

IN THE MATTER of a public
 complaint of DB, ZB, and KB
 Against Constables BM, and IW made under
 The Royal Newfoundland Constabulary Act 1992

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IN THE MATTER of a public
complaint of DB, ZB, and KB
Against Constables BM, and IW made under
The Royal Newfoundland Constabulary Act 1992

(Heard April 27,28,29,30, May 3,4, July 15,16, 2021)

Before:

Adjudicator, Andrew J. Wadden, QC

Appearances:

Mark D. Murray and James Strickland	On behalf of the RNC Public Complaints Commission
Stephen P. Orr	On behalf of Constable Isabella Wagner
Kenneth Mahoney	On behalf of Constable Bernard Morgan
Wendy Zdebiak	On behalf of the Chief of Police

Background

1. This public complaint stems from an incident which occurred on November 8 2017. The alleged offences occurred between approximately 5:50 pm and 6:40pm in the Octagon Pond Topsail Road area of Paradise, mainly at the residence of the complainants.
2. The complainants are the Ball family: Dennis, Kimberly, and Zackary Ball. Dennis and Kimberly, are parents to Zackary.
3. Generally the evidence indicates that on the evening of November 8 2017, Dennis Ball (DB) came upon an accident scene at the intersection of Topsail Road and McNamara Drive. It is alleged that DB's behaviour at the intersection (yelling profanities and speeding away in a westerly direction) caused Constable Stephen Simmons (Cst. Simmons) to leave the accident scene and pursue DB.¹ Cst. Simmons followed DB to his home, with each bringing their vehicles to the rear portion of the Ball property. Just after Cst. Simmons arrived at the rear of the property, Zackary Ball (ZB) exited the home. Cst. Simmons then

¹ There is also a complaint against Constable Stephen Simmons in relation to the events of November 8 2017, but the public complaint herein proceeded against Constables Morgan and Wagner only, as Constable Simmons elected to appeal a preliminary decision in relation to his legal representation/conflict of interest. Constables Morgan and Wagner wished to proceed with the hearing in relation to the complaints as against them. The public complaint against Constable Simmons will presumably be heard by another Adjudicator at a later date.

exited his vehicle, as DB was continuing to manoeuvre his vehicle. Cst. Simmons then got back in his vehicle, maneuvering his vehicle to a slightly different position. Cst. Simmons then exited his vehicle again, and moved toward DB's vehicle. ZB then re-entered the home, to put on footwear. At this point, a physical struggle ensued as between DB and Cst. Simmons. ZB then exited the home again, running toward the area where DB and Cst. Simmons were located. ZB remained close to where the struggle was occurring, at one point removing keys belonging to DB from atop DB's vehicle. ZB eventually retreated from where DB and Cst. Simmons were located after being sprayed with Oleoresin Capsicum (OC spray) by Cst. Simmons. After a brief period of remaining outside, at or near the rear deck area of the home (and clearly being in distress based on video evidence) ZB went back into the home again. He then exited the home again, only to re-enter again moments later. He again exited the home, pointing toward the area where DB and Cst. Simmons were located (as can be seen on video footage) and then again re-entered the home. Shortly after that, Constables Bernard Morgan and Isabella Wagner arrived at the scene, having come from the afore noted accident scene on Topsail Road and responding to a distress call sent by Cst. Simmons. They ran toward where DB and Cst. Simmons were located. After a verbal exchange with Cst. Simmons, they each went toward the rear door of the home, one after the other (Constable Morgan before Constable Wagner, with Constable Wagner turning and going back toward DB and Cst. Simmons before again moving toward the back door of the home). Constable Morgan asked ZB to exit the home, but he would not. Constable Wagner shattered the glass in the rear door of the home, and Constable Morgan then broke/cleared some of the the glass from the door. ZB then exited the home, laying face down on the back deck (referred to herein interchangeably as a patio), and was handcuffed. He was escorted to a police vehicle by Constable Morgan and Constable Wagner, and it is during the escort that ZB appears to have made an abrupt movement, and Constable Morgan struck ZB from behind, at the head or neck area. Constable Morgan and Constable Wagner secured ZB against a police vehicle, and then continued to escort ZB to their police vehicle. Cst. Simmons soon thereafter escorted DB to a police vehicle. Kimberly Ball (KB) arrived at the scene after both DB and ZB were in custody. She spoke to various officers, including Constable Wagner. The complainants had video cameras at both the rear and front of their home, which captured the events of November 8 2017, and video footage was viewed numerous times during the hearing. Dash cam footage from DB's vehicle was also viewed.

4. In connection with the above, Constables Bernard Morgan (Cst. Morgan) and Isabella Wagner (Cst. Wagner) are alleged to have conducted themselves in a manner contrary to subsections 3(1)(a), 3(1)(b), 3(1)(c), 3(1)(g), and 3(1)(j) of the *Royal Newfoundland Constabulary Public Complaints Regulations* (the *Regulations*), thereby committing an

offence under subsection 3(2) of the *Regulations*. It is alleged that the Constables arrested and/or detained the complainant Zackary Ball, without sufficient cause, used unnecessary force with respect to Zackary Ball, were discourteous to the complainant Kimberly Ball, attempted to aid, abet, counsel or procure another police officer to contravene the *Regulations*, and carried out their duties in a manner contrary to the RNC Policy and Procedure Manual.

Charter Challenge

5. At the conclusion of the second full day of the hearing in this matter (April 28), counsel for Cst. Wagner and Cst. Morgan, asked that I give a “directed verdict” in relation to the allegations of contrary conduct under subsections 3.(1)(b), and 3.(1)(g), insofar as Cst. Wagner was concerned, and 3.(1)(g) insofar as Cst. Morgan was concerned. While “directed verdict” is language normally used in criminal proceedings, presumably what counsel for Cst. Wagner and Cst. Morgan were seeking (although it was not expressly stated) is that the complaints in relation to the sections noted, be dismissed as per S.26 of the *Regulations*.² I advised that I would reserve making a decision on this request until the end of the full hearing, to give me time to assess the request, but that in assessing the request I would obviously only consider evidence presented as of end of day 28 April (i.e., the conclusion of the RNC Public Complaint’s Commission’s case). All counsel agreed with this. I noted, that I read S.26 (along with S.27) to mean that I should render a decision as to the request of Cst. Wagner and Cst. Morgan, before proceeding any further. But, this was not possible, as to render a decision, I would want opportunity to review the transcripts to April 28, such that I could accurately determine whether the evidence submitted by the Royal Newfoundland Constabulary Public Complaint’s Commission (the Commission) showed whether they had made out a case against Cst. Wagner and Cst. Morgan, as such case relates to the sections noted. I advised that practically, my decision on the request would not be provided likely until the conclusion of the hearing, or shortly after (but certainly before closing briefs and submissions were due and provided, which would come at a date after hearing conclusion). However, on May 3, the final day of the hearing, Cst. Morgan and Cst. Wagner brought a *Canadian Charter of Rights and Freedoms* (the *Charter*) challenge (to be argued at the time of closing submissions) which essentially replaced their request for a directed verdict.

² S.26 of the RNCPC Regulations state: *where at the conclusion of the evidence submitted by the commissioner the adjudicator determines that a case has not been made out, the adjudicator shall dismiss the complaint.*

6. The *Charter* Application, put concisely, states that there has never been any evidence that all the officers committed all of the offences that they have been charged with. Given this, counsel for Cst. Morgan and Cst. Wagner say, it is unclear why they were all charged with the same offences by the Commission, and why the Commission proceeded with the prosecution. Counsel for Cst. Morgan and Cst. Wagner say that there has been an abuse of process, contrary to section 7 of the *Charter*³, and a stay should be imposed under S. 24(1)⁴ of the *Charter*.
7. Cst. Wagner specifically says there was no reasonable basis for charges to be laid against her, and that once those charges were laid, they should have been reviewed and withdrawn as it was plain and obvious that they could not succeed. This abuse of process violates her rights under S.7 to a fair hearing. She accuses the Commission of “blanket charging”.
8. Cst. Morgan specifically says, in addition to adopting much of what Cst. Wagner argues, that he was denied due process as per his S.7 *Charter* rights as he has the right to only be put on trial for offences for which there is a reasonable prospect of conviction, or in this case, a finding of guilt for police misconduct. He notes some of the allegations as being completely devoid of merit, or unsupported by the evidence. Basically, he speaks less to the idea of blanket charging, and more so to the idea of an absence of grounds for him to have been charged to begin with.
9. I must decide the following:
 - a. **Does the *Charter* apply?**
 - b. **If the *Charter* applies, is a S.7 Charter application an available remedy?**
 - c. **If the *Charter* applies, and a S.7 Charter application is an available remedy, has S.7 been breached?**

³ Section 7: *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.* Section 7 of the Charter requires that laws or state actions that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at paragraph 19). - <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/check/art7.html> .

⁴ Section 24.(1): *Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.* This section permits a person whose rights have been infringed to apply to a “court of competent jurisdiction” for “such remedy as the court considers appropriate and just in the circumstances”. Within certain jurisdictional limits, the court’s exercise of its remedial power is discretionary. - <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/check/art241.html> .

- i. Constable Wagner
 - ii. Constable Morgan
- d. If S.7 has been breached, should the charges against the Constables be stayed?

Does the Charter apply?

10. Before entering into a discussion as to whether or not the *Charter* provides a remedy here, and whether or not the rights of Cst. Morgan and Cst. Wagner were breached, I must first determine if the *Charter* even applies to the RNC public complaints hearing process.

Position of the Constables

11. The Constables make the point⁵ that in a 2019 decision of David Eaton QC, in the matter of *The Chief of Police v Derrick Cole*⁶, Eaton QC found (in a separate tribunal/forum from this one) that the *Charter* did apply to the *Royal Newfoundland Constabulary Act* (the *Act*) and *Regulations*, and based on the same reasoning, it also applies to this tribunal.

12. There, Eaton QC relied heavily on *R v. Conway*⁷, which stated:

[78] The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is “competent” to grant a particular remedy within the meaning of s. 24(1).

[79] Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-4; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal’s specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Quebec (Commission des droits de la personne et des droits de la*

⁵ Constable Morgan relies on/adopts the submissions of Constable Wagner in relation to whether the Charter applies to these proceedings.

⁶ In the matter of the Royal Newfoundland Constabulary Regulations between The Chief of Police and Sgt. Derrick Cole, decision of the disciplinary tribunal, 21 February 2019.

