

**IN THE MATTER** of a public  
Complaint of D.B., Z.B., and K.B.  
Against Constable S.S. made under the  
*Royal Newfoundland Constabulary Act 1992*

**Royal Newfoundland Constabulary Public  
Complaints Commissioner**

**AND**

**Constable S.S.**

**RESPONDENT**

**AND**

**Royal Newfoundland Constabulary**

**THIRD PARTY**

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**Merits Decision**

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**Hearing Dates:** September 18-21, 25-29, 2023. January 9, 2024.  
**Decision Date:** March 28, 2025  
**For the Commission:** James Strickland  
**For the Respondent:** Jerome Kennedy, K.C.  
**For the Chief of the RNC:** Wendy Zdebiak  
**Adjudicator:** John Whelan Q. Arb., Chief Adjudicator RNCPC

## **PROCEDURAL HISTORY**

1. On or about July 2, 2019, then Commissioner John Rorke referred the Complaint of D.B., Z.B., and K.B. (“the Complaint”) to then Chief Adjudicator Gregory A. French. The Complaint(s)<sup>1</sup> filed involved several officers and was being heard as a single proceeding. As part of that proceeding, Adjudicator Wadden, as he was then, heard several preliminary matters. Adjudicator Wadden filed a Preliminary Decision on an Application for Dismissal on or about 6 March 2020. Adjudicator Wadden filed a Preliminary Decision on Standing for the Chief of Police on or about 18 October 2020. Finally, Adjudicator Wadden filed a Preliminary Decision removing Mr. Kennedy as Counsel for Constable SS on or about 6 November 2020. A Request for consideration of the 6 November 2020 decision was denied by Adjudicator Wadden on or about 2 December 2020.

2. Judicial review was sought on the Decision on Removal of Counsel and Denial of Reconsideration filed by Adjudicator Wadden. Justice Marshall ruled that the decisions were unreasonable; set aside the decision; and remitted the matter back for further consideration in accordance with the decision.<sup>2</sup>

3. On January 4, 2023, Adjudicator Wadden was appointed to the Newfoundland & Labrador Provincial Court. Consequently, he was no longer capable of discharging the duties of an Adjudicator under the *Royal Newfoundland Constabulary Act, 1992*<sup>3</sup> (the *Act*) or the *Royal Newfoundland Constabulary Public Complaints Regulations* (the *Regulations*).

4. On February 27, 2023, the undersigned advised the Parties that given the absence of statutory direction, or procedural convention, I would not be bound by prior decisions of Adjudicator Wadden and that the July 2, 2019, referral would be treated as though it were a new referral to the Chief Adjudicator.

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<sup>1</sup> Note: while there are multiple Complainants and multiple elements of their individual Complaints, I will refer herein to a single “Complaint” for convenience as the individual complaints were consolidated into a single referral.

<sup>2</sup> See *Simmons v. Royal Newfoundland Constabulary Public Complaints Commission*, 2022 NLSC 27 (CanLII) at para 151.

<sup>3</sup> SNL1992 c. R-17

5. On or about March 14, 2023, the Chief of the Royal Newfoundland Constabulary applied for standing pursuant to Section 30(1)(e) of the *Royal Newfoundland Constabulary Act, 1992* (“the Act”). The Application was granted on June 13, 2023.

6. The hearing on the merits commenced on September 18, 2023. Final arguments were heard on January 9, 2024.

7. The evidence from witnesses was extensive. As there is a fully transcribed recording of the hearing, this decision will not detail all of the evidence that was provided.

### **SUMMARY**

8. On November 8, 2017, a traffic accident occurred in Paradise, Newfoundland & Labrador, at a busy intersection on Torbay Road. Royal Newfoundland Constabulary (RNC) Officers were dispatched to the scene. The officers attended the scene, took steps to safely manage traffic around the accident site, and took witness statements.

9. During this time, one of the Complainants, Dennis Ball (DB), was driving home from work. Ball approached the intersection where the RNC officers had diverted traffic. DB needed to turn left, but the traffic diversion forced him to turn right.

10. While navigating the right turning lane, DB slowed or stopped his vehicle near Cst. Simmons (the Respondent) and made a comment to The Respondent about managing the flow of traffic properly. The parties agree that DB’s comment included some profanity.

11. DB then proceeds to drive his vehicle on to Torbay Road where he promptly executed a U-turn. DB proceeded through the intersection, changed lanes, and continued driving down Torbay Road. DB’s private residence was only a short distance down Torbay Road.

12. Based on DB's conduct at the accident scene, The Respondent decided that a traffic stop of DB's vehicle was warranted. The Respondent quickly entered a police vehicle and proceeded in the direction of travel taken by DB.

13. What followed cannot be described as anything other than unfortunate. DB and The Respondent would have a physical altercation. During the altercation with DB, The Respondent would deploy his OC spray on DB's son Zachary Ball (ZB). The rear patio door of the DB residence would be smashed by another member of the RNC. Both DB and ZB would be arrested. ZB was subject to the administration of unreasonable force by another responding officer. Kimberley Ball (KB) would return home from work to find her husband and son arrested, her home damaged, and a group of RNC officers in her driveway.

14. The consequences of November 8, 2017, would be significant for many of the parties involved. DB & ZB had to resolve criminal charges against them. DB was required to deal with restrictive release conditions while the criminal matters were dealt with. KB was required to live with the uncertainty created by the situation. Internal discipline at the RNC was triggered by the event. Ultimately, complaints by DB, ZB, and KB were filed with the Royal Newfoundland Constabulary Complaints Commission.

15. The Reference to an Adjudicator, filed July 2, 2019, states, in part:

*The alleged offence occurred on November 8, 2017, between approximately 5:50pm and 6:40pm in the Octagon Pond/Topsail Road area of Paradise, Newfoundland and Labrador. It is alleged that Cst. Simmons arrested and/or detained the complainants Dennis Ball and Zackary Ball without sufficient cause, used unnecessary force with respect to Dennis Ball and Zackary Ball, was discourteous to the complainant Kimberly Ball, attempted to aid, abet, counsel or procure another police officer to contravene the Royal Newfoundland Constabulary Public Complaints Regulations, carried out his duties in a manner contrary to the Policy and Procedures Manual, and [REDACTED].*

16. The Redacted portion of the referral was struck from the proceeding by consent of the Parties.

17. There is no question that the individuals involved with the events of November 8, 2017, would have preferred an alternate outcome. Further, there can be no doubt that alternate choices on the night of November 8, 2017, would have resulted in less damaging outcomes. There is much to be learned and improved upon from what happened on November 8, 2017.

18. That said, the purpose of this phase of the public complaints process is to determine whether the conduct of the Respondent on November 8, 2017, falls beyond the scope of conduct expected of members of the RNC. It is not a question of whether the Respondent made what could be described colloquially as “good decisions.” Rather, it is a question of whether the decisions made by the Respondent on November 8, 2017, fall within the bounds of allowable decisions for a reasonable officer in his position.

19. I have concluded that the Respondent acted within his authority to arrest DB & ZB. Further, I find that the Respondent used reasonable force in the circumstances. I find there is insufficient evidence to support the allegation that the Respondent was discourteous to DB, ZB, or KB. I find that there is no evidence to support the balance of the allegations. My reasons follow.

**EXHIBITS**

20. The following table provides a listing of all exhibits from the hearing:

| Exhibit Title | Description  |
|---------------|--|
| Consent 1     | Information of Zachary Ball and Dennis Ball dated 9 November 2017 and Recognizance of Zachary Ball   |
| Consent 2     | Information dated 9 November 2017 of Dennis Ball, Recognizance dated 9 November 2017 of Dennis Ball and Recognizance of Dennis Ball dated 22 November 2017 |

|            |  |
|------------|--|
| Consent 3  | Dash Cam Video Footage 8 November 2017   |
| Consent 4  | Home Surveillance Video Footage 8 November 2017  |
| Consent 5  | Video Footage from the St. John's Lockup 8 November 2017   |
| Consent 6  | Public Complaints Against Constable Simmons, Constable Morgan, and Constable Wagner dated 1 May 2018   |
| Consent 7  | Referrals re: Constable Simmons  |
| Consent 8  | RNC Policy & Procedures Manual, various dates: <ul style="list-style-type: none"> <li>a) Arrest &amp; Confinement dates 2 May 2003</li> <li>b) Courtesy dates 25 June 1999</li> <li>c) Oleoresin Capsicum (OC) Spray dated 6 January 2016</li> <li>d) Dress and Deportment, 28 October 2013</li> <li>e) Traffic Direction and Control dated 18 January 2012; and,</li> <li>f) Use of Force dated 30 August 2016</li> </ul> |
| Consent 9  | Google Earth images of 1652 Topsail Road, undated  |
| Consent 10 | Diagram of Robert Cuff, undated  |
| Consent 11 | Transcript of Communication Centre recording taken on 8 November 2017  |
| Consent 12 | Communication Centre calls, dated 8 November 2017 <ul style="list-style-type: none"> <li>a) Kimberly Ball to Communication Centre</li> <li>b) Sgt. Cole to Kimberly Ball</li> <li>c) Sgt. Cole to Cst. Simmons</li> <li>d) Cst. Simmons to Communication Centre</li> </ul>   |
| Consent 13 | Audio Transcription – Sgt. Cole & Kimberley Ball – 8 November 2017 at approximately 9:05pm   |

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| Consent 14 | Portions of the Royal Newfoundland Constabulary Patrol Officer's Guide 2012                           |
| DB #1      | Transcript of April 28, 2021, Testimony – Dennis Ball   |
| DB #2      | Transcript of April 27, 2021, Testimony – Dennis Ball   |
| DB #3      | Transcript of Taped Interview – 10 May 2018 – Ontario Provincial Policy & Dennis Ball                 |
| DB #4      | Provincial Court Record Check – Dennis Ball – October 20, 2020  |
| ZB #1      | Photograph from November 9, 2017 – Zachary Ball   |
| ZB #2      | Private Information – Z. Ball v. Morgan   |
| ZB #3      | Transcript of May 6, 2019, interview by Robert Cuff with Zachary Ball                                 |
| ZB #4      | Transcript of Taped Interview – 10 May 2018 – Ontario Provincial Policy & Zackary ( <i>sic</i> ) Ball |
| KB #1      | Transcript of Taped Interview – 10 May 2018 – Ontario Provincial Policy & Kim Ball                    |
| KB #2      | Transcript of April 28, 2021, Testimony – Kimberley Ball  |
| KB #3      | Transcript of May 6, 2019, Interview by Robert Cuff with Kimberley Ball                               |
| DC #1      | Decision 3 of the Cole Disciplinary Tribunal – 27 May 2020  |
| DC #2      | Decision 4 of the Cole Disciplinary Tribunal – 16 July 2020   |
| DC #3      | Notice of Appeal  |
| DC #4      | Provincial Court Record Summary   |
| BM #1      | Notes of Cst. B. Morgan   |

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|-------|---|
| BM #2 | April 30, 2021, Testimony of B. Morgan                            |
| IW #1 | May 3, 2021, Testimony of I. Wagner                               |
| TK #1 | Testimony of April 29, 2021, of Tony Kane                         |
| MS #1 | Testimony of 29 April 2021  |
| MS #2 | Ontario Provincial Police Summary Report                          |
| CD#1  | Emails from Cathy Drake to Cst. Simmons – November 8, 2017        |
| SS #1 | Narrative Report – Cst. Simmons                                   |
| SS #2 | General Occurrence Report – Cst. Simmons                          |
| SS #3 | Handwritten Notes – Cst. Simmons                                  |
| SS #4 | Use of Force Report – Cst. Simmons                                |
| SS #5 | Letter from Insp. S. Bill – Professional Standards                |
| SS #6 | Ontario Provincial Police Statement – June 6, 2018 – Cst. Simmons |
| GC #1 | Google Map Printout of Sept 27, 2023                              |
| GC#2  | Ontario Provincial Police Interview Summary – Grant Colbert       |
| GC #3 | Testimony of Grant Colbert – April 29, 2021                       |
| GT #1 | Continuation Report – Gregory Thorne – November 9, 2017           |
| KK #1 | Use of Force Biography – Sgt. Kelly Keith                         |
| KK #2 | Use of Force Opinion – Sgt. Kelly Keith                           |

|       |                    |
|-------|--------------------|
| SH #1 | Obstruction Policy |
|-------|--------------------|

**Issues**

21. The Originating Reference was amended on the consent of the Parties. The amended reference states:

*The alleged offence occurred on November 8, 2017, between approximately 5:50pm and 6:40pm in the Octagon Pond/Topsail Road area of Paradise, Newfoundland and Labrador. It is alleged that Cst. Simmons arrested and/or detained the complainants Dennis Ball and Zackary Ball without sufficient cause, used unnecessary force with respect to Dennis Ball and Zackary Ball, was discourteous to the complainant Kimberly Ball, attempted to aid, abet, counsel or procure another police officer to contravene the Royal Newfoundland Constabulary Public Complaints regulations, and carried out his duties in a manner contrary to the Policy and Procedures Manual.*

22. Based on the reference, I must consider the following issues:

- i. Whether the Respondent had lawful authority to arrest DB on November 8, 2017?
- ii. Whether the Respondent used unnecessary force in the arrest of DB on November 8, 2017?
- iii. Whether the Respondent properly detained DB overnight on November 8, 2017?
- iv. Whether the Respondent was discourteous to DB in violation of s.3(1)(c) and (j) of the Regulations on November 8, 2017?
- v. Whether the Respondent had lawful authority to arrest ZB on November 8, 2017?
- vi. Whether the Respondent used unnecessary force in the arrest of ZB on November 8, 2017?
- vii. Whether the Respondent was discourteous to DB in violation of s.3(1)(c) and (j) of the Regulations on November 8, 2017?
- viii. Whether the Respondent properly detained ZB overnight on November 8, 2017?
- ix. Whether the Respondent was discourteous to KB in violation of s.3(1)(c) and (j) of the Regulations on November 8, 2017?
- x. Whether the Respondent aided, abetted, counselled, or procured another police officer to contravene the RNCPC Regulations?

- xi. Whether the Respondent carried out his duties in a manner contrary to the RNC Policy and Procedures Manual?

### **Evidentiary Standard**

23. The appropriate evidentiary standard is the balance of probabilities.

### **Onus**

24. The onus rests with the RNCPC. The Respondent is not obligated to disprove any of the allegations made against him.

### **Evidence**

25. There is little dispute about the sequence of events on November 8, 2017. For ease of reading, I will provide a consolidated summary of the evidence that was provided in a narrative form.<sup>4</sup> Where the testimony of specific witnesses varies from the narrative summary, I will make note of the deviations.

26. On November 8, 2017, an accident had occurred at the intersection of McNamara Drive and Topsail Road. While the intersection is currently a roundabout, it was previously a T junction with a traffic signal.

27. The Respondent was one of the officers on the scene and traffic that was northbound on McNamara was forced to take a right turn on to Topsail Road.

28. DB was returning home on the evening of November 8, 2017. His normal route home would have required that he make a left-hand turn from McNamara on to Topsail Road. The RNC detour around the accident prevented him from making that turn.

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<sup>4</sup> As a full audio recording and written transcript of the hearing exists, I will refrain from the usual arbitral practice of providing detailed summaries of individual witness testimony.

29. Dashcam footage provided by DB shows that DB entered the intersection and was turning right to go eastbound on Topsail Road. While driving through the intersection, DB slowed his vehicle and yelled at the Respondent who was taking a statement from an individual involved in the accident. DB's comment included the use of a common expletive and suggested that if the RNC did not do a better job of managing traffic flow, there would be another accident.

30. Dashcam footage from DBs vehicle shows that DB entered the eastbound lane of Topsail Road and then executed a U-turn. There was an oncoming pickup truck in the westbound lane, but DB managed to execute the U-turn, fell in behind the pickup truck, and began travelling westbound on Topsail Road.

31. There is a dispute whether the tires of DBs vehicle emitted a noise when he executed the U-turn and began to travel westbound on Topsail Road. DB denies his vehicle made any noise. The Respondent and other witnesses describe the noise as either a "squealing" or a "chirping" noise.

32. The Respondent decided that it would be appropriate to leave the scene of the accident and pursue DBs vehicle. The Respondent stated that he believed DB was acting in an erratic manner given then the statement made at the intersection and the manner in which DB executed the U-turn.

