this is particularly an issue for women; for their actual safety and security, for their reasonable understanding of their safety and security, for their reasonable understanding that their safety and security is important to the University, for their access to education, and for their sense of justice and accountability. These are all related to the adverse effects women experience because they are overwhelmingly the targets of sexual misconduct as women, and in many cases here, were the actual targets of the sexual misconduct taking place.

152. The University claims that the fact that Mr. Hay was also harmed by the University's responses undermines the Complainant's case (Submissions [1143]). Mr. Hay's experiences do not undermine the Complainants' claims of harm as being related to their sex as women. His interest did not flow from his gender, or from personal exposure to sexual misconduct, or to the risk of sexual misconduct. He did not have a personal stake in the University responding effectively as a demonstration of its commitment to the safety and security, and therefore substantive equality, of women, because of his gender. His personal investment in the University responding appropriately was intense, but it was not particularly related to his gender. As such, the harm that came to him when the University did not respond effectively or in a timely way was also not related to his gender.

153. Applying the building example from above, a person could be barred from a building because of a rule requiring him to be a member of a group granted access. If so, the harm to him would be the same as a disabled person, lack of access, but he would not have a human rights complaint because he would not be able to show that any personal characteristic was at play in the reason why he was being adversely affected by lack of access. Similarity of harm does not mean that every person will have a discrimination claim.

iv. Group vs. Class Complaint

154. In *National Automobile, Aerospace, Transportation and General Workers of Canada (CAW – Canada) Local 111 v. Coast Mountain Bus Company* (No. 7), 2005 BCHRT 478 (“*Coast*”), the Tribunal described the distinction between a class and group complaint as follows:

A group of persons is a number of individuals who are identifiable, or who, with relative ease, could be identified by name for the dates relevant to the complaint. On the other hand, a “class” of persons is a number of individuals who can be described by characteristics for the dates relevant to the complaint but cannot necessarily be individually named.

155. As the University admits (Submissions [1067]), the Tribunal does not have any rules of practice or guidelines regarding Class and Group complaints, and the Code has no provisions which assist with determining whether a complaint is a Class or Group complaint.

156. Contrary to the submissions of the University, the Tribunal has not found that in class complaints all class members must have suffered identical discrimination and damages, or that resolution of a single issue must resolve the complaint for all class members (Submissions [1080]). On the contrary, the Tribunal has readily acknowledged that individual circumstances may exist, and can be individually considered by the Tribunal in relation to findings of liability and damages. The key point, however, is that evidence in relation to one member of a class can be considered in relation to other members of the classes.

157. In *Coast*, the Tribunal stated (paras. 52, 53):

[52] An issue which arises in this regard, however, is that while Local 111 seeks systemic remedies, it is also seeking remedies with respect to individual members of the class. In *CAW No. 5*, the Tribunal commented on Local 111’s ability to do so. While acknowledging that the assessment of disability and accommodation require very individualized assessments, the Tribunal noted that the bringing of a representative complaint on behalf of a group or class of persons does not inhibit the Tribunal’s ability to award individual remedies where appropriate. The Tribunal noted:

... there have been several cases before the Tribunal in which a complainant has argued that specific actions taken against them as an individual, that would entitle them to an individual remedy, are also part of a larger pattern of behaviour, or were the result of systemic policies and practices. (at para. 60)

[53] The Tribunal clearly has the ability to award both individual and systemic remedies, given the appropriate evidentiary base. However, the question which remains is how these individual issues are to be dealt with in the context of a representative complaint.

158. In *Citizens for Safe Technology Society obo others v. B.C. Hydro*, 2012 BCHRT 300, the Tribunal stated (para. 59):

Third, I disagree with Hydro that a class limited to those claiming to be afflicted with EHS would fail to contain common issues of fact and law. For example, the issues of

whether or not EHS is a disability, and whether exposure to wireless Smart Meters adversely affects persons with EHS to a degree requiring accommodation are common issues. In any representative complaint, individual circumstances may ultimately need to be explored if a systemic breach of the *Code* is found: *Coast*, paras. 52-56.

159. The current complaint was brought as a class complaint involving two classes in order to ensure that evidence about the University's history, policies and processes would be cumulative and available for general consideration with respect to both liability and remedies, as well as being available in relation to the experiences of each individual involved. It was also brought as a class complaint to ensure that individual experiences could be considered cumulatively in relation to systemic remedies. It was further brought as a class complaint, in relation to the Mordvinov Class, to accommodate the fact that the experiences of all of the class members related to a single set of events in which they were involved in various ways. At the outset of the complaint all members of each class were not known. Now many members of both classes are known, although we say it is certainly possible that further members of each class may exist and come forward. This might be especially likely with respect to the General Class where identification of class members was a very hit and miss process that continued up until the start of the hearing, and in relation to which the University never provided information about the steps it had taken to identify class members.

160. The University says (Submissions [1068]) that the complaint was not subject to a certification process. We say that the process of defining the classes which resulted in the Tribunal's decision on class definitions was the certification process for this case under the Tribunal's processes.

161. The University says that members of the General Class in particular do not share common facts and experiences (Submissions [1080]). We disagree. All were students of the University. All were subject to the University's policies and processes. All had to deal with circumstances where several different entities might have responsibility (campus security, the EIO, the NAM process, and Administrative Heads of Units) and where communication among those entities was very uneven. All had to deal with a situation where the University had policies it was not using in practice much or fully (Statement on Respectful Environment, Policy 3 and Policy 14). All were participating in a system that chronically failed to provide complete information to students with concerns about options going forward, both within the University and without. Most dealt with the same University personnel. Within these constraints, they did have different experiences, but this does not invalidate them as members of a class, and does not mean that the Tribunal should not be able to consider the evidence regarding each of the class members cumulatively. In relation to the Submissions [1069], we say that sharing common issues of fact and law is not the same as having every issue of fact and law be the same. The University's argument is like saying that because victims in the same car crash sat in different seats, they did not experience the same crash.

162. The University says that success for one class member cannot mean success for all (Submissions [1082]). We agree, as we have argued, that the specific circumstances as known for different members of the two classes need to be taken

into account, including with respect to individual remedies. We are not arguing that persons with different experiences should be treated identically at an individual level. However, it is also our view that the Tribunal can consider the evidence cumulatively to find that the *classes* have established discrimination and can make declaratory findings and award systemic remedies for the complaint as a whole. Once the Tribunal finds that discrimination is made out, the Tribunal's remedial power is discretionary, including the extent to which it does or does not individualize its remedies.

163. The University suggests that this complaint should now be transformed into a group complaint. It says there is no rule preventing this. We say that there is no need for the Tribunal to do this, given that its jurisprudence in respect of class complaints is clear that it may consider evidence both cumulatively and individually, and may award remedies on a complaint wide basis, and individually. We further say that the principles of adjudicative fairness strongly suggest that the basis of a complaint should not change drastically late in the day.

164. The University also suggests that the Tribunal should now address this complaint as a series of different classes than those identified at the outset. We say that this approach will not simplify matters over considering individual circumstances, but that where circumstances are similar, that should be taken into account in establishing damages. We have attempted to do this in the damages we have sought.

v. Class Members Not Testifying

165. It is clearly usual for complainants to testify. When no complainants testify, the Tribunal has been wary of making findings of discrimination. The University relies on the case which they call Pivot Legal and which has come to be known as *VANDU* as it was known when it reached the BCCA (*Vancouver Area Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132) (submissions [1089]). In *VANDU*, the vulnerable members of the class did not testify. Although the Tribunal had before it statistical evidence showing that persons making up the complainant class (persons who were or appeared to be members of a street homeless population in the jurisdiction of the DVBIA) were overwhelmingly disabled, racialized, and/or indigenous, the Tribunal declined to find that this was sufficient to establish nexus between the actions of the downtown ambassadors against the complaint class and the protected characteristics. The Tribunal found that the statistical evidence about the demographics of the community only established the *potential* for a disproportionate impact on protected grounds. In the absence of *either* broad data showing that members of protected groups *were* disproportionately impacted (data the DVBIA was in a position to collect but did not), or individual evidence of impact by persons with protected characteristics as was provided in *Radek*, the Tribunal was not prepared to find nexus. This outcome arose as a matter of fact on the evidence provided in the case. This outcome did not make testimony of individuals essential. Had the complainants in *VANDU* been able to advance statistical evidence about who was in fact being affected, they arguably would not have needed individual evidence to establish nexus.

166. As we noted in our original submissions, the Tribunal has awarded individual remedies even where individuals have not testified (*Brar*, 2015 BCHRT 151).

167. It is certainly not the case that the Tribunal's expectation is that every member of a class complaint will testify. In the present case, members of both classes have testified, and the *Complainants* called a number of other witnesses as to the events that transpired with the General Class complainants in particular. While the University describes the evidence of Kay, Bohnen, Lundeen and Vessey as cross-examination (Submissions [1078]), the evidence of these witnesses primarily came in through direct examinations *by the Complainants*. Whether direct or cross, the evidence of these witnesses is all legitimate evidence on which the Tribunal may assess whether the University's response to General Class members after they raised concerns about sexual misconduct fully protected their right to a harassment-free and non-discriminatory educational, living and working experience. In many cases, we argue the facts are clear that the University's response was insufficient and harmful.

168. We say both that the evidence regarding General Class members can be considered cumulatively to assess the effectiveness and efficiency of the University's processes, and that the individual experiences of General Class members can be considered as grounding both liability and damages to individuals.

169. The University consistently argues, in relation to individual complainants who did not testify, that the submissions made in relation to each by the Complainants amount to the Representative Complainant "improperly substituting" her views and opinions for those of the individual about that individual's experience, which allegedly does not respect the individual's autonomy. We respond that given that the University was to advise every potential Complainant of the complaint, if individual Complainants have chosen not to identify themselves to us and also not to opt out of the complaint, it is reasonable to infer that they understood and accepted that the Representative Complainant would speak for them without their input. Doing so respects their interests in this matter to the greatest extent possible; simply dismissing their complaints or ignoring their circumstances without warning to them would not. Moreover, when the University asks the Tribunal to dismiss the complaints of these individuals, we note it is doing so in its *own* interest since clearly the University has no authority itself to speak for these Complainants. There is no evidence or claim that here that the University sought permission from any Complainant to seek the dismissal of their complaint, even though the University knows the identities of all Complainants, which the Representative Complainant does not.

170. The University also takes issue with the Complainants' position in respect of some Jane Doe complainants that discrimination in respect of them personally is not made out on the evidence (Submissions [1103]). The University claims that this position indicates that the Complainants are not fulfilling their obligations as

class representatives. The fact that this is a class complaint does not oblige the Complainants to argue that discrimination is established in respect of every complainant. The Complainants have an obligation to the Tribunal to advise if they do not think the evidence establishes discrimination on a personal basis. This does not preclude the Complainants from otherwise relying on the evidence in respect of these class members in service of the overall complaint and the claims of other class members. It is reasonable for the Complainants to argue that instances where things went well help to show that instances where they did not are instances of an insufficient response by the University.

171. Where the Complainants say that discrimination is not made out for some General Class Complainants, the University is very critical of the Representative Complainant for addressing the evidence about those members of the General Class. In some instances, they say that this was done for the benefit of the complaint as whole, and not for the benefit of the individual Complainant. In relation to this claim, we note the woefully inadequate and extremely delayed disclosure by the University regarding many of the Jane Doe files, and the fact that the Complainants could not know in advance, before evidence was called from University personnel at the hearing, whether or not a case of *prima facie* discrimination would emerge on the facts for any Jane Doe. We say that this circumstance was also a consequence of the Tribunal's choice not to provide the Complainants' Representative information about the identity of the Jane Doe Complainants. In these circumstances, the Representative Complainant was obliged to see what evidence would be available for each Jane Doe, and could not simply assume that a case would not be made out before evidence was called. We rely on the Tribunal to address the evidence of these members of the General Class in a sensitive manner, as we have been assured it will.

vi. Use of Comparative Analyses

172. The University objects to submissions by the Complainants which compare how the University responded to complaints of sexual misconduct in different situations (Submissions [1100]). The University says that following *Moore*, the test for *prima facie* discrimination does not require a comparator group. We agree that it is no longer *necessary* to identify a comparator group, but we do not agree that it is never appropriate to identify and rely upon evidence in relation to comparative situations. Establishing adverse impact and also nexus can be done in various ways. Sometimes comparative evidence is appropriate to show that conduct in the situation in question was abnormal or adverse.

173. That was the point we were making with the evidence about Hyson's quick action in relation to Jane Doe 20's complaint about individuals continuing to contact her in an unwelcome fashion. The fact that Hyson could and did act promptly in response to Jane Doe 20's complaint sheds further light on his total failure to act in any way in relation to complaints about Mordvinov until the spring of 2015. In our submission, this comparison supports our view that the University's response to the allegations about Mordvinov was severely insufficient and untimely.

174. The University says that there are “dramatic” differences between Kirchmeier’s complaint and Jane Doe 20’s complaint, which it identifies as the fact that Jane Doe 20’s complaint was not a third party complaint. In our submission, since all Kirchmeier wanted originally was for someone to speak with Mordvinov about conduct that was unwelcome, with no disciplinary consequences to be attached, which was exactly what Jane Doe 20 had also asked for, it is unreasonable to suggest that the University’s hands were tied in taking this simple preventative step in relation to Mordvinov because Kirchmeier’s complaint was a third party complaint. The University’s duty to ensure a discrimination and harassment free environment for work and study required it to act in both cases. If the reason it did not act in relation to Mordvinov was an ideological position about third party reporting, this underscores the serious harm caused by the University’s unduly limited understanding of its obligations to act.