⁷ 2010 SCC 22, [2010] 1 SCR 765.

jeunesse); *Quebec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).

[80] If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. As McLachlin J. said in *Weber*, “[i]f an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the *Charter* and likewise grant remedies” (para. 61). I agree with the submission of both the Ontario Review Board and the British Columbia Review Board that in both types of cases, the analysis is the same.

[81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal’s jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.

[82] Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal’s statutory mandate, structure and function (*Dunedin*).

13. Eaton QC noted, beginning at paragraph 12:

This tribunal is an adjudicative administrative tribunal which, as part of its function and responsibility, must decide issues of law on a regular basis. the tribunal interprets the Royal Newfoundland Constabulary Act (RNC ACT), and the regulations, and applies legal principles emanating from courts and other similar administrative tribunals. this includes the determination of applicable tests for proof of the various disciplinary offences. this tribunal is charged with the responsibility of ensuring that the principles of fundamental justice are adhered to and respected.

He went on at paragraph 15:

There is nothing in the RNC Act or the regulations that has in any way withdrawn authority to determine charter issues. Therefore, the threshold component has been satisfied.

Position of the Commission

14. The Commission does not take issue with whether the *Charter* applies to the RNC public complaints hearing process, but says that a Section 7 (S.7) *Charter* application is not an

available remedy to me as an Adjudicator, because S.7 does not apply to protect economic or employment interests, but rather is meant to protect from risk to an individual's life, liberty, or security of the person.⁸

Decision - Does the Charter apply?

For the same reasons already quoted above as noted by Eaton QC in *The Chief of Police v Derrick Cole*, in that tribunal, the *Charter* applies to the RNC public complaints hearing process.

If the Charter Applies, is section 7 an available remedy?

Position of the Constables

15. The Constables argue that S.7 applies as this is a disciplinary matter (and not just a strict employment matter).⁹ Cst. Wagner cites *Blencoe v. British Columbia (Human Rights Commission)*¹⁰ as well as *Robertson v. Edmonton (City) Police Service*.¹¹ The Constables say that S.7 of the *Charter* has been ruled in administrative tribunals such as seen in *Blencoe* to apply to commissions, and bodies exercising statutory authority, and are bound by the *Charter* even though they are exercising authority independent of government. *Blencoe* at paragraph 40:

[40] Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the Commission.

16. In *Robertson*, a detective faced a disciplinary proceeding as a result of allegations of misconduct. There, as to whether S.7 could apply to the disciplinary proceeding, the Chief of police took the position that notwithstanding the applicability of the *Charter*, S.7 did

⁸ See pp. 67-68, July 15 2021, oral submissions in relation to the Charter Application.

⁹ See pp. 6-7, July 15 2021, oral submissions in relation to the Charter Application.

¹⁰ [2000] 2 S.C.R. 307.

¹¹ [2002] A.J. No 470.

not apply to the proceeding. The Court said that if the Charter applies then by definition each of the Charter's provisions similarly apply unless a provision is irrelevant or there is something within the provision which precludes its application.¹²

17. Cst. Wagner says the focus here should be on her security of the person.¹³ She cites paragraph 57 of *Blencoe*, noting that not all state interference with an individual's psychological integrity will engage S.7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress." Cst. Wagner says that serious state-imposed psychological stress delineates two requirements that must be met in order for the security of the person to be triggered. First, psychological harm must be state imposed, meaning the harm must result from actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by the government will lead to automatic S.7 violations.
18. Cst. Wagner says the hearing has had an effect on her psychological integrity. She says she's an officer subject to an unwarranted discipline hearing for matters which occurred while she was on probation.¹⁴
19. Cst. Morgan relies primarily on the authorities filed by Cst. Wagner in relation to the law on S.7 and the issue of prejudice and psychological integrity.¹⁵
20. The Constables say¹⁶ that abuse of process should be remedied by S.7 of the Charter, and that the doctrine of abuse of process in administrative law, while used in the rarest of circumstances, is a live principle, citing paragraph 144 of *Blencoe*:

...Administrative law abuse of process doctrine is fundamentally about protecting people from unfair treatment by administrative agencies. ...
When we ask whether there has been an administrative law abuse of process, we ask the same fundamental question: has an administrative agency treated people inordinately badly?

Position of the Commission

21. The Commission says that as a result of the limitations placed on the powers of me as Adjudicator concerning orders under S.33.(1) of the *Act*, following the hearing on the

¹² *Robertson* at para. 6.

¹³ See pp. 8-9, July 15 2021, oral submissions in relation to the Charter Application.

¹⁴ See p. 11, July 15 2021, oral submissions in relation to the Charter Application.

¹⁵ See p. 40, July 15 2021, oral submissions in relation to the Charter Application.

¹⁶ See p.13, July 15 2021, oral submissions in relation to the Charter Application.

merits, an application under S.7 of the *Charter* is essentially out of place here. They say only economic and employment interests are at stake. They say there is no evidence to suggest that the rights under S.7 are engaged.

22. The Commission says that courts and administrative bodies have consistently found that S.7 does not apply to protect economic or employment interests. S.7 is meant for situations where there is an actual risk to an individual's life, liberty, or security of the person. They say that the Commission is a statutory body more akin to a professional regulatory body such as a Law Society or the College of Physicians and Surgeons, than a criminal court. The Commission's primary purpose is not disciplinary. They further note that in *Royal Newfoundland Constabulary Public Complaints Commission v McGrath*,¹⁷ our Court of Appeal stated the following when describing the nature of a Commission:

[38] The primary objective of the public complaints scheme is not discipline, although discipline may ultimately result. Discipline of Royal Newfoundland Constabulary members is dealt with by s. 42 of the **Act** and, more particularly, by Royal Newfoundland Constabulary Regulations, CNLR 802/96.

23. The Commission further notes that the Commission is an administrative body without statutory authority to restrict the life, liberty, or security of the person of the Constables. If the offences as alleged in the referral as against Constables are proven, the potential consequences range from additional training requirements to termination from employment as an RNC officer. The Commission refers to *Siemens v. Manitoba (Attorney General)*¹⁸:

[45] The appellants also submitted that s. 16 of the *VLT Act* violates their right under s. 7 of the *Charter* to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's *Charter* jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, at para. 66:

. . . the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

¹⁷ 2002 NLCA 74.

¹⁸ 2003 SCC 3 (CanLII), [2003] 1 SCR 6.

24. Like the Constables, the Commission also cites *Blencoe*, and notes that in order for S.7 to be applicable the applicant must first establish that the interest falls within the ambit of S.7. They say that while the liberty interest protected by S.7 is not restricted to mere freedom from physical restraint, the liberty interest is only engaged where state actions affect important and fundamental life choices. They refer to paragraph 47 of *Blencoe*, in terms of triggering the operation of S.7, which says:

Thus, if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops there.

Decision - is a S.7 Charter application an available remedy?

25. I agree with the Commission that a S.7 *Charter* application, is not an available remedy, in this matter.

26. In order for S.7 to be triggered, one must first establish that the interest in respect of which the applicant asserts their claim, falls within the ambit of S.7. In *Blencoe*, Justice Bastarache noted ¹⁹

47 Section 7 of the *Charter* provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Thus, before it is even possible to address the issue of whether the respondent's s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. These two steps in the s. 7 analysis have been set out by La Forest J. in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 401, as follows:

To trigger its operation there must first be a finding that there has been a deprivation of the right to “life, liberty and security of the person” and, secondly, that the deprivation is contrary to the principles of fundamental justice.

Thus, if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops there.

27. In Robertson, at paragraph 6, Clackson J. stated:

...the Respondent Chief's position is that s.7 of the Charter does not apply to this this disciplinary proceeding. In my view, if the Charter applies then by definition each of the Charter's provisions similarly apply **unless a provision is irrelevant or there is something within the provision which precludes its application.**

(emphasis mine)

¹⁹ See *Blencoe*, at para 47.

And then at paragraph 10, after canvassing other case law:

Clearly the Blencoe decision, supra, decision makes the Charter applicable to this disciplinary proceeding. the parties have agreed that that is the case. Accordingly, there was nothing left of Kullman that is germane to this inquiry. therefore there is nothing in either decision which precludes the application of. S.7 to Police Act disciplinary proceedings, **as long as the interest at stake is more than just economic.**

(emphasis mine)

28. This is not a disciplinary matter, as has been suggested by the Constables. The RNC has a separate mechanism for disciplinary matters. As noted in *McGrath* at paragraph 38:

The primary objective of the public complaints scheme is not discipline, although discipline may ultimately result. Discipline of Royal Newfoundland Constabulary members is dealt with by s. 42 of the **Act** and, more particularly, by Royal Newfoundland Constabulary Regulations, CNLR 802/96.

29. The interests at stake here for the Constables are not more than just economic. The potential outcome for each of them can be seen as dictated by that which I may order as per s.33.(1) under the *Act*. The orders vary, and include ordering that the officer(s) comply with the standards of police service prescribed in the regulations, to not being considered for a promotion for up to 3 years, to being dismissed:

Orders of adjudicator

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.

30. Section 7 of the *Charter* does not apply to economic interests. Orders I may ultimately make are limited to orders which are related to the Constables' employment with the RNC. This has been confirmed as referenced by the Commission in *Kalmring v. Alberta*,²⁰:

[34] The law is clear that section 7 does not protect economic interests and thus does not protect an individual's right to work, operate a business or to practise one's chosen profession or career, where the harm is purely economic...

31. The Constables have attempted to circumvent the actuality of the economic interest argument by saying that the process itself is the problem ; i.e.; abuse of process (either by way of blanket charging or charging without adequate proof) and this has caused them stress. I'm not prepared to accept this argument, insofar as this *Charter* challenge is concerned. In my view it is a red herring, which distracts from the realities of the validity of a *Charter* challenge here, which is to say that the interests to focus on here insofar as the attempted *Charter* challenge are the interests (employment/economic) as reflected within the possible orders I have the power to make, which speak to the actual and potential impact on the Constables, and such interests should not be subject to S.7 scrutiny.

32. The interests (when looked at under the light of the impact of potential orders under s.33.(1) of the *Act*) at stake are not those of "liberty", i.e., the Constables being prevented from making any fundamental personal choice.²¹ The interests also cannot be defined as "security of the person", i.e. interference with the Constables' psychological integrity at all, or to the extent that it could be said to be serious state-imposed psychological stress.²²

²⁰ 2020 ABQB 81.