33. The Respondent stated that DBs vehicle had "sped off" down Topsail Road. There is no objective evidence to establish the speed by which DB travelled westbound on Topsail Road. The Commission suggested that I could calculate a rough average speed by comparing the elapsed time on the video to the estimated distance travelled. Respondent counsel cautioned against such an approach based on concerns with the nature of video evidence.

34. The dashcam footage shows that DBs vehicle increased its speed after executing the U-turn. DB then passes a single pickup truck and falls within what would be generally considered

“the flow of traffic.” Other than the pickup truck that was in the left lane, DB passes no other vehicles before turning into his driveway.

35. DB executed a right-hand turn into a driveway and proceeded to the rear of the property in his vehicle. At the end of the driveway there is a shed with a garage door. The flashing lights of the Respondent’s patrol vehicle are visible in the video when DB begins executing a multi-point turn in his vehicle.

36. As DB is executing his turn, the dashcam shows an individual emerging on the rear patio of the home. The individual emerging from the home is ZB.

37. The video shows that DB turned his vehicle around so that it was now facing Topsail Road. The Respondent’s patrol vehicle is visible in the frame of the dashcam. Both DB and the Respondent stated that DB’s vehicle was in close proximity to the patrol car when he was executing the multi-point turn.

38. The Respondent stated that he had exited his vehicle while DB was making his multi-point turn. The Respondent stated that it was his belief that DB may have intended to use the vehicle as a weapon. The Respondent stated that he re-entered his patrol car because he believed that DB may have executed the turn because he intended to flee the area.

39. The video shows that the Respondent’s patrol car was reversed away from DBs vehicle. DB stops his vehicle at roughly the same time that the Respondent reemerges from his patrol car.

40. The dash cam shows the Respondent approaching DBs vehicle. At this time, ZB is standing in the same position on the rear patio.

41. As the Respondent leaves the frame of the dashcam, ZB can be seen re-entering the home and putting on his shoes. There is no further dashcam footage from this point forward.

42. The Ball family had installed a video surveillance system on the exterior of their home due to prior incidents involving a neighbour. I note that there are concerns with the video surveillance system. For instance, the time stamps are not accurate representations of the actual time of day and the picture clarity exists somewhere between “poor” and “good.” However, it does provide an objective sequencing of events.

43. The video system is divided into Channels 1, 2, 3, & 4.

44. Channel 1 shows a roughly eastward view across the Ball’s rear yard. In frame, it includes both the rear patio and the shed. The right edge of the frame roughly corresponds with the rear wall of the Ball residence. There appears to be some form of shrub or shadow near the shed that obscures some the video at the eastern side of the shed. The view of the rear door is obstructed by a small section of roof and eavestrough downspout.

45. Channel 2 shows a roughly northern view up from the front of the Ball residence to the rear of the driveway. The left edge of the frame roughly corresponds with the eastward wall of the Ball residence. The left edge of the frame is partially obstructed by what is presumably a spider web.

46. Channel 3 shows the front of the home. It is bordered on the left by the front of the residence. In the top right-hand corner of the frame, it is possible to see Topsail Road.

47. Channel 4 provides no relevant information to the allegations.

48. I will provide a rough description of what is depicted in the video at relevant times. The following sequence is evident from Channel 1:

| Channel | Time Stamp | Description  |
|---------|------------|--|
| 1       | 07:40:40   | DB vehicle enters the frame from the right   |
| 1       | 07:40:50   | Respondent patrol car enters the frame from the right.   |
| 1       | 07:40:52   | Patrol vehicle driver door opens, and Respondent exits.<br>ZB exits the residence and is standing on the rear patio.                     |
| 1       | 07:40:56   | DB vehicle continues executing a multi-point turn and drives close to patrol vehicle.  |
| 1       | 07:41:00   | DB vehicle reverses course and continues multi-point turn. Patrol vehicle goes in reverse and backs up approximately one vehicle length. |
| 1       | 07:41:06   | Respondent can be seen emerging from patrol vehicle. ZB is on the rear patio and indicating in the direction of DB vehicle.              |
| 1       | 07:41:09   | Respondent can be seen approaching DB vehicle.   |
| 1       | 07:41:14   | Respondent has closed the distance to DB vehicle. DB can be seen emerging from his vehicle.  |
| 1       | 07:41:18   | An interaction between DB and Respondent is visible. Both parties exit the frame.  |
| 1       | 07:41:25   | ZB emerges from the home. ZB is running towards the shed where DB's vehicle was parked.  |
| 1       | 07:41:29   | ZB is stationary near the front passenger tire of DB's vehicle.  |

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| 1 | 07:41:39 | ZB can be seen walking backwards. ZB is then stationary near the front fender area of DB's vehicle.   |
| 1 | 07:41:45 | ZB can be seen gesturing at something out of frame.   |
| 1 | 07:41:47 | ZB begins advancing from the front of the vehicle and returns roughly to the area adjacent to the front passenger tire of DB's vehicle. ZB then takes two steps back and returns to the area adjacent to the front bumper of the vehicle. |
| 1 | 07:41:52 | ZB is seen gesturing with his hands and arms. ZB again advances towards the area adjacent to the front passenger tire of DB's vehicle.  |
| 1 | 07:42:08 | ZB appears to put his weight on his rear leg.   |
| 1 | 07:42:11 | ZB raises his right arm to his face. ZB rapidly moves away from the vehicle and can be seen wiping at his face.   |
| 1 | 07:42:18 | ZB goes approximately to the end of the rear patio. ZB stops to bend over resting his arms on his knees. ZB's hands repeatedly go to his face.  |
| 1 | 07:42:42 | ZB is now on his knees on the rear patio.   |
| 1 | 07:42:50 | ZB stands and begins walking around near the patio eventually re-entering the home at 07:43:13  |
| 1 | 07:43:50 | ZB exits the home and can be seen gesturing toward the shed area with his right arm.  |
| 1 | 07:44:26 | Another RNC patrol vehicle enters the frame. It is occupied by Morgan & Wagner.   |

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| 1 | 07:44:31 | Moran & Wagner are seen rapidly advancing from their vehicle to the shed area of the yard.  |
| 1 | 07:44:33 | Moran & Wagner turn rapidly and begin advancing toward the rear door of the Ball property.  |
| 1 | 07:44:38 | Wagner returns to the shed area and can be seen in front of DB's vehicle for a few seconds. Wagner then turns and joins Morgan at the rear door of the Ball property. |
| 1 | 07:45:00 | Morgan & Wagner are visible at the rear of the property. It is not possible to see what they are doing from the video. <sup>5</sup>                                   |
| 1 | 07:45:08 | Morgan & Wagner do not enter the home. ZB emerges from the home.  |
| 1 | 07:45:16 | ZB has raised his arms and is now laying prone on the rear patio.   |
| 1 | 07:45:23 | ZB is cuffed by Morgan.   |
| 1 | 07:45:37 | ZB is brought to his feet by Morgan & Wagner and escorted to their vehicle.   |
| 1 | 07:45:52 | Movement can be seen through the shrubbery adjacent to the shed and DB's vehicle. No information can be gained from this movement other than its existence.           |
| 1 | 07:46:15 | DB and the Respondent re-enter the frame adjacent to DB's vehicle. DB appears to be cuffed, and the Respondent is walking behind him.                                 |

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<sup>5</sup> It is established through testimony that Morgan and Wagner break the glass of the door to the home to gain entry.

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| 1 | 07:49:50 | KB enters the residence through the rear door. KB emerges shortly after. |
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49. The following sequence is evident from Channel 2<sup>6</sup>:

| Channel | Time Stamp | Description  |
|---------|------------|--|
| 2       | 07:40:58   | DB is executing his multi-point turn. Respondent's door is partially closed at this point. There appears to be approximately a ½ vehicle width between the vehicles based on the camera perspective. |
| 2       | 07:41:01   | DB reverses his vehicle and rotates is counterclockwise. The vehicles are pointed at each other on parallel paths.   |
| 2       | 07:41:03   | The Patrol vehicle has been reversed, and the driver's door is opening. It would appear that the Respondent has positioned the vehicle on a slight angle across the driveway.                        |
| 2       | 07:41:15   | DB is seen emerging from the vehicle. His arm is outstretched and points directly at the Respondent.   |
| 2       | 07:41:16   | There is physical contact between the Respondent and DB.   |
| 2       | 07:41:18   | The Respondent and DB begin grappling. The Respondent pushes against DB and puts him against his vehicle.  |
| 2       | 07:41:22   | The Respondent and DB are grappling and moving around the rear of the vehicle in a counterclockwise direction.   |

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<sup>6</sup> I will only include descriptions from Channel 2 where it provides information not provided by Channel 1, or gives better clarity to the visual information from Channel 1.

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| 2 | 07:41:24 | The Respondent and DB move across from the vehicle and against the shed. They are continuing to grapple with each other.          |
| 2 | 07:41:26 | The Respondent and DB move from the shed back to the vehicle. ZB enters the frame and is seen moving rapidly towards the vehicle. |
| 2 | 07:41:29 | The Respondent has placed DB up against his vehicle. ZB is stationary near the vehicle but gesturing towards the Respondent.      |
| 2 | 07:41:37 | DB is continuing to resist against the Respondent. ZB is moving from side to side and gesturing towards the Respondent.           |
| 2 | 07:41:49 | ZB removes something from the hood of DBs vehicle. <sup>7</sup>   |
| 2 | 07:42:10 | The Respondent can be seen raising his right arm and pointing it towards ZB.  |
| 2 | 07:42:12 | ZB suddenly moves backwards and to his right side.  |
| 2 | 07:42:15 | The Respondent continues securing DB.   |
| 2 | 07:42:36 | The Respondent and DB are essentially stationary along the passenger side of DB's vehicle.  |
| 2 | 07:42:46 | The Respondent brings DB to the ground on his hands and knees.  |
| 2 | 07:42:49 | DB is now laying prone on the ground. The Respondent is above and behind him on DB's right side.                                  |
| 2 | 07:43:50 | ZB enters the frame from the left side and the Respondent can be seen indicating towards ZB with his right arm.                   |

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<sup>7</sup> Evidence will establish this to be DB's car keys.

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| 2 | 07:44:32 | The Respondent can be seen pointing towards the residence while speaking with Morgan & Wagner.           |
| 2 | 07:46:05 | The Respondent can be seen bringing DB to his feet.  |
| 2 | 07:46:12 | The Respondent takes an item off the ground.   |
| 2 | 07:46:14 | The Respondent begins escorting DB to the patrol vehicle.  |
| 2 | 07:46:56 | DB, Wagner, and the Respondent are adjacent to the rear driver side tire of the Respondent's Patrol car. |
| 2 | 07:47:31 | Morgan can be seen removing his reflective safety jacket.  |
| 2 | 07:47:43 | KB enters the frame. KB approaches the Respondent's patrol car.  |
| 2 | 07:47:50 | Wagner and the Respondent are placing DB into the rear of the Respondent's patrol car.                   |
| 2 | 07:47:56 | KB is speaking with Morgan and Wagner.   |
| 2 | 07:48:01 | KB is exiting the frame and heading towards the front of the property.                                   |
| 2 | 07:48:15 | Morgan raises his arm and gestures towards KB who is slightly in frame.                                  |
| 2 | 07:48:30 | Morgan, the Respondent, and Wagner are talking between the two patrol cars.                              |
| 2 | 07:49:15 | Wagner removes her reflective jacket.  |
| 2 | 07:49:45 | KB re-enters the frame walking alongside the house.  |

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| 2 | 07:50:00 | The Respondent is speaking with KB. The Respondent is positioned near his patrol car. KB is located on the rear patio. The Respondent is easily identified in the video because he is the only officer wearing his reflective jacket. |
| 2 | 07:50:26 | Morgan moves to the driver's side of his patrol car to tell KB (off frame) to move away from the vehicle. KB is attempting to speak with ZB who is in the back of the patrol car.   |
| 2 | 07:50:58 | The Respondent leans into his patrol vehicle through the front driver's door.   |
| 2 | 07:51:43 | The Respondent exits his patrol car.  |
| 2 | 07:52:40 | The Respondent appears to be speaking on a mobile phone and is approach by KB. The Respondent and KB appear to have a conversation. At 07:53:36 the conversation appears to end.  |
| 2 | 07:54:11 | Conversation briefly resumes between KB and the Respondent. It ends by 07:54:25   |
| 2 | 07:59:08 | The Respondent leaves his patrol car and walks to the rear of DB's vehicle. The Respondent returns to his vehicle at 07:59:57.  |
| 2 | 08:00:30 | The Respondent enters his patrol car and closes the door.   |
| 2 | 08:01:17 | The Respondent exits his patrol car.  |
| 2 | 08:01:45 | Another apparent discussion between the Respondent and KB. The Respondent can be seen gesturing to KB.  |
| 2 | 08:02:02 | The Respondent and Wagner remove DB from the rear of the Patrol vehicle. They appear to adjust his handcuffs and return him to the  |

|   |          |   |
|---|----------|---|
|   |          | Patrol car at 08:02:51. (The Respondent is visible on Channel 3 at 08:04:50 walking down the driveway towards Topsail Road.)                          |
| 2 | 08:04:02 | The Respondent exits the frame while holding what appears to be a phone to his ear.   |
| 2 | 08:05:45 | KB is on frame speaking with individuals who are not the Respondent. The individuals include Morgan, Wagner, Paramedics and other members of the RNC. |
| 2 | 08:18:24 | The Respondent re-enters the frame and speaks with Morgan.  |

50. DB testified that he was on his way home from work when he encountered the detour at the intersection of McNamara and Topsail Road. DB stated that as he was driving through the intersection, he rolled down his window and yelled at an officer that they were doing a poor job of managing traffic and were likely to cause another accident.

51. DB testified that he then looked at traffic and concluded that it was safe to execute a U-turn. DB testified that he executed a U-turn and then proceeded towards his home that was located on Topsail Road.

52. DB testified that he was not aware a police vehicle was in pursuit of his vehicle until he began executing his multi-point turn. DB stated that it was his habit to execute a multi-point turn when he entered his driveway because it was unsafe to drive on to Topsail Road in reverse. DB stated that he turned around his vehicle when he was parking because it saved time when he went to leave his house.

53. DB stated that he did see the patrol car and did see the lights were activated, but as he believed that he had done nothing wrong, he continued to execute his turn.

54. DB stated that it was his belief that he had done nothing wrong and that the RNC officer had no cause to be on his property. DB stated that it was his belief that if he had not done anything wrong, then he was under no obligation to comply with the officer's direction.

55. DB stated that the Respondent approached his car and told him to "shut off the fucking car." DB stated that he complied with the direction. DB stated that when he got out of the car the Respondent "was telling me to get on the fucking ground. And in my mind, I didn't do nothing wrong. I was proceeding around the back of my vehicle."

56. DB stated that he wanted to get away from the Respondent because he did not want to risk getting charged for any offences. DB stated that he was concerned that the Respondent was "out of control" because of "his vulgar language and the way he was screaming at me."

57. When asked by Commission counsel whether he had been given a reason to get on the ground, DB stated "No, not at that point. He never give me no reason for nothing. Just cursing and swearing, get on the ground... So I proceeded around the back of my car and that's when Constable Simmons grabbed me. And we proceeded around the back of the car." DB described a complex situation where there was a "Lot of yelling and a lot of cursing and swearing and everybody was..."

58. DB admitted that when he was grabbed by the Respondent they engaged in what DB described as "a little dance." DB stated that he was aware that he had been placed under arrest. While he acknowledged that he had heard he had been placed under arrest, DB described a course of action that is best described as something beyond passive resistance. DB stated that he did not attack or fight against the Respondent, but held his body in a way that made it impossible for the Respondent to secure him.

59. DB stated that he believed that the Respondent may have wished to cause him harm based on prior interactions that DB has had with the RNC. DB was provided a copy of his criminal record which shows significant past involvement with the RNC.<sup>8</sup>

60. ZB stated that he was at home on the evening in question and in the kitchen when DB's vehicle pulled into the driveway. ZB stated that he then became aware of the police lights that were visible in the yard.

61. ZB stated that he left the home when he realized that something was happening with DB and the police officer who was in the rear yard. ZB stated that he went back into the home to put his shoes on.

62. ZB stated that he approached DB's vehicle to see if his father needed assistance. ZB stated that he could hear the police officer saying that DB was under arrest. ZB stated that he asked the officer to say why DB was under arrest but was not provided with an answer.