175. In saying this we note, however, that it was not Kay’s evidence that she did not speak with Mordvinov because Kirchmeier’s report was a third party report. Kay testified that she proposed the training because it would both address the University’s expectations and identify resources for the women in the department. She further testified that she could have also spoken with Mordvinov if she had been told that the training that took place had not been adequate. She testified that there would have been no reason not to speak to Mordvinov in that circumstance.

viii. Duty to Respond

176. The Tribunal’s case law under s. 13 of the Code has established that employers have a duty to respond to reports of sexual harassment or sexual assault: *Beharrell v. EVL Nursery*, 2018 BCHRT 62 (“Beharrell”); *Denness v. PDK Café and others*, 2020 BCHRT 184; *The Sales Associate v. Aurora Biomed Inc. and others* (No. 3), 2021 BCHRT 5 (“Aurora Biomed”). The principle underlying the duty to respond is that the protection against discrimination would be hollow if employers “could sit idly when a complaint of discrimination was made and not have to investigate it”: *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 3 at para 53 (“Marineland”).

177. Like employers, service providers have a duty to provide services in a non-discriminatory manner: *Code*, s. 8. The underlying principle that supports the duty to respond in the employment context applies equally in the context of service provision: if service providers could sit idly when a discrimination complaint was made, the protection against discrimination in s. 8 of the *Code* would be rendered hollow. Both this Tribunal and the Human Rights Tribunal of Ontario have affirmed that service providers have an obligation to take reasonable steps to address allegations of discrimination: *Kirchmeier obo others v University of British Columbia* (No. 4), 2021 BCHRT 149, para. 101 (“Kirchmeier No. 4”); *Armitage v. Ottawa Carlton District School Board*, 2022 HRTO 252, para. 191, *Hale No. 5* (2023 BCHRT 121).

178. The Tribunal has noted that a service provider’s response to allegations of sexual assault must be non-discriminatory, and that this requires that it not have an adverse impact on individuals based on personal characteristics protected by

the *Code*: *Kirchmeier No. 4*, para. 100. In order for the duty to respond to fulfill its purpose of giving teeth to the protection against discrimination the *Code* offers, it is important to also give content to the duty. As the Tribunal has recognized, it cannot be the case that *any* response would fulfill the duty to respond: *Aurora Biomed*; *Kirchmeier No. 4*, *Hale No. 5*.

179. The University argues that the duty to respond is like the duty to accommodate, and therefore belongs in the justification part of the analysis, after *prima facie* discrimination has been established (Submissions [1148, 1152]). This misses the argument that we are making. We say that when the University fails to respond effectively and in a timely way to complaints of sexual misconduct, that failure is *itself* a form of discrimination. This is because that failure is the source of adverse impact for the complainants and that adverse impact is related to the Complainants' sex. The adverse impact arises because the University has an obligation to respond effectively and in a timely way, and it has not done so. This analysis directly engages the *Moore* analysis and does not ignore it, as claimed by the University (Submissions [1147]).

180. As the University points out, the Tribunal has accepted a number of criteria which may be considered to determine if a Respondent has met its duty to respond. In *Beharrell v. EVL Nursery*, 2018 BCHRT 62 ("*Beharrell*") the Tribunal held (para. 21, quoting *Marineland*, paras. 59-60):

With respect to whether EVL's alleged failure discriminated against Ms. Beharrell on the basis of sex, the Tribunal has held that when an employee raises allegations of discrimination on the basis of a protected ground, an employer has an obligation to investigate the alleged discrimination: *Smyth v. Loblaw Companies*, 2017 BCHRT 73 (CanLII), para. 60; *Davis v. Western Star Trucks*, 2001 BCHRT 29 (CanLII), para. 94; *Ford v. Nipissing University*, 2011 HRTO 236 (CanLII), para. 56; *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII), para. 53. In *Laskowska*, the Ontario Human Rights Tribunal set out a helpful list of criteria against which the reasonableness of an employer's response may be measured:

The six criteria of corporate "reasonableness" in *Wall* have been adopted in previous decisions of the Board of Inquiry. I adopt a conflated version of them. The criteria are:

- (1) Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;
- (2) Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and
- (3) Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication: Did the employer provide a reasonable resolution in the Circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy,

discrimination-free work environment? Did it communicate its findings and actions to the complainant?

While the above three elements are of a general nature, their application must retain some flexibility to take into account the unique facts of each case. The standard is one of reasonableness, not correctness or perfection. There may have been several options – all reasonable – open to the employer. The employer need not satisfy each element in every case in order to be judged to have acted reasonably, although that would be the exception rather than the norm. One must look at each element individually and then in the aggregate before passing judgment on whether the employer acted reasonably (paras. 59-60)

181. The University says that there can be no dispute that it had a proper understanding of discrimination and proper mechanisms for the resolution of complaints of discrimination during all relevant times related to this complaint (Submissions [1159, 1169]). The University says that Kay, Morrison and Hyson had “a comprehensive understanding of discrimination and harassment”. We say that the evidence clearly shows that this was *not* the case. Almost no-one at the University (other than Kay) had a working knowledge of discrimination, particularly adverse effect discrimination, and the mechanisms in place that were actually in use, namely the NAM process, failed to identify the conduct it was dealing with as discrimination, failed to engage Complainants as parties to the process rather than witnesses, and was not aimed at ensuring safety and security or at ensuring a return to a non-discriminatory environment. These were the findings of the Tribunal in *Hale No. 5* as well.

182. The University relies on Policy 3 which it claims contains a formal complaint resolution procedure (Submissions [1161]). The evidence was that, although Kay understood Policy 3 to guide her informal work, the formal procedure in Policy 3 was not in use *at all* during the time frame of the complaint for issues relating to student perpetrators.

183. The University relies on the Statement on Respectful Environment for Students, Faculty and Staff (Submissions [1162]). They say the Statement only relates to personal harassment (Submissions [1164]). This is not evident from the wording of the Statement. We observe that the Statement contains no mechanism for any form of enforcement.

184. The University claims that it responded promptly and sensitively to the concerns raised by Kirchmeier and then the other women from the History Department in July 2014 (Submissions [1173-1175]). This is manifestly not the case, including because the University failed to speak with Mordvinov about his conduct ever, let alone at the earliest opportunity, and failed to comprehend that in coming forward in both January and July 2014 the students were raising concern about Mordvinov as an ongoing threat to women, which concern needed to be addressed in a concrete and effective manner to alleviate the reasonable concerns women had about his return to both Green College and the History Department. The University relies on its disciplinary action in the NAM process (Submission [1176]) but does not address our argument that its obligation was to address the lack of safety and security for women, and restore non-discriminatory

conditions, to which its disciplinary response was a very delayed and incomplete response.

185. The University says that it could not act before it had first party complaints (Submission [1176]). We strongly disagree with this assertion. First, the University had first party complaints by the end of June 2014 that it did not act on for more than a year (Student B and Student E). Second, the University was certainly able to act on all of the information it had, including third party complaints, and it was essential that it do so to address the reasonable concerns of women over safety and security for women at the University, and for a non-discriminatory work, study and living environment for women. The University's focus was on its disciplinary powers under s. 61 of the *University Act*, not on its obligations under the *Human Rights Code*, which the evidence made clear, key staff were not thinking about at all.

186. The University says that it reasonably balanced promptness with "essential principles of fairness and due process" (Submissions [1178]). In fact, it sat on complaints and information for more than a year, never advised Mordvinov of the concerns, never spoke to Mordvinov, never obtained his response, and then banned him from the campus without warning at the end of April 2015 before he had any right of response. Ultimately he was permitted to respond to the few allegations that went forward in the NAM process, but this did not happen until October 2015, long after very serious concerns about him were raised, and not until concerns about him had become the subject of a CBC documentary. While the impact on Mordvinov is not the subject of this complaint, this was not a reasonable institutional response for *any* person involved.

187. The University says that it demonstrated sensitivity to complainants through its trauma-informed and survivor-centred approach (Submissions [1185]). In many instances we disagree with this claim and the specific claims the University is making, and have set out the evidence that supports our view in relation to individual Complainants.

188. The University says that its staff received appropriate training in trauma-informed practice and specific supplemental training on sexual assault and harassment cases (Submissions [1186]). This was not the evidence. The evidence was that this was eventually provided, but was not in place in 2014 when the Mordvinov issues arose.

189. The University says that its staff received training on relevant policies (Submissions [1192]). This was not the evidence either. Kay testified that she received no training from the University when hired, knew little about the Student Code of Conduct or the Statement on Respectful Environment, and was at sea with respect to Policy 14 which she did not understand at all. Hyson and Bohnen knew next to nothing about Policy 3 or the Statement on Respectful Environment. Bohnen did not know much about the NAM process either. Neither Lundeen or Vessey knew much at all about any policy and were focused, although not that clearly, on the Green College residents contract.

190. The University claims that the NAM process had numerous protections for complainants (Submissions [1186]). We have addressed the serious and harmful deficiencies in this process for complainants and will not repeat those submissions here except to say that we strongly disagree that this is a good process for complainants with complaints of sexual misconduct, and note that both the University itself, in its subsequent review which led to the creation of Policy 131, and the Tribunal in *Hale No. 5* also concluded this. It is a concern to us that despite its own findings, which led to the creation of a different policy for sexual misconduct complaints, and the findings in *Hale No. 5* which were critical of the NAM process, the University continues to argue here that the NAM process was a suitable approach for allegations of sexual misconduct. This defiant approach gives rise to concern that the University might return to the NAM process for complaints of sexual misconduct in future. The Tribunal's orders here must make it clear that this would not be an acceptable retreat.

191. The University says that the Complainants' views on what would be a better investigative system are contradictory (Submissions [1196]). We disagree. Our views about proper involvement of and disclosure to complainants do not require an oral format. The minimal oral format the University was using in the NAM process created extreme stress for complainants but did not permit enough contact with parties to properly assess credibility in any but the most superficial fashion. Our view is that fact-finding is best done in an investigation by the person doing the investigating who should also provide recommendations, not a committee of unrelated persons.

192. In its submissions [1198], the University continues to suggest that just presenting the full case to the respondent in the NAM process is sufficient. Given the findings in *Hale No. 5*, as well as our very pointed submissions here about the harm to complainants of not being provided with any clue about the respondent's response, this is surprising and discouraging. It is not "inconsistent" for us to be very critical of a process that leaves complainants entirely in the dark about the responses to their complaint from respondents and witnesses, but also having to respond to that response on the spot in a hearing. We do not agree that our position shifts. We are very clear about what would be a better approach.

193. The University says that it is "incorrect to state that the University has any obligation to apply a human rights analysis to the allegations" (Submissions [1189]). We fundamentally disagree and suggest this is a very surprising submission. When allegations come forward that clearly amount to allegations of sexual harassment amounting to discrimination, the University is required by law to ensure that it fully complies with its obligations to remedy discrimination which has occurred and to restore non-discriminatory conditions. This *requires* it to apply a human rights analysis. The University cannot expect to comply with its *Human Rights Code* obligations not to discriminate and to ameliorate discriminatory conditions if it does not do so. The University's view that somehow considering its human rights obligations under the *Code* is optional is a fundamental error, an error that was all too evident in the evidence in this case.

194. The University says that it was required to “respond to complaints of discrimination in a manner that was reasonable and appropriate in the circumstances” (Submissions [1190]). How can it do this without first analyzing the facts before it from a human rights perspective? What we saw over and over, especially with respect to Mordvinov, was the University considering a disciplinary approach (which focuses on the University’s own relationship with Mordvinov), rather than an ameliorative and restorative human rights approach required under the *Code* which would have focused on the needs of the women at Green College and in the History Department. This is a very different lens, and one that the University did not apply.

195. The University says that its responses are not rendered unreasonable just because its staff did not possess a comprehensive understanding of broad human rights concepts (Submissions [1193]). The concepts its staff were unaware of (except Kay) were *basic* human rights concepts, including the entirety of adverse effect discrimination. This is simply inadequate for a major university’s key staff charged with responding to complaints of discrimination, and displays a lack of commitment and adherence to the *Human Rights Code* that cannot be acceptable at this point in time, many years after the *Human Rights Code* was first enacted.

196. As part of its response on its duty to respond, the University claims that it has limited jurisdiction (Submissions [1201]) and cannot “simply assert jurisdiction over the lives of individuals merely as they happen to be UBC students” (Submissions [1202]). The University has many tools to control its environment for the benefit of women seeking a non-discriminatory working, studying and living environment. It decides who can be a student or employee. It decides who can be present on its campuses. It decides where they can go (see the case of Jane Doe 5 and JM for example). It decides where they can live (see RW). It decides where and with whom they can work. It decides which courses they can take and who will be their instructors. It decides how it will respond to complaints. It can closely manage how individuals co-exist in a department (see McBryan). It decides on funding. It can even surveil students using their cell phone location data (see Jane Doe 4). It can continue responding until an effective outcome has been achieved. Compared to an employer, the University has a tremendous amount of control over students in particular, especially given that problems at University can create a permanent record for a student, unlike problems in employment generally.