²¹ See paras 49-54 of *Blencoe*. Also see *Siemens v. Manitoba* referenced above at paragraph 23.

²² See paras 55-57 of *Blencoe*. Also see *Siemens v. Manitoba* referenced above at paragraph 23.

33. I will however, briefly discuss the abuse of process piece, which the Constables associate with psychological stress, which they say should motivate me to move forward with a S.7 analysis.
34. Cst. Wagner takes the position that her psychological integrity has been interfered with and this infringes upon her security of the person, thereby engaging S.7. She says charges should not have been laid against her and the charges when laid should have been withdrawn as it was plain and obvious such charges could not succeed. She says this amounts to abuse of process as she has the right to only be put on trial for offences when there is a reasonable prospect of conviction. She should not have had to go through a hearing. She says the Commission counsel serve in a quasi-prosecutorial role, and they are responsible for the imposition of psychological harm, by way of moving ahead with the charges laid, and the hearing, and the conduct of the hearing by Commission counsel. In the result she says, there has been an impact on her psychological integrity.
35. Cst. Morgan relied on the submission of Cst. Wagner in relation to psychological integrity.
36. First, I was not presented with any suitable evidence (e.g.; medical) for review that suggests the Constables have undergone any manner of psychological stress.
37. Second, even if I were to accept that they have undergone stress, and to take it a step further, that such stress meets the bar of serious state-imposed psychological stress (of which there is no evidence), there has to be a, to paraphrase paragraph 60 of *Blencoe*, sufficient causal connection between the “blanket charging” (assuming it exists)/the charges brought without sufficient evidence (assuming it exists), and, the prejudice suffered by the Constables for S.7 to be triggered. That’s simply a bridge too far here.
38. It’s worth noting that each of the Constables have also been sued in a civil action related to the same facts, and any psychological stresses, if they exist, could hypothetically be argued to be related in part to that matter, if I were to go down the causal connection road.
39. In summary the Constables’ attempt at a *Charter* challenge, does not succeed. It is not a remedy available here. If the challenge can be characterized as a vessel, then suffice to say it doesn’t even really get away from the dock, and there is no need to dive into questions c) and d) under paragraph 9 above, even though question c) has been to some extent looked at here nonetheless.
40. Costs are in the cause insofar as the *Charter* application is concerned.

The Merits/Hearing Proper

41. The basic facts are as written above at paragraph 3. As noted, Cst. Morgan and Cst. Wagner are alleged to have conducted themselves in a manner contrary to subsections 3(1)(a), 3(1)(b), 3(1)(c), 3(1)(g), and 3(1)(j) of the *Regulations*, thereby committing an offence under subsection 3(2) of the *Regulations*. It is alleged that the Constables arrested and/or detained the complainant Zackary Ball, without sufficient cause, used unnecessary force with respect to Zackary Ball, were discourteous to the complainant Kimberly Ball, attempted to aid, abet, counsel or procure another police officer to contravene the *Regulations*, and carried out their duties in a manner contrary to the Policy and Procedure Manual.

42. By way of summary, I find as follows:

All complaints against Cst. Wagner, are dismissed.

Cst. Morgan conducted himself in a manner contrary to subsection 3(1)(b) and by extension, 3(1)(j) of the *Regulations*, thereby committing an offence under subsection 3(2) of the *Regulations*. Specifically, he used unnecessary force with respect to Zackary Ball, and as such, carried out his duties in a manner contrary to the Policy and Procedure Manual.

The complaints against Cst. Morgan under 3(1)(a), 3(1)(c), and 3(1)(g) of the *Regulations*, and by extension the complaint under 3.(1)(j) insofar as policy and procedure are related to 3(1)(a), 3(1)(c), and 3(1)(g), are dismissed.

43. The afore noted sections of the *Regulations*, read as follows:

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;

...

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

...

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

...

(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.

44. Numerous witnesses testified at the hearing. First, I will give a synopsis of their testimony.

Zackary Ball

45. ZB testified remotely by video. He is an apprentice ironworker who works 21 days on and 7 off. He testified mainly in relation to the contents of video footage which was procured from two separate exterior cameras attached to the Ball's residence. He indicated that this camera system had been put in place a number of years ago after someone tried to break into the garage at the family home.

46. ZB confirmed what can be seen on the video, which is that he exited the house just moments after his father and the Cst. Simmons arrived. The video shows and ZB confirmed that he went back into the house to get his shoes and then came back out to get closer to his father and Cst. Simmons. ZB Approached where Cst. Simmons and his father were located behind the house and near the vehicle of DB. ZB said that he was told to "get back" by Cst. Simmons, and then was sprayed with OC spray by Cst. Simmons, after which the video shows him retreating from the immediate area where Cst. Simmons and his father were located, and then re-entering the home. He said he was about 12 feet back from Cst. Simmons when he was sprayed (but the video does not clearly show just how far back he would have been). It was put to him on cross examination that he was likely closer to Cst. Simmons when he was sprayed. He says he called his mother after he was sprayed. He admitted to having a set of keys in his hand at the time he was sprayed. Shortly thereafter Cst. Wagner and Cst. Morgan arrived on the scene. Both eventually ended up at the back door of the home, shortly after which, ZB testified that he was being asked by the officers to exit the home and he was telling them repeatedly to "get a warrant". Expletives, (i.e., the F-word) ZB testified, were being used by both he and the officers in their verbal exchange. ZB said that Cst. Wagner broke the glass on the right side of the two-sided door.

47. ZB also testified as to the moments where he was being walked away from the home toward a police vehicle by both Cst. Wagner and Cst. Morgan. It is clear on the video as ZB confirmed that he was handcuffed with his hands behind his back. There was a lot of testimony and questioning on both direct examination and cross examination in relation to a moment seen on the video where Cst. Morgan it appears strikes ZB prior to placing him in a police vehicle. He agreed that he did not raise having been struck in the back of the head on the evening of the incident with the Constables or anyone at the lock-up, and

recalled having a headache. He told paramedics he had a headache. Later in his testimony, he indicated he did tell the paramedics he was struck in the back of the head.

48. ZB testified that after he was struck (on what ZB says was the back of his head by Cst. Morgan) and pushed into a vehicle, that Cst. Morgan told him to stop being a tough guy, and was told to "stop resisting".
49. ZB indicated at one point he was told he was being arrested for assault, but shortly after that, Cst. Morgan told him that there would not be an assault charge. He says he was also told that he would be spending the night in the lock-up for "resisting".
50. ZB Says he received medical attention from an ambulance, after which he was taken to the lock-up.
51. He said he did not have any alcohol or drugs on the day of the incident and that he is "straightedge".
52. He recalled hearing his mother being told that if she did not step away from the police vehicle that he was in, she would be arrested as well.
53. He denied being aggressive but admitted to being agitated.
54. A statement that ZB had given to the Ontario Provincial Police (OPP) in relation to an investigation into this matter was put to him. One of the main points raised on cross examination with ZB in relation to this statement were the facts surrounding the strike to ZB by Cst. Morgan. It was noted that in the OPP the statement he indicated that he "later learned" he was "punched in the head". ZB Testified that he knew the night of the incident that he was struck in the back of the head.
55. I found ZB to be a convincing witness, notwithstanding some of his recollections insofar as whether he backed up when asked by Cst. Simmons, or offered any resistance when being escorted to a police vehicle. He was calm on both direct and cross examination. Also, when he was unsure of an answer, he admitted so, such as when he was questioned as to who placed handcuffs on him. In that instance he admitted he was not sure. He also admitted to not being sure as to the content of a conversation as between his mother and officers she was speaking to.

Dennis Ball

56. DB is the father of ZB. He works as a plasterer/painter. He testified over two days, the afternoon of April 27, and morning of April 28.
57. DB began his testimony by making comment on a diagram at TAB 15 of the consent book of exhibits which was created by a Commission investigator. The diagram shows an area

where a traffic accident had occurred which DB drove through prior to the subject incident at the home of the complainants. He also testified as to dashcam footage available from his vehicle which shows the drive through the intersection, and then to the home.

58. DB admitted to making a comment to a police officer as he passed through the intersection where the accident had occurred in relation to what he viewed to be a lack of traffic direction being provided to drivers. He said he did not threaten anybody and noted that he was not speeding. He says his comment as he was passing the accident area was "someone should direct the [F-word] traffic." He denied speeding when it was put to him that it appeared he was going fast after he had made a u-turn to head toward his home. In his view a u-turn was not illegal, and he seemed to deem it appropriate. He said he did not hear a police officer say anything to him as he drove through the intersection and noted that he often has his music up very loud, and it was loud on this occasion. He denied the suggestion that he "screeched" his tires and cited his car as having "anti-traction".
59. DB said he was diagnosed with bipolar disorder in 2006.
60. In testifying in relation to his dashcam footage he noted that he drove to the end of his driveway, and as he normally would, turned around once he got to the end of the driveway such that his vehicle was pointing out towards the road. DB said that after arriving at the home (with Cst. Simmons arriving moments later) Cst. Simmons told him to get out of his car and told him to shut off his (F-word) car, and get on the (F-word) ground. He says he was not given a reason to get on the ground by Cst. Simmons.
61. He indicated that when Cst. Wagner and Cst. Morgan arrived, Cst. Simmons indicated to them that ZB was in the house. DB says he was aware at the time of the glass in the door being broke. DB spoke to the door specifically and the portion where the glass was broken.
62. DB said that the keys which ZB would have had in his hand at the time he was sprayed were keys that belonged to DB and had been placed on the top of DB's vehicle (the hood) with DB having asked ZB to remove the keys.
63. In relation to the camera system which was attached to the home, DB said he purchased it from COSTCO, and installed it, with ZB being the one who learned how to operate it.
64. He indicated that he heard some of the conversation as between his wife, Kimberly Ball, and the officers, and that in general, in respect of the officers' behavior, "they weren't nice."
65. DB indicated he did not witness ZB being struck.