63. ZB stated that all three men were using profanity while DB and the Respondent struggled alongside the shed and car. DB agreed that the three had been using profanity during the interaction around the car. The Respondent denies using profanity during the interaction around the car.

64. ZB stated that he did not hear a warning and was hit in the face with pepper spray without warning. ZB stated that the Respondent had said the word "assault" before he used the pepper spray. ZB said the word "assault" made him upset because he was not close to the officer. On cross-examination, ZB would admit that he was told that he was arrested for assault while in the police car and that he began kicking the divider in the car at that time.

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<sup>8</sup> At this juncture I will note that despite his significant historical criminal record, DB has had no criminal convictions since 2010. Mr. Ball is to be commended for such a significant turnaround in his personal circumstances.

65. During his testimony, DB stated that he had told ZB to get back in the house. DB stated that the Respondent had said to ZB “Back the fuck up, get away from us... he told [ZB] several times to back up. They kept cursing and swearing at each other.”

66. DB stated that the Respondent issued instructions multiple times for ZB to back up. DB stated that ZB was not warned about the deployment of pepper spray before it was used.

67. ZB stated that once he was hit with the pepper spray, he went into the house to rinse it off of his face. ZB stated that when he returned from the home he told the Respondent that he was out of control. ZB recalled that the Respondent told ZB to lie on the ground and that he was under arrest. ZB stated that DB was telling him to go back into the house at this point.

68. ZB stated that he called his mother on the phone while in the home to alert her about what was happening.

69. ZB stated that he remained in the home until other officers arrived on the scene, entered the home, and took him into custody.<sup>9</sup>

70. DB stated that at this point he went down to the ground when the Respondent told him that he would be pepper sprayed if he did not comply.

71. DB stated that he was getting upset in the patrol car because of how the officers were addressing KB. DB stated that “I kicked the door trying to get their attention, I guess. I guess I kicked the window. I didn’t break nothing. But, yeah, I was upset at that point because it was disrespecting my wife...”

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<sup>9</sup> The conduct of these officers was subject to another proceeding of the RNCPC where in an officer, Bernard Morgan, was found to have engaged in misconduct during the arrest of ZB.

72. DB stated that he was eventually charged with obstruction of justice, resisting arrest, and dangerous driving. DB stated that the conditions that were placed on him during his bail hearing were onerous and had a detrimental impact on his quality of life and professional livelihood.

73. KB stated that she was on her way home from work when she received the call from ZB. KB stated that when she arrived at the home there were two police cars in the driveway and that two officers were placing DB into the back of one of the cars.

74. KB stated that as she approached the vehicles she was addressed by Cst. Morgan told her to “stay the fuck back.”

75. KB stated that she then went to the driveway and attempted to speak with the officers who were present. KB stated that she tried to speak with ZB, but she was told by the officers to stay away from the vehicle.

76. KB stated that she was unable to overhear any conversation between the officers who were in the driveway.

77. KB stated that she then went into the home to put her purse away and review the damage.

78. KB stated that she attempted to speak with DB, but when she approached the vehicle, the Respondent told her to “stay the fuck away from the car” or she was going to be arrested. KB stated that she asked the Respondent what had happened and the Respondent told her that ZB had tried to “jump” him. KB recalled that DB told her to go watch the cameras to see what had happened in the driveway. DB stated that when he was placed in the back of the patrol car, he could hear some of the conversation that was happening outside but he was unable to hear particular statements because there was “a lot of cursing and swearing again by [the Respondent].”

79. KB stated that she did not immediately view the cameras, but partially reviewed the video that evening before DB and ZB were removed from the property.

80. During cross examination, counsel for the Respondent asked KB to use the video evidence and identify when she was speaking with the Respondent and when the Respondent was swearing at her. Throughout the video, the Respondent had been wearing a bright reflective jacket that was easily identifiable on the screen. While KB correctly identified the Respondent at times throughout the video, at other times she was incorrectly identifying other officers as the Respondent.

81. KB called the RNC again after the vehicles departed and spoke with Sgt. Cole. KB advised Cole that there was a mismatch between what she was being told by the officers who were arresting ZB and DB and what KB had observed on the home security video. During the conversation, Sgt. Cole advised KB that nothing could be done until ZB and DB made their appearance in Court the next morning.

*Evidence of Sergeant Derrick Cole*

82. Derrick Cole, Cole, is a Retired Sergeant of the Royal Newfoundland Constabulary. Cole was the NCO on duty during the events of November 8, 2017.

83. Cole stated that he received a call from the Respondent advising him of the incident that had occurred. Cole stated that the Respondent had some questions for him regarding potential charges for DB.

84. Cole stated that he received a call from KB asking about DB and ZB. Cole stated that he was unaware that DB and ZB had been brought to the lockup until he was advised by KB. Cole stated that generally as a rule the NCO is advised by the arresting officer when someone is being brought to the lockup. Cole also stated that “sometimes they tell you after the fact that they got someone locked up...”

85. Cole stated that it was not unusual for officers to phone the NCO seeking direction on what charges should be laid in particular instances. Cole stated that on a given night it could be between three and six times that an officer would engage with the NCO about potential charges that could be laid in a particular situation.

86. Cole stated that it was his understanding that the call from the Respondent was a common routine call from a patrol officer to the NCO.

87. Cole stated later in the evening the Respondent advised him that he had detained ZB and DB because they would not settle in the back of the patrol cars and they had been kicking at the cars. Cole stated that the Respondent advised him that they were detained to prevent continuation.

88. Cole stated that he recalled being phoned later by the Respondent who advised him that the Respondent was in possession of additional statements from witnesses at the accident scene who had witnessed the behaviour of DB while driving.

89. When asked about the decision to pursue the vehicle, Cole stated:

*...it's pretty easy to be a Monday morning quarterback, seriously, and I've seen a lot of it, but if someone is going through an accident scene and being irate, and then speeds off and whatever, passes cars, like the information that was related to me, and you got witnesses standing up there, a lady and her child was probably in the accident I assume, and the tow truck drivers, or whoever else was involved here, and the officers just ignored it, they're going to say like, you know, this guy could be – he could be drunk. He could be impaired. He could on drugs. He could be having an episode. So if you don't go after them, the next thing he had a collision or something, they're going to say, well, the officers informed that. So, it is – it is a hard situation."*

Evidence of Bernard Morgan

90. Bernard Morgan, Morgan, is a former Constable of the Royal Newfoundland Constabulary and attended the scene on November 8, 2017.

91. Morgan had been attending the same accident scene at the Respondent on the corner of Topsail Road and McNamara Drive with Cst. Wagner.

92. Morgan recalled that the Respondent left the scene of the accident. Morgan stated that it was his belief that the Respondent had left the scene to conduct a traffic stop. Morgan stated that he did not observe DB's vehicle in the intersection, but assumed the Respondent was making a traffic stop because he left the scene with the vehicle lights activated.

93. Morgan stated that after the Respondent left the scene, the Panic feature was activated on the radio net. Morgan stated that he was concerned because the Respondent had just left, and called the communication centre who confirmed that it was the Respondent's radio unit that sent the Panic signal.

94. Morgan stated that he was able to contact another officer who had reached the Respondent via telephone. Through that communication channel, Morgan and Cst Wagner were able to located the Respondent at the Ball household.

95. Morgan said that when they arrived on the scene, the Respondent declined assistance with securing DB and said "Watch out for the second guy in the house. I sprayed him." Morgan recalled that he and Wagner moved towards the home when Morgan had Cst. Wagner confirm with the Respondent that the second individual, ZB, was arrestable.

96. Morgan stated that they advised ZB to exit the home because he was under arrest. Morgan stated that ZB ignored the request, at which point Morgan instructed Wagner to break the glass door.

97. Morgan stated that the arrested ZB and then began moving him to the police vehicle. Morgan described his next actions as a “move to secure ZB.” When asked by Commission Council whether that had been determined as excessive force by Adjudicator Wadden, as he was then, Morgan stated that he was not prepared to acknowledge that the Adjudicator’s decision was the final result in that matter.

98. Morgan stated that after conferring with the Respondent, he advised ZB that he was under arrest for resisting arrest and obstruction of a police officer. Morgan stated that he read ZB his rights and cautions.

99. Morgan stated that during this time KB arrived and he exited his police vehicle to speak with her. Morgan stated that he advised KB that they would speak with her momentarily but KB continued to move towards the police vehicles. Morgan then described using “very clear direction” for KB to return to her vehicle.

100. Morgan denied advising ZB that he was under arrest for assault.

101. Morgan stated that he could not recall the Respondent swearing at KB, ZB, or DB, at any point during the evening.

102. Morgan stated that he called for an ambulance to assess ZB because of the pepper spray. Morgan recalled that an advanced care paramedic attended the scene and provided aid to ZB.

103. Morgan stated that he began to describe the situation to KB. Morgan stated that he made notes regarding the statements of KB. Morgan stated that his notes contained the following “[KB] Couldn’t understand the situation as it was perceived by police. She said it was

all on video, that the officer was scared he was getting run over. Dennis just turn [the car] around.”

104. Morgan stated that at no point did the Respondent tell him that ZB had jumped on his back. Morgan stated that he did not hear the Respondent tell any other person that ZB had jumped or attempted to jump on his back.

105. Morgan stated that it was his experience that if an individual was non compliant up to the point of deciding whether to detain or release, the individual was generally detained. Morgan stated that he had observed ZB in the back of his vehicle being non compliant. Morgan described there as being “a lot of noise” coming from the Respondent’s vehicle where DB had been placed.

106. Morgan stated that he believed that there would have been a safety concern if either ZB or Db had been released on the night in question. Morgan also stated that he was concerned about potential repetition of the offences if the individuals were released.

107. Morgan stated that he had worked previously with the Respondent on a number of calls and had observed the Respondent using professional behaviour during those times.

*Evidence of Cst. Isabella Wagner*

108. Isabella Wagner, Cst. Wagner, is a Constable with the Royal Newfoundland Constabulary and was present on the night of November 8, 2017.

109. Cst. Wagner stated that she did not observe DB’s vehicle going through the intersection on the night in question.

110. Cst. Wagner stated that it was her recollection that the Respondent left the accident scene in a patrol vehicle without speaking to either herself or Morgan.

111. Cst. Wagner stated that she heard the emergency alert broadcast over the radio net. Cst. Wagner recalled that she and Morgan began driving along Topsail Road in an attempt to locate the Respondent.

112. Cst. Wagner stated that when they arrived on the scene, they were directed to deal with ZB by the Respondent. Cst. Wagner confirmed that she asked the Respondent whether ZB was arrestable. It was Cst. Wagner's recollection that the Respondent did confirm that ZB was arrestable.

113. Cst. Wagner stated that they were able to observe ZB through the glass doorway. Cst. Wagner stated that it appeared that ZB was in a lot of discomfort from the OC spray. Cst. Wagner stated that ZB was non responsive to their instructions to exit the home, at which point she was instructed by Cst. Morgan to break the glass. Cst. Wagner recalled that once the door was broken, ZB exited the home on his own accord and was instructed to lay prone.

114. Cst. Wagner stated that after ZB was placed into the Morgan patrol vehicle, DB was placed into unit 281.

115. Cst. Wagner described DB as being extremely belligerent during the entire encounter at the home.

116. Cst. Wagner described the Respondent's demeanour as professional and not out of the ordinary. Cst. Wagner stated that she did not observe the Respondent use profanity towards either KB, DB, or ZB.

117. Cst. Wagner stated that DB was yelling in the back of the patrol car about the video cameras on the home. Cst. Wagner described DB as "smashing his head against the [plexiglass barrier]" and kicking his legs at the back windows of the vehicle.

Evidence of Tony Kane

118. Tony Kane works with Avalon Towing Services and was present at the accident scene on November 8, 2017.

119. Kane stated that he was one of two tow truck drivers dispatched to the accident scene at McNamara Drive and Topsail Road on November 8, 2017.

120. Kane stated that he could recall two police vehicles present at the scene of the accident. Kane stated that he did not see flares at the scene, but that there were probably cones present. Kane stated that he only observed two officers at the scene and did not observe a third officer.

121. Kane stated that while he was at the scene, he heard a driver yell “The fucking police department should be doing their work and moving traffic” or “directing traffic.” Kane described the vehicle as a Volkswagen Jetta that was dark in colour.

122. Kane stated that he recalled the driver of the vehicle yelled this out while proceeding through the diversion that was in place at the intersection.

123. Kane said that he saw the vehicle going through the diversion, make a u-turn and proceed down Topsail Road. Kane stated that the vehicle stopped at the traffic light, and the individual again swore at the officers. Kane stated that he believed the vehicle was moving quickly, but he did not hear any noises from the tires. Kane described the driving manoeuvre as reckless given the time of day and the volume of traffic.

124. Kane stated that after the vehicle made the u-turn, he observed an officer get into a patrol car and proceed in the same direction down Topsail Road.

Evidence of Second Tow Truck Driver

125. The second tow truck driver was called to provide evidence to the hearing. During examination, the driver indicated that since the night of November 8, 2017, he suffered a medical incident that impacted his memory. The driver expressed that he had difficulty remembering specific events from the night in question.

126. In order to protect the medical confidentiality of the individual, I am not including their name or the specific medical incident in this decision. Further, while I find that the witness answered questions to the best of his ability, concerns about the reliability of the evidence provided by the witness remain. His evidence was not used to render this decision.

Evidence of Cathy Drake

127. Cathy Drake, Drake, was one of the driver's involved in the motor vehicle accident at the corner of McNamara Drive and Topsail Road on November 8, 2017.

128. Drake stated that on the evening of November 8, 2017 she had been driving in her car with her eight year old son when they were "t-boned" at the intersection.

129. Drake stated that she recalled there were two police vehicles that attended the accident scene. Drake stated that she recalled interacting with the Respondent at the accident scene.

130. Drake recalled that she was standing at the median of the intersection with the Respondent when a vehicle stopped at the intersection and the driver began screaming from the car.

131. Drake recalled that the driver of the vehicle used profanity when yelling from the car.

132. Drake said that after the driver yelled, he drove eastward on Topsail Road, executed a u-turn, “screeched” his tires and then went through the intersection. Drake described the manoeuvre as “super dangerous” because she recalled there being a lot of traffic on Topsail Road.

133. Drake said that after the vehicle did this, the Respondent got into his vehicle and left the accident scene.

Evidence of Steven Simmons

134. The Respondent is a member of the Royal Newfoundland Constabulary and first joined in 2006. Prior to joining the RNC, the Respondent worked as a Corrections Officer for three years before joining the RNC training program in 2005.

135. The Respondent stated he has previously worked in Patrol Services in the downtown area of St. John’s. The Respondent stated following his initial five years with Patrol Services, he worked in the Criminal Intelligence unit for two years. Following the Criminal Intelligence Unit, the Respondent worked in the Combined Forces Special Enforcement unit for three years conducting drug investigations. In 2016, the Respondent returned to Patrol Services.

136. The Respondent outlined an extensive amount of experience dealing with service calls and confrontational situations. The Respondent stated that it was important to incorporate both education and experience when responding to real-life situations.

137. The Respondent stated that he was familiar with the RNC Use of Force Policy and the National Use of Force Framework. The Respondent provided a brief overview of his understanding of force escalation through the Framework.

138. The Respondent stated that he did not know DB prior to the night of November 8, 2017. The Respondent stated that he had attended the accident scene at the corner of

McNamara and Topsail Road. The Respondent stated that he initially ignored the vehicle when the driver screamed at him at the intersection.

139. The Respondent stated he then heard “screeching of tires” and turned to observe what he suspected to be the same vehicle speeding westward on Topsail Road. The Respondent stated that he decided that he was going to conduct a traffic stop on the vehicle.

140. The Respondent stated that it was his understanding that under s.201.1 of the *Highway Traffic Act* he had the authority to conduct a traffic safety stop on the vehicle. The Respondent stated that based on the manner in which the vehicle was being operated, he decided that he was going to conduct a traffic safety stop to make a determination on what was happening. Specifically, the Respondent stated that he intended to check the registration and insurance of the vehicle along with the license and sobriety of the driver.

141. The Respondent stated that there was nothing strictly indicating potential impairment of the driver, but that he generally considered the behaviour of the driver to be unusual. The Respondent stated that “it wasn’t normal behaviour for someone to come by and scream and then pull through an accident scene in that aggressive manner.”