197. The University suggests that if it took action (in particular to implement the requirements of the *Human Rights Code*), those actions “would likely be *ultra vires*” (Submissions [1202]). This is a fundamentally incorrect position; the University is *required* to implement the *Human Rights Code*, and must be considered to have the powers necessary to do so. The University’s power to discipline is far from the only power it is able and required to bring to bear if discrimination is occurring. This is especially so since the provisions of the *Code* prevail if there is conflict between the *Code* and any other enactment (*Code*, s. 4), which we say clearly includes the *University Act*. The University’s apparent belief that it is not empowered to act by the requirements of the *Code* amounts to an impoverished view of its own powers and jurisdiction which we say improperly limited the

actions it was prepared to take in the cases considered here. Multiple witnesses were asked if they considered whether the *Human Rights Code* required them to act in various situations. The answer was generally that they had not considered this question at all.

198. The University says that UBC's jurisdiction over student conduct is limited by its own policies, including the Student Code of Conduct (Submissions [1205]). This is incorrect. First and foremost, the University cannot contract out of its obligation to provide a working, studying and living environment free of discrimination by enacting any given policy as part of its contract with its students, including the Calendar (which includes the Student Code of Conduct). If it had enacted policies which prevented it from acting effectively to prevent and remediate discrimination, its policies would breach the *Code*, and could not therefore amount to a valid defense.

199. In any event, we say second that the University's policies, including Policy 3 in particular, permitted and indeed *required* the University to act effectively in situations where discriminatory conduct was occurring. See for example s. 3.8 of Policy 3's procedures (Exhibit 1, Page 53).

200. Third, we note that the Calendar, including the Student Declaration and Responsibility (Exhibit 1, Tab 26, Page 297) means that students are widely subject to the rule of the University while at the University. The Declaration provides:

I hereby accept and submit myself to the statutes, rules and regulations, and ordinances (including bylaws, codes, and policies) of The University of British Columbia, and of the faculty or faculties in which I am registered, and to any amendments thereto which may be made while I am a student of the University, and I promise to observe the same.

201. Fourth, we say that the *University Act* does not create a statutory limit. It empowers the University, and specifically the President of the University, to impose discipline. However, it in no way limits the University to only acting in a disciplinary frame. It certainly does not disentitle the University from acting as necessary to carry out the requirements of the *Human Rights Code*.

202. The University cannot evade its obligations to provide a working, studying and living environment for women that is free of discrimination by claiming that it lacked the power to act effectively, or by enacting policies which hobbled its ability to do so.

203. The University suggests in particular that the Student Code of Conduct prevented the University from addressing conduct that did not occur on or near campus, or at University-sponsored activities with direct campus connections because such conduct fell outside the scope of the University's "disciplinary jurisdiction" (Submissions [1205]). We say this argument rests on the fallacy that that the only mode in which the University can act is its disciplinary mode. We say this assertion is fundamentally incorrect. The University can and must also act to prevent and ameliorate discrimination, including by preventing circumstances where women are not safe and secure.

204. In relation to the physical set up of the University, this statement is uncontroversial. The University must maintain a physical set up that promotes safety and security for women in order to protect them against sex-related harms.

205. However, it is equally true that the University must also act to prevent a discriminatory lack of safety and security in relation to the people present on or accessing the campus. Whether or not the University could discipline a person for actions that were not tied to the University, the University was able and *required* to consider whether such actions made the actor a person who could not reasonably be present at the University if the safety and security of women, which is required to create a discrimination-free working, studying and living environment for women, is to be given due attention. The risk to safety and security of women alone empowers the University to act. In fact, in relation to Mordvinov, the University eventually did act under Policy 14 in late April 2015. This action was taken in respect of a safety risk, and was not a disciplinary action *per se*. The University always had this power, including in relation to Mordvinov's conduct towards Student B. It was required to assess the risk that Mordvinov presented and act effectively to ameliorate that risk. It was never limited to acting through a disciplinary process, as it showed in April 2015 when it banned Mordvinov.

206. Whether or not discipline was possible was never the only question. From the evidence in this case, and the University's own arguments here, it is evident that the University continues to apply a narrowly *disciplinary* lens to its obligations to act, when what it must be considering is its *wider* obligation to provide and restore a discrimination-free environment. This can require it to act even if discipline is not a tool available to it. This was the central message of *Hale No. 5*. It is apparent that the University has not yet absorbed this critical message and, as a result, is at serious risk of continuing to fail to provide a discrimination-free environment for women in relation to sex-related risks.

207. The University claims that its position on jurisdiction is rooted in the necessity for procedural fairness and due process as well as adherence to statutory and policy limits (Submissions [1206]). Acting in respect of safety and security of women, and their need for working, studying and living spaces that are non-discriminatory, does not preclude the University from extending due to process to the respondent in question. He can be presented with the claims and information against him and be asked to respond. The University can assess his response against the evidence in hand suggesting he is a risk, and make a decision on a balance of probabilities about how to proceed. This is all that is required to reach a legally defensible conclusion. If the information against respondent is third party information is a matter of weight, but does not entitle the University not to act altogether where safety and security of women in relation to sex-related risks is at stake such that they are exposed to discriminatory conditions.

208. The University relies on a number of authorities to say that the University must provide procedural fairness to respondents (Submissions [1210]). We agree, but say that this requirement does *not* require the University to use a process that

does not adequately protect women complaining of conditions that affect their safety and security, and their right to work, study and live in a non-discriminatory environment. The University's claim that procedural fairness to respondents conflicts with the interests of women students betrays its lack of understanding of procedural fairness, and of the *Code*.

209. We note in particular that in *Zaki v. University of Manitoba*, 2021 MBQB 178, a decision relied on by the University (Submissions [1210]), the Court relied on the principle of *audi alteram partem* in discussing procedural fairness, which it defined as "let the other side be heard as well", to hold that "no person should be judged without a fair hearing in which *each party* is given the opportunity to respond to the evidence against them" (*emphasis added*) (para. 68). We object to the NAM Committee process because it does not provide complainants this opportunity. We further note that in *Zaki* the university had relied on anonymous complaints which it had summarized for Mr. Zaki as the respondent. The court did not find this objectionable (paras. 72, 73). While the court overturned the university's decision in *Zaki* to expel Mr. Zaki, it did so on grounds that are not relevant here.

210. The University relies on a Supreme Court of Canada case which it does not name (Submissions [1210]), but which is evidently *Baker v. Canada (Citizenship and Immigration)*, 1999 CanLII 699 (SCC). *Baker* holds that the content of the duty of fairness depends on the context and requires consideration of several factors, including the nature of the decision being made, the nature of the statutory regime, the importance of the decision to the individuals affected, the legitimate expectations of those individuals, and the procedures chosen by the decision-maker (*Baker*, paras. 23-27). The SCC in *Baker* stated (at para. 28):

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

211. These principles do not require an adjudicative rather than an investigative process, and indeed the University's NAM process is an investigative rather than adjudicative process, which is why, for example, it does not permit cross-examination of one party by the other.

212. The University relies on *Homma v. University of British Columbia (School of Music)*, 2023 BCSC 1926, at para. 51. The fact that academic matters are within the jurisdiction of the University is no answer to whether the University is required to act effectively under the *Code*, with or without responding within a disciplinary framework.

213. The University argues that speaking with Mordvinov on the basis of Kirchmeier's third-party allegations would have been inconsistent with the principles of procedural fairness and due process (Submissions [1213]). As she originally only sought to have someone speak with him, his procedural fairness and due process interests were either very low or non-existent at that point. This is demonstrated by the various times Hyson was prepared to or did speak to

respondents in General Class matters to caution them about their conduct without having formal complaints before him or providing those complaints to the individuals in question. We assume it is not the University's view that Hyson violated those individual's due process rights in doing this.

214. The University suggests that eviction from residence, campus bans, and campus restrictions were disciplinary actions by the University (Submission [1207]). This is incorrect. None relied on the President's power under the *University Act* to discipline. RW was evicted because he breached the Resident's contract. Persons who were not students were banned from campus under the common law rules of property and trespass. Mordvinov was banned from campus as a security risk. These events in fact underscore our point that the University has the capacity to act to preserve safety and security of women, and to ensure or restore a discrimination-free environment for women in relation to sex-related risks. Ultimately, we say the University is required to act in order to comply with the *Code*, the Code authorizes the University to act, and doing so is always therefore within the University's "legal and policy boundaries".

215. The University claims that it could not act on "vague", "incomplete" or third-party information without the consent of the survivors as this would violate due process, and that acting at all required a formal complaint, an opportunity for the accused to respond to an impartial arbiter, and findings of fact and law (Submissions [1213]). It does not cite authority for these specific claims. In particular, it cites no authority for requiring the consent of survivors before acting.

216. The information the University had about Mordvinov in particular was not vague or incomplete. It certainly could have spoken to Mordvinov based on the information Kirchmeier provided as this activity carried very low risk of consequences for Mordvinov. Information from Student B and Student E was not vague or incomplete. The University certainly could have proceeded with it in June 2014. Indeed, Mordvinov was barred from campus on the basis of Student E's account, although not until April 2015. The further complaints of the women from the History Department in July 2014 were also not vague or incomplete, and also required the University to act.

217. Ultimately, the University says that acting on "unsubstantiated" or third-party reports "without a formal complaint or clear, direct allegations would expose the University to significant legal risks, including claims of defamation" (Submissions [1214]). This submission, we say, names the crux of the matter for the University. It failed to act protect women from risks to their safety and to ensure them a non-discriminatory working, living and studying environment out of self-interest and concern that it could be liable to Mordvinov or other respondents. This is the self-interest identified by Dr. Brown which leads institutions to fail to act, and to therefore harm and betray those it has a legal responsibility to protect. It is this self-interest which this complaint seeks to overcome by asking the Tribunal to make it clear that the University's obligations and therefore self interest *in fact* lie in insuring that it complies with the *Human Rights Code* by properly protecting women at risk of sexual misconduct, and by

ensuring that women have a non-discriminatory working, living and studying environment as the law requires.

218. In relation to Submissions [1215], it is inaccurate to say that UBC staff informed Kirchmeier that she could not bring forward complaints about others without their participation or consent. Kay denied saying that Kirchmeier could not bring forward complaints about third parties, and no one else discussed the third party issue with Kirchmeier.

ix. Specific Submissions on NAM Process and Policy 3

219. In relation the NAM process, the University says that Hyson advised complainants what to expect at NAM hearings (Submissions [1223]). We say his evidence was that he did not attend NAM hearings and did not have specific information about how they proceeded. Any information he was able to provide about the process was therefore limited and general. The University says that Hyson tried to limit the number of times complainants had to retell their stories. The fact is, however, that complainants did have to retell their stories multiple times in some cases as they made their way through the University's processes.

220. In its submissions, the University attempts to address the practice of not providing respondent and witness information to complainants before NAM hearings and of not providing the decision to complainants by saying that the NAM process "was not a forum for protecting the rights of victims of sexual assault", and that survivors should go to the civil courts or this Tribunal for that (Submissions [1239]). The University continues with its position that the only role of complainants in the NAM process is to provide information. It does not address the argument that complainants in the NAM process have a profound interest in having their allegations proven, which also makes them an interested party with due process rights, or that providing them with the respondent's response and other witness information as well as the outcome would not in any way compromise procedural fairness for the respondent. As the Tribunal has already found in *Hale*, treating the NAM process as the only option in relation to complaints of sexual assault does not properly attend to the needs of women to have a discrimination-free working, studying and living space.

221. Contrary to the University's claim (Submission [1240]), we are not saying that the only appropriate response to allegations of sexual assault is one that mirrors a process provided by the Tribunal or the courts. We are not saying that the process must be adversarial; we accept that it should be investigative. We are not suggesting that the University should be engaged in considering damages for harms in its processes, as the Tribunal or courts would. We are saying, however, that the profound interests of women in an effective response can only be met in a process in which they are full participants, including in viewing and responding to the information coming forward, and in receiving the full outcome of the investigative process.

222. In relation to concerns about the NAM Committee including students, the University emphasizes that not all were undergraduates. There was however

undergraduate representation on NAM Committees here, so it is inaccurate for the University to claim that the Committee members were all “not more junior” than the complainants themselves. Further, our concerns about the life experience and appropriate training of students remains in relation to law or medicine students (including because both are, in fact, still taking undergraduate degrees).

223. In a familiar pattern of failing to accept the Tribunal’s rulings as binding on it or determinative, the University again tries to argue on the basis of *Maughan v. University of British Columbia*, 2006 BCHRT 33 and *Rojas v EaglePicher Energy Products Corp.*, 2006 BCHRT 450, that the Tribunal will not inquire into a respondent’s internal processes and procedures (Submissions [1231]). These submissions have been comprehensively refused by multiple Tribunal members at this point, including in *Kirchmeier No. 1* (2017 BCHRT 86) and *Kirchmeier No. 3* (2021 BCHRT 149). In its decision on the University’s application to dismiss here, the Tribunal stated as follows:

[98] The issue in this complaint is not whether, in offering this service, UBC acted fairly, complied with its policies, or reached wrong or unreasonable conclusions. This distinguishes it from both *Rojas* and *Maughan*. Nor is the issue whether UBC’s services contained the specific elements which Ms. Kirchmeier has detailed in her complaint. Rather, the issue, as contemplated in both *Rojas* and *Maughan*, is whether, in the course of providing this service, UBC adversely impacted women in a way that was connected to their sex and was thus discriminatory.

[99] UBC’s argument has already been previously rejected by the Tribunal. In *Kirchmeier obo others v. University of British Columbia (No. 1)*, [2017 BCHRT 86](#), the Tribunal reasoned:

The decisions raised by UBC to support the proposition that the Tribunal will not venture into examination of a respondent’s internal processes, *Rojas* and *Maughan*, are only of assistance to UBC if their processes are not alleged to be discriminatory.