66. He indicated that during the incident he told ZB repeatedly to get back in the house because he didn't want him involved, and he was unable to explain why it was that he asked ZB to retrieve the keys from where they were laid on his vehicle given that doing so would place ZB in close proximity to where he and Cst. Simmons were located.
67. When asked why he did not just submit to arrest, he said in relation to Cst. Simmons, "I wasn't going to do what he told me to do." DB said when Cst. Simmons got out of his car he was "out of control" and that there was no talking to him. He indicated he wanted to get around to the other side of his vehicle and get away from Cst. Simmons so they could speak. He said he wanted to get distance from Cst. Simmons but did not get a chance to.
68. DB says he did not have any alcohol or drugs on the day of the incident and that he stopped drinking in 2006. He indicated he was thankful for both his dash cam footage and the footage available from his home because in his view if he didn't have it both he and his son would be in jail.
69. He admitted to "flipping out" after he was placed in the back of the police vehicle and that his "bipolar kicked in" and that he "gets agitated very easily."
70. He said prior to being taken to the lock-up, he was taken to St. Clare's hospital. He also testified as to video from the lock-up which showed him being brought in, that reflected a fairly cordial conversation as between himself and the correctional officer on duty, who DB indicated he knew from his younger school days.²³
71. DB acknowledged his criminal record which can be seen at Tab 17 of the consent exhibits.
72. While I found DB to be a combative witness (on cross examination by counsel for Cst. Morgan) and impatient at times, he came across as forthright in his testimony.

Kimberly Ball

73. KB is the wife of DB and mother of ZB. She is a contracts coordinator and has a BBA. At the time of her testimony she was working on her CPA. She has no criminal record.

²³ During the testimony of DB in relation to the video at the lock up, Counsel for the Commission spent some time on a comment that was made by someone (who cannot be seen) from behind the check-in desk at the lock-up, to the effect of someone jumping on someone's back. Counsel for Cst. Wagner objected to this saying it was hearsay and I agreed. It appeared what Counsel for the Commission was trying to accomplish here was not get a statement from somebody behind the counter in for the truth of its contents, but to get it admitted such that an inference could be made that a police officer must have told the person at the counter as to something that happened at the scene. I suggested that such inference could not properly be made because we don't know who would have told that person behind the counter that information.

74. KB said she had just dropped her daughter off to do a public exam, when she got a call from ZB indicating that he had been sprayed, and that DB was being arrested.
75. She says when she arrived on the scene of the incident she was told to “get back.” She says she asked “what the [F-word] is going on?”. She says when she approached the vehicle that ZB was in to check on him, that Cst. Morgan told her to “stay the [F-word] away from the car.”
76. KB testified as to the broken pane of glass in the door in the rear of the house and indicated that she had thought that she would be reimbursed but that she was not. She indicated she did not give the receipt for fixing the door directly to the RNC but rather to her lawyer, Erin Breen.
77. KB says that she called the RNC and asked for a Sergeant, and that she was led to believe that one was on the way.
78. Also during the incident, KB says she went into the house and skimmed through the video that had already been taken by the cameras on the house and witnessed where ZB was sprayed.
79. She testified that both Cst. Wagner and Cst. Morgan were discourteous to her, and in respect of what Cst. Wagner said to her, such discourtesy was mostly in relation to the tone used by Cst. Wagner. She found Cst. Wagner to be “disrespectful”.
80. When questioned as to the portion of the video where she was speaking to two of the officers, one being Cst. Wagner, she indicated that the other officer was Cst. Morgan, and maintained this to be her understanding when it was put to her on cross examination that it was a different officer (Officer Derek McDonald).
81. KB also testified that at the time of the incident she requested that both DB and ZB be released into her custody but she was told, no.
82. She admitted to not being trusting of the police (which in my view reflects a measure of candour that lends itself to the likelihood of her willingness to tell the truth).
83. KB agreed that Cst. Morgan took clothing for ZB, but that in her view this was because of the influence of Officer Derek McDonald.
84. KB Would not admit to the idea that she was angry during the incident but said that instead she was very upset.
85. KB said that her opinion officers should be held accountable if they were not doing their job properly and that the public should be allowed to attend disciplinary proceedings relating to officers.

86. KB came across is as honest, humble, and was calm during her testimony.

Tony Kane

87. Tony Kane ("Kane") is a resident of St. John's and is a tow truck operator. He was present at the accident scene on Topsail Road at the time that DB drove through scene. He frequently attends at accident scenes as he is party to a contract with the RNC which involves attending scenes to remove cars, sweep the road, etc. He indicated he could easily visit 300 accident scenes in a single year, although later in his testimony he seemed to indicate that he may not personally be at 300, and that in the time since the accident he had been to a "couple hundred", but that the company he is with may do an average of one a day.

88. Kane Testified that DB "stopped abruptly" when passing through the area and says that he had a clear view of DB's vehicle. He indicated that DB was "swearing" and "yelling". Kane said he was 15 feet away from where DB was when he passed Cst. Simmons. He said that when DB began swearing and that the father who was standing on the island adjacent to DB's vehicle covered the ears of the child that was present. He said that DB drove through the accident scene like he didn't care for anyone's safety. He indicated that he thought DB shouted at the police a couple of times, a "couple of minutes apart" and that DB would have stopped at the lights. Dashcam footage was put to him which showed the length of time that DB being present in the area was significantly less than two minutes and he simply indicated that he had thought it was indeed two minutes.

89. He says he did not hear screeching of tires.

90. Kane says he witnessed DB make a u-turn and "almost collide with another vehicle."

91. He noted seeing an officer turn on his lights and siren and pursue DB. In reference to DB's actions, he indicated that it was the "worst case I've ever seen of someone getting upset over an accident...".

92. He could not recall, other than DB's voice, any other noise (i.e., music) coming from DB's vehicle.

93. Kane also indicated in his testimony that when DB was driving through the area, he was located on the flatbed portion of his tow truck. However, when dashcam footage was later put to him and it was suggested that he was standing on the road, he was less clear where he himself was actually located during the time that DB was passing through the area.

94. Kane's recollection did not appear to be wholly reliable, and he was unwilling to bend much on his testimony when evidence to the contrary was put to him insofar as dashcam footage.

Mike Sylvia

95. Mike Sylvia ("Sylvia") works at Avalon Towing and was also present at the accident scene when DB drove through the area. He was operating a tow truck separate from the one that Kane was operating.

96. He recalled hearing yelling, rocks flying, and the vehicle of DB speeding on after he had heard the yelling. He indicated he felt unsafe.

97. He couldn't say whether he saw anyone directing traffic. He initially indicated that he had viewed DB's vehicle for about 30 seconds, but later in his testimony when dashcam footage was put to him he seemed to acknowledge it was much less than that. He couldn't recall the colour of DB's vehicle but thought that it may have been red. Initially during his testimony, he seemed to indicate that the first time he saw DB's vehicle was when DB was passing by the island and that he would have been stood around the rear driver side portion of his tow truck. But later in his testimony he indicated that the first time he saw DB's vehicle was after he had gone around his tow truck.

98. Sylvia seemed uncertain for much of his testimony. He used phrases such as "I guess" and "I figure".

Erin Breen, QC

99. Erin Breen, QC ("Breen QC") is as a lawyer in St. John's and works in the area of criminal defence. She has been practicing law for about 18 years.

100. Breen QC was retained by DB and ZB in relation to charges against both of them which had resulted from the November 2017 incident. She confirmed that the charges ended up being withdrawn by the Crown after the Crown had viewed video footage provided to them by her.

101. Breen QC also testified as to the information at Tab 3 of the consent exhibits which was a private information sworn by ZB and endorsed by Judge David Orr of our provincial court. She indicated this was the only private information she had ever been involved with in her career and it came about partly as a result of the Balls wishing to seek remedy after charges had been withdrawn against them, and also after the director of public prosecutions had advised that the Crown would not be proceeding with charges as against Cst. Morgan.

102. Breen QC spoke to the letter at Tab 10 of the consent exhibits which is a letter she wrote for the Balls in relation to their public complaint. She also prepared a timeline in relation to camera footage, which is attached to that letter.
103. She also spoke to the issue of public confidence in the RNC and agreed that disciplinary proceedings should be opened to the public, as this would allow for more transparency.

Brent Colbert

104. Brent Colbert (“Colbert”) lives at 3 Tilting Place, which is a cul-de-sac close to where the Balls live. He is an engineer was not employed at the time of his testimony, but was employed at the time he was a witness to the incidents noted herein.
105. He was called mainly in relation to his having indicated that he was able to see some of the events that transpired at the Ball’s, from his home, mainly from standing on his back deck, notwithstanding there being another backyard in between his and the rear area of the Ball’s home, as well as various trees, etc.
106. He indicated that on the evening of the incident he had come home from work and shortly after he saw, likely from his kitchen window, a police car (the first police car) pull into the Ball’s driveway.
107. He admitted he would not have been able to see when DB and Cst. Simmons were on the ground as that would have been below his line of sight. He did see Cst. Simmons approach DB’s car after he arrived and recalls Cst. Simmons yelling. He could not recall if Cst. Simmons walked toward DB, or ran.
108. He saw ZB exiting and entering the scene but not could actually see him going in and out through the door of the house.
109. He recalled the other officers arriving on the scene and also recalls Cst. Simmons telling them that there was someone in the house to be arrested. He could not determine the gender of the other officers that arrived. He did see those two officers go toward the house after they had arrived and had spoken to Cst. Simmons.
110. He said he could hear banging from inside one of the police vehicles and he also recalled the ambulance showing up.

Iain Hollett

111. Iain Hollett (“Hollett”) works with the Crown Attorney’s office in St. Johns. He has held various positions with the Crown. At the time of his testimony he was Director of Public Prosecutions.

112. In May of 2018 he was the liaison/point of contact in relation to the OPP investigation into the events which are the subject of this public complaint.
113. St. John's lawyer Gus Bruce, QC, ended up being in charge of oversight in relation to the OPP investigation and he requested an opinion from the Crown as to a reasonable prospect of conviction on charges as against the police officers. Hollett provided that opinion, and it was his view that there was no reasonable prospect of conviction of Cst. Simmons, Cst. Morgan, or Cst. Wagner.
114. He said he did not feel that he would be able to prove beyond all reasonable doubt that the strike by Cst. Morgan to ZB, was excessive.
115. Aside from his thoughts on a reasonable prospect of conviction, Hollett also spoke to the 6 month limitation as it relates to summary conviction offences which had expired.
116. Hollett also testified as to the private information which had been laid by ZB as against Cst. Morgan. Hollett recalled that Judge Orr did find that BM applied force to ZB at the hearing where the private information was certified, but that it still would have been up to the Crown to decide if there was a reasonable prospect of conviction on the force being excessive. He spoke to S.25 of the Criminal Code which reflects special protection for police officers because he noted that every arrest that happens based on the simple definition of assault, is an assault.
117. Upon being presented with the video evidence which reflected the strike to ZB by Cst. Morgan, Hollett indicated he did not think that ZB was out of control and he did think that ZB was trying to pull away just before the strike occurred.
118. I found Hollett to be a very knowledgeable witness when it came to discussing the ins and outs of the Crown's process, especially the thought process in terms of determining whether there was a reasonable prospect of conviction on charges.