142. Additionally, the Respondent stated that he did not believe the driver executed the u-turn safely given the traffic and time of day. The Respondent admitted he did not witness the u-turn but said that a u-turn was the only possible conclusion given the time that had elapsed between the driver going eastbound on Topsail Road and then his observation of the vehicle going westbound on Topsail Road.

143. The Respondent stated that he entered his patrol vehicle with the intention of stopping the driver. The Respondent stated that the lights were already activated on the vehicle and he also activated the siren.

144. The Respondent stated that he observed the driver make an “abrupt quick turn” up what turned out to be a driveway. The Respondent stated that it was his belief that the driver was attempting to flee based on his past experience as a patrol officer. The Respondent stated that he pulled into the driveway and saw the vehicle was attempting to turn around. The Respondent stated that he had no knowledge that the driver, DB, was in the driveway of his home.

145. The Respondent stated that he exited the vehicle and told the driver to stop. The Respondent recalled that the driver said “You’d better get the fuck out of my way.” The Respondent stated that the vehicle did not stop and actually advanced toward him. The Respondent stated that at that point he believed that he was going to be hit and run over with the vehicle. The Respondent stated that he returned to his vehicle and moved it back to create distance. The Respondent recalled that at this point he turned off the siren on his patrol car.

146. The Respondent stated that the driver completed the turn and then stopped the vehicle. The Respondent stated that he believed that the driver realized that there was not enough room to get between the two vehicles and back on to Topsail Road. The Respondent stated that he exited his patrol vehicle in preparation for a foot chase.

147. The Respondent stated that he approached the vehicle and instructed the driver to “Stay in the vehicle.” The Respondent stated that he always told people to stay in the vehicle because it is safer for the officer than having them out of the vehicle. The Respondent denied telling the driver to exit the vehicle.

148. The Respondent recalled that the driver exited the vehicle. The Respondent stated that he told the driver “This is a traffic safety stop; I want to see your license, your registration and insurance.” The Respondent recalled that the driver told him that he did not have to give the Respondent those materials and then swore at the Respondent.

149. The Respondent said that the driver put his hand in the Respondent's face and that the Respondent grabs his hand. The Respondent recalled that the driver then moved towards the rear of the vehicle and the Respondent was of the belief that the driver was going to attempt to flee on foot.

150. On cross-examination the Respondent was asked whether he had considered a de-escalation strategy during this time. The Respondent stated:

*...I was acting under the perception that – well, I didn't know this was his driveway, that he had just abruptly sped up that driveway in an opportunity – or in a – trying to evade me, and then I was suspecting that he was going to run, so my focus was on keeping him close to me, so that if he goes to run, I can catch after him – or catch him if he ran, sorry. If he wasn't so aggressive when he exited the vehicle, certainly there would've been an opportunity to converse and de-escalate, and it would've went a lot more smoothly than the way it ended up.*

151. The Respondent recalled that another individual had exited the home at this point. The Respondent assumed that the individual was the home owner or an occupant of the home. The Respondent recalled advising the individual that he would speak with them in a moment after the conclusion of the traffic stop.

152. The Respondent stated

*I'm telling [the driver] to stop as he's walking away. Once he starts walking away, I've already made up my mind I'm going to arrest him because he's just obstructing me under the Highway Traffic Act. So I've asked him to stop. He refuses to stop. I had my lights and sirens on. He didn't stop. I told him to stop. I asked him for his license, registration and insurance. He said, "No, fuck you" - or whatever he said – "I'm not giving them to you." He was obstructing me under the Highway Traffic Act... so I made the decision to arrest him for obstruction.*

153. The Respondent stated that he recalled telling the driver that he was under arrest as they moved around the back of the vehicle. The Respondent could not recall whether he

advised the individual of the specific charge at that time, but he did recall telling him that he was under arrest.

154. The Respondent recalled that as they were struggling around the vehicle, the driver something similar to "I'm glad this is being recorded. You know you're in the wrong."

155. The Respondent recalled that as he was struggling with the driver along the vehicle, the other occupant of the home approached the two men. The Respondent stated that he was attempting to bring the driver to the ground because they've been trained that is the safest place to take control of the individual.

156. The Respondent stated that he was not able to take the driver to the ground because he was concerned about the presence of the other individual, ZB. The Respondent stated that he was attempting to physically control the driver while verbally instructing ZB to stay back.

157. The Respondent stated that he was concerned for his personal safety at this time because both the driver and ZB were quite angry. The Respondent stated that at this moment he realized that the two individuals were related and he was concerned that ZB would physically intervene to assist the driver.

158. The Respondent stated that in these moments he was attempting to physically control the driver, verbally control ZB, and attempting communicate with dispatch via his radio. The Respondent stated that it was his belief that he was in an area of poor radio transmission because of radio trouble he had initially when he attempted to radio in the traffic stop. The Respondent stated that at this time he hit the emergency button on his microphone.

159. The Respondent stated that he instructed ZB to back up numerous times but he did not comply. The Respondent stated that it was his opinion that ZB was too close to him and that ZB's presence was preventing him from safely placing the driver under arrest.

160. The Respondent stated that he could recall whether he advised ZB that he was under arrest before or after he deployed the OC spray.

161. When asked about why he deployed the OC spray, the Respondent stated

*Well, he wouldn't comply with my orders to back up. I was attempting to make an arrest with [DB]. I had made a determination that I was going to arrest [ZB] at this point now for obstruction as well, so had I had the ability to arrest safely [DB], I then would've arrested [ZB], but I wasn't about to do that because I was...still struggling on the car with [DB], so in order to effect that and to allow me – and so in order to effect the arrest of [ZB] and to prevent him from interfering with the arrest of [DB] I deployed the OC spray.*

162. The Respondent stated that it was his recollection that he warned ZB that he would be pepper sprayed if he did not comply with the instruction to stand back. The Respondent denied the allegation that he deployed the OC spray without warning.

163. The Respondent stated that after he deployed the OC spray, ZB left the area and he was able to bring the driver to the ground. The Respondent stated that the driver refused to provide his hands to be cuffed. During this time, the Respondent recalled that Cst. Wagner and Morgan arrived on the scene. The Respondent recalled warning them about the individual in the house and advising them that the individual was arrestable for obstruction and resisting arrest.

164. The Respondent stated that he only spoke with KB two times on the night in question. The Respondent recalled a conversation that occurred near his patrol vehicle and another conversation near the back patio.

165. The Respondent stated that while initially DB was yelling and cursing, along with kicking at the rear windows of the patrol vehicle, he eventually calmed down while in the back of the patrol vehicle. The Respondent stated that DB complained that the cuffs were too tight. The Respondent stated that he told DB that he would loosen the handcuffs if DB remained calm. The

Respondent recalled that DB remained calm following this request. The Respondent recalled that he loosened the handcuffs.

166. The Respondent stated that he did not tell KB that ZB had tried to jump on his back. The Respondent stated that he did not tell KB that he was the one who had broken the glass to the patio door. The Respondent denied speaking with KB in an unprofessional manner and denied using profanity when talking with KB.

167. The Respondent stated that he recalled having a conversation with Sgt. Cole about the arrest and detention, or possible release, of the two individuals. The Respondent stated that it was protocol to advise the NCO, Sgt. Cole, about use of force incidents. The Respondent stated that he discussed with Sgt. Cole about the possible charges that could be laid based on the events.

Evidence of Grant Colbert

168. On November 8, 2017 Grant Colbert, Colbert, lived at a property adjacent to DB's home. Colbert stated that his view of the rear yard of the property was partially obstructed by trees and a fence. Colbert also stated that there was a distance of between 150 and 200 feet between his property and the home.

169. Colbert stated that as he was returning home from work he observed a police car turn into 1652 Topsail Road. Colbert stated that he observed a police officer exit the police vehicle and he heard screaming and yelling. Colbert stated that he heard someone say "Get out of the car" and potentially heard someone say that they were under arrest, but he did not remember fully. Colbert stated that the event had occurred a long time ago.

170. Colbert stated that he saw someone emerge from the home and approach where the garage was. Colbert stated that he heard someone yell to stay back. Colbert stated that he could see arms flailing between individuals. Colbert stated that he heard someone say something to the effect of "get back" multiple times.

171. Colbert could not tell who was giving the direction to move back, but did state that it was a male voice.

172. Colbert stated that he observed another police vehicle enter the driveway. Colbert stated that he heard a voice say that “there was a second guy in the house and to go arrest him.” Colbert recalled that the arrest was for obstruction or resisting arrest.

173. Colbert stated that he could hear a lot of screaming and yelling, but he could not hear what was specifically being said when people were screaming or yelling.

174. Colbert was provided a copy of a summary of a statement he made on May 12, 2018 in relation to the incident and his testimony of April 29, 2021 at the Morgan/Wagner hearing. Colbert stated that he did hear swearing, but was unable to state with any certainty who had been swearing and whether it was two or three different voices doing the swearing.

*Evidence of Gregory Thorne*

175. Constable Gregory Thorne is a member of the Royal Newfoundland Constabulary was assigned to Patrol Services and on duty on the night of November 8, 2017.

176. Cst. Thorne stated that on the evening in question he was at a computer writing a report when the emergency button was pressed by the Respondent. Cst. Thorne accessed the RNC systems to determine that it was the Respondent’s radio that had transmitted the call and presumed that it had been done in error. Cst. Thorne stated that he called the personal cellphone of the Respondent to alert him to the potential error.

177. Cst. Thorne stated that when the Respondent answered the phone, Cst. Thorne was able to hear what he believed to be panic in the Respondent’s voice. Cst. Thorne stated that he could hear the Respondent issuing commands to an individual to back up and to stop resisting.

Cst. Thorne stated that he remained on the phone with the Respondent for several minutes. Cst. Thorne stated that he was unable to get a clear indication of what was occurring based on what he was hearing on the phone call.

Evidence of Kelly Keith

178. Sgt. Kelly Keith was called by the Respondent to provide expert opinion evidence on the use of force, the training of law enforcement officers on use of force, and the National Use of Force Framework. The RNCPC consented to Sgt. Keith testifying as an expert on the above matters.

179. Sgt. Keith stated that he reviewed the video surveillance footage along with a significant volume of documentation that had been provided to him.

180. Sgt. Keith described the situation between DB and the Respondent as a high-risk situation for the Respondent. Sgt. Keith stated that because the Respondent had arrived on the scene alone and was experiencing radio difficulties, it led to a higher risk situation.

181. Sgt. Keith stated that the Respondent was in a difficult position when DB drove onto his driveway. Sgt. Keith stated that the Respondent was required to balance the risk of pursuit against the potential harm to other individuals who may have been on the property.

182. Sgt. Keith said that without knowing that the property belonged to DB, the Respondent was required to draw inferences based on the behaviour of DB and the manner in which he was operating the vehicle on the property.

183. Sgt. Keith stated that the movement of the vehicle by DB in the driveway contributed to the risk experienced by the Respondent. In particular, Sgt. Keith stated that it was his opinion that the movement of DB's vehicle toward the Respondent created a significant perception of risk for the Respondent.

184. Sgt. Keith stated that when DB exited the vehicle, put up his arm, and then pulled away from the Respondent he was engaged in “active restraint” as per the National Use of Force Framework. Sgt. Keith stated that at this point the Framework would suggest that medium physical control would have been appropriate in the circumstances.

185. Sgt. Keith stated that the use of a stable platform, such as the ground or the side of the vehicle, assists the officer in maintaining safe control of the individual.

186. Sgt. Keith stated that the situation faced by the Respondent, trying to maintain control of DB while managing the approach of ZB, was a difficult and high-risk situation for the Respondent.

187. Sgt. Kelly stated that his assessment of the body language exhibited by ZB in the video surveillance demonstrated “pre-assaultive cues.” Sgt. Keith stated that the back and forth motion of ZB, the up and down movement of ZBs arms, the bladed stance of ZB, and the angry gesturing all indicate an individual who was showing “pre-assault.” Sgt. Kelly stated that he appreciated why ZB would be upset given what was occurring between DB and the Respondent.

188. Sgt. Kelly stated that it was his opinion that a reasonable person in the position of the Respondent would assume that ZB was about to attack.

189. Sgt. Kelly stated that the distance between ZB and the Respondent could have been quickly closed by ZB and that the position of ZB relatively to the Respondent constituted a threat to the Respondent. Sgt. Kelly stated while backing up did decrease the risk posed by ZB, the distance that was created was insufficient for the Respondent to ensure his safety. Sgt. Kelly stated that the use of intermediate weapons would have been justified in the situation. Sgt. Kelly stated that the only available intermediate weapon capable of bridging the distance between the Respondent and ZB would have been the OC spray carried by the Respondent.

190. Sgt. Kelly stated that it was his opinion that disengagement was not an option for the Respondent because he was outnumbered and did not know if or when backup would be arriving on the scene.

191. Sgt. Kelly stated that it was his opinion that the use of OC spray by the Respondent was in compliance with the National Framework. Sgt. Kelly stated that he was aware the RNC Policy on OC spray called for a warning prior to discharge, but stated that it was his opinion that such a warning was contrary to the accepted training on the use of OC spray.

Evidence of Scott Harris

192. Sergeant Scott Harris is member of the Royal Newfoundland Constabulary, having joined the force in 2007.

193. Sgt. Harris stated that he had worked with the Respondent on numerous occasions and had not seen the Respondent act in a manner that Sgt. Harris would consider to be out of control. Sgt. Harris described the Respondent as an individual who is calm, effective, and by the book.

194. Sgt. Harris stated that he was not aware of any direction in the Patrol Officer's Guide that would prohibit an officer from entering upon private property in order to effect a traffic stop under s.201.1 of the Highway Traffic Act.

195. Sgt. Harris stated that there was a standing practice to obtain approval from an NCO prior to detaining an individual at the lock-up. Sgt. Harris stated that it was his understanding that once an arresting officer detained someone in the lock up the decision was not revisited.

**Relevant Statutes & Internal Policies**

196. Section 33 of the *Royal Newfoundland Constabulary Act*,<sup>10</sup> states:

*33. (1) Following a hearing not respecting the chief an adjudicator shall make a determination on the balance of probability and may order*

*(a) that the decision appealed from be confirmed;*

*(b) that the police officer who is the subject of the complaint*

*(i) comply with standards of police service prescribed in the regulations,*

*(ii) enter a rehabilitative or further training program which the adjudicator considers necessary,*

*(iii) be reinstated with or without a reprimand,*

*(iv) where he or she is not a commissioned officer, not be considered for promotion for a time period of up to 3 years,*

*(v) where he or she is not a commissioned officer, be demoted permanently or for a specified period,*

*(vi) where he or she is not a commissioned officer, be suspended with or without a salary for a specified period of time, and*

*(vii) where he or she is not a commissioned officer, be dismissed from his or her position with the constabulary;*

*(c) that, where the police officer who was the subject of the complaint conducted himself or herself in a proper manner, he or she be compensated for the reasonable costs incurred by him or her as a result of an investigation, a hearing or both;*

*(d) that the police officer who was the subject of the complaint pay the reasonable costs incurred by the constabulary in an investigation and discipline of that police officer by the chief; and*

*(e) that the police officer who was the subject of the complaint pay the reasonable costs incurred by the commission in conducting an investigation, a hearing or both.*

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<sup>10</sup> SNL 1992, c. R-17, at s.33 (“the RNC Act”)

*(2) Following a hearing under this Part respecting a commissioned officer, an adjudicator shall make a determination on the balance of probability and may recommend to the minister that*

*(a) a commission granted under subsection 4(4) be revoked;*

*(b) the commissioned officer not be considered for promotion for a period of up to 3 years;*

*(c) the commissioned officer be demoted; and*

*(d) the commissioned officer be suspended with or without a salary for a specified period of time or dismissed from his or her office as commissioned officer.*

197. Section 3 of the *Royal Newfoundland Constabulary Complaint Regulations*<sup>11</sup> states:

*3. (1) A police officer shall not conduct himself or herself in a manner unbecoming to a police officer and liable to bring discredit upon the Royal Newfoundland Constabulary, which shall include but not be limited to the following:*

*(a) without good and sufficient cause make an arrest or detain a person;*

*(b) use unnecessary force with a prisoner or other person contacted in the execution of duty;*

*(c) be discourteous to a member of the public;*

*(d) neglect or omit to promptly and diligently perform his or her duties as a police officer;*

*(e) fail to record or report promptly a complaint made to him or her;*

*(f) without proper authority, disclose, directly or indirectly to a person, information which he or she has acquired as a police officer;*