In this case, the Complainant is clearly alleging that UBC’s policies and procedures for sexual harassment and related sexual misconduct discriminate against women. Her essential argument is that women are, in fact, and logically by a significant margin, the recipients of sexual harassment and as a result represent, again by a significant margin, the complainants under such policies. No proof is advanced for such an argument, however, I am of the view that the logic is persuasive. Further proof is not needed at this point.

The Complainant submits that, while the policies and procedures devised and utilized by UBC in such cases are neutral on their face, they are in fact discriminatory in their effect...

I am satisfied that, if the Complainant can prove that complainants (or potential complainants) under the UBC policies and procedures are predominantly women and that those policies and procedures have resulted in adverse treatment of those women that comprise the representative group, the Tribunal could find that the *Code* has been violated. [paras. 47-50]

The Tribunal’s assessment in *Hale* was along similar lines:

UBC argues that while the *Code* requires it, as a service provider, to provide a safe, harassment-free educational environment, the *Code* does not require it “or any service provider or employer to have in place any particular process for

ensuring that sexual harassment does not occur or for addressing or remedying harassment if it does occur.” It points to *Rojas* ... and *Maughan* ... in asserting that the *Code* does not require any particular form of process or policy. Yet UBCO and both of these decisions expressly acknowledge that such internal processes must not be discriminatory. In this case, Ms. Hale alleges that the processes were indeed discriminatory in that her mental disability and sex factored into the adverse impacts she experienced through her interactions with the [Equity and Inclusion Office] and NAM. As such, I do not find these cases particularly instructive here. [para. 53]

I agree with, and adopt, the Tribunal’s analysis in these decisions.

[100] Like in *Hale*, Ms. Kirchmeier alleges that UBC’s internal processes adversely impacted her and the class members based on their sex; in other words, that those processes were discriminatory. She is not required to prove, as UBC suggests, that the processes draw direct discriminatory distinctions based on sex or treat people differently based on their sex. Such an approach would ignore the discrimination that arises when a seemingly neutral policy has a disproportionate impact on certain people based on personal characteristics protected by the *Code: Fraser v. Canada (Attorney General)*, [2020 SCC 28](#) at para. [30](#). I return to this below.

[101] Further, while I agree with UBC that the *Code* does not obligate service providers to implement any one specific process or system for responding to discrimination, including sexual harassment and assault, it does obligate service providers to respond in a manner that is reasonable and appropriate: *Jamal v. TransLink Security Management and another (No. 2)*, [2020 BCHRT 146](#) at para. [106](#). A failure to do so can amount to discrimination. In *Employee v. The University and another (No. 2)*, [2020 BCHRT 12](#) at para. [272](#), an employment case, the Tribunal explained why:

The failure to investigate a complaint of discrimination can independently cause harm, and therefore, can independently be a discriminatory breach under the *Code*. It is for these reasons that a complaint of failure to respond can proceed on its own merits even if the underlying complaint which gave rise to the duty is found to be unproven. An employer’s liability flows from its own obligations to respond appropriately to complaints that arise between its employees. An employer has an obligation to have a discrimination-free work environment. In general, this requires that appropriate policies and procedures are in place, and that an employer respond appropriately to complaints, whether or not a complainant is ultimately able to establish the underlying allegations of inappropriate conduct. [para. 273]

Though this passage refers to a “failure to investigate”, which is not what happened here, the principles apply more broadly to the manner in which an employer or service provider responds to allegations of discrimination.

224. The University says that proceeding under Policy 3 would have been ineffective in the case of Mordvinov (Submissions [1235]). Its basis for this claim is that because two Administrative Heads of Unit were involved, a single act by either would not have solved the issues for all complainants. The University does not address why both could not have acted, which could have solved the issues for all complainants, except to say that Dr. Loo could not have restricted Mordvinov’s access to the History Department. We say this is incorrect. Following receipt of information about Mordvinov’s sexual assault of Student B, Dr. Loo could have determined that Mordvinov could no longer be a student in the History Department (after giving him a due opportunity to respond). This would have removed any legitimate basis for him being present in the History

Department, or anywhere else on campus, and would have permitted the University to act under Policy 14, as it eventually did in any event. We note that when the University acted under Policy 14, it did not obtain *any* response from Mordvinov to the allegations against him before doing so, contrary to the arguments it is now making about its obligations of due process.

225. We further say that if Green College had taken the position in 2014 on the basis of the allegations of Student E and Student B that Mordvinov could not return to Green College at any time, the evidence is this would have been a relief to both Student E and Student B. (See Student B's distress in 2015 when she realizes this has not happened. See the evidence from Student E about her extreme distress when she realized that Mordvinov has assaulted Student B after nothing happened with Student E's complaint at the start of May 2014).

226. Ultimately, our position is that the University has the power to act to ensure the objectives of the *Code*, and cannot claim that it cannot do so because its policies are insufficient. As already argued, insufficient policies are not a defense.

III. ARGUMENT – INDIVIDUAL COMPLAINANTS

227. We have generally addressed the issue of the service which the Complainants were receiving from the University which engages s. 8 in the case of each member of either class. We rely on these submissions in respect of the University's claims that individual Complainants are not covered by s. 8, and will not repeat them here for individual Complaints.

228. The University repeatedly argues that any award of dignity must only reflect the harm that flowed from the University's conduct in responding to allegations, not any harm from the underlying allegations of sexual misconduct, or other events in the Complainant's life. They say in a number of cases that the Complainants have not led evidence to permit the different causes of harm to be parsed out. We respond that suggesting there are other causes of harm that should limit damages paid is a form of defense, and that the University, not the Complainants, has the onus of establishing an evidentiary basis for any defences on which it seeks to rely, including this one. We rely on this general response and do not repeat it for all of the Complainants where the University repeats this claim.

i. Glynnis Kirchmeier

229. The University says that Kirchmeier's complaint must be dismissed as she is not a class member (Submissions [1244]). Kirchmeier is a Complainant here in her own right, as well as the Representative Complainant for the members of both Classes. This is why the complaint is called "Glynnis Kirchmeier *and* Glynnis Kirchmeier obo others". As such, she does not herself need to be a member of either Class. By making complaints to the University about Mordvinov, she sought the service of an effective response to circumstances she considered unsafe for women and inconsistent with a discrimination-free work, study and living space for them. In any event, as a person who made a complaint to the University

about Mordvinov's conduct during the time she was a student, she qualifies as a member of the Mordvinov class (*Kirchmeier No. 2*, para. 41). There is no jurisdictional basis to dismiss Kirchmeier's complaint. The University itself acknowledges this when it later describes Kirchmeier as an "individual and representative complainant" (Submissions [1272]).

230. The University relies on the evidence of Vi Addams to say that Mordvinov was not receiving funding to attend the conference in May 2014 that he attended, and therefore that Kirchmeier's evidence was not credible (Submissions [1251]). Addams' testimony only related to what funding Mordvinov received from the History Department. As graduate students receive funding from other sources, including the Faculty of Graduate Studies, Addams' evidence did not show that Mordvinov's attendance at the conference was not supported by the funding from the University that he continue to receive well into 2015.

231. The University argues that it was reasonable for it to fail to take action on the information it received from Kirchmeier in January 2014 with Mordvinov, despite Prof. Ducharme telling her action needed to be taken, because she had "no authority to come forward on anyone's behalf and nor did she have her own complaint" (Submissions [1253]). We submit this is an unreasonable position. Kirchmeier reported conduct by Mordvinov she had personally witnessed to be unwelcome, as well as her communications with Student A in which Student A confirmed the conduct to be unwelcome. In doing so, she was reporting, in part, her own discomfort with Mordvinov's conduct towards Student A which she had not been able to figure out how to stop. She further reported information that his conduct had continued after she first observed it, raising concern for her that it was not just the result of an early lack of acculturation to the Canadian context. Kirchmeier's information that Mordvinov's conduct was continuing was correct.

232. Kirchmeier did not require some form of "authority" to make these reports, and suggesting that she did places a very significant impediment in the way of the University acting effectively to ensure women on campus are able to live, work and study in non-discriminatory spaces. There is no authority for this proposition. The Tribunal should in no way accept the proposition that a person with a serious concern about sexual misconduct requires some form of "authority" to report that concern to authorities at the University.

233. The University says that Kay's notes made in September 2014 are revealing (Submissions [1254]). We agree. We say that they exhibit a consistent failure on the part of a key University actor to recognize that information about Mordvinov's very serious acts of sexual misconduct starting in January 2014 (Kirchmeier re Student A and Caitlin Cunningham) and continuing through early May (Student E), early June (Student B), and July (History Department students including Kirchmeier raising concerns about the assault of Student B, and Cunningham with her own account) required the University to move forward, including to ensure that those aware of Mordvinov's conduct, recipients of his conduct, and potentially subject to his conduct in future would be assured that the University understood the conduct was serious, and were taking concrete steps to confirm the accounts they had received and to take effective action to ensure that

Mordvinov's sexual misconduct would not continue to be a threat to female members of the University community. In these circumstances the University could not reasonably continue to wait for complaints, including because it already had very serious complaints from Student E and Student B. The notes are also revealing because of their confusion about Student E somehow being in Toronto and being unwilling to go to the Police in Toronto, when Kay should have been well aware in September 2014 that Student E was at Green College and her complaint had originated there.

234. The University makes reference to the fact that Kirchmeier is a defendant in a suit brought by a former professor at UBC, Steven Galloway, against a number of people who made negative comments about his sexual conduct in respect of a student with whom he had a sexual relationship over a period of two years while he was a professor (Submissions [1256]). The single Tweet which is the subject of Galloway's suit against Kirchmeier took place in 2018, and was not related in any way to the facts of the case before the Tribunal. The comments were made in a public forum. They were not made in the context of a complaint to the University. Kay says that she raised the risk of defamation with the History students in her meeting with them in July 2014 to get them to stop talking about the allegations against Mordvinov. In her examination in chief Kay acknowledged that her knowledge of defamation law was limited and that she did not get into the issue of truth as a defense or qualified privilege with the students. It was thus reasonable for Kirchmeier to understand Kay's bald comments about defamation as an overt attempt to silence her and the other students.

235. The University says that it was not responsible for delay after Kirchmeier's January 2014 report, and nor was it responsible for not acting in the fall of 2014 (Submissions [1260]). As it is clear the University had *formal complaints* from Student B and Student E by the end of June 2014, and was well aware of very significant concerns about Mordvinov from a group of students aware of his conduct towards Student B by the end of July 2014, all of which required it to act, we say there is no foundation for them to say that they were not responsible for delays in these periods.

236. The University criticizes Kirchmeier for taking issue with not being told about the decision to restrict Mordvinov from campus in advance given that her complaint was not the basis for the restriction being imposed (Submissions [1262]). The University's sudden decision to restrict Mordvinov at the end of April 2015, which happened just after Hay sent multiple letters raising serious ongoing concerns about Mordvinov, meant that the University's communication with those who had come forward formally by then was non-existent. As a result, these students learned of the restriction without any information about how it had come about. The University is responsible for causing significant anxiety through its lack of communication.

237. On the issue of whether Kirchmeier's complaint to Kay in December 2014 was meant to be a stand-alone complaint, Kirchmeier was always clear that she made her formal complaint to Kay to support Cunningham's complaint. This is the information she provided to Morrison in 2015 when she argued that her

complaint should proceed to ensure that the NAM Committee understand the full range of concerns about Mordvinov.

238. In relation to the wishes of Student A, we continue to say there is no evidence that Student A did not want to talk to Kirchmeier. Kirchmeier testified that Student A said she did not want to talk to *Dr. Wang*, their mutual supervisor.

239. The Complainants collectively argue that the University did not respond to their allegations against Mordvinov in a timely and effective way. Included in this general claim is Kirchmeier's specific claim that her information should have been included in the only investigative process the University undertook with respect to Mordvinov, the NAM Committee disciplinary process. The University's reasons for excluding Kirchmeier's information from the NAM process flow from its narrow focus on making a disciplinary case against Mordvinov, rather than fully assessing the risk he posed to women on the campus, including at Green College and in the History Department, which should have been its focus.

240. The University's narrow focus included excluding any evidence other than that of direct survivors of sexual misconduct. Kirchmeier's evidence about what she observed of Mordvinov's conduct towards Student A was direct evidence. Her evidence about Mordvinov's conduct towards her, where he aggressively pursued her after her break up and then ignored her altogether as a colleague once he was no longer interested in her sexually, was also direct evidence. Her evidence about what Student A said about Mordvinov's conduct towards her was the best available evidence about Student A's state of mind in relation to Mordvinov's conduct. Kirchmeier's evidence did not relate to Mordvinov's reputation. To assess the risk that Mordvinov posed, the University needed to take account of Kirchmeier's evidence. Including this evidence in a process against Mordvinov created no due process risk for Mordvinov as he would have been fully able to provide his account of the events described by Kirchmeier.

241. The University's failure to fully assess the risk posed by Mordvinov at its earliest opportunity created risk for women at the University, and distress, hardship and estrangement for women working to have the University provide a reasonable response to the concerns that had been raised with it, including Kirchmeier. The University's insufficient response had an impact on Kirchmeier in relation to her gender since her gender was at play in her concerns about Mordvinov's conduct towards her, towards her friend and colleague Student A, and towards other women on campus. It is not our claim that the University took any action *because of* Kirchmeier's gender; that would be a complaint of direct discrimination, which this is not.