Constable Bernard Morgan

119. Cst. Morgan has been a police officer with the RNC since August of 2015. He testified over two days, the afternoon of April 30, and morning of May 3.
120. At the time of the incident in November 2017, he was assigned to patrol services, which is general law enforcement. It would have been standard at the time of the incident for Cst. Morgan to be responding to accident scenes.
121. Cst. Morgan referred to his police notes throughout his testimony. He indicated he made all these notes on the evening of the incident. He did not seem to have independent recollection of escorting ZB to the police vehicle, or of striking ZB. He had no notes in relation to striking ZB. He was not entirely clear throughout his testimony which pieces

he actually had independent recollection of, and which pieces of the event he was speaking to as a result of viewing the video footage.

122. He was part of a backup unit that responded to the accident on Topsail Road on the night of the incident. He observed two vehicles there that had each sustained significant damage. Both cars were immobilized. Part of his role was to investigate the cause of the accident.
123. His police vehicle was on McNamara Drive, facing toward Topsail Road. At the accident scene, he put various "static traffic control devices" in place, such as flares.
124. Cst. Morgan Indicated he observed the vehicle of DB traveling faster than a reasonable vehicle should at that time on Topsail Road, at a higher than normal rate of speed. He understood DB to have made a u-turn before heading west but said that he did not actually see the u-turn himself. He did see DB's car go through the intersection.
125. He saw Cst. Simmons enter a police vehicle and "give chase" to DB. Cst. Simmons had indicated that he was going after the DB vehicle but did not indicate why.
126. As he was removing traffic control devices, he received a signal on his radio which indicated there was an officer who had pressed their emergency alert button. Cst. Morgan referred to this as the "officer down" button that officers use when they feel they are in need of assistance. He contacted the communications centre and they confirmed that it was Cst. Simmons who had sent the signal. At some point he was also contacted via radio by Constable Greg Thorne who had himself been able to contact Cst. Simmons, and confirmed that Cst. Simmons needed assistance. Cst. Morgan could not recall another time when he had to respond to an officer down emergency.
127. Cst. Morgan left the accident scene and felt it was safe to leave the scene at that time. He had been at the accident scene for about 40 minutes. Cst. Wagner joined Cst. Morgan in his car. They headed west on Topsail Road but initially drove past the location of the Ball house and went as far as a Marie's Mini Mart. They then turned around and located where Cst. Simmons was.
128. Cst. Morgan said his first perception as he exited his police vehicle and proceeded up the Ball driveway was that Cst. Simmons was down and injured but then realized that Cst. Simmons and DB were engaged in a struggle.
129. Cst. Simmons indicated to Cst. Morgan and Cst. Wagner that they should watch for the male in the house (i.e., ZB) because he (Cst. Simmons) had sprayed him. Cst. Simmons also apparently indicated that he did not need help (presumably in controlling DB). Cst. Morgan went toward the house and asked Cst. Wagner to confirm that the male inside the house was arrestable, which he said Cst. Wagner confirmed with Cst. Simmons.

130. Cst. Morgan assumed that the person in the house perhaps had some involvement in what was going on.
131. Cst. Morgan recalled that Cst. Simmons had directed Cst. Wagner to help him (him being Cst. Morgan).
132. Cst. Morgan said when he approached the door at the back of the house he had intended to negotiate with ZB for him to exit. He then saw that ZB was exhibiting signs of having been sprayed and advised ZB that he was under arrest and told him to exit the house. He says he told him this three times. He did not communicate to ZB that he had any concern for his (ZB's) safety and agreed that it is possible if he had done that it may have helped to deescalate the situation.
133. BM said he felt he had grounds for arrest based on communication from Cst. Simmons. He also said that he had asked Cst. Wagner to determine from Cst. Simmons if ZB "was arrestable". Cst. Morgan said he did not have direct instruction from Cst. Simmons to make an arrest. He did not know at the time exactly what he was arresting him for. He said he did not himself form the grounds to arrest, but was operating under an order to arrest, from Cst. Simmons.
134. After seeing ZB in the house, Cst. Morgan says he did not lose sight of him.
135. Cst. Morgan said that ZB told him he needed to get a warrant.
136. BM indicated that his training tells him that if someone has access to a kitchen then they may in turn have access to a weapon. Cst. Morgan felt he had a reasonable suspicion in relation to his own safety as well as that of ZB's. He did not see ZB pick up a weapon.
137. Cst. Morgan said that ZB was demonstrating aggression toward him in that he had his fists clenched.
138. BM said that his recollection of the rear door was as being a sliding patio door, but he acknowledged based on an exhibit presented that this recollection was incorrect.
139. As to the breaking of the glass on the right side of the door, Cst. Morgan said this would have been safer than to kick it.
140. Cst. Morgan noted that he did not have his protective gloves with him which would protect his hands from glass, as he had dropped them on arrival after exiting his police vehicle. Cst. Wagner used a special tool which is used to break glass to attempt to break the glass in the right side of the door which indeed shattered the glass but it did not break it. Cst. Morgan then struck the same spot with his baton, to break the glass. He noted this rendered his baton as useless as a use of force tool. Cst. Morgan says he removed the

glass and then ZB exited the home. Cst. Morgan said the damage to the glass occurred when ZB put his back to he and Cst. Wagner.

141. Cst. Morgan says ZB was still demonstrating aggression when he exited and he drew his spray (but did not deploy it) and directed ZB to get on the ground as this would place Cst. Morgan in a position of advantage. BM said he did have concern as to imminent bodily harm, in relation to himself, Cst. Wagner, and ZB. He said ZB was agitated throughout interactions with him.
142. He directed ZB to get on the ground. BM said he placed the handcuffs on ZB.
143. He recalled that ZB challenged him to a fight while he was handcuffed. BM indicated he made a comment to ZB to the effect of, "everyone's a tough guy when they got the cuffs on".
144. Cst. Morgan said he made this comment because he felt it would deescalate the situation by showing ZB that it is futile to challenge a police officer to a fight.
145. Cst. Morgan said in his opinion the video footage shows him using his forearm against ZB, in relation to the footage of the strike. He said his fist did not make contact with ZB. Cst. Morgan indicated it is not unusual to encounter some level of resistance when arresting somebody.
146. He noted the definition of an impact strike, which he says is to draw the arm back and use a fist or palm with 100% of force. He said the strike we see on the video is not an impact strike. He indicated he felt that he used his forearm, and that the strike was to ZB's neck, not his head. Cst. Morgan indicated he was not even aware of the strike to ZB until he was able to review the video footage with the OPP during their investigation. He said after the strike he shoved ZB into the trunk of the police car to re-establish physical control.
147. He said he did not know the identity of ZB until after he was put in the police car. He did not ask ZB his name when ZB was inside the house. He said it was a dynamic situation and it was not practical at the time.
148. Cst. Morgan testified that when KB arrived home, she was agitated, and he asked her to stay in her car but she would not.
149. He says he did not swear at anybody. He says he did not tell KB to get back to her (F-word) car. He did however tell her to go back to her car, and he says at that point he did so because he thought it was important to "preserve" the scene. He says he instructed KB to go back to her vehicle 3-4 times. In doing so, he says it would have been normal for him to raise his voice and make a gesture.

150. He noted that Cst. Simmons gave him direction to take ZB to the lock up. He also noted in relation to taking direction, that he understands it is correct to follow reasonable direction from a senior officer. He indicated he was "duty bound" to do so.
151. Cst. Morgan believed it was him who contacted the paramedics and that he requested an advanced care paramedic to attend given ZB had been sprayed. He recalled the paramedics providing him with saline solution, for ZB to use.
152. He confirmed when directed toward his training record that he had done training in relation to use of force through various training modules.
153. He agreed that officers should be held to a high standard but when asked if disciplinary processes should be open to the public he could only say that he has never participated in a disciplinary process and couldn't speak to it.

Constable Isabella Wagner

154. Cst. Wagner has been a member of the RNC since September 2017. At the time of her testimony, she was 25 years old. At the time of the incident she was still within her probationary period, and this particular day was the first day that Cst. Simmons was her coach officer. She indicated it was May of 2018 when she became aware of the public complaint against her. She testified over two days, the afternoon of May 3, and morning of May 4.
155. Cst. Wagner spoke of her notepad and the notes taken thereon and indicated that it was her first notebook and she was still learning how to take notes at that time. She said she likely made her notes while at the hospital (on the evening of the incident) or when she got back to the office. She recognized that her notes could have been better.
156. As to the accident scene on Topsail Road, she indicated that she spent most of her time in a police vehicle obtaining a witness statement. She did not hear any screeching tires nor did she see the event where DB spoke to Cst. Simmons as DB was driving through the area.
157. She recalled that after taking the witness statement and exiting the vehicle she was in, Cst. Simmons ran toward her, said nothing, and got in the police vehicle and drove west.
158. Cst. Wagner said her and Cst. Morgan drove west shortly after receiving an emergency alert.
159. When they arrived at the Ball house, she says she saw that Cst. Simmons and DB were on the ground. Her version of what Cst. Simmons said to them was that they should watch out for the male inside the house and he was under arrest for obstruction. She said they

both then went toward the house and BM asked her to confirm with Cst. Simmons that ZB was arrestable. She said she asked Cst. Simmons “is he arrestable?” and that Cst. Simmons confirmed that he was.