*(g) attempt to commit, aid, abet, counsel or procure another police officer to contravene these regulations;*

*(h) improperly use his or her character and position as a police officer for private advantage;*

*(i) obstruct a police officer or investigator either in the course of an investigation or in the carrying out of that person's duties under an Act;*

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<sup>11</sup> Under the *RNC Act* (OC 96-244) at s.3

*(j) carry out his or her duties in a manner contrary to the Policy and Procedures Manual;*

*(k) wilfully or negligently make a false, misleading or inaccurate oral or written statement or entry in an official document or record, or otherwise pertaining to official duties;*

*(l) without lawful excuse destroy, mutilate or conceal an official document or record, or alter, erase or add to an entry in that document;*

*(m) place himself or herself under pecuniary or other obligation to a person in a manner that might affect the proper performance of his or her duties as a member of the Royal Newfoundland Constabulary;*

*(n) report for duty or be on duty while unfit for duty as a result of impairment by alcohol or a drug; or*

*(o) conduct himself or herself in a manner contrary to the Act.*

*(2) A police officer who violates the provisions of subsection (1) commits a breach of these regulations and is liable to the penalties set out in section 33 of the Act.*

198. In 2017, Section 201.1 of the *Highway Traffic Act*<sup>12</sup> stated:

*201.1 (1) A peace officer, in the lawful execution of his or her duties, may require the driver of a motor vehicle to stop, and the driver of the motor vehicle, when signaled or requested to stop by a peace officer who is readily identifiable as such, shall immediately come to a safe stop and remain stopped until permitted by the peace officer to depart.*

*(2) A peace officer may, at any time when a driver is stopped,*

*(a) require the driver to give his or her name, date of birth and address to the officer;*

*(b) require the driver to produce his or her licence, and the vehicle's insurance certificate and registration and another document respecting the motor vehicle that the peace officer considers necessary;*

*(c) inspect an item produced under paragraph (b);*

*(d) request information from the driver about whether and to what extent the driver consumed alcohol or drugs before or while driving;*

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<sup>12</sup> RSNL 1990, c. H-3 at s.201.1

*(e) require the driver to go through a field sobriety test;*

*(f) request information from the driver about whether and to what extent the driver is experiencing a physical or mental condition that may affect his or her driving ability; and*

*(g) inspect the motor vehicle's mechanical condition and request information from the driver about it.*

*(3) For the purpose of enforcing a provision of this Act or the regulations, a peace officer may require a vehicle's passenger to give his or her name, date of birth and address to the officer.*

*(4) A peace officer is not required to inform a driver or passenger of his or her right to counsel, or to give the driver or passenger the opportunity to consult counsel, before doing anything subsection (2) or (3) authorizes.*

*(5) Nothing in this section limits or negates a peace officer's authority to request information from a driver or passenger or to make observations of a driver or passenger that are necessary for the purpose of road safety enforcement.*

199. Sections 25-27 of the *Criminal Code of Canada*<sup>13</sup> states, in part:

*25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law*

*(b) as a peace officer or public officer,*

*is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.*

*(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if*

*(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;...*

*26 Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.*

*27 Every one is justified in using as much force as is reasonably necessary*

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<sup>13</sup> R.S.C., 1985, c. C-46

*(a) to prevent the commission of an offence*

*(i) for which, if it were committed, the person who committed it might be arrested without warrant, and*

*(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or*

*(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).<sup>14</sup>*

200. Section 129 of the *Criminal Code* states:

*129 Every one who*

*(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,*

*(b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, or*

*(c) resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure,*

*is guilty of*

*(d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or*

*(e) an offence punishable on summary conviction.<sup>15</sup>*

201. Section 495 of the *Criminal Code* states:

*495 (1) A peace officer may arrest without warrant*

*(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;*

*(b) a person whom he finds committing a criminal offence; or*

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<sup>14</sup> *Ibid*, at ss.25-27.

<sup>15</sup> *Ibid.*, at s. 129.

*(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.*

*(2) A peace officer shall not arrest a person without warrant for*

*(a) an indictable offence mentioned in section 553,*

*(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or*

*(c) an offence punishable on summary conviction,*

*in any case where*

*(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to*

*(i) establish the identity of the person,*

*(ii) secure or preserve evidence of or relating to the offence, or*

*(iii) prevent the continuation or repetition of the offence or the commission of another offence,*

*may be satisfied without so arresting the person, and*

*(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.<sup>16</sup>*

202. The 2 May 2003 Arrest and Confinement Policy of the RNC states, in part:

*Arrest and Confinement*

*1. Purpose of Arrest*

*a. Primary Consideration:*

*The primary purpose of arrest in criminal procedure is to compel the appearance of an accused to stand trial for the commission of an offence. However, arrest is only one mechanism whereby this purpose can be accomplished. The Criminal Code also provides for compelling the appearance of an accused by appearance notice, promise to appear, recognizance or summons.*

*b. Secondary Consideration*

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<sup>16</sup> *Ibid.*, as s.495

*In considering the member's discretionary decision between making an arrest or issuing an appearance notice, promise to appear, recognizance or summons to a suspect, Section 495(2) CCC directs the member to consider the "public interest." The "public interest" is based on reasonable grounds and includes the need to:*

- (1) Establish the identity of the person;*
- (2) Secure or preserve evidence of or relating to the offence;*
- (3) Prevent the continuation or repetition of the offence or the commission of another offence; or*
- (4) Ensure the safety or security of any victims or witness.*

#### *11. Duties After Arrest*

*b. A member who has arrested a person with or without a warrant has the following duties and obligations.*

- (1) He may release that person unconditionally if he is satisfied that the suspect should be released unconditionally.*
- (2) He may release the suspect upon delivering to him an appearance notice, upon the suspect giving a promise to appear or upon the suspect entering into a recognizance in accordance with the provisions of Part XVI CCC.*
- (3) If the member (or OIC) does neither of the above, then he must take the accused before a Justice of the Peace without unreasonable delay.*

203. The 25 June 1999 Courtesy Policy of the RNC states, in part:

*Courtesy must be practised by departmental members in order to earn the respect and support of the community. In a free society, any government agency that fails to earn and maintain this support cannot hope to attain its goals. Courtesy encourages cooperation and wins respect; discourtesy breeds obstruction and contempt. While police employees often encounter situations that may make formal courtesies impractical, the nature of the work is never an excuse for discourtesy. ...*

#### *8. Profanity*

*The use of profanity is never appropriate. ...*

204. The 6 January 2016 Oleoresin Capsicum (OC) Spray Policy of the RNC states, in part:

1.2. *The RNC supports the use of intermediate weapons by police officers who are qualified and/or certified to use them when lower levels of force (including other specific intermediate weapons) have been ineffective and/or inappropriate, and the use of higher levels of force may not be justified and/or appropriate.*

1.3 *Officers must bear in mind that the decision to use force and the amount thereof must be reasonable and not excessive and in accordance with the Use of Force policy. Such decisions are subject to review...*

2.2 *OC spray is to be used on individuals exhibiting active resistance where verbal commands and pain compliance techniques have failed or are likely to fail...*

3.0 *Use of OC Spray*

3.1 *OC Spray may be used to:*

- a. *aid in the arrest of an actively resisting subject;*
- b. *control a subject when lesser means are not likely to succeed or have failed, and more severe means are not yet required;...*

3.2 *OC spray must be used in accordance with the approved Use of Force Continuum...*

7.0 *Pre-usage Considerations...*

7.2 *If an officer finds it necessary to resort to OC spray and if time permits, the police officer must verbally warn the subject that OC spray will be used.*

205. The 28 October 2013 Dress and Department Policy of the RNC states, in part:

1.0 *Department and Public Relations*

1.3 *The actions of an individual reflect upon the RNC and its officers. When dealing with the public, officers must bear in mind the following points.*

- a. *Officers shall:*
  - (1) *be prompt and courteous in answering questions;*
  - (2) *address citizens as "Sir," "Madam," or "Miss," as the case may be;*

- (3) act in a friendly and quick manner*
- (4) never enter into arguments; and*
- (5) remain calm and not lose their tempers.*

*b. Officers shall not:*

- (1) use excessive authority;*
- (2) be rude or oppressive in conduct;*
- (3) use unnecessary force;...*

206. The 18 January 2012 Traffic Direction and Control Policy of the RNC is incorporated herein by reference.

207. The 20 August 2016 Use of Force Policy of the RNC states, in part:

*1.0 General*

*1.1 Purpose: To provide direction to police officers regarding use of force. Officers should pay particular attention to specific information enclosed that is intended to guide them in making decisions regarding their use of force application and the subsequent reporting.*

*1.2 Scope: All police officers should pay particular attention to this policy. This policy specifically references Sections 25-27 of the Criminal Code that govern police officers use of force.*

*2.0 Police Officer Use of Force...*

*2.3 Officers must avoid using unnecessary force. The privilege to use force is limited. A police officer can only use as much force as necessary to protect themselves or others. In some cases, that amount of force will involve lethal force. Most often, the amount of force will be what is reasonable necessary to enable them to affect the arrest.*

*2.4 Use of force situations often does not allow for an ordinal progression up a continuum of force and officers must be ready to escalate or de-escalate as the situation evolves.*

*2.5 Disengagement is a reasonable option in consideration of officer safety and the necessity to apprehend immediately. Disengagement, area containment, surveillance, waiting out a subject, summoning reinforcements,*

*or calling in specialized units may be an appropriate response to a situation and should be considered.*

*2.6 Force options may be used simultaneously, for instance, combining verbal commands with use of chemical irritant. The officer must exercise proper use of force decision making, which means the use of reasonable force, including proper tactics, and de-escalation techniques.*

#### *5.0 Authority for Use of Force Under the Criminal Code (CC)*

*5.1 The authority of police officers the [sic] use of force is derived from and limited by Sections 25, 26 and 27 of the Criminal Code. All police officers must be familiar with the Criminal Code provisions governing the use of force.*

*5.2 In accordance WITH Section 25 CC, police officers will only be justified in using force when:*

- a. they are in the lawful execution of their duties;*
- b. the circumstances lead them to believe the use of force is necessary;*
- c. their belief is based on reasonable grounds; and,*
- d. only as much force as is necessary is employed.*

*5.6 Section 27 CC states that everyone is justified in using as much force as is reasonably necessary:*

- a. to prevent the commission of an offence:
  - (1) for which, if it were committed, the person who committed it might be arrested without a warrant; and*
  - (2) that would be likely to cause immediate and serious injury to the person or property of anyone; or**
- b. to prevent anything being done that, on reasonable ground, s/he believes would, if it were done, be an offence mentioned in paragraph (a).*

#### *6.0 Use of Force Guidelines*

*6.1 Police officers shall not resort to the use of force unless such use is necessary in the execution of their duties as peace officers and this purpose cannot reasonably be accomplished by less violent means.*

*6.3 Although decisions may have to be made instantly, in each case the decision shall be based on a reasonable assessment of the totality of the circumstances.*

6.4 *Police officers shall not use any more force than is necessary under the circumstances to accomplish their lawful objectives.*

#### 7.0 *Subject Behaviours*

7.1 *There are essentially give categories of subject behaviours:*

c. *Active Resistance*

*The subject uses non-assaultive physical action to resist while resisting an officer's lawful direction. Examples include pulling away to prevent or escape control, locking of body parts to other persons or objects or running away.*

d. *Assaultive Behaviour*

*The subject attempts to apply or applies force to an officer. Examples include kicking, punching or pre-assaultive signs that can include; ignoring the officer; repetitious questioning; aggressive verbalization; clenching of the fists or aggressive stances.*

#### 8.0 *Dialogue and Communication*

8.2 *If dialogue and communication skills fail and/or prove to be inappropriate an unreasonable due to the circumstances faced by an officer, then escalation to an appropriate and reasonable force option may be employed to gain compliance and control of a subject.*

#### 13.0 *Justification for the Use of Force*

13.1 *When an officer uses any force option in the execution of their duties, they do so to:*

a. *gain control of a subject who is being non-compliant with an officer's lawful order;*

b. *protect themselves or others from physical harm; or*

c. *bring an unlawful situation safely and effectively under control.*

13.2 *Any force option used by an officer to control another person must be based on an officer's assessment of the threat to that officer or others. The force option chosen must be reasonable and justifiable.*

13.3 *The concept of "reasonableness" is central to the application of a force option. Some, but not all the factors that can affect the reasonableness of a force option selection are:*

a. *Subject factors:*

- (2) size;
- (4) combative skills or perceived combative skills;
- (5) multiple subjects;
- (7) pre-assaultive signs;
- (10) mental state.

b. *Officer factors:*

- (7) perception of threat;
- (8) position, time and distance;

c. *Tactical factors*

- (1) friendly / hostile territory;
- (3) proximity of back-up
- (5) lighting (ability to see);
- (7) possibility of tactical repositioning / disengagement.

**Arguments of the RNCPC**

208. The RNCPC has essentially taken the position that the conduct of the Respondent on November 8, 2017, should be viewed as an overreaction to the conduct of DB as he drove through the intersection of McNamara Drive and Topsail Road.

209. The RNCPC argues that I should apply the discreditable conduct test articulated in *Spurrell v. Priddle and Puddicombe* (2014) wherein the Board outline the test for conduct unbecoming an officer as:

- a) The test is primarily an objective one
- b) The board must measure the conduct of the officer by the reasonable expectations of the community
- c) In determining the reasonable expectations of the community, the Board may use its own judgment, in the absence of evidence as to what the reasonable expectations are. The

Board must place itself in the position of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case;

- d) In applying the standard the Board should consider not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time;
- e) Because of the objective nature of the test, the subjective element of good faith is an appropriate consideration where the officer is required by the circumstances to exercise his discretion.<sup>17</sup>

210. The RNCPCCC argues that I should give little weight to the testimony of the two tow truck drivers given the differences between their evidence and the evidence of the dashcam footage. The RNCPCCC described Kane's account as "sensationalized" and noted many inaccuracies with the evidence of the second driver.

211. The RNCPCCC also notes that neither Morgan, Cst. Wagner, or Drake testified that they heard any screeching tires at the accident scene. The RNCPCCC noted that only Drake testified to seeing DB drive in dangerous manner.

212. The RNCPCCC argued that the Respondent's reporting of DBs driving in his written accounts of November 8, 2017 is an exaggeration of what occurred.

213. The RNCPCCC argues that while a police officer has authority to stop a vehicle under s.201.1 of the *Highway Traffic Act*, the *HTA* only allows those stops for limited purposes.

214. The RNCPCCC argued that it would have been unlikely that the Respondent heard DB say "get the fuck out of my way" since the Respondent had his siren engaged and DB was listening to heavy metal music when he allegedly uttered the phrase.

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<sup>17</sup> *Spurrell v. Priddle and Puddicombe* PCC 24 March, 2016

215. The RNCPCCC suggests that I should view the conversation between Cole and the Respondent as a situation wherein the Respondent was coming down from a highly stressful situation and realized that he had two individuals detained. The RNCPCCC suggests that I should review the discussion between the two individuals as an officer searching for a charge to create an ex post justification for his prior conduct.

216. The RNCPCCC says that I should consider the differences between what DB was charged with and what the Respondent stated at the hearing. The RNCPCCC notes that DB was charged with dangerous driving, obstruction, resisting arrest, and causing a disturbance but that the Respondent stated his primary arresting intention was related to the alleged obstruction of DB.

217. The RNCPCCC argues that the Respondent has not been consistent with the explanation for the arrest of DB. The RNCPCCC notes that in the General Occurrence Report, the Respondent stated that he decided to arrest DB when DB attempted to get away from him. The RNCPCCC notes that this is inconsistent with what was shown on the video evidence.

218. The RNCPCCC notes that DB emerged from his vehicle at 7:41:13 on the video and had the Respondent's hands on him by 7:41:15.

219. The RNCPCCC says that it is impossible to align the testimony of the Respondent with the time that has elapsed on the video. The RNCPCCC says that it is not reasonable to accept that within those two seconds the Respondent advised DB that he was conducting a stop, asked for license and registration, was refused by DB, called a "fucking idiot" by DB, and then effected an arrest.

220. The RNCPCCC suggests that a more likely scenario was that DB got out of his car, called the Respondent a "fucking idiot" and was arrested by the Respondent.

221. The RNCPCCC argues that the ability to arrest an individual without a warrant under s.495 is only engaged in this instance if DB actually obstructed the Respondent from doing his job. Absent obstruction, the Respondent was not entitled to arrest DB.