242. The University says that allowing Kirchmeier to participate in the NAM process on the basis of her individual observations would "undermine the autonomy of those survivors who did participate in the NAM process. It would have detracted from their experiences" Submissions [1275]). This is a nonsensical argument. There is no evidence that any person involved in the NAM process objected to Kirchmeier's participation, and nor were Student E or Cunningham asked this question by the University on cross-examination. This argument also

contradicts the University's position that complainants in the NAM process are witnesses only with no procedural rights.

ii. Caitlin Cunningham

243. The University claims that Cunningham "no longer" fit the definition of a class member in the Mordvinov Class when she stopped studying on campus (Submissions [1286]). This argument is not consistent with the Mordvinov Class definition which provides that once a female student "at least once" reports, discloses or communicates to a faculty member or administrative staff member by any means a concern about the sexual misconduct of Mordvinov towards women, she becomes a member of the Class. This is an "on or off" proposition. Once qualifying as a member of the Class, the definition contains no way in which a person could later stop being a member of the Class (other than opting out, which Cunningham did not do). In this case, Cunningham made such a report in July 2014 while she was a student, and is therefore a member of the Mordvinov Class.

244. The University says that Cunningham "elected to proceed with the NAM process over any other type of process" (Submissions [1291]). No process other than the NAM process was offered to Cunningham by the University (the mediation offered was part of the NAM process).

245. The University does not address the larger issue that the NAM process was an inappropriate response to the sexual misconduct allegations about Mordvinov because it did not amount to a comprehensive way of assessing any ongoing risks posed by Mordvinov, was unduly protracted and demanding of individual complainants, placed on them the stress of a hearing although the oral evidence gathered was negligible, and did not treat them as full parties with full rights in the process.

246. The University claims that we have not established a nexus between the concerns raised by Cunningham in her evidence and her sex. This is incorrect. The evidence is clear that Cunningham's sex was central to her concerns about Mordvinov's conduct towards her and others, including the account she received of the sexual assault of Student B, and about her general concern that the campus was not safe for women, and that this was not a concern of importance to the University. She required a reasonable and timely response to these concerns from the University because she was a woman. When the University did not respond in a timely way, she was drawn into multiple actions that were taxing on her. This involvement flowed from her concerns as a woman. This evidence is sufficient to establish nexus to sex.

247. In particular, the University claims that because the NAM process did not find that Mordvinov's conduct towards Cunningham was a sexual assault, no nexus to sex can be established (Submissions [1302]). We note that the Statement of Allegation prepared by Hyson described the conduct as a physical assault not a sexual assault (Exhibit 6, Tab 378, Page 976). In cross-examination, Hyson said that it was an error not to describe the conduct as sexual assault, and that he had described the event as a sexual assault in his email to Mordvinov. The NAM

Committee found that because Mordvinov's intention was not sexual, the event which occurred with Cunningham was unwanted physically aggressive behaviour. We say that because Human Rights law looks at impact not intention, this finding is not consistent with the *Code* and in any event is not binding on the Tribunal.

248. The University says that there was no delay in the NAM process regarding Cunningham's complaint, even though it took 11 months from when Cunningham made her formal complaint for Mordvinov to be expelled. We note that their timeline (Submissions [1304]) omits Hyson's April 2015 communication with Kay where he advised that his view at that time was that Cunningham's complaint was *not* within the jurisdiction of the NAM process because it took place off campus.

249. The University says that Cunningham did not experience the adverse impact of institutional betrayal or long term harm because she expressed a continuing desire to become a UBC faculty member. Cunningham testified that she was interested in academia and might be interested in a research position after law school. However, she also testified in cross-examination that it felt to her like she would never be able to apply for a job at UBC, and would never be welcome in the History Department as a faculty member.

250. The University objects to Cunningham's claim for counseling expenses because she did not disclose her counseling records (Submissions [1307]). Cunningham did not rely on those records. The University could have but did not seek disclosure of those records in order to cross-examine Cunningham. Having chosen not to seek disclosure, it cannot claim that it was hampered in its defence by the absence of the records it did not seek.

iii. Student E

251. The University says there is no evidence that Student E wanted anything other than an educational approach when she came forward to Lundeen (Submissions [1315, 1318]). This claim ignores Student E's evidence that she felt dismissed by Lundeen and frustrated, the evidence that Lundeen told her that there was nothing else that Green College could do, and her evidence that she felt upset about this. It is exceedingly problematic for the University to attempt to rely on what Student E wanted when the evidence was that she had not been told what University responses were available. This underscores our concerns that when the University says it wants complainants to take the lead as part of trauma-informed practice, it is really just abdicating its responsibility to complainants to ensure they have all the tools they need to proceed.

252. It is striking that the University would suggest that not connecting Student E with Campus Security immediately did not result in an adverse impact (Submissions [1317]). Student E testified about how horrified and devastated she felt when she learned about Mordvinov's sexual assault of Student B and the guilt and hopelessness she felt that she had not warned Student B about Mordvinov. In relation to her medical leave in the Fall of 2015, Student B testified that she felt a lot of guilt about not being able to prevent Mordvinov from sexually assaulting Student B. The University's failure to act at all when Student E first came forward

ensured that no action would be taken on Student E's account with Mordvinov before he assaulted Student B, and contributed to these harms.

253. The University relies heavily on Mordvinov's absence from campus to suggest that no harm came from its failure to act until 2015. In fact, Mordvinov returned to campus, to Green College, in late May 2014, after Student E's report to Lundeen. Further, Mordvinov's absence from campus did not prevent him from using his travels between a conference he attended as a student and his research in Russia as a student to sexually assault Student B, an event which had a profound effect on women on campus, including Student E. The impact on Student E included drawing her into speaking with Campus Security, which she described as stressful because she had to relive her experience with Mordvinov, and proceeding with a complaint through the NAM process, all of which was very difficult for her.

254. Student E testified that she emailed Lundeen on April 5, 2015 because she was nervous and worried that Mordvinov might come back, especially as she had heard from Hyson that he would be contacting Mordvinov about Student E saying something about him. She testified that when Lundeen advised that so far Mordvinov was going to come back, she was unhappy and upset because their response was not enough, and she felt frustrated and scared as a result. These feelings were directly attributable to the University's failure to act to that point.

255. Student E testified in relation to her dealings with the University around Mordvinov that it was mentally taxing to have to talk to different people and tell her story in great detail to multiple people, and that it made her feel disheartened that it took so much and so many women to have to speak up and do so much for anyone to really believe them. Student E also testified that comments made by Vessy that Mordvinov was a big man and could be anywhere, and that they did not know if he was at UBC or not, made her feel worse and exacerbated her anxiety. Student E testified about the NAM hearing that she was nervous and remembered breaking down and crying. Overall she said of the NAM process that it was difficult to have to revisit the whole experience, and that it took the University far too long to take action. She testified that having to repeat what happened over a few years, including to Paula Butler, was difficult and brought up a lot of feelings which definitely impacted her mental health, and that she had been feeling anxious, afraid, guilty, and was not able to sleep properly. This evidence supports her claim of adverse impact, and her claims for damages.

iv. Student B

256. The University says that Student B is not a member of the Mordvinov Class and that her complaint should be dismissed on that basis (Submissions [1332]). As we noted in our original argument, the concerns Student B raised about Mordvinov included both the sexual harassment incident that resulted in her head injury and concussion in 2012, and Mordvinov's sexual assault of her on May 26, 2014. Both incidents were brought to the University's attention and the University took no effective action in respect of either incident. Student B is a

member of the Mordvinov Class because of her report of sexual harassment involving Mordvinov in 2012 when she was a student.

257. The University's jurisdictional argument with respect to Student B's allegations about Mordvinov conflates the service relationship issue re Student B, and the University's jurisdiction with respect to Mordvinov's conduct. In terms of the University's jurisdiction over Mordvinov's conduct, we say that because of its obligations under the *Human Rights Code* to provide a working, studying and living environment free of discrimination for women at the University, including at Green College and in the History Department, the University must take account of information that indicates a person who is part of the University community poses an unacceptable risk to women. We say that the University's obligations under the *Code* gave it the ability to act to ensure a non-discriminatory environment for women. This obligation is also reflected in Policy 3.

258. Even if this was not the case, the University's Student Code of Conduct gives it jurisdiction over any behaviour that has an impact on persons at the University (section 4.1). The allegations about Mordvinov's conduct towards Student B had a profound impact on Student E, and on the women of the History Department who came forward to the History Department. They also had a significant impact on Hay, on other students within the History Department who became involved with the Statement on Harassment, and on others in the History Department over time, including Prof. Krause, Prof. Ishiguro, Prof. Loo and other members of Faculty. The profound effects of the allegations re Mordvinov's conduct towards Student B and others authorized the University to act with respect to Mordvinov under the language of the Student Code of Conduct. We submit that the analysis by Hyson and his superiors about whether the NAM process applied was overly narrow, and therefore incorrect.

259. The University implies that the effect on persons on campus should only be evaluated with respect to the person who was sexually assaulted (Submissions [1337]). We say that the Student Code of Conduct contains no such limitation.

260. In relation to the service issue, we rely on our submissions above, namely that Student B's complaints to the University gave rise to a need for services from the University to respond appropriately to her complaints. We say her need for an effective response to her complaints arose from her sex as a person who had been sexually harassed by a group including Mordvinov, and then sexually assaulted by Mordvinov, and from her sex as a person who was very interested in ensuring that the University acted seriously with respect to complaints relating to sexual misconduct, and with respect to protecting the safety and right to a non-discriminatory environment for women remaining at UBC.

261. The University says that it would be unduly onerous to require the University to "govern the behaviour of their students in private homes in other provinces that have no relationship to the University" (Submissions [1336]). We have several responses to this. First, we doubt this is the position the University would take towards a varsity athlete travelling for competition. We say travelling for a conference and degree-related research is no different; both involve

representing the University outside the physical bounds of the University. Second, we say that the issue is the risk Mordvinov presented to women at UBC and their sense of safety and security and their right to a discrimination-free environment at the University. That risk was not dependant on where Mordvinov chose to commit sexual assault. The University's obligations under the *Human Rights Code* required it to respond effectively to address the risk that Mordvinov posed to persons at the University because he was alleged to have sexually assaulted Student B. It is not unduly onerous to require the University to ameliorate known risks to the equal participation of women at UBC; this is expressly contemplated by the provisions of s. 3 of the *Code*.

262. The University says that its decision not to accept Student B's complaint in relation to Mordvinov's sexual assault had nothing to do with Student B's gender (Submissions [1334]). We say that a decision not to move forward with an allegation of sexual assault always impacts a woman in relation to her sex because sexual assault is tightly related to sex, and the need for an effective response to sexual assault is thus also tightly related to sex. We accept, however, that the University did not make this decision because Student B was a woman. Such an allegation would be a complaint of direct discrimination; this complaint is not a complaint of direct discrimination, it is a complaint of *adverse effect* discrimination.

263. The University says that Student B's primary concern was keeping Mordvinov off campus (Submissions [1338]). We say that Student B had a number of concerns, but her primary concern was broadly to ensure that no woman would be alone with Mordvinov in circumstances where he could repeat the conduct he had directed towards Student B.

v. Russell and Thornton

264. The University says that it is egregious for Russell and Thornton to seek significant amounts in injury to dignity and lost tuition because they did not have direct experiences of sexual assault or harassment at the University (Submissions [1341]). This argument misses the point that it is the impact of the University's response or lack of response to their *complaints* that is in issue, not their underlying experience of sexual assault. The University says that only those directly affected by misconduct have standing to bring complaints about their personal rights (Submissions [1342]). This continues the University's failure to understand the basis of this complaint. The discriminatory conduct here is the University's insufficient response to the complaints of Russell and Thornton about unsafe conditions at the University impacting them as women. They have direct experience of this, which is a form of discrimination, which is why they are entitled to damages.

265. As both Russell and Thornton made complaints to the University about Mordvinov's sexual misconduct, they are members of the Mordvinov Class. The class definition does not require the complainant to complain of personal actions by Mordvinov against them individually.

266. The University's submissions continue to fail to appreciate that the concern raised by Russell, Thornton and others was that as a person credibly accused of sexual assault, Mordvinov posed a threat to women on campus that required the University to act to evaluate that threat, and remove it if it was found to be well supported. That was their complaint, and it was in place as soon as they came forward to the University administration in July 2014. Nothing further was required from them for the University to be required address their specific concerns in a concrete way. Russell and Thornton did not require further options for making complaints. Contrary to the University's claims (Submissions [1349]), Kay and Prof. Loo did *not* engage an appropriate complaint pathway for this complaint. This resulted in egregious delay in the University acting on the information it had that Mordvinov had committed sexual assault (not to mention his actions towards Student E, of which the History Department students were not aware). There were not, as the University claims, jurisdictional or proper policy constraints that prevented the University from acting.

267. In relation to the claims about what Prof. Loo did in particular, we note that as Administrative Head of Unit, Prof. Loo had specific jurisdiction under Policy 3 in relation to investigations which she did not exercise or seem aware of. As such, her understanding of her role was materially deficient in a manner that contributed to the adverse effect on Russell and Thornton.