160. She said ZB was exhibiting signs of having been sprayed, that he was extremely agitated and angry.
161. Cst. Wagner says that Cst. Morgan advised ZB to open the door . She recalled the door as being a sliding door but acknowledged that it was not, and it surprised her that it was not.
162. She had concerns that ZB was in kitchen which gave him access to weapons. She said it seemed obvious that ZB was not going to comply with police requests. Cst. Wagner indicated that ZB was belligerent and irate. She said she was also thinking about a fatal police related shooting that had occurred sometime in the recent past in Corner Brook.
163. Cst. Wagner indicated that she did lose sight of ZB briefly while he was inside the house.
164. Cst. Wagner Indicated she was wearing slash gloves and she used the appropriate tool to puncture the glass in the door on the right side. She did not question following directions to break glass and felt she was following direction of senior officer.
165. Cst. Wagner said that when ZB exited the house he was still very agitated, with fists clenched and did not appear compliant, until Cst. Morgan took out his OC spray. ZB then got on the ground.
166. She said that while Cst. Morgan placed handcuffs on ZB, she assisted in moving one of ZB’s arms so that it was easier for BM to place the handcuffs on ZB. She indicated there was no force placed to ZB’s back while he was in the prone position getting handcuffs placed on him.
167. Cst. Wagner said that at the time she did not deem anything memorable about walking ZB to the police vehicle. She says that her involvement with ZB ended after he was placed in the police vehicle. She indicated that her role while escorting ZB to a police vehicle was to have control of his left arm.
168. Cst. Wagner assisted Cst. Simmons with escorting DB to a police vehicle as well. She said that DB was also very agitated and was striking the separator “silent patrolman” as between the back seat and the front seat of the vehicle. She said he indicated to her that he was bipolar and needed his medication. Cst. Wagner testified that it is not practice of the RNC to administer medication. She read DB his rights and it was clear that DB didn't want to speak with her. Eventually she exited that vehicle.
169. Cst. Wagner indicated that when KB arrived she was in obvious distress, and that this was understandable. She said that it seemed KB wanted little to do with speaking with her.

She did not recall saying something to the effect of “that's not how a bipolar person acts” to KB. She did not deem herself to be rude to KB, or to have used a “tone”, and agreed that it is not appropriate for a police officer to be rude to civilian.

170. Cst. Wagner said she did not hear any officer swear at the incident, but she did hear swearing, and that she thought it to come from DB.
171. Cst. Wagner along with Officer Derek McDonald took DB to St. Clare’s hospital and Cst. Wagner noted that DB was much more cooperative during that time.
172. Cst. Wagner testified that Cst. Morgan and herself are in a relationship.
173. When asked about the coach officer program she said she could not think of any recommendations as to how it could be improved.

Credibility

174. Notwithstanding any brief comments above that may relate to credibility of witnesses, credibility of witnesses will be addressed below (as needed) within discussion of the complaints. While related comments above generally convey my views on demeanour during testimony, any assessments of credibility conducted here do not rely only on the demeanour of a witness.²⁴ The honesty and reliability of a witness in this matter, is assessed by looking at a range of factors: demeanour, memory, plausibility, consistency of their evidence both within the context of the hearing and relative to other testimony (statements) they have given, as well as consistency with facts established by other witnesses, motivation (bias), and their ability to perceive (observe).²⁵
175. Further, a “finding that I do not believe some part of testimony of a witness does not mean that I reject all of the testimony of that witness.”²⁶

The Complaints / Analysis

176. The Constables and the Commission are in agreement as to the test to be applied as I review the complaints i.e., The Discreditable Conduct Test.²⁷ It states:
 - a) The test is primarily an objective one.

²⁴ For discussion on this point, see *Faryna v. Chorny*, 1951 CanLII 252 (BC CA) ; (also see *White v. The King* [1947] SCR 268, and *R. v. C.H.* [1999] N.J. No.273.).

²⁵ *Ibid*, and see for further discussion, James Casey, QC, Law Society of Alberta, 2017, The Decision Making Process, Assessing Credibility: <https://cpled.desire2learn.com/d2l/home/45518> .

²⁶ *R. v. Hiller*, 2021 NLSC 108, at para. 39.

²⁷ *Spurrell*, *Infra* note 36.

- b) The Board must measure the conduct of the officer by the reasonable expectations of its community.
- c) In determining the reasonable expectations of the community, the Board may use its own judgement, 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 this 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.

177. I will address each complaint, in relation to each officer, in turn, (insofar as the complaints can be addressed in that way) but will combine them where appropriate. The burden of proof to be applied is a balance of probabilities.²⁸ This burden of proof is sometimes referred to as being on a preponderance of the evidence, with the preponderance being established clearly. It is the most probable of the possible view of the facts.²⁹

Cst. Wagner

Conducted herself contrary to 3.(1)(a) - without good and sufficient cause make an arrest or detain a person, and, 3.(1)(g) attempt to commit, aid, abet, counsel or procure another police officer to contravene these regulations, and, 3.(1)(j) carried out her duties in a manner contrary to the Policy and Procedure[s] Manual

178. This complaint relates to the allegation that Cst. Wagner arrested and or detained the complainant ZB without sufficient cause, did so in contravention of RNC policy, and, in relation to the arrest and detention, aided Cst. Morgan. In this case, the complaint appears to be focused mainly on arrest without cause.

179. On a balance of probabilities, I cannot say that Cst. Wagner did not have sufficient cause here. The evidence of Cst. Wagner (and Cst. Morgan) indicates that they were advised

²⁸ See s. 33.(1), Royal Newfoundland Constabulary Act, SNL 1992 C R-17, and see, *Callahan v. Ballard*, (1996) in the matter of a complaint pursuant to the royal Newfoundland Constabulary Public Complaints Regulations.

²⁹ See paragraphs 37-44, *Tessier v. Workplace Health Safety and Compensation Commission*, 2002 CanLII 45549 (NL SC).

by Cst. Simmons that ZB was under arrest. The Commission has not proven otherwise to be the case. Cst. Simmons was not called in this regard to assist in possibly meeting the burden. The Commission took issue with a prior statement of Cst. Morgan, being inconsistent with his evidence at the hearing, insofar that in a statement given by Cst. Morgan to the OPP, he did not reference instructing Cst. Wagner to go back to Cst. Simmons to confirm that ZB was arrestable. However, Cst. Morgan during his testimony advised that having had the opportunity to review the video, he was able to refresh his memory. I accept that. He appeared to be telling the truth, and this is entirely plausible. It is also consistent with video evidence. The Commission also noted that Cst. Wagner's evidence in relation to her having to return to speak briefly to Cst. Simmons on the instruction of Cst. Morgan is inconsistent insofar as the statement that she gave to the OPP, in her testimony at the hearing. She acknowledged at the hearing not recalling the conversation with Cst. Simmons at the time she gave her OPP statement. Further, even if I did not accept the evidence of Cst. Wagner³⁰ or Cst. Morgan in relation to the instruction of Cst. Simmons or the request of Cst. Morgan for Cst. Wagner to confirm the arrest with Cst. Simmons, the absence of evidence in this regard does not prove the charge. This was made clear in *R. v. Furlong*³¹ at paragraph 27:

In this case, the trial judge acknowledged that there was no evidence on the Legal Aid aspect of the *Charter* right. However, he erred when he inferred from the absence of evidence on the point that the information about Legal Aid had not been given by Constable McDonald to Ms. Furlong. The Summary Conviction Appeal Court judge made the same error in upholding the trial court decision. Constable McDonald's lack of testimony on the aspect of the right to counsel concerning Legal Aid does not prove that he did not provide the Legal Aid information to Ms. Furlong. It cannot be otherwise, for as Justice Lamer said in *Collins*, a court cannot assume that things happened or did not happen in the absence of evidence. Neither can a court infer that things happened or did not happen in the absence of facts from which a reasonable inference can be drawn. Accordingly, Ms. Furlong has not proved that the Legal Aid information included in her right to counsel was not given to her by Constable McDonald and that she consequently suffered a breach of her s. 10(b) *Charter* right.

180. The Commission wants me to dismiss the testimony of Cst. Wagner and Cst. Morgan as being unreliable given the time that has passed since the events, the differences in statements given to the OPP and testimony at the within hearing, and after discussions (the extent to which I could only speculate) they would have had with each other since that time. For reasons above at paragraph 179, I'm not prepared to do that. Also, memories can shift over time and I do not see a reason to paint them with a brush of collusion (as to their evidence in relation to the arrest) and go so far as to say they are

³⁰ Cst. Wagner's evidence that Cst. Simmons confirmed to her that ZB was arrestable is not hearsay. The evidence that Cst. Simmons told Cst. Wagner that ZB was arrestable, is proffered for the fact that such statement was made, and not for the truth of its contents.

³¹ 2012 NLCA 29.

recounting events due to being motivated by kinship. I believe the Constables to have been under the instruction of Cst. Simmons. Moreover, and it is worth repeating, that the video evidence, while without sound, is consistent with the Constables' version of events in this regard, (i.e., the brief initial conversation with Cst. Simmons, and Cst. Wagner returning briefly to speak with Cst. Simmons.) It is entirely plausible that this is why she returned briefly to speak with Cst. Simmons, as can be seen in the video. I do not accept the Commission's view that the evidence of the Constables concerning their interactions with Cst. Simmons and what was said by Cst. Simmons to have been "*drastically inconsistent*" (italics mine). Their evidence is externally consistent with the independent (video) evidence, and internally consistent (with each other).

181. It is crucially important to keep in mind in relation to this charge, that I accept that neither Cst. Wagner or Cst. Morgan made the decision to arrest ZB. That decision was made by Cst. Simmons. Cst. Wagner and Cst. Morgan acted on what they were told by Cst. Simmons, and based on their observation that ZB had been sprayed (which Cst. Simmons also informed them of). DB also indicated in his testimony, that when Cst. Wagner and Cst. Morgan arrived, Cst. Simmons indicated to them that ZB was in the house. While DB could not say that Cst. Simmons advised of ZB being arrestable, an independent witness, Colbert, did say he heard from (who he alluded to as) Cst. Simmons to have said there was someone in the house to be arrested as well (further external consistency). While I appreciate the Commission's position that Colbert would have had an obstructed visual, I have no reason to believe that his recollection of hearing it be said that there was someone in the house to be arrested as well, is inaccurate.
182. In relying on Cst. Simmons insofar as making the arrest, it is worth noting that even if Cst. Simmons was wrong, Cst. Wagner and Cst. Morgan could still rely on Cst. Simmons. The Constables point to the testimony of Hollett, as well as the decision in *R. v Cody*³² in this regard:

[18] It is recognized that the test for finding whether there are reasonable and probable grounds to affect an arrest is not as exacting as might be the case in considering the validity of a search warrant. In *R. v. McCabe*, 2008 NLCA 62, 280 Nfld. & P.E.I.R. 250, Barry, J.A. stated:

23 Rosenberg J.A., writing for the Court in *Polashek*, referred to the comments of Doherty J.A. in *R. v. Golub* (1997), 1997 CanLII 6316 (ON CA), 34 O.R. (3d) 743 (C.A.), at p. 750, who noted that the test for finding reasonable grounds for arrest is not as exacting as it might be in other situations where reasonable grounds are required, such as in considering the validity of a search warrant:

³² 2013 CanLII 94260 (NL SC).