222. The RNCPCCC notes that s.129 of the *Criminal Code*, obstruction, requires three elements. First, an actual obstruction. Second, a police officer in the execution of their duties. Third, willful obstruction by the individual.

223. The RNCPCCC directed me to consider the analysis of Justice Hoegg in *R. v. Smyth*<sup>18</sup> where she outlined that “the willful obstruction of justice is a serious offence. It is an offence of specific intent, in that a conviction requires proof of a heightened mens rea. This means that an offender must not only have intended to carry out the actions leading to the charge, but he or she must also have intended to obstruct the course of justice by carrying out those actions.

224. The RNCPCCC argues that it is not reasonable to conclude that the necessary elements of the offence were made out by the Respondent within the short time frame shown on the video.

225. The RNCPCCC directed me to consider the analysis of Porter PCJ in *R. V. Murphy*<sup>19</sup> wherein the Judge considered whether swearing at a police officer was sufficient to justify arrest. Porter PCJ concluded, that there is no power of arrest in the *Highway Traffic Act*, and that swearing at a police officer on its own was not a crime.<sup>20</sup>

226. The RNCPCCC argues that to charge DB with causing a disturbance was not a reasonable course of action for the Respondent and an indicative of overcharging. The RNCPCCC

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<sup>18</sup> 2019 NLCA 73, at para 1.

<sup>19</sup> 2013 CarswellNfld 260

<sup>20</sup> *Ibid.*, at para. 59.

directed me to consider the SCC's analysis in *R v. Lohnes*<sup>21</sup> that concluded the offence requires an "interference with the ordinary and customary use by the public of the place in question."<sup>22</sup>

227. The RNCPCCC noted that a similar conclusion was reached by the Newfoundland & Labrador Court of Appeal in *R. v. Penton*.<sup>23</sup> In that case, the Court of Appeal considered whether the use of a derogatory & sexualized phrase constituted a criminal disturbance. The Court of Appeal upheld the trial judge's dismissal of the charge noting that there was no public interference<sup>24</sup> and no evidence that the accused intended to cause a disturbance.<sup>25</sup>

228. The RNCPCCC argued that I should also consider that the Respondent testified that he considered nothing of DBs language when it was yelled at the intersection. The RNCPCCC suggests that I should draw an adverse conclusion against the Respondent because there is a clear disconnect between the minimization of the language used at the intersection and the eventual criminal charge of Causing a Disturbance that was laid later that evening.

229. The RNCPCCC argued that if I conclude that the arrest of DB was unlawful, then I am required to conclude that the arrest of ZB was also unlawful because the Respondent would not have been acting in his lawful duty at the time.

230. The RNCPCCC also argued that I should consider the alleged failure of the Respondent to give a verbal warning to ZB as an indication that the use of force was not reasonable.

231. The RNCPCCC argued that ZB had complied with the instructions of the Respondent to move back. The RNCPCCC suggests that had a warning been issued to ZB prior to the deployment of the OC spray, the use of force may have been avoided.

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<sup>21</sup> [1992] 1 SCR 167

<sup>22</sup> *Ibid.*, at para 18.

<sup>23</sup> 2022 NLCA 47.

<sup>24</sup> *Ibid* at para 28.

<sup>25</sup> *Ibid.*, at para 31.

232. The RNCPCCC argued that it was not necessary to detain DB and ZB overnight.

233. The RNCPCCC argues that it is illogical to conclude that continuation was a concern given the charges that were laid against DB and ZB. The RNCPCCC noted that the offences charged were hybrid/summary offences and s.495(2) of the *Criminal Code* applies.

234. The RNCPCCC directed me to consider the analysis of the SCC in *R. v. Storrey*<sup>26</sup> along with the applicable RNC Policy when determining whether overnight detention was appropriate in the circumstances.

235. The RNCPCCC also argued that if I find that the arrest of DB was unlawful, then the instruction issued to Morgan and Cst. Wagner to arrest ZB was also unlawful and a breach of s.3(1)(g) of the *Regulations*.

236. The RNCPCCC argues that it was not necessary for the Respondent to make immediate physical contact with DB when DB exited the vehicle. The RNCPCCC argues that if the arrest of DB was unlawful, then the force used on both DB and ZB was without legal justification and consequently also unlawful.

237. The RNCPCCC acknowledges that there is some concern regarding KBs ability to identify the Respondent on the video. However, the RNCPCCC argues that KB stated she was speaking with both the Respondent and Morgan who both used profanity. Further, the RNCPCCC argues that DB and ZB both testified that the Respondent was using profanity when speaking with them. Additionally, the RNCPCCC notes that Colbert indicated that he believed he heard the officer using profanity while he was observing the interaction in the backyard. Finally, the RNCPCCC notes that the Respondent was using profanity during his telephone call with Cole.

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<sup>26</sup> [1990] 1 SCR 241

238. The RNCPCCC also noted that Sgt. Keith indicated that officers were likely to use profanity in high stress environments similar to the one encountered by the Respondent.

239. The RNCPCCC argues that on the balance of probabilities it is more likely than not that the Respondent used profanity on the evening of November 8, 2017 in contravention of the RNC Courtesy policy.

240. The RNCPCCC notes that in order to find the Respondent guilty, it is only necessary to demonstrate a violation of any part of section 3 of the *Regulations*. The RNCPCCC notes that the absence of an adverse finding against the Respondent necessarily means that what happened to KB, DB, and ZB is within the reasonable expectations of the community. The RNCPCCC states that no member of the public could reasonably conclude that what happened on 8 November 2017 was acceptable.

### **Arguments of the Respondent**

241. The Respondent agreed that the appropriate standard in this instance would be the balance of probabilities. When articulating the standard, the Respondent directed me to consider the analysis of LeBlanc J. in *Turner v. Newfoundland and Labrador Legal Aid Commission*,<sup>27</sup> wherein Leblanc J., stated

[8] *In any civil proceeding, the onus of proof to be applied is proof on a balance of probabilities. In F.H. v. McDougall, 2008 SCC 53, [2008] 3 S.C.R. 41, at paragraph 40, Rothstein J. referred to the onus of proof in civil cases as follows:*

*... there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof... .*

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<sup>27</sup> 2014 CarswellNfld 388, 2014 CanLII 75145 (NLSC).

*Justice Rothstein went on to say that proof on a preponderance of evidence is met if there is “sufficiently clear, convincing and cogent” evidence (paragraph 46), and where “the evidence establishes that it is more likely than not that the event occurred” (paragraph 48).<sup>28</sup>*

242. The Respondent also provided direction about how I should assess the credibility of witnesses given the conflicting statements made at the hearing.

243. The Respondent cautioned against over reliance on video evidence given the absence of any expert evidence regarding the video. The Respondent cautioned against over reliance on the videos given the lack of audio, grainy quality, and limited view plane of the angles.

244. The Respondent also cautioned against hindsight and placing the Respondent against a standard of perfection. In particular, the Respondent directed me to the comments of Commissioner Barry at the Commission of Inquiry Respecting the Death of Donald Dunphy. Wherein Commissioner Barry noted that

*Front line police officers have one of the most challenging jobs that society has to offer... the job of the front line officer is one of considerable risk. Officers regularly have to balance their duty to confront danger (with...limited information about the nature of the danger) against the personal risks to themselves – a very challenging task that few others in society are required to undertake in the same way or to the same extent.<sup>29</sup>*

245. Further, the Respondent directed me to consider the comment of Chartier C.J.M. in *R. v. Alexson*<sup>30</sup>, wherein the Chief Justice of Manitoba noted

*The justifiability of the officers’ conduct must always be measured against the unpredictability of the situation they encounter and the realization that volatile circumstances required them to make quick decisions.<sup>31</sup>*

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<sup>28</sup> *Ibid.*, at para 8.

<sup>29</sup> *Commission of Inquiry Respecting the Death of Donald Dunphy*, June 27, 2017, at p.36

<sup>30</sup> 2015 MBCA 5

<sup>31</sup> *Ibid.*, at para 20.

246. The Respondent stated that the proper lens of analysis is based on what was known to the Respondent during the incident, not the facts that came to light post incident.

247. The Respondent also noted that the RNCPC has the onus of proving the allegations.

248. The Respondent noted that s.201.1 of the *Highway Traffic Act* allows police officers to do traffic safety stops without any reasonable suspicion or reasonable grounds to believe that a criminal offence has been or is being committed.

249. The Respondent argued that the RNCPC position about the reasonableness of DBs driving is not factually accurate. The Respondent noted that DB executed a u-turn on a busy section of road during rush hour and came close to another vehicle when he executed his turn.

250. The Respondent discussed at length that driving on to the property of DB to conduct the traffic safety stop was allowable.

251. The Respondent argued that the reasons for arresting DB were clearly articulated and the threshold for arrest was met.

252. The Respondent directed me to consider the analysis of Hoegg J.A. in *R. v. Kinsella*<sup>32</sup>, where Hoegg J.A. reviewed the applicable legal grounds for arrest:

*[18] Every case involves different facts, so what constitutes reasonable grounds for arrest differs from case to case. In R. v. Storrey, 1990 CanLII 125 (SCC), [1990] 1 SCR 241, the Supreme Court of Canada stated that reasonable grounds for a warrantless arrest comprises both subjective and objective grounds (250-251). The arresting officer must honestly believe he has grounds for arrest, and the grounds must actually exist and be justifiable from an objective point of view (250). In R. v. Debot, 1989 CanLII 13 (SCC), [1989] 2 SCR 1140, the Supreme Court of Canada stated the objective grounds must be based*

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<sup>32</sup> 2022 NLCA 40

on the totality of the circumstances known to the officer (1168). This principle was endorsed in *Tim*, wherein the Court stated, “the objective assessment is based on the totality of the circumstances known to the officer at the time of arrest...” (para. 24). (See also *R. v. Santos*, 2022 SKCA 50 at para. 29).

[19] The reasonableness of a police officer’s grounds was considered by the Supreme Court of Canada in *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 SCR 250, which involved assessing the officer’s grounds on the lesser standard of reasonable suspicion. The officer in *MacKenzie* was very experienced, and his training and experience informed his evaluation of the circumstances which led to his reasonable suspicion...

[21] Accordingly, an experienced officer investigating a particular crime can give evidence which is informed by the officer’s training and experience. Just as there is no requirement for an officer to be qualified as an expert in order to testify to matters within his training and experience, there is no requirement for an officer who could be or frequently is qualified as an expert to divorce himself from his training and experience in the course of conducting an investigation or in giving evidence. Rather, such an officer’s training and experience can inform his assessment of whether reasonable grounds for arrest exist “as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer” (*Tim*, at para. 24). Neither is a court required to accept without question such an officer’s evidence because the officer is more experienced, knowledgeable, or trained in the subject matter in issue. **As Justice Moldaver said in *MacKenzie*, an officer’s testimony must not be “accepted uncritically” by the courts, neither should it be considered with undue skepticism or placed under a “scanning electron microscope” (paras. 64-65).**

[22] In *Tim*, which involved reasonable grounds for a warrantless arrest, the Supreme Court of Canada recently confirmed the principles respecting reasonable grounds in *Storrey*, and *MacKenzie*, at paragraphs 23-25. **Further in *Tim*, the Court stated that an objective assessment of the totality of the circumstances known to the officer at the time of an arrest includes consideration of the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training and experience as the arresting officer (para. 24).** See also *R. v. Day (R.)*, 2014 NLCA 14, 349 Nfld. & P.E.I.R. 1, wherein this Court applied the above principles in determining whether an officer had reasonable grounds to effect an arrest, and *R. v. Al-Amiri (H.)*, 2015 NLCA 37, 368 Nfld. & P.E.I.R. 146, wherein this Court applied the above principles in determining whether reasonable grounds existed for obtaining a search warrant.<sup>33</sup>

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<sup>33</sup> *Ibid.*, at paras 18-22.

Emphasis Added

253. Summarizing the threshold for arrest under s.495(1), the Respondent noted that
- i. S.495(1) requires both a subjective and objective component<sup>34</sup>
  - ii. ...The reasonable grounds threshold is relatively low and has been described as a “minimum threshold”<sup>35</sup>
  - iii. Reasonable grounds require an objectively reasonable honest belief that the grounds exist, not a prima facie case for conviction<sup>36</sup>
  - iv. The question is not whether the grounds are ultimately true, rather they were reasonable at the time.<sup>37</sup>

254. The Respondent directed me to consider the analysis of Paciocco J.A. in *R. v. Gerson-Foster*,<sup>38</sup> wherein Paciocco J.A. made the following comments:

[77] *In R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R 241, at pp. 250-251, Cory J. explained what is required:

*[A]n arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.*

[78] *As this passage suggests, the relevant inquiry is into the officer’s grounds and the officer’s basis for those grounds. Put otherwise, an arrest can be justified only on the officer’s subjective purpose for the arrest: R. v. Caslake*, 1998 CanLII 838 (SCC), [1998] 1 S.C.R. 51, at paras. 21, 27; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at para. 85. And since it is the officer’s belief that must be objectively reasonable, that arrest can be justified objectively solely on the “facts known to the officer which were available to the officer at the time he or she formed the requisite belief”: *R. v. Slippery*, 2014 SKCA 23, 433 Sask. R. 183, at para. 21; *R. v. Muller*, 2014 ONCA 780, 318 C.C.C. (3d) 539, at paras. 36-37; *R. v. Notaro*, 2018 ONCA 449, 47 C.R. (7th) 229, at para. 39.

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<sup>34</sup> *R. v. Alexon*, 2015 MBCA 5 at para 24

<sup>35</sup> *Alexon*, *supra*, at para 26 & *R. v. Douglas*, 2021 ONCJ 562 (Ont CJ) at para 50

<sup>36</sup> *R. v. Hoffman*, 2019 CarswellNfld 445, 2019 CanLII 112836 (NLPC) at pp. 132-133

<sup>37</sup> *Douglas*, *supra* at 35, at para 42.

<sup>38</sup> 2019 ONCA 405

**[79] To be clear, the “facts” relied upon by the officer need not be true. “Reasonable grounds can be based on [an officer’s] reasonable belief that certain facts exist even if it turns out that the belief is mistaken”: R. v. Robinson, 2016 ONCA 402, 336 C.C.C. (3d) 22, at para. 40. This includes an honest but reasonably mistaken subjective belief that an arrest warrant relied upon to make an arrest is valid: R. v. Kossick, 2018 SKCA 55, 365 C.C.C. (3d) 186, at para. 26.<sup>39</sup>**

Emphasis Added

255. The Respondent argued that the analysis of the NL Court of Appeal in *R. v. Smyth* is not applicable since that cases involved the falsification of a ticket by a police officer. Instead, the Respondent directed me to the analysis of Gorman PCJ in *Hoffman*, wherein Gorman PCJ noted:

*[125] As can be seen, section 129(a) requires proof of resistance or obstruction of a peace officer who is engaged in the execution of her or his duties. It has been held that the “offence of resisting a peace officer is met by establishing that a person either resists or wilfully obstructs a peace officer, knowing that they are a peace officer, or any person lawfully assisting a peace officer, while that officer is within the lawful execution of their duty” (see R. v. Gryba, 2019 MBPC 47, at paragraph 20).<sup>40</sup>*

256. The Respondent argues that since s.129 of the *Criminal Code* may be prosecuted by indictment, it allows an officer to arrest a person breaching s.495(1)(a) without a warrant. The Respondent cited the analysis of Cote J. at paragraph 93 of *Fleming v. Ontario*, 2019 SCC 455 in support of its position.

257. The Respondent argued that it is necessary to consider what is meant by the “execution of his duty” in order to determine whether an individual is engaged in obstruction. The Respondent provided multiple cases involving traffic stops where the driver was non-compliant with the officers, grounding a charge for obstruction.<sup>41</sup>

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<sup>39</sup>*Ibid.*, at paras 77-79.

<sup>40</sup>Supra at 36, at para 125.

<sup>41</sup>See *R. v. Alexander*, 2012 BCPC 108 (BCPC). See Also *R. v. Maradin*, 2018 ABCA 274 and *R. v. Torres*, 2013 ABPC 86 (Alta P.C.).