268. The University repeats its argument here that the similar experiences of Hay, who is not a class member, undermine the assertion that sex was a factor in the adverse impacts experienced by Russell and Thornton. We rely on our response, above, to this claim. Moreover, we say that the actual evidence of Russell and Thornton establishes nexus in their cases to sex. Russell gave moving personal testimony about how she was impacted by hearing about Mordvinov's assault of Student B because of the similarity of the account to her own experience of sexual assault which she had not yet processed for herself. In fact, she said she talked to Cunningham about her own assault for the first time after hearing about the assault on Student B. She then testified about feeling dedicated to doing something about Mordvinov as a way of taking care of the part of herself that had been sexually assaulted and had not had anyone to take care of *her*. This evidence was profound testament to the particular impact that sexual misconduct can have on women because sexual conduct is so prevalent for women. It establishes the required nexus between Russell's very, very concerted actions in 2014 and 2015 and her sex. Her concerns for the safety of women in the Department, including herself, arose because of her own experiences with a lack of safety because of her sex. She developed the view that women's safety was best approached as a collective issue to avoid the isolation that accompanies disclosing sexual violence. From the earliest days she testified about being concerned about undergraduates who might encounter Mordvinov as a TA.

269. Thornton also became aware of the allegations against Mordvinov in July 2014 in the context of a group of women meeting together. Her reasons for becoming involved included supporting Cunningham, who disclosed her direct experience with Mordvinov, and having a strong concern about physical safety in the Department because it was unclear whether or not Mordvinov would be back

on campus in the fall. Her feeling was that the University should act urgently. She testified about learning more about Mordvinov's conduct and coming to the conclusion that his behaviour was disturbing, and that the University needed to take urgent action to preserve safety in the Department in light of information about Mordvinov. She also linked the issues with Mordvinov to other issues with safety in the Department, including in relation to Brock Hall and TA office spaces. Thornton testified that her interest was in gaining assurance that the University would take concrete action to ensure physical safety for graduate students in the Department. In relation to the meeting with Kay and Prof. Loo in July, she talked about the group of women students there as vulnerable. Thornton also testified about her commitment to the Department having open, respectful and transparent conversations about sexual harassment and assault so that people who have experienced those things will feel safer and will feel that the issue is not a shameful secret. She felt that this would result in real action being brought to the issue when it was raised. We submit that Thornton's commitment to action by the Department on issues of safety which primarily or entirely affected women arose because Thornton herself was a woman and saw herself in the vulnerable group of people pressing the Department and the University for action. As such, Thornton's sex was at play in her commitment to these issues, and the impact that working on these issues with little progress by the University had.

270. Above we discussed that although Hay was also very committed to his advocacy work on the issue of safety for women, his engagement was not connected to his sex, and as such, did not engage the *Code*, whatever the impact on him.

271. The University claims that by April 2015, when the work on the Statement on Sexual Harassment was underway by the HGSA, "there were no direct complaints about Mordvinov's behaviour remaining in the History Department" (Submissions [1360]). This submission misses the point that what was of concern to the women involved was future risk and lack of safety in the Department, and also that the Department take a clear stance on the issue of sexual misconduct, including stating that sexual misconduct had occurred, was a serious threat to safety, and was not something that would be tolerated in the Department.

272. The University says that the evidence of Thornton and Russell about the adverse impacts they experienced did not amount to individualized evidence of adverse impact as required by *Moore* (Submissions [1361]). We submit that this evidence precisely set out the personal impacts on these Complainants when the University did not act effectively to ensure the safety of women from sexual misconduct, including by taking a strong public stance against sexual misconduct as an ongoing means by which women were denied equality in the Department.

273. The University says that there is no evidentiary basis for Russell's claim for tuition. Russell gave detailed evidence about the impacts she experienced from her engagement in trying to get the University to act on the safety concerns related to Mordvinov and the lack of safety in the Department. This evidence is sufficient to ground her claim for these damages.

274. The University suggests that because Thornton and Russell were graduate students they were less vulnerable and therefore, presumably less prone to a compensable impact. No authority is cited for this claim. While they might be more mature as graduate students, the close relationship graduate students need to have with their supervisors, and their significant investment in a single large project with their supervisors, as well as the subjectivity relating to evaluation of theses are all sources of significant vulnerability, as Russell, Thornton and Hay testified. We submit that Thornton and Russell were in very vulnerable positions as graduate students, which should be reflected in any award for damages to them.

vi. Grego

275. We note that the University spells Grego's name incorrectly throughout.

276. In addition to the article she wrote for the GUTS magazine in 2014, Grego provided information to the University in a series of emails to Green College, Hyson, and Prof. Loo detailing her own experiences with and observations of Mr. Mordvinov which included unwelcome touching while dancing, sexist comments about Canadian women being frigid, and an inappropriate sex-based comment to Student B during a political discussion that Mordvinov did not know if he wanted to marry or kill her (Exhibit 6, Pages 540, 542, and 545). Grego emphasized in her emails that her information contributed to understanding Mordvinov's harmful patterns of behaviour towards women. As Grego was describing events that occurred while she was a student, these accounts of Mordvinov's sexual misconduct, including towards herself, brought Grego within the Mordvinov Class. By making these complaints to the University, Grego requested an effective and timely response to the concerns she was raising. This established a service relationship between Grego and UBC. Grego was explicit in her GUTS article (Exhibit 6, Tab, P147) that her concerns arose from her feminist views as a woman, including her view that Green College had a long history of misogyny. (This view was validated by evidence elicited by the University from Lundeen about former College President Keith Benson. In redirect we raised news articles about his sexual misconduct towards Green College residents). Her engagement with the issues relating to Mordvinov also came from her close friendship with Student B. Her sex was at play in that friendship, and in her ability to relate to the harm arising for Student B from Mordvinov's sexual assault. This was sufficient to establish nexus between Grego's complaints about Mordvinov and her sex.

277. As described in our original submissions, the University did not respond to Grego's complaints about Mordvinov at all. This was adverse treatment in relation to her complaints, which had an adverse impact on her, including by tainting her ongoing relationship with UBC as her *alma mater*.

278. The University says that Grego's concerns about the safety of women at UBC and particularly Green College arising from the University's failure to address the risk represented by Mordvinov and his plan to return to the University cannot ground a human rights complaint. They cite no authority for this claim. Adverse impact, arising from the University's insufficient response to wide concerns about

Mordvinov, including those raised by Grego, in which personal characteristics are at play, is sufficient to establish a *prima facie* case of discrimination.

vii. KM

279. The University suggests that in order to be a member of the Mordvinov class, KM had to have reported a personal experience of sexual harassment or assault at the University, or had to have made an “independent” report to the University (Submissions [1373]). The definition of the Mordvinov class does not include any limitation that the required communication to the University be about a personal experience with Mordvinov or in some way be independent. The reports of the women who communicated with the History Department were intentionally meant to be mutually supportive and thus not independent.

280. Had KM’s involvement only been to assist Student E with her report to Lundeen, it might have been the case that KM could not show adverse impact. As it was, however, KM was a close friend of Student B’s, was very upset about the news of Student’s B’s sexual assault, and was angry when she learned that Mordvinov had not been told that he could not live at Green College and it had not been made explicit to him that his behaviour would not be tolerated at Green College. These were adverse impacts which KM personally had from the University’s failure to respond to the information KM and others had brought forward about Mordvinov’s conduct. KM’s sex was an play in her close friendship with Student B, in her role in the Green Lanterns supporting Student E, and in her own fear about Mordvinov’s potential return to Green College, and Green College’s lack of commitment to an effective response to the risk Mordvinov represented. This is sufficient to establish nexus between the adverse impacts she experienced and her sex.

viii. Student C

281. The University says that Student C is not a member of the Mordvinov Class because she was not a student when she made her complaint about Mordvinov to the University, even though the University accepted the complaint, included it in the NAM Committee process, and expelled Mordvinov in part on the basis of her complaint. We submit that C is a member of the Mordvinov class because her complaint about Mordvinov relates to the time period when she was a student at UBC and a resident of Green College. The University also says that Student C is not a member of the Mordvinov Class because she did not communicate her complaint to the University directly. Given that the University was prepared to accept the complaint through Hay and moved forward with her complaint, this is an unreasonable claim. We also rely on the broad language of the Mordvinov Class definition about communications with the University. The University says that it did not provide Student C with a service. We say the University was clearly providing Student C with a service when it was processing her complaint through the NAM process.

282. The University says that it adopted a trauma-informed approach to Student C (Submissions [1384]). A truly trauma-informed approach would have been to

assess the risk posed by Mordvinov to women at Green College, the History Department and the University on the full picture available at the earliest opportunity, which would have spared both Student C and Cunningham from having to come forward and participate at length in a process they both plainly found uncomfortable. This is not rectified by the University's efforts to make a very difficult process less difficult.

283. The University notes that Student C required considerable accommodations and complains that she did not communicate with them directly, but then says that there is no evidence the NAM process had an adverse impact on her. We say her very significant need to be sheltered from the NAM process is evidence of the adverse impact on Student C of the process.

284. The University says that Student C did not experience adverse *treatment* (which would be evidence of direct discrimination) (Submissions [1386]). We note that under *Moore*, the proper question is whether she experienced adverse *impact* (which is evidence of adverse effect discrimination).

ix. Meghan Longstaffe

285. The University received Longstaffe's concerns about Mordvinov along with the concerns of other women in the History Department. She had a reasonable expectation that the University would respond to those concerns in a timely way given their significant seriousness. This did not happen. Instead, Longstaffe with others was drawn into a protracted and emotional process with the Department to attempt to have it take effective action with respect to the concerns about the safety and security of women in the Department in relation to sexual misconduct. Even without testimony from Longstaffe directly, it is reasonable for the Tribunal to infer from the evidence of multiple other students that the experience of Longstaffe was similar to the others who testified about their process with the University. This is sufficient to establish adverse impact.

286. The University says there is no basis to find that Longstaffe was in a vulnerable position. This claim contradicts the extensive evidence of Hay about the specific vulnerability of PhD students, and the risks associated with taking a controversial position in any way, risks which directly impacted Hay's progress through his PhD. Again, it is reasonable for the Tribunal to infer that the experience of Longstaffe was similar to the others who testified about the impacts on their relationships within the Department and their academic progress. This also contributes to a finding of adverse impact.

287. Like the other women who came forward, Longstaffe's sex was engaged when she asked the University to take effective action in relation to a risk of sexual misconduct towards women, and it failed to do so for more than a year after her concerns were communicated to the University. This is sufficient to establish nexus.

288. The University says that recognizing adverse impact to Longstaffe, who was closely associated with a number of women who came forward and then

with the HGSA group working on the Statement and the 2015 forum, would create a floodgates concern (Submissions [1396]). We respond, first, that her close identification with a small group of actors, many of whom testified, allays any floodgates concern. We say further that the need to be a person falling within one of the two Class definitions also strictly limits who may claim damages here. We say there is no reasonable floodgates concern in this case.

x. Tremblay

289. The University says that it could not immediately move to an eviction of RW without first attempting less punitive measures with him. We submit that RW's conduct in repeatedly contacting Tremblay against her clear wishes was plainly a breach of the Green College Resident's Contract, and certainly could have been the basis of an eviction from the outset. Instead, Green College and the EIO proceeded with an undertaking, which was almost immediately breached by RW. This was entirely predictable given his complete inability to abide by the limits that had been expressed to him to that point. When RW was evicted, we say it was usual University practice to also ban him from the premises of Green College, but that the principals of Green College chose not to do this because they did not think it was necessary, even when it was recommended to them by Hyson, who had previous experience in the residence system at UBC, and Bohnen, an expert in safety and security. This failure had well documented very serious impacts on Tremblay.

290. Despite ongoing issues with RW, he was not banned from Green College until April 7, 2015, more than 10 months after he was told he was being evicted. This left Tremblay with the risk of RW's presence throughout. KM testified about the ongoing serious impacts of this on Tremblay. At the time of the full ban on RW, Tremblay described the preceding arrangements as a "gray area" that was "confusing" and did not give her "peace". As a result, we submit the evidence is clear that the University did not act "promptly and reasonably" in relation to Tremblay, as alleged by the University (Submission [1404, 1415]).

291. We also note again the dishonest and rather callous communication from Vessey to Tremblay after RW showed up at Green College suggesting that Green College had done all it could in evicting RW (Exhibit 55, Page 2): "unless or until some competent authority decides that RW's movements should be restricted, he is at liberty to go where he wishes, with the proviso that he is not to communicate with you. As we are all painfully aware, that still leaves a large grey area in which he may feel comfortable and you may feel harassed." Dr. Vessey later concluded, "I am sorry that we cannot impose a cleaner and clearer solution to this problem. Until someone establishes grounds and means for restricting RW's movement on campus, everything that can be done (by others than RW) is already being done."

292. The University says that fully banning RW from Green College premises required consultation with central University offices since Green College "lacked unilateral authority for a campus-wide ban" (Submissions [1408]). There never was a campus-wide ban on RW, and Green College had full authority to ban RW from Green College premises which it did not exercise until April 2015. Moreover,

the evidence in relation to Green College's relationship with central University offices is that Green College did not accept advice from Hyson and Bohnen about the ban, and did not take into account the modified language Hyson negotiated with RW when it did move to ban RW in April 2015.

293. The University says that the evidence of Tremblay's distress is evidence of the impact of RW's actions, not the impact of the University's choices in responding to RW. Where, however, RW's actions were permitted by or made more likely because of the University's actions, we submit that the evidence of Tremblay's distress *is* evidence of the impact on her of the choices the University made in responding to her complaint.