Mr. Harris' reliance on the search warrant cases is misplaced. Both a justice and an arresting officer must assess the reasonableness of the information available to them before acting. It does not follow, however, that information which would not meet the reasonableness standard on an application for a search warrant will also fail to meet that standard in the context of an arrest. In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, 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. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.

[19] The arresting officer may act on the direction of another officer without being personally aware of the grounds for the arrest. In such a circumstance the subjective and objective grounds of the directing officer are to be examined. In **R. v. Lal** (1998), 1998 CanLII 4393 (BC CA), 130 C.C.C. (3d) 413 (B.C.C.A.), Ryan, J.A. stated:

24 The Crown submitted in this case that proof of the reliability of the information provided to Constable Rankin by Corporal McKay was unnecessary since a police officer should be entitled to rely on another officer's information without question. I agree that a police officer is entitled to act upon information given to the officer by another member of the police force. To suggest that police officers cannot act on the assumption that a fellow officer's advice is reliable is unrealistic and would unduly hamper law enforcement. But when the Crown is called upon at trial to justify a search based on reasonable grounds or a stop based on articulable cause, there must be some evidence placed before the trial judge that the police officer's information was in fact reliable or worthy of acting upon.

[20] RNC Sergeant Tim Hogan was the lead investigator in Operation Razorback with responsibility for all key decisions respecting the file. Information from the field was relayed to Sergeant Hogan from his primary contact, Constable Ken Walsh, so as to inform these decisions. The order to arrest Brennan-Smith and the next person he met with was given by Sergeant Hogan to Constable Walsh who, in turn, directed that order to the surveillance teams in the field.

[21] In the present case while the arresting officer was Constable Knight, the ultimate decision to effect the arrest was that of Sergeant Hogan. It is to the reasonable and probable grounds of Sergeant Hogan that we must direct our inquiry.

183. Even if I did not accept that Cst. Simmons issued commentary to the effect of ZB being arrestable, or that ZB had been sprayed, the other Constables would have grounds for

arrest to rely on, having been able to observe themselves that force was used on ZB, (OC spray). As such they could assume ZB was under arrest and they could continue to effect arrest.³³ Moreover, Cst. Morgan's notes from the time of the incident indicate that Cst. Simmons said "Watch out for the male in the house, I sprayed him." Clearly the Constables were aware that ZB had been sprayed.

184. The Arrest and Confinement policy within the RNC Policy and Procedure Manual aligns with arrest powers under ss. 494 and 495 of the Criminal Code of Canada. The Constables (as dictated by the policy) would have been concerned in relation to the commission of an offence, as well as for the safety of themselves and ZB. However, the analysis under this portion of the complaint does not require that I review the subject provisions of the Arrest and Confinement policy, because as noted, Cst. Wagner (nor Cst. Morgan) were the ones making the decision to arrest. The Commission spent some time on this point, but going down that road would mean that I do not accept the evidence that Cst. Wagner and Cst. Morgan acted on the authority of Cst. Simmons, or that I don't accept they knew ZB to have had force (spray) used against him - but I accept these things.

185. I believe Cst. Wagner to have acted in good faith, in a dynamic situation, and an objective member of the community would view her conduct in relation to the arrest and detention of ZB to be reasonable. I believe (if I were to play out the requirements under the policy regarding arrest and confinement) that her actions could largely be seen to be in line with that policy and procedure. She (and Cst. Morgan) had been told by a senior officer that ZB was to be arrested, and furthermore (although not germane to my analysis) they were concerned, given ZB's proximity to the kitchen of the home (i.e. proximity to weapons), and his state of agitation (in part I suspect because he had been sprayed which was patently obvious), that he was a threat to them, and to himself. No warrant was needed. They acted reasonably and swiftly in the circumstances, and moreover within the reasonable expectations of the community.

Conducted herself contrary to 3.(1)(b) - use unnecessary force with a prisoner or other person contacted in the execution of duty, and, 3.(1)(g) attempt to commit, aid, abet, counsel or procure another police officer to contravene these regulations, and, 3.(1)(j) carried out her duties in a manner contrary to the Policy and Procedure[s] Manual.

³³ See *R. v. Squires* [2016] N.J. No 351 at paras 33-34.

186. This complaint relates to the allegation that Cst. Wagner used unnecessary force with respect to ZB, having done so in contravention of RNC policy, and, also in relation to unnecessary force, aided Cst. Morgan.
187. Notwithstanding the Commission takes the position that “both Constables Morgan and Wagner used unnecessary force in the arrest and detention of Zachary [sic] Ball”, I am unable to conclude that Cst. Wagner used unnecessary force with respect to ZB, or aided Cst. Morgan in that regard.
188. The unnecessary force, as it appears the Commission wishes to apply it to the events of November 8 2017, is confined to 2 separate events: 1. ZB being ordered to lay down on the patio, allegedly in an area of broken glass, prior to being handcuffed and; 2. the strike by Cst. Morgan to the rear of ZB.
189. Cst. Wagner submits that her entire interaction with ZB can be seen on the video evidence. While I am not prepared to agree that the entire interaction with ZB can be seen on the video evidence, I do agree that the relevant portions of Cst. Wagner’s interaction with ZB can be seen on the video evidence. We see her assisting Cst. Morgan in the moment where ZB is being handcuffed, by moving one of ZB’s arms, as well as assisting Cst. Morgan as ZB is being walked away from the home toward the police vehicle Cst. Simmons arrived in, and then away from Cst. Simmons’ vehicle and toward the vehicle that Cst. Morgan and Cst. Wagner arrived in.
190. The Commission submits in relation to ZB having to lay prone on the patio prior to being handcuffed that the “officers ordered Zachary [sic] Ball to lay down on the broken glass when they easily could have asked him to put his hands behind his back to be handcuffed while standing. Instead, after being pepper sprayed, he was ordered to lay down on a glass covered patio while wearing a sleeveless shirt and pajama pants on a November evening. This clearly was not necessary or reasonable.”
191. Insofar as Cst. Wagner is concerned, it appears to be the position of the Commission that she took part in ordering ZB to lay down on broken glass. The evidence however from both Cst. Morgan and Cst. Wagner is that Cst. Morgan ordered ZB to lay on the ground. ZB indicated on direct examination he “voluntarily” got on the ground and did not seem to speak directly as to who ordered him to the ground on cross examination. Further, while I accept that there would have been some glass on the patio from the breaking and clearing of glass from the door, it is not clear how much there was or where such glass

was located. ZB suggested it was “all over the patio” which is in my view is a vague description, not lending itself to a fulsome and helpful observation. Cst. Wagner on examination did not know how much glass was on the patio. I am not aware of any evidence to suggest ZB was injured by broken glass, nor is it clear that he was laying in any such glass, other than Cst. Morgan’s comment on direct examination that ZB complained about feeling glass (we do not know where or how much) but that it was not practical to stand ZB up until handcuffs were placed on him. The pictures from the RNC show that most of the glass remained in the door, and only show (to the extent that the patio is depicted) broken glass on the patio, immediately in front of the door.

192. Cst. Wagner did not order ZB to lay down on the patio. She did not physically guide him into the prone position (nor did Cst. Morgan) and this is patently clear from the video evidence and her testimony. Her assistance was limited to assisting when handcuffs were being paced on ZB, as can be clearly seen in the video. I do not think a member of the community would look at Cst. Wagner’s actions on the patio and see that she did anything wrong. I cannot see how she breached the RNC Use of Force Policy, nor did she do anything to aid Cst. Morgan in breaching the policy, given (as will be seen below) Cst. Morgan did not use excessive force *on the patio*, but only as much force as was necessary.³⁴
193. As for Cst. Wagner’s involvement in relation to the strike to ZB by Cst. Morgan, I am also unable to see how she contravened 3.(1)(b) , 3.(1)(g), or 3.(1)(j) of the *Regulations* on this front. The video appears clear that Cst. Wagner was not holding ZB when Cst. Morgan struck him (as ZB had briefly moved forward and away from her grasp). She noted in her testimony on review of the video that it appears she lost control of ZB’s left arm, but she did not seem to indicate (on cross examination) she had an independent recollection of that. In a prior statement to the OPP she did not indicate that ZB looked to be resisting. But, and at the time of her testimony at this hearing, she had opportunity to see the video multiple times. She was able to refresh her memory. It is entirely plausible and consistent with the video evidence that ZB moved away from Cst. Wagner’s grasp while being escorted by her and Cst. Morgan. She was not evasive and appeared to be telling the truth.
194. The Commission further submits that ZB “was being escorted to the police vehicle by the Constables, when Constable Morgan further breached the regulations and use of force policy by striking Zackary Ball in the back of the head.”

³⁴ *Infra*, See 2.1 of the Use of Force Policy at paragraph 229 below re “as much force as is necessary”.

195. I will address Cst. Morgan's part in relation to the strike later, but Insofar as Cst. Wagner is concerned, it appears to be the position of the Commission that she had a responsibility to stop force from being applied. Presumably the Commission is referring to 2.7 (also referenced below at paragraph 229) of the RNC Use of Force Policy³⁵ which speaks to the responsibility to protect a third party in the face of an assault. It reads as follows:

A police officer's failure to stop an assault by a third person may be grounds for a charge of assault (or assault causing, assault with a weapon, aggravated assault for murder as the case may be) for that police officer. The courts have held that because a peace officer has a duty to protect persons in their custody, that the failure to protect them in the face of an assault is in fact an encouragement of the assault. The passive police officer is therefore a party to the offence and criminally liable.

196. If I assume (for the moment) that Cst. Morgan assaulted ZB, or used what can be considered unnecessary force, I can say with certainty that based on the video evidence there is absolutely no way that Cst. Wagner could have prevented it. The strike, which will be discussed in further detail below, happens quickly. From the moment where ZB moves from Cst. Wagner's grasp, to when the strike occurs, there is a period of between 1-2 seconds. (Even if the video is not fully accurate on this point re timing, it still would not be much longer, if at all). She could not have prevented the strike. She was not restraining ZB when Cst. Morgan struck him.