258. The Respondent also stated that I must consider the totality of the circumstances when assessing whether the Respondent acted appropriately in arresting DB. In support of this position, the Respondent directed me to the analysis of Jamal J. in *R. v. Beaver*, wherein the Justice noted:

[72] *The essential legal principles governing a warrantless arrest are settled:...*

3. *The arresting officer’s subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer (Storrey, at pp. 250-51; Latimer, at para. 26; Tim, at para. 24).*

4. *Evidence based on the arresting officer’s training and experience should not be uncritically accepted, but neither should it be approached with “undue scepticism” (R. v. MacKenzie, 2013 SCC 50, [2013] 3 S.C.R. 250, at paras. 64-65). Although the analysis is conducted from the perspective of a reasonable person “standing in the shoes of the [arresting] officer”, deference is not necessarily owed to their view of the circumstances because of their training or experience (R. v. Chehil, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 45 and 47; MacKenzie, at para. 63). The arresting officer’s grounds for arrest must be more than a “hunc[h] or intuition” (Chehil, at para. 47).*

5. *In evaluating the objective grounds to arrest, courts must recognize that, “[o]ften, the officer’s decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete” (R. v. Golub (1997), 1997 CanLII 6316 (ON CA), 34 O.R. (3d) 743 (C.A.), at p. 750, per Doherty J.A.). Courts must also remember that “[d]etermining whether sufficient grounds exist to justify an exercise of police powers is not a ‘scientific or metaphysical exercise’, but one that calls for the application of ‘[c]ommon sense, flexibility, and practical everyday experience’” (R. v. Canary, 2018 ONCA 304, 361 C.C.C. (3d) 63, at para. 22, per Fairburn J.A. (as she then was), citing MacKenzie, at para. 73).<sup>42</sup>*

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<sup>42</sup> *R. v. Beaver*, 2022 SCC 54, at para 72.

259. The Respondent argued that the RNCPC's reliance on a single case was telling. Further, the Respondent argued that the analysis of Porter PCJ in *R. v. Murphy*, supra, was incorrect based on the Respondent's canvassing of similar cases across Canada and a decision of the SCC.

260. The Respondent argues that the RNCPC has taken a narrow approach in assessing the reasonableness of the Respondent's decision to arrest DB. The Respondent argues that the RNCPC is only considering the few seconds that elapsed from the moment when DB emerged from his vehicle. The Respondent suggests that I should consider the totality of the circumstances observed by the Respondent when assessing the reasonableness of his decision. The Respondent suggests that I should consider all events from the moment when DB passed through the intersection until he was arrested by the Respondent.

261. When considering use of force, the Respondent directed me to the articulation of the basic principles as outlined by LeBel J. in *R. v. Nasogaluak*, wherein LeBel J. stated:

*[35] Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in R. v. Bottrell (1981), 1981 CanLII 339 (BC CA), 60 C.C.C. (2d) 211 (B.C.C.A.):*

*In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]<sup>43</sup>*

262. The Respondent further directed me to the analysis of Kelly J., in *R. v. Montsion*, wherein Kelly J., stated:

*[420] Police officers are under a duty to act and must often react in difficult and exigent circumstances, exercising judgment and discretion with little time for reflection. Recognizing this, the law affords officers some latitude in the choices they make in using force. They cannot be expected to measure the force*

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<sup>43</sup> 2010 SCC 6, at para 35.

*they use with exactitude, and their conduct will not be measured against a standard of perfection. A reviewing court must not be too quick to second guess police decisions about force based on an over-reliance on reflective hindsight. It is one thing to have the time to reconstruct and examine an arrest over several days at trial; it is another thing to be a police officer in the heat of the moment with little time to dissect the significance of events and reflect calmly on the actions to be undertaken.[86]*

*[421] Writing in the context of a “hard entry” during execution of a search warrant, the Supreme Court of Canada cautioned against a “Monday morning quarterback” approach when reviewing a forcible police response:*

*[The police] cannot be expected to measure in advance with nuanced precision the amount of force the situation will require: R. v. Asante-Mensah, 2003 SCC 38, [2003] 2 S.C.R. 3, at para. 73, Crompton, at para. 45. It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances.[87]<sup>44</sup>*

263. The Respondent argued that the video and the report of Sgt. Keith demonstrate that the Respondent used reasonable force through his engagement with DB. Since the RNCPCCC has taken the position that “should the initial arrest of [DB] be determined to be lawful, the Commission does not take issue with the nature and amount of force used with [DB]” I will not articulate the detailed arguments of the Respondent on this point.

264. The Respondent argued that the video and the report of Sgt. Keith demonstrated that the Respondent used reasonable force throughout his engagement with ZB. The RNCPCCC has taken the position that the use of force was not reasonable because (i) the arrest of DB was unlawful, and (ii) there was no verbal warning prior to the use of the OC spray, contrary to the RNC Policy. I will not articulate the Respondent’s detailed arguments about the use of force generally.

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<sup>44</sup> 2020 ONCJ 464, at para 420-421

265. In relation to the Courtesy elements of the Complaint, the Respondent canvassed video evidence along with the testimony of those present on the night of November 8, 2017 and directed me to consider the credibility of the witnesses.

266. To guide me in the assessment of credibility, the Respondent directed me to consider the analysis of LeBlanc J., in *Turner*, wherein Justice LeBlanc stated:

[10] *As to the assessment of a witness's testimony, I am guided by the comments of O'Halleran, J. in Faryna v. Chorny, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), at paragraph 11, where it is stated as follows:*

*The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.<sup>45</sup>*

267. Additionally, the Respondent directed me to consider the analysis of White J.A. in *Coast to Coast Contractors Inc. v. Millbrook Development Company Inc.*, wherein White J.A. stated

[12] *The trial judge also referred to the factors to be considered in the assessment of witness credibility as stated in Finn v. St. John's (1999), 1999 CanLII 19807 (NL SC), 186 Nfld. & P.E.I.R. 197 (Nfld. T.D.), at para. 102:*

*... As in all cases, assessment of the credibility of a witness, whether a party, a related individual, or a true "third party", must be carried out by*

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<sup>45</sup> *Supra*, at note 27, at para. 10.

*considering a number of factors. I will not review the principles here in detail; it is sufficient to say that credibility involves more than an assessment of whether the witness is deliberately fabricating or otherwise. Matters of opportunity to perceive, mental and physical condition of the witness at the relevant time, ability to clearly communicate, power of recollection, opportunity for subsequent persuasion - self-induced or otherwise - and the ability to set aside its effects, if any, when testifying, are also among the factors necessary to be considered in deciding whether statements of fact given by a witness represent a true, correct and objective picture of what actually occurred.<sup>46</sup>*

268. In relation to the decision to detain DB and ZB overnight, the Respondent directed me to consider the statements of Charron J. in *R. v. Beaudry*:

*37 Nevertheless, it should not be concluded automatically, or without distinction, that this duty is applicable in every situation. Applying the letter of the law to the practical, real-life situations faced by police officers in performing their everyday duties requires that certain adjustments be made. Although these adjustments may sometimes appear to deviate from the letter of the law, they are crucial and are part of the very essence of the proper administration of the criminal justice system, or to use the words of s. 139(2), are perfectly consistent with the “course of justice”. The ability — indeed the duty — to use one’s judgment to adapt the process of law enforcement to individual circumstances and to the real-life demands of justice is in fact the basis of police discretion. What La Forest J. said in *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, at p. 410, is directly on point here:*

*Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.*

*Thus, a police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process. But this discretion is not absolute. Far from having carte blanche, police officers must justify their decisions rationally.<sup>47</sup>*

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<sup>46</sup> 2017 NLCA 47, at para 12.

<sup>47</sup> 2007 SCC 5, at para 37

269. Essentially, the Respondent argues that the Arrest and Confinement Policy allows the officer to exercise their discretion when making the determination on whether or not an individual should be released prior to their appearance. The Respondent notes that the he clearly articulated his grounds for detention and acted in good faith. The Respondent argues that there is no evidentiary basis to support the RNCPC contentions that the decision to detain overnight could somehow be revisited later in the course of the evening.

### **Analysis**

270. The events of November 8, 2017 should not have occurred. From the Complainants' perspective, DB found himself engaged in a physical struggle with a police officer when, to his mind, all he had done was drive up his own driveway; ZB found himself on the receiving end of OC spray when he ran out to see what was happening to his father; and KB could not obtain a satisfactory answer why she came home to find her son and husband detained in the back of police vehicles and the rear door to her house smashed in.

271. The RNCPC has suggested that if I fail to conclude that the Respondent acted improperly then I am necessarily concluding that the public would condone what happened to this family. I do not agree with this zero-sum formulation of the issue.

272. My role is not to determine whether or not the Respondent made the correct choices on the night of November 8, 2017. My role is to determine whether the choices made by the Respondent were in accordance with the law and the policies of the RNC.

273. To be clear, having assessed the evidence brought before me by the parties I can conclude that the Respondent had other choices on the night of November 8, 2017. However, conducting an ex post "What If?" analysis of the Respondent's conduct is not within the scope of this hearing.

274. My role is to make a factual determination about what happened on the night of November 8, 2017. Then, to consider the choices made by the Respondent at each juncture and

whether those choices were, or were not, in accordance with the law and operating policies of the RNC. Finally, I must consider whether those actions satisfy the criteria to conclude that the Respondent engaged in disreputable conduct.

Arrest of DB

275. First, I will consider whether the Respondent had reasonable grounds to arrest DB.

276. The RNCPCCC has essentially taken the position that the short period of time that elapsed between DB emerging from the vehicle and the Respondent placing his hands on DB is insufficient for the Respondent to have reasonably concluded that he had grounds to arrest DB. The Respondent argues that if I consider the totality of the circumstances, the reasonable grounds for the arrest of DB is evident.

277. Having reviewed the materials submitted by the parties, I find that it is appropriate for me to consider the totality of the circumstances as articulated by Jamal J. in *R. v. Beaver*.

278. I find that the conduct of DB at the accident scene is unusual. The behaviour described by the Respondent and Drake is atypical for the operator of a motor vehicle accident. Most people do not swear out the window of their car at a police officer while driving through an accident scene.

279. While there was a lot of back and forth at the hearing about whether DB's vehicle emitted a noise while executing a u-turn, I do not believe that this is a material factor either way. Tires do and do not make noise for all sorts of reasons. While it was the evidence of Morgan, Wagner, and DB that there was no noise from the tires; I must balance that against the statements of the Respondent and Drake that there was noise.

280. Whatever happened, the Respondent did not see the vehicle execute the u-turn, but something happened to bring the Respondent's attention to the vehicle which had suddenly changed directions.

281. The dash cam clearly indicates that DB executed a u turn across several lanes of traffic. I find that it would be uncommon for a driver to execute a multi lane u-turn during rush hour traffic in close proximity to a police officer and a police vehicle that had its lights engaged. I am not concluding that the manoeuvre was contrary to the *Highway Traffic Act*, but I do find that the manoeuvre was strange or uncommon.

282. The RNCPC described the u-turn as “reasonable and safe [in] manner with regard to all surrounding circumstances.” I do not believe that the turn was necessarily unsafe, and given the limited information available from the dashcam would not conclude that it was unreasonable. I am simply concluding that it was strange or uncommon behaviour.

283. While the parties did engage in debate about the appropriateness of calculating approximate vehicle speed using the dashcam footage and/or the AVL information from the Respondent’s vehicle, I find that there is insufficient evidence to calculate the speed of either vehicle based on the available data.

284. We do not know the exact distance from the start point to the driveway of the residence. We do not know whether the frame rate allows for an accurate calculation of speed. Additionally, we have no evidence about the reliability of the AVL system that would allow me to make conclusions regarding vehicle speed with a sufficient degree of certainty. Calculation of speed over such a relatively short distance is highly variable dependent.

285. Returning to the totality of the circumstances, while I appreciate DBs evidence that he was simply manoeuvring his vehicle in his usual fashion, it was somewhat strange that he continued to execute the parking manoeuvre in the presence of a police vehicle with its lights and sirens engaged.

286. DB stated that he heard the Respondent tell him to stop his vehicle but he continued his parking manoeuvre. By his own admission, DB refused to stop his vehicle because he believed that he had done nothing wrong and the order of the Respondent was unlawful.

287. DB acknowledged that he then advanced the vehicle in the direction of the Respondent in order to continue executing his multi point turn. I find again that this type of behaviour is uncommon.

288. At this juncture, where does the Respondent find himself? The Respondent is at a private residence but does not know it is the residence of the driver. The Respondent is confronted with a driver who is not engaged in typical driving behaviour and has ignored his instruction to stop the vehicle. The Respondent stated that when the car advanced to him, he was concerned that the driver was going to run him over.

289. Would a reasonable person in the position of the Respondent conclude that the driver of the vehicle was complying with his instructions, or would they conclude the individual was resisting or willfully obstructing them in the execution of their duties?

290. It was the Respondent's evidence that as he was approaching the vehicle the second time, he told DB to stay in the vehicle. The video appears to show the Respondent outstretched and pointing towards the vehicle as he walks toward it. DB stated that he heard the Respondent say "Get out of the fucking car." Colbert stated that he believed he heard someone say "Get out of the car" but he was not certain on his recollection due to the passage of time.

291. DB stated that he emerged from the vehicle and pointed at the Respondent. DB stated that at this point in time he was concerned he was going to get arrested so he attempted to put distance between himself and the officer.

292. This is the moment when subjective interpretation and objective assessment comes into focus.

293. The DB of November 8, 2017 was, by all accounts, a different man than the one who had amassed a not insignificant criminal record. However, DBs past interactions with the RNC were less than positive. DB wanted to avoid interaction with the RNC because of his past

history with them. Additionally, at this point DB believed that he had every right to walk away from the officer because he did not believe that the officer had a lawful right to be on his property.

294. DB testified, and I accept his testimony, that he believed he was within his right to resist the Respondent because the Respondent was acting outside of his authority. It is an honest belief, but in this instance a mistaken one.

295. Section 201.1 of the *Highway Traffic Act* allowed the Respondent to pull over DBs vehicle to conduct a traffic safety stop. The RNCPCCC correctly points out that the circumstances under which such a stop can be made are limited. However, I am satisfied on the evidence that the Respondent was within his authority to exercise such a stop on the DB vehicle.

296. Further, I find that the law enabled the Respondent to follow the vehicle on to private property. The Respondent was not aware that the subject property was the personal residence of the driver. To suggest that driving on to private property eliminates the right of a police officer to affect a stop under s.201.1 is to nullify the provision within any urban setting.

297. The RNCPCCC has argued that it was not possible for the Respondent to sufficiently establish obstruction in the short period of time between emerging from his patrol vehicle for the second time and placing his hands upon DB.

298. I understand the point that the RNCPCCC is making. The situation unfolded in a short period of time and there was only partial information that was available to the Respondent prior to the decision to affect the arrest. Individuals may rightfully question whether the determination that DB was engaged in obstruction could have been properly completed in such a short duration of time.

299. However, as noted above, I do not find that the proper period of time to assess the conduct of DB is within the three second window, but rather in the totality of the circumstances, with particular attention to the conduct of DB and the manner in which he operated his vehicle in the driveway.

300. The essential elements of s.129 require:

- i. Did the evidence prove an obstruction of a peace officer?
- ii. At the time was the police officer acting in the execution of his duty?
- iii. Was the obstruction wilful in the sense that it was not only intentional but done without lawful excuse? <sup>48</sup>

301. Considering the totality of the circumstances, including the conduct of DB immediately prior to the arrest and specifically DBs refusal to comply with the instructions issued by the Respondent, I find that

- i. DB was operating his vehicle and conducting himself in a manner that was obstructing the Respondent
- ii. The Respondent was acting in the execution of his duties by attempting to effect a traffic safety stop under s.201.1 of the *Highway Traffic Act*,
- iii. DB was aware of the Respondent's instructions but intentionally acted in the above manner based on a mistaken belief that the Respondent was not acting within the limits of his authority.

302. Consequently, the Respondent had reasonable grounds to believe that DB was arrestable for a breach of s.129 of the *Criminal Code*.

#### Use of Force - DB

303. Having concluded that the Respondent had reasonable grounds to arrest DB, I also conclude that he used reasonable force when affecting that arrest.

#### Arrest & Use of Force - ZB

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<sup>48</sup> See Generally *R. v. Brian Arthur Alexander*, 2012 BCPC 108, at para 175 referencing *R. v. Westie* (1971), 2 C.C.C. (2d) 315 (B.C.C.A).

304. Having concluded that the Respondent had reasonable grounds to arrest DB, I must now assess the decision to arrest ZB and the use of force against ZB.