294. The University relies on Tremblay's letter in support of Kay. We say this letter does not contradict the evidence the Complainants have provided about the harm to Tremblay of the University's approach overall, particularly in relation to the refusal of Green College to ban RW from Green College altogether when it was plainly able to do so, as its eventual ban showed. Vessey testified that he always had the power to totally ban RW.

xi. McBryan

295. Given the very serious outcome for McBryan, including the loss of a good project with career-making potential, a year or more academically and her aspirations for an academic career, it is striking for the University to claim that it responded comprehensively and reasonably to McBryan's concerns (Submissions [1422]). This did not happen, with significant adverse consequences for McBryan. It is especially problematic for the University to claim that the significant limitations of any assistance it provided to McBryan arose because of *her* wishes (Submissions [1427]). The University must provide an effective response and must not impose the costs of that response on complainants. The general statement that McBryan did not want X excluded is not an excuse for moving McBryan's office rather than X's, or requiring McBryan to change to a much less advantageous research project, ultimately resulting in the loss of her project and of a year of work.

296. We do not agree that the timing of Ms. McBryan's complaint denied the University the opportunity to prevent some of the harm which McBryan experienced (Submissions [1423]). The law is clear that the University must provide a discrimination-free working, studying and living environment for students, and that it will be liable if it does not do so irrespective of its state of knowledge about any discriminatory acts. The Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (para. 17) noted that liability flowed to an entity like the University with or without active awareness of an issue because of the ameliorative purposes of the *Code*, and the fact that the University was the entity in the best position to take the effective preventative measures which the *Code* requires.

297. The University claims that McBryan did not communicate that she needed further help (Submissions [1429]). This is factually incorrect. McBryan

communicated with Faculty in her Department multiple times that issues with X were continuing and that she needed more help with him.

298. The University says that McBryan did not experience an adverse impact connected to a personal characteristic (Submissions [1432]). In our original submissions, we set out at length the adverse impacts on McBryan from the University's failure to act effectively on her complaint. We will not repeat those arguments here except to say that McBryan has certainly provided evidence of adverse impact.

299. The University claims that it lacks the documents to determine if McBryan's estimate of her financial losses was accurate. Many of the relevant documents mentioned by the University regarding tuition, standard costs of program, bursaries, TA wages, and graduate student financing are documents *in the University's possession*. The University cannot seek a discount on McBryan's claim because it failed to search for or disclose *its* documents which might have provided a foundation on which to challenge McBryan's claimed losses. McBryan did estimate her income after graduation.

xii. Fisher

300. The University says that events at a UBC fraternity and at an AMS dance on campus were not UBC-related events and therefore cannot form the basis of a complaint to the Tribunal against UBC (Submissions [1447]). We submit that both fraternities and the AMS are part of campus life, and that incidents in relation to events run by these entities are within the jurisdiction of the University. Sexual misconduct in either of these contexts could, for example, be the basis of NAM proceedings against a student. Moreover, we say the definition of the General Class here only requires the reported event to relate to a person studying or working at UBC towards a female student enrolled at UBC. As such, these events can certainly be the basis of a complaint here against the University in relation to its response. We similarly say that the Tinder date allegation, which related to a third year UBC student, also places Fisher within the definition of the General Class.

301. In its response, the University cites work SASC did with Fisher as support and accommodations provided by the University. SASC is not part of the University and its services to Fisher were not services provided by the University. The University's point seems to be that SASC could have or did tell Fisher about their options in dealing with sexual misconduct at the University and about consent, a particular concern for Fisher. In our submission, whether SASC could have provided this information to Fisher does not change the University's obligation to itself provide this information, which we say it did not do. Fisher's evidence was that UBC did not assist Fisher to understand how to hold those engaging in sexual misconduct towards them accountable.

xiii. Jane Doe 1

302. As we indicated in our original submissions, the evidence here did not establish a *prima facie* complaint of discrimination against Jane Doe 1.

xiv. Jane Doe 2

303. As we indicated in our original submissions, the evidence here did not establish a *prima facie* complaint of discrimination against Jane Doe 2.

304. The University objects to our observation that it is very problematic for the University to have information that a current student may have engaged in sexual misconduct and not to act on that information to protect other women from discriminatory circumstances. The University says that the Complainants called no evidence from a qualified person that it would be appropriate for the University to act in such a case (Submissions [1488]). In fact, we say, Ms. Israel, our qualified expert, did agree that there were circumstances in which it was important and valid for the University to address conditions leading to sexual misconduct, even if individual complainants did not want to proceed.

305. The University repeats its claim that it was not obliged to notify members of the Complainant classes here of this complaint proceeding. We have addressed this claim above, and say again that the record of the Tribunal's decisions is clear: the University was obliged to make this notification, and was permitted to do this in confidence.

306. As with other Complainants for which discrimination is not made out, the University is very critical of the decision to put any evidence about Jane Doe 2 before the Tribunal, and says that this was done for the benefit of the Complaint as a whole, against the interest of Jane Doe 2. We have addressed this argument generally above. In relation to Jane Doe 2 in particular, we do not agree that the fact Jane Doe 2 was not a student when she made her complaint was determinative because she was a student when the complained of event happened, which we say is enough to make her a member of the General Class.

xv. Jane Does 3A, 3B and 3C

307. It is not our view that the male in Jane Doe 3C's case is the same person as the male in the case of Jane Does 3A and 3B. This is because of Bohnen's evidence that the physical descriptions of the two men do not match. The University says that we have not established that the male in Jane Doe 3C's case was a student. As he presented himself as a student, and the University has not alleged that he was not a student, we say the best available evidence (namely the male's own statements to Jane Doe 3C as reported by her) is that he was a student.

308. In our original submissions, we addressed the issue of whether Jane Does 3A and 3B were members of the General Class, even though JZ was not a student at the time their complaints were made. We say that Jane Doe 3A is clearly a member of the General Class because the events in her case occurred when JZ was a student and when she was also a student. We say it is not determinative that JZ

was no longer a student when her complaint was made. We say that Jane Doe 3B is arguably a member of the General Class as well because she was a student when the events occurred, and JZ told her that he was also a student at that time. The University had an obligation to act to protect women students in relation to his presence on the campus, whether or not he was a student when the events occurred with respect to Jane Doe 3B.

309. In our original submissions, we addressed the issue of adverse impact. As usual, the University is not directing its attention to adverse impacts from the means and timing of the University's response. We do not agree that the University must be responsible for the actions of JZ for us to establish adverse impact (Submissions [1503]). We do not agree that the adverse impact must be in relation to the educational environment of each Complainant (Submissions [1504]). When Complainants make complaints to the University, they are requesting a service that must be provided in a reasonable and sufficient way by the University. If it is not, that may have an adverse impact on the Complainants which can take any form and need not be related to educational environment only.

xvi. Jane Doe 4

310. We note that some of the dates in our submission on Jane Doe 4 are wrong. All of the events in relation to Jane Doe 4 took place in 2015 (not 2014).

311. Jane Doe 4 is a member of the General Class because she was a student at the time she was acting as a TA, being a student was an essential pre-condition to being a TA, being a student contributed to her vulnerability as a TA, and one of the two people who submitted the objectionable materials to her was a student at the time of the objectionable materials were provided to Jane Doe 4. This is all that was required to establish that Jane Doe 4 was a member of the General Class.

312. The University says that Hyson kept Jane Doe 4 updated on his investigation throughout (Submissions [1518]). This is incorrect as Hyson failed to advise Jane Doe 4 that he had spoken to the individuals that were in her tutorial, what he learned from that conversation, or what next steps were available.

313. The University says that nothing different would have happened if the University had proceeded against the individuals involved under Policy 3. Policy 3 permits the University to proceed against non-students. The University called no evidence to establish that nothing different would have happened if the University had proceeded under Policy 3. All Hyson was able to say was that he was not aware of *whether* a notation could be put on the former student's transcript. We also note that the University could have proceeded under the *Human Rights Code*, and also under its property rights to exclude the two men from campus. Despite its alleged claim to be guided by the wishes of complainants, the University neither advised Jane Doe 4 of the outcome nor asked her what she wanted to have happen at that point.

314. We addressed the evidence of harm to Jane Doe 4 in our original submissions.

xvii. Jane Doe 5

315. The University says that there is no evidence that Jane Doe 5 felt any stress or anxiety as a result of the University's actions in her case (Submissions [1528]). We say that her repeated complaints about JM, including in real time when she encountered him in the library in November 2015, is evidence that JM's repeated contact with her, which was occurring because he had not been banned from the library as early as 2012 but certainly after he continued harassing Jane Doe 5 in 2013, was causing her stress and anxiety. The evidence also includes the fact that Jane Doe 5 required academic accommodations in the fall of 2015 and lost a course at that time because JM was still harassing her. Again, this would not have happened had the University acted effectively in relation to JM.

316. The University says that there was no evidence about the "actual risk" that JM represented (Submissions [1534]). By the time of Jane Doe's complaints in 2014, multiple women had come forward with complaints about JM's harassing conduct. There had been prior need for a priority response in respect of at least one of these women. The risk that JM clearly represented, which risk had been borne out multiple times, was that women would be denied their right to a harassment free working and studying environment. This was a right the University was bound to ensure under the *Human Rights Code*.

317. The University claims that in assessing the impact on Jane Doe 5, the Tribunal should not consider the information that came to campus security in 2012 about JM, even though this information was available to the University and specifically to Bohnen who was involved in the response to Jane Doe 5's concerns in 2014. The University says this information is not reliably established and that there is "no factual foundation for it" (Submissions [1540]). The University says that the individuals from 2012 did not come forward to any of the University employees interacting with Jane Doe 5. We submit that the business records created by Campus Security, whose primary job is to create records of conduct issues, must be treated by the Tribunal as reliable. The Tribunal cannot accept that the University is not responsible for taking a comprehensive view of the information it has about an individual whose conduct is in question. We submit that the University should not be excused for its tendency to silo information and to fail to take a comprehensive view of the information it has in prominent and known locations in order to ensure an approach to a known individual that fully takes account of his history.

318. In relation to our submission that Cunningham and Student E were not offered the option of not attending the NAM Committee hearing in their case, in contrast to Jane Doe 5, the University says that "it is clearly more persuasive to have the complainant attend the hearing to support her allegations". There was no evidence to this effect from Morrison who was the only witness who attended hearings and made decisions following them. In the evidence here there are at least two examples of complaints being upheld without the complainant attending

(Student C, Jane Doe 5). Hyson also told Jane Doe 30 that she did not need to attend, which she did not, but it seems in the final analysis that her allegations were not actually adjudicated by the NAM Committee.

319. It remains our submission that the University is obliged to take a realistic and thorough view of the risk posed by an individual facing complaints like JM to the right of women to a discrimination-free environment. If the NAM process cannot do this comprehensively, which the University says it cannot because of due process concerns, then it is the wrong process and does not meet the requirement of the *Code* on the University that it provide and/or restore a harassment-free environment for women.

320. The University says that the NAM Committee process could not amount to adverse *treatment* in this case. We say that the NAM Committee process, and particularly its failure to ban JM from the libraries where he encountered Jane Doe 5 and instead to rely on a rule which he had already broken that he not contact Jane Doe 5, created the adverse *impact* on Jane Doe 5 of again being harassed by JM in the library when she returned to UBC. Her sex was engaged in this harassment, establishing *prima facie* discrimination.

xviii. Jane Doe 6

321. As we indicated in our original submissions, the evidence here did not establish a *prima facie* complaint of discrimination against Jane Doe 6.

322. As with Jane Doe 2, the University is very critical that the Complainant called evidence about Jane Doe 6's circumstances at the hearing. In response to this claim, we note the woefully inadequate and extremely delayed disclosure by the University regarding many of the Jane Doe files, including this one, and the fact that the Complainants could not know in advance, before evidence was called from University personnel at the hearing, whether or not a case of *prima facie* discrimination would emerge on the facts of any Jane Doe file. This was also a consequence of the Tribunal's choice not to provide the Complainants' Representative with information about the identity of the Jane Doe complainants. In these circumstances, the Representative Complainant was obliged to see what evidence would be available for each Jane Doe, and could not simply assume in advance that a case would not be made out. In further response to the University's criticisms, we note that the University was required to make Jane Doe 6 aware of the complaint, and that she did not opt out at any time.

323. The University says that the University is not responsible for the initial behaviour of the men whose conduct is in question (Submissions [1574]). We note that the law is clear that the University *could* be held liable for this conduct, on the principle that they are in the best position to take preventative measures (*Robichaud*, *supra*), but that this complaint is *not* about that liability. Instead, this complaint is about the University's response to complaints made to the University. However, it is troubling that the University appears to deny its overarching responsibility for a discrimination-free environment at the University, strongly

suggesting again that the University does not fully or effectively understand the full ambit of its responsibilities under the *Code*.

xix. Jane Doe 7

324. It is not our understanding that Kay actually coordinated positive space training for the St. Johns College community following Jane Doe 7's complaint (Submissions [1582]). She discussed doing so, but there is no evidence that this training actually happened.

xx. Jane Doe 13

325. The University claims that as the claims of Jane Doe 13 appear to have arisen from her employment, she is not a member of the General Class. We respond that the General Class definition does not contain any such limitation. As long as Jane Doe 13 was a student and made a complaint, she is a member of the class as defined by the Tribunal.

xxi. Jane Doe 20

326. As we indicated in our original submissions, the evidence here did not establish a *prima facie* complaint of discrimination against Jane Doe 20.

xxii. Jane Doe 21

327. The University argues that it did not have jurisdiction over the sexually harassing conduct of M13 complained of by Jane Doe 21. In part they say this is because AMS clubs can include both students and members of the public. As both Jane Doe 21 and M13 were students, this fact does not alter the University's responsibility under the *Human Rights Code* to act effectively in relation to Jane Doe 21's complaint about M13's conduct. The University says that neither Jane Doe 21 nor M13 were engaged in "a university-related activity". We respond that the University has established the breadth of its interest in the "Background and Purposes" of Policy 3, which states the University's expectation that "all Members of the University Community will conduct themselves in a responsible manner so as not to cause, condone or participate in the Discrimination or Harassment of another person or group of persons". The Policy continues, "The fundamental objectives of this Policy are to prevent Discrimination and Harassment on grounds protected by the BC Human Rights Code, and to provide procedures for handling complaints, remedying situations and imposing discipline when such Discrimination or Harassment does occur". Policy 3 expressly covers events off-campus in a "University-related context" (section 2.5). This language is broad enough to encompass events in relation to the production of a play by University students at the University, including under the aegis of an AMS club. Similarly, the Student Code of Conduct references conduct which is alleged to adversely affect, disrupt or interfere with another person's reasonable participation in University programs or activities" (s. 3.1(b)). This club is a University activity in that it is an activity at the University, even though it is sponsored by the AMS.

There is no suggestion that the University required the AMS to rent rehearsal or performance space as it would an unrelated third party.

328. The University says that there would be no basis to engage Policy 3 because there was not expected to be ongoing interaction between Jane Doe 21 and M13 and she was not afraid of him. This claim does not take account of the fact that Policy 3 also exists to *remedy* harassment that has already occurred, including through discipline, as the language in the Background and Procedures cited above makes clear. The University's obligations under the *Human Rights Code* (and thus Policy 3) are not merely *preventative*.

329. The University says that the Tribunal should consider whether the University's decision about jurisdiction in respect of a particular Complainant constituted discrimination *before* considering if a discriminatory environment existed (Submissions, [1616]). Our submission is that the University's obligation to provide a non-discriminatory environment *gives it jurisdiction* to address events which have resulted in a non-discriminatory environment not being present, or which may result in a non-discriminatory environment not being present in future. Its decision about jurisdiction is therefore not a separate question. In our submission, the University consistently fails to acknowledge that it has obligations arising from the *Human Rights Code* that require it to act, irrespective of its internal policies, including policies in service of powers it has under the *University Act*. Its policies *do not* define its obligations under the *Human Rights Code*. Rather, its obligations under the *Human Rights Code* define its jurisdiction.

330. The University says that there is no evidence that Jane Doe 21 wanted a Policy 3 response (Submissions [1618]). We respond that the University cannot rely on its failure to advise Jane Doe 21 about Policy 3 or the *Human Rights Code* to defend its failure to respond appropriately to Jane Doe 21's complaint of sexual harassment. As we have noted elsewhere, this is a very serious issue that arises from the University taking the position that the University need only take steps requested by a complainant.

331. The University says that even if the University had proceeded under Policy 3, it would not have permitted removal of the student from campus because that remedy falls exclusively under the Student Code of Conduct process. There is no evidence that this is so. The *University Act* permits the President to discipline a student, but does not prescribe how that will discipline process will work, or that discipline is the only way the University can act. We say the Student Code of Conduct is not the only way to discipline a student (see Policy 3 for example), and that discipline is not the only way the University can act. These are fallacies the University has relied on to avoid acting under the *Human Rights Code*.

332. The University relies on the lack of training of AHUs to manage serious allegations like those being brought forward by Jane Doe 21 (Submissions [1621]). We reply that the University cannot rely on its failure to train the persons it has made responsible under Policy 3 as a reason not to proceed under Policy 3. It was always open to the University, for example, to hire an external investigator where its in-house people lacked the necessary skills and training.

xxiii. Jane Doe 24

333. We continue our concern that Hyson did not proceed with the complaint about events on November 2, 2013 at the P1 party because he believed those events took place off-campus, and not because of any preference expressed by Jane Doe 24, of which there is no documentary evidence. We also note again our understanding that the P1 party took place at a house *on* campus.

334. We continue our concern that Hyson relied on information about the November 2, 2013 event in deciding not to proceed with Jane Doe 24's complaint, even though he was not formally considering that event and he had not shared any of the information he received, including about the November 2, 2013 event, with Jane Doe 24. The University says that providing Jane Doe 24 with an opportunity to review or comment on the information Hyson had gathered from others about her complaint "was not part of the NAM process" (Submissions [1646]). The University explained this by saying that the NAM Committee is not a quasi-judicial or adversarial body. Nothing, including these facts or the Rules for the NAM process, precluded Hyson or the NAM Committee from providing the information gathered in response to a complaint to the complainant at some point in the NAM process. The University's failure to do this, as we have already argued, is fundamentally contrary to the complainant's interest in a fair process where her complaint is fully and fairly considered. As such it denies her an appropriate and effective response to her complaint and is discriminatory.

335. The University says that the Complainant's sex was not involved in its decision not to proceed with Jane Doe 24's complaint (Submissions [1642]). As we have noted elsewhere (in relation to Student B), a decision not to move forward with an allegation of sexual harassment always impacts a woman in relation to her sex because sexual harassment is tightly related to sex, and the need for an effective response to sexual harassment is thus tightly related to sex.

xxiv. Jane Doe 25

336. The University says, in a repeat of submissions it has made about many others, that there was no evidence that Jane Doe 25 felt any stress or anxiety with respect to the University's response to her concerns (Submissions [1650]). In response, we say that through a letter from SASC, Jane Doe 25 expressly stated her disappointment in the University's failure to act on her complaint because the event took place off-campus.

337. The University says that because the allegations related to an off-campus sexual assault there was no jurisdiction for the University to act under the Student Code of Conduct (Submissions [1651, 1652]), even though the incident involved a sexual assault of one student by another. In making this submission, the University did not specifically address the language in the Student Code of Conduct taking jurisdiction over conduct having an adverse affect on, disrupting, or interfering with another person's reasonable participation in University programs or activities (s. 3.1(b)). Jane Doe 25 advised that the assault had left her

constantly uncomfortable on campus because she frequently saw M8 there. The University argued that because Jane Doe 25 was not on campus *at the time of the assault*, her learning environment was not impacted (Submissions [1656]). This is a wholly unreasonable reading of the language in the Student Code of Conduct. That language cannot be limited to the moment when the assault is taking place, but rather must address the ongoing impact of the assault for the complainant. The University's submissions in this respect also wholly fail to take account of their obligation to act effectively under the *Human Rights Code*.

338. The University says that its jurisdictional decision was grounded in the *University Act* (Submissions [1652]). There is nothing in the *University Act* which precludes the University from taking effective action against a student who sexually assaults another student, regardless of where that assault takes place. Even if there was, that provision would conflict with the *Human Rights Code* obligation to prevent and remediate discrimination on the basis of sex which would prevail pursuant to s. 4 of the *Human Rights Code*.

339. The University says that the Complainant's sex was not involved in its jurisdictional decision not to proceed with Jane Doe 25's complaint (Submissions [1642]). As we have noted elsewhere (in relation to Student B and Jane Doe 24), a decision not to move forward with an allegation of sexual harassment always impacts a woman in relation to her sex because sexual assault is tightly related to sex, and the need for an effective response to sexual assault is thus tightly related to sex.

xxv. Jane Doe 26

340. The University says that the Complainants do not seek any damages for Jane Doe 26 (Submissions [1669]). This is incorrect. We seek \$4,000 for Jane Doe 26 on the basis that no one at the University recognized that Jane Doe 26 would have benefited from information about consent and healthy relationships, and that this should have been provided by the University. In our submission, not providing this information amounted to a deficient response that was harmful to JD 26, and therefore that injury to dignity damages are appropriate.

xxvi. Jane Does 29 and 30

341. The University argues that Jane Doe 29 is not a member of the General Class because M12 had been suspended or removed from the BFA program when the complaint was made (Submissions [1683]). This is not determinative of whether or not Jane Doe 29 was a member of the General Class. Jane Doe 29 was a student at the time she made her complaint. Her complaint was about sexual misconduct by M12 during the time he was a student. He was able to return as a student in the fall of 2014. As such, Jane Doe 29 is a member of the General Class.

342. In relation to Jane Doe 30, the evidence upon which we rely to say that not providing her with a copy of her complaint and M12's response was harmful are Jane Doe 30's comments in her revised complaint which make it clear that she has

been left to guess about the language of her complaint and M12's response. This is, we say, a reasonable basis on which to infer harm.

xxvii. Jane Doe 31

343. The University claims that the Tribunal's process does not permit witnesses who have not testified to observe other witnesses, suggesting that for this reason, there was nothing wrong with the NAM Committee hearing process (Submissions [1717]). The Tribunal's processes, which includes in many instances applications to dismiss, clearly *do* permit complainants to know the content of the respondents' responses, the content of any applications to dismiss, the content of all evidence provided by the respondents, whether on an application to dismiss or at a hearing, and the content of all arguments provided by the respondents, whether on an application to dismiss or at a hearing on the merits. Complainants, like respondents, are permitted to be present throughout a hearing before the Tribunal. The Tribunal's process also allows complainants and respondents alike to review the Tribunal's full decisions on ATDs and after hearings on the merits. The suggestion that it was somehow not possible for the University to provide cross disclosure to complainants in its NAM Committee process, or that this would undermine the credibility of the evidence provided by complainants (but somehow not respondents in the NAM Committee process) has no foundation or merit. We note that the NAM Committee Rules are silent about whether or not cross-disclosure will take place.

xxviii. Jane Doe 32

344. The University says that Jane Doe 32 and M15 did not see each other on campus. In fact the evidence was that Jane Doe 32 and M15 did not see each other *much* on campus, indicating that there was ongoing impact for Jane Doe 32 of the sexual misconduct she alleged.

345. The University says that the decision that it did not have jurisdiction over Jane Doe 32's complaint was not based on her gender (Submissions [1729]). As we have argued elsewhere (in relation to Student B and Jane Does 24 and 25), a decision not to move forward with an allegation of sexual harassment always impacts a woman in relation to her sex because sexual misconduct is tightly related to sex, and the need for an effective response to sexual misconduct is thus tightly related to sex.

IV. EXPENSES OF THE COMPLAINANTS' REPRESENTATIVE

346. It is commonplace for a Complainant to seek the costs of bringing a complaint to hearing as damages, and the Tribunal routinely compensates these costs provided that they relate to the discrimination that occurred. For example in *Hale v. University of British Columbia (Okanagan) No. 5*, 2023 BCHRT 121, the Tribunal ordered compensation for mailing expenses, office supplies and the expenses of a psychologist's report and testimony at the hearing (paras. 440, 441).

347. The task of bringing this very substantial matter to hearing was a very significant burden for the Representative Complainant. In this context, the expenses sought by the Representative Complainant are modest. It is not unusual for a complainant to seek compensation for lost wages to prepare for or attend the hearing, both of which always happen after a complaint has been filed. The required evidence is that she was involved in preparation for the hearing or attending at the hearing, as she was entitled to do, rather than undertaking her paid work. Asking for compensation for *lost* wages does not make acting as the Representative Complainant a paid role.

348. The University challenges the reasonableness of the Representative Complainant's travel expenses. While the Representative Complainant was able to manage much of the work of the hearing remotely, it was not unreasonable for her to attend in Vancouver for some of the key preparation, including document review of the University's initial disclosure, and preparation for the start of the hearing. Being in Vancouver allowed the Representative Complainant to work closely with counsel to prepare for hearing at these critical times. The cost claims are reasonable and should be awarded.

349. Administrative expenses are routinely incurred after a complaint is filed, and are routinely compensated by the Tribunal. These are not considered to be "legal expenses", which the Tribunal does not compensate. The costs of hosting the website in particular were incurred because of orders made by the Tribunal, and are properly compensable.

V. OTHER REMEDIES

i. Systemic Orders

350. The University claims that its new sexual assault policy has substantially addressed the concerns raised in this complaint that might give rise to systemic remedies. The University makes this argument although it ultimately chose to provide no evidence about its new policy (Policy 131, now SC17) or its operations. As a result, nothing is known about the new policy, or the extent to which it addresses the deficiencies evident here on the evidence. For example, it is not known what information a complainant in the new policy is entitled to during an investigation process or at the end of an investigation, significant issues raised by the Complainants here.

351. We agree that the Tribunal is limited to commenting on the University's processes as they were at the time of this complaint, but say that the Tribunal should name any deficiencies it identifies on the evidence before it and direct the University to remedy those deficiencies. Whether the University's new policies do so is a question for another complaint, but not a reason for the Tribunal not to make systemic orders here on the evidence before the Tribunal. It is imperative that the Tribunal continue the process started in *Hale No. 5* of identifying specific requirements for the University's processes.

352. The University acknowledges its obligation to provide a safe, harassment-free educational environment (Submissions [1774]). We say that its obligation in fact is to provide a safe, harassment- *and discrimination*-free educational, *living and working* environment. The University says that it takes its obligation seriously and at all times met this obligation. We say that in fact it consistently failed to direct itself to this broad question, and instead tended to focus on whether or not there was grounds for discipline under the Student Code of Conduct, which we say is a different and narrow question that does not fully or reasonably address the need to provide a safe and harassment- and discrimination-free environment for students.

ii. Costs

353. Per the leave granted in Kirchmeier No. 3, 2020 BCHRT 102, para. 40, Kirchmeier provides notice that she will reapply for costs do to the University's failure to disclose documents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26TH DAY OF AUGUST, 2026.



Clea Parfitt
Counsel for the Complainants