305. There is a consensus among the parties that the Respondent issued multiple instructions for ZB to step back while the Respondent and DB were pressed up against the side of the vehicle.

306. Based on an assessment of the video, I find that the Respondent and DB were located somewhere between the rear passenger door and rear window of the vehicle. At various times, ZB was either adjacent to the A pillar of the vehicle, alongside the hood of the vehicle, or near the front bumper of the vehicle.

307. Based on an assessment of the video, ZB continually moves in a space that could be roughly defined as the front bumper of the vehicle and the A pillar of the vehicle.

308. Based on assessment of the video, ZB can be observed raising his arms up and down along his side, pointing in the direction of the Respondent, and taking a foot forward stance that was described as “bladed” by Sgt. Keith.

309. The testimony of DB, ZB, and the Respondent indicates that ZB was continually questioning what was happening to DB and was doing so in a loud tone of voice.

310. At the time the three individuals were in close proximity to one another:

- i. The Respondent was unable to establish radio contact with the Communication Centre
- ii. The Respondent was unaware when backup would be available
- iii. The Respondent was outnumbered, two on one
- iv. DB described himself as being in excellent shape and worked in a physical trade
- v. ZB described himself as being in excellent physical shape and it is observable on the video that he is in good shape
- vi. It was a low light situation

- vii. The parties were at the rear of the property where there was limited visibility from the road

311. Not wanting to editorialize, but one cannot help but empathize with ZB in this situation. Moments before he was in his kitchen on a normal evening, and the next thing he is observing a physical altercation between his father and a police officer. ZB would have been aware of DB's past negative interactions with the RNC. ZB was rightfully concerned about DB's well being and what may happen in the back yard. Any son would rush to his father's defence in such a situation.

312. A tension arose between ZB's desire to assist his father and the Respondent's need to ensure his personal safety while he was executing his duties.

313. An assessment of the video, and the opinion evidence of Sgt. Keith, indicates that ZB was within striking distance of the Respondent. That is not the same as saying that ZB would have struck the Respondent, but it does create a zone of risk that the Respondent needed to be cognizant of.

314. ZB failed to respond adequately to the Respondent's instructions to move back. ZB failed to respond to his father's instructions to go into the house. The video clearly shows that ZB was, understandably, in an agitated state. ZB was obstructing the Respondent from executing the lawful arrest of DB.

315. Considering the test for obstruction, the continued presence of ZB within striking distance of the Respondent and his refusal to comply with the Respondent's instructions to move back created the reasonable grounds upon which the Respondent to arrest ZB for obstruction under s.129 of the *Criminal Code*.

316. The RNCPC has argued that the failure of the Respondent to provide a verbal warning prior to the deployment of the OC spray constitutes unreasonable use of force. For ease of reference, I will reproduce the relevant section of the Policy

*7.2 If an officer finds it necessary to resort to OC spray and if time permits, the police officer must verbally warn the subject that OC spray will be used.*

317. It was the evidence of the Respondent that he did provide a prior warning to ZB before deploying the OC spray. DB and ZB state that there was no warning. Colbert could not recall hearing a warning.

318. The video evidence indicates that the Respondent drew the OC canister and raised it in the direction of ZB. The video seems to indicate that there was a brief period of time between the raising of the arm and the deployment of the spray.

319. Again, DB, ZB, and the Respondent were dealing with a highly fluid situation where most of the events occurred within a matter of seconds rather than minutes. Considering all of the various scenarios to which the OC Spray Policy is intended to apply, I am not willing to conclude that “if time permits” is intended to be measured with less than the second hand of a watch.

320. Simply stated, ZB was exhibiting behaviour that was consistent with the RNC definition of assaulting behaviour. From the perspective of the Respondent, time was of the essence for his personal safety and the safety of all individuals involved.

321. To be clear, I am not concluding that the verbal warning was optional, or not directive within the policy. I am concluding that the determination of whether time permitted cannot be properly conducted in hindsight using grainy black and white video that does not provide a complete picture of the scene.

322. The Respondent and DB both stated that ZB was not complying with the instructions to back up. DB stated that he believed ZB had backed up, but not enough to satisfy the Respondent. The Respondent viewed him as a risk.

323. Viewing the video, I find that the Respondent's assessment of the risk was not unreasonable in the circumstances. The distance accepted by the parties, of approximately ten feet, could have been closed by ZB within moments.

324. The absence of a verbal warning in this instance is not evidence of breach in and of itself given the context.

325. Consequently, I find that the Respondent did not breach the Use of Force or OC Spray policy when he discharged his OC Spray at ZB. Issuing a verbal warning was not necessary to comply with the OC Policy given the timeframe of the events.

#### Decision to Detain Overnight

326. The RNCPCCC alleges that the decision to detain DB and ZB overnight was contrary to the Policy and Procedures manual.

327. The RNCPCCC has essentially taken the position that it was possible to release DB and ZB either at the residence once they had calmed down, or at some point later in the evening after they had received medical attention.

328. The Respondent stated that he made the decision to detain the individuals because he was concerned about the potential for continuation and additional conduct by the individuals.

329. The decision to detain or release is a discretionary decision of the officer and according to the policy can be either for the primary purpose of compelling the appearance of an individual, or for listed secondary purposes that include (paraphrased):

- i. Establishing identity,

- ii. Securing or preserving evidence
- iii. Preventing the continuation or repetition of the offence or another offence; or
- iv. Ensuring the safety of victims or witnesses

330. The Respondent stated that he made the decision to detain DB and ZB overnight under secondary consideration (iii) – prevention the continuation or repetition of the offence or another offence.

331. The RNCPCCC argues that this was an unreasonable discretionary decision and/or the decision could have been revisited at some point later in the evening.

332. I will deal with the second branch of the argument first. It would appear, based on the testimony of the officers at the hearing that once the decision has been made to detain the individual overnight, the decision is not revisited. This appears to be the practice of the RNC. From an administrative standpoint, it is a practice that makes sense. If the argument of the RNCPCCC were to hold, it would mean that the RNC would need to continually monitor individuals who have been detained pending an appearance to make a determination whether those individuals could be released prior to appearing. Administratively, this does not seem to be reasonable.

333. This leads us to the consideration of whether the discretionary determination was appropriate in the first place. Was the Respondent correct in deciding that DB and ZB should be detained overnight until they could appear in the morning?

334. Again, my role is not to determine what the Respondent ought to have done; nor is to engage in an ex post assessment of what should have occurred. The question is whether the decision in the moment was reasonable.

335. Despite describing it as “a little dance” DB had just resisted arrest. When placed in the back of the patrol vehicle, DB was yelling and began kicking at the windows and smacking

his head off the safety divider. Cst. Wagner described DB as “extremely belligerent the whole encounter at his home.” The Respondent did state that DB became calm eventually in the car and enabled the Respondent to adjust the setting on the handcuffs.

336. At this juncture, we must consider everything that had been observed by the Respondent up to this point in time, assess that objectively as a reasonable person with the training and experience of the Respondent, and then determine whether there is a reasonable basis to conclude whether there is a possibility of continuation, repetition or another offence.

337. Based on the totality of the circumstances, I conclude that the decision to detain DB overnight was reasonable. While he had regained his composure in the back of the vehicle near the end of the incident, his uncommon behaviour to that point created a reasonable basis to have concerns regarding repetition or another offence.

338. ZB was located in the back of another patrol vehicle. Morgan described ZB as being “irate” and “not compliant and not really receptive to anything we were trying to accomplish there.”

339. Could the Respondent have released ZB with a notice to appear? Maybe. The decision to release in accordance with 11.b.(2) of the Policy would have been an option for the Respondent to consider. The determination of whether 11.b.(2) was possible would have been made in the moment based on the totality of the circumstances.

340. While there is not a presumption of reasonableness on the conduct of the Respondent, the RNCPC does carry the onus of proving its allegation on the balance of probabilities. In this instance, that requires more than demonstrating that the Respondent had options. It requires demonstrating that the Respondent chose an incorrect option.

341. Based on the totality of the evidence, in particular the descriptions of ZB's disposition in the back of the patrol car, I find that there was a reasonable and objective basis to conclude that there was a risk of repetition or a new offence by ZB. That is not to say that I think

ZB would have reengaged in obstruction or committed some other offence, but it is to say that there was sufficient conduct by ZB to warrant the discretionary decision to be concerned that he might.

342. Consequently, I find that the decision to detain ZB overnight was reasonable in the circumstances.

Charging with Causing a Disturbance

343. The RNCPC argues that I should consider the disturbance charge as an indicator of disreputable conduct by the Respondent.

344. I find that the disturbance charge is an ancillary issue to this matter and not determinative in either direction of the Respondent's conduct. There is no indication that the charge was laid in bad faith. The RNCPC alleges that the call with Cole was to develop ex post justification for the arrest. The Respondent argues that it was simply an officer calling his superior for clarification on a confusing scenario. I find the latter is more likely than the former.

345. Additionally, one is reluctant to consider the practical implications of finding that a decision to drop a charge by the Crown was indicative of over charging by a police officer.

Courtesy and Profanity Use

346. The Complainants have alleged that the Respondent was using profanity throughout their interactions with him on the night of November 8, 2017. Additionally, KB alleges that the Respondent was rude to her during their interactions. The Respondent denies the allegation that he used profanity and denies that he was rude to KB.

347. As noted by counsel for the Respondent, given the stark differences in the testimony of the Complainants and the Respondents, I am required to assess the credibility of the witnesses in order to make evidentiary determinations.

348. For ease of reference, I will reproduce the articulation of White J.A in *Coast to Coast Contractors Inc. v. Millbrook Development Company Inc.*, wherein White J.A. stated

[12] *The trial judge also referred to the factors to be considered in the assessment of witness credibility as stated in Finn v. St. John's (1999), 1999 CanLII 19807 (NL SC), 186 Nfld. & P.E.I.R. 197 (Nfld. T.D.), at para. 102:*

*... As in all cases, assessment of the credibility of a witness, whether a party, a related individual, or a true "third party", must be carried out by considering a number of factors. I will not review the principles here in detail; it is sufficient to say that credibility involves more than an assessment of whether the witness is deliberately fabricating or otherwise. Matters of opportunity to perceive, mental and physical condition of the witness at the relevant time, ability to clearly communicate, power of recollection, opportunity for subsequent persuasion - self-induced or otherwise - and the ability to set aside its effects, if any, when testifying, are also among the factors necessary to be considered in deciding whether statements of fact given by a witness represent a true, correct and objective picture of what actually occurred.<sup>49</sup>*

349. For the benefit of potential lay readers, I will briefly discuss credibility assessments and their use in administrative proceedings. The term “credibility assessment” at law does not mean that the person deciding the issue makes a determination that a witness is, or is not, telling the truth. Instead, the term is used as a short hand description of how the person deciding the issue assesses a variety of factors in order to determine what weight to provide to conflicting testimony.

350. Considering the factors noted by White J.A. above in *Coast to Coast Contractors Inc. v. Millbrook Development Company Inc.*, the two threads of credibility assessments can be seen. They are generally described as reliability and credibility.

351. First, the reliability of the individual’s testimony. Is the testimony consistent with the known facts? Is the testimony consistent with corroborating evidence? Is the testimony logically coherent and does it obey, as an example, the laws of physics? Was the individual in the

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<sup>49</sup> 2017 NLCA 47, at para 12.

physical space or position to make observations necessary for their testimony? Can the individual clearly articulate, with the necessary precision, on the issue at hand? Does the individual possess the necessary mental acuity to recall the events in question?

352. As an example, a tow truck driver who suggested at the hearing that we were reviewing video from the wrong evening because it did not accord with his recollection would have low reliability.

353. Second, the credibility of the individual providing the testimony. These factors may be considered as internal to the individual. For instance, does the witness have significant personal investment in the matter, or is the witness independent from the issue? Has the individual adjusted their recollection of events in order to fit their internal narrative? Is the individual acting in a manner that is self-serving?

354. I want to be clear that a credibility assessment is not an assessment of whether an individual is lying. It is an assessment of which testimony makes the most sense when considered in “harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”<sup>50</sup>

355. This is necessary because, as cautioned by O’Halloran J.A. in *Faryna*, “For a trial Judge to say ‘I believe him because I judge him to be telling the truth’, is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.”<sup>51</sup>

356. Further, it is possible for the person deciding the issue to accept all, some, or none of individual testimony as well as placing different weights on different parts of their testimony.

357. What I would consider to be the only independent witness to the interactions between the Respondent and DB, and ZB, is not particularly helpful in this matter. The evidence

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<sup>50</sup> *Faryna v. Chorny*, 1951 CanLII 252 (BCCA) at p. 357.

<sup>51</sup> *Ibid.*

of Colbert was that he heard swearing in the rear yard, but he was unable to specify whether it was two or three individuals swearing. Further, given the obstructed view of the yard and the relative position of Colbert, I am unable to use his evidence alone to conclude on the balance of probabilities whether the Respondent had been swearing while attempting to detain DB or issuing instructions to ZB.

358. Both DB and ZB describe the Respondent as using profanity throughout their interactions. A high percentage of statements attributed to the Respondent by either ZB or DB include some variant of a profanity.

359. On the whole, I found DB to be a reliable witness. I found that he was often forthright with his answers and was willing to provide answers that would not have been in his interest as a complainant. DB's evidence was consistent with the video evidence that had been presented and was internally consistent and logical throughout.

360. Similarly, I find ZB to be a generally reliable witness. While I find that his testimony did attempt to minimize certain aspects of his behaviour, I find that it was consistent with the video evidence and internally consistent.

361. However, I am concerned with the testimony of DB and ZB in relation to the disposition of the Respondent. A significant period of time had passed between November of 2017 and September of 2023 when DB and ZB testified at the hearing. Between those times the individuals provided multiple investigative statements as well as testifying at the Morgan/Wagner hearing. I cannot help but be concerned that the function of time and multiple statements may have had the effect of impacting the recollection of events for the two men.

362. The testimony of KB is problematic when assessing her credibility. KB's evidence was not consistent with the known facts. As an example, at multiple points during her evidence KB stated that the video indicated that she was speaking with the Respondent when the Respondent was known to be at another location. KB's animus towards the Respondent was

palpable. Her factual inaccuracy combined with my concerns regarding her internal motivations require me to place little weight on her testimony in relation to the Respondent's disposition.

363. I find that the Respondent was a reliable witness. I found that he was forthright with his answers and that those answers were consistent with the video evidence that was presented.

364. However, I have similar concerns regarding the impact of time and the internal narrative of the individual and the potential impacts on his recall of events.

365. Sgt. Keith noted in his evidence that it was not uncommon for officers to use profanity during use of force incidents. While witnesses who worked with the Respondent testified that he did not use profanity, the Respondent had found himself in a unique and dangerous situation on the night of 8 November, 2017, so it is possible that he was not acting in accordance with his usual disposition.

366. In order to find that the Respondent breached the Courtesy policy or used profanity, I must conclude on the balance of probabilities that the Respondent did use profanity and/or was rude to KB.

367. It is certainly possible that the Respondent used profanity. However, there is insufficient evidence to conclude that he did so on the balance of probabilities. The onus is upon the RNCPC in this instance. The onus has not been satisfied.

368. Similarly, while KB does believe that the Respondent was rude to her on the evening of 8 November 2017, I find that this allegation is not supported by the evidence. Neither Morgan nor Cst. Wagner heard any statement by the Respondent that would be considered objectively rude to KB. Where the evidence of Morgan and Cst. Wagner contradicts the evidence of KB, I prefer the evidence of Morgan and Cst. Wagner. Additionally, the Respondent denied being rude to KB. From an objective standpoint, I cannot conclude that the Respondent was rude on the balance of probabilities.

*Aiding and Abetting*

369. Having concluded that the Respondent acted within his authority to arrest both DB and ZB, there is no basis to conclude that he instructed Morgan and Cst. Wager to contravene s.3(1)(g) of the *Regulations*.

*Carried out duties Contrary to the Policies & Procedures Manual*

370. Given the above, I find no indication that the Respondent breached the Polices and Procedures manual of the RNC.

**Order**

371. I find that the allegations against the Respondent and not founded.

372. The Respondent has asked for his costs in this matter. I will hear submissions from the parties on this issue.

Dated at St. John's, this 28<sup>th</sup> day of March, 2025



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John R. Whelan Q. Arb  
Chief Adjudicator  
Royal Newfoundland Constabulary  
Public Complaints Commission