197. I do not think an objective member of the community would look at Cst. Wagner's actions (or alleged inaction) in relation to the strike and see that she did anything wrong. I cannot see how she breached the RNC Use of Force Policy, nor did she do anything to aid Cst. Morgan in his alleged breaching of the policy.

198. To quote counsel for Cst. Wagner during oral/final submissions: "She touched a wrist and she held an arm walking to the car, and that's about the extent of it."

Conducted herself contrary to 3.(1)(c) - be discourteous to a member of the public, and, 3.(1)(j) carried out her duties in a manner contrary to the Policy and Procedure[s] Manual.

³⁵ As Adjudicator I was provided with various/relevant policies and procedures of the RNC, both by the Chief and by way of consent exhibits. Some of these, while I have been able to view the ones provided in their entirety, have also been provided to me with certain sections redacted, as it would not be in the interest of public/officer safety for the public to be aware of certain pieces of these policies. As such, any quotes from the policies referred to within this decision are from portions that have not been redacted. All counsel in this matter also have access to the policies referenced.

199. This complaint relates to the allegation that Cst. Wagner was discourteous to KB, and unnecessarily damaged the Ball residence, having done so in contravention of RNC policies which relate to courtesy, and deportment.
200. In addressing this portion of the complaint, I have to rely more so on the evidence of Cst. Wagner and KB, rather than the silent but useful video evidence. On a balance of probabilities, I am unable to say that Cst. Wagner violated 3.(1)(c).
201. There are two RNC policies relevant to this portion of the complaint. The first is the Courtesy Policy. The second is the Dress and Deportment Policy.
202. The Courtesy Policy (rescinded in 2019) notes that courtesy must be practiced by officers in order to earn the respect and support of the community. It speaks to matters including but not limited to how officers should greet members of the public, tone of voice, voice volume, body language, profanity, and demeaning remarks.
203. The deportment piece of the Dress and Deportment Policy, essentially boils the Courtesy Policy down to its core. The relevant portion states in part at section 1.3:

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.

Officers shall not:

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

...

204. KB testified that when she arrived on the scene, she said "what the [F-word] is going on here", but in her view she did not say it in a rude manner. She says Cst. Wagner was rude to her with respect to making judgmental comments concerning DB's mental health. She says that when she advised Cst. Wagner that DB was bipolar, that Cst. Wagner said, "that's not the way a bipolar person acts." She indicated she felt Cst. Wagner's tone to be very disrespectful as if Cst. Wagner didn't believe anything she was saying. She further indicated she felt belittled by the Constables.

205. Cst. Wagner submits that KB was visibly angry, and a tone used does not amount to being rude or oppressive. She denies making any comment about DB's mental illness. Cst. Wagner notes that KB was told multiple times to remain away from the police vehicles (which KB admitted to, as well as not listening to the police officers).
206. Each of KB's version and Cst. Wagner's version of events re discourtesy are plausible and each appeared to be telling the truth. I am left not knowing if Cst. Wagner was discourteous to KB.
207. The Commission has referred me to *Spurrell v Priddle and Puddicombe*³⁶, which is a 2014 decision in the matter of a public complaint. There, officers were found guilty of discourteous conduct having arrested the complainant on suspicion he was intoxicated when in fact he was mentally ill. Conduct was found to be oppressive and rude. But in within matter, as noted by Cst. Wagner, she was not dealing with a vulnerable member of the public, and the facts here are quite different. As such I do not find *Spurrell* to be entirely instructive, on this point.
208. I do not doubt KB's evidence that she felt disrespected and did not like Cst. Wagner's tone, but that position does not equate to it being necessarily true that Cst. Wagner was disrespectful or used an inappropriate tone. While I indeed believe it to be possible that Cst. Wagner was discourteous to KB, I cannot say it is more probable than not that she was. It's possible she made a comment about the nature of bipolar disorder, but I am not convinced on balance that she did, and if she did, I don't believe in this context I could go as far to say it to, on balance, have infringed policy, because based on Cst. Wagner's evidence she was simply asking a question and trying to get an understanding of what DB was going through.
209. As to the unnecessary force (in relation to the damage to the residence), I have already indicated above under my analysis re Cst. Wager and the arrest, that I take no issue with the glass in the patio door being shattered/broken. The Constables needed ZB to exit the home. He was not complying. They were concerned about weapons given kitchen proximity. They had authority to arrest and were proceeding as necessary.
210. As a final point in relation to Cst. Wagner, it was noted at numerous times during the hearing that at the time of the incident she was assigned a coach officer and was still working within her probationary period. As of November 8 2017, she had been working for about 2 months. For example, in relation to making and arrest of ZB, it was submitted

³⁶ Decision of Chief Adjudicator John W. McGrath, QC, in the matter of a public complaint of Diane Spurrell.

(during submissions in relation to the *Charter* application) that as she was still in coaching, she could not have made a decision to make an arrest. It was also noted as well that that she is duty bound to obey lawful orders of senior officers³⁷, and this puts her in a “tight spot”, given she is working within her probationary period. It was suggested she could be held to a lower bar, as long as she acted in good faith and followed policies.

211. I have found above that the complaints as against Cst. Wagner are dismissed. In doing so, I have not delved into (as I did not find it necessary) whether I should be looking at the charges as against her under light of her employment status at the time of the incident. Put plainly, I did not need to give her the benefit of any arguable mitigating circumstances, because no excuse for her conduct (which was reasonable, or cannot be show to be unreasonable) needs to be discussed. Had I found it necessary to discuss whether being in the Coach Officer Program as a “Recruit Constable”³⁸ was a relevant variable to a determination in relation to Cst. Wagner’s conduct, it is unlikely I would have seen it as a mitigating variable, given there does not appear to be anything in the Coach Officer Program Policy which suggests such a mitigating variable could be afforded to Cst. Wagner. Although, it could be argued, (had Cst. Wagner needed to avail of her employment status as a mitigating variable) that being part of a program which is designed to provide for “mentorship, support, guidance, on the job training and close supervision”³⁹ could mean that the subject officer be granted some latitude.

Cst. Morgan

Conducted himself contrary to 3.(1)(a) - without good and sufficient cause make an arrest or detain a person, and, 3.(1)(g) attempt to commit, aid, abet, counsel or procure another police officer to contravene these regulations, and, 3.(1)(j) carried out his duties in a manner contrary to the Policy and Procedure[s] Manual

212. This piece of the complaint in relation to Cst. Morgan has largely been addressed within the analysis above as to whether Cst. Wagner conducted herself contrary to the *Regulations* in relation to arrest.

³⁷ See 7.(1)(a), *Royal Newfoundland Constabulary Regulations* 802/96 under the *Royal Newfoundland Constabulary Act*, 1992.

³⁸ See generally, Coach Officer Program, RNC Policy and Procedure Manual – (notably the policy provided to me by the Chief is dated April 1 2021, and may not have been in place in *this form* at the time of the incident, but according the Affidavit of Kimberley Harding under cover of which the policy was provided, the Coach officer Program has been in place since 2011.)

³⁹ Affidavit of Kimberley Harding, , Executive Director of Support Services for the Royal Newfoundland Constabulary, at paragraph 10, 22 April 2021.

213. I will not repeat that analysis here, but to say as follows: I accept that Cst. Morgan acted on the information provided by Cst. Simmons, and was permitted to do so. I accept his evidence that he took direction from Cst Simmons that there was a male in the house to be dealt with. I appreciate that in a statement given to the OPP, he noted that he was not aware that Cst. Wagner returned to speak to Cst. Simmons, but he explained this inconsistency to my satisfaction by noting that he said that in the context of it being the first time he saw the video footage and he was confused as to the sequence events, and he'd had the ability to refresh his memory since that time. He knew ZB had force applied against him by way of OC spray, and he fairly believed ZB was party to an offence and was arrestable. Cst. Morgan instructed Cst. Wagner to break the glass in the door off the patio of the Ball home, and this was in an effort to gain entry, when it appeared that ZB was not exiting and after he had been asked by Cst. Morgan numerous times to exit the home. Cst. Morgan was believable on these points, was able to refresh his memory (in part) from his notes, and his story does not place a strain on the realities of the situation. I accept Cst. Morgan's plausible evidence that when ZB exited the home he initially had clenched fists, given Cst. Morgan's ability to clearly observe this in the relevant moment, and other moments in the video where we indeed see ZB with clenched fists, and that it caused Cst. Morgan to back up "a little bit" (which back up is consistent with and can be seen on the video), draw his OC spray, and instruct ZB to get on the ground.
214. The distinct question to ask here insofar as Cst. Morgan is concerned, is did he counsel or procure Cst. Wagner to contravene the *Regulations*. First, as noted, Cst. Wagner did not contravene the *Regulations* in this regard. But, that does not necessarily mean that Cst. Morgan did not counsel or procure Cst. Wagner to contravene the *Regulations*. In other words, can it be said that Cst. Morgan counsel or procured Cst. Wagner to do something which contravened the *Regulations*, but in this instance that she did not do? On the evidence presented, there does not appear to have been any such event.
215. Also, Cst. Morgan spent some time in his submissions (as did the Commission on questioning) discussing "Hot Pursuit" and "Exigent Circumstances" in relation to the arrest, and lack of warrant/entry (to the extent that there was entry) to the Ball home. I see no need to go unto a discussion of those matters here. Cst. Morgan acted on the information provided by Cst. Simmons (and the confirmation offered by Cst. Wagner) and was permitted to do so.

Conducted himself contrary to 3.(1)(b) - use unnecessary force with a prisoner or other person contacted in the execution of duty, and, 3.(1)(g) attempt to commit, aid, abet, counsel or procure another police officer to contravene these regulations, and, 3.(1)(j) carried out his duties in a manner contrary to the Policy and Procedure[s] Manual.

216. This complaint relates to the allegation that Cst. Morgan used unnecessary force with respect to ZB, having done so in contravention of RNC policy, and, also in relation to unnecessary force, counseled or procured Cst. Wagner to use unnecessary force.
217. As can be seen from my commentary above beginning at paragraph 186 in relation to the use of force complaint as against Cst. Wagner, I do not deem ZB being ordered to lay down on the patio, allegedly in an area of broken glass, prior to being handcuffed, a use of unnecessary force. Furthermore, I will not repeat the analysis here, but to say I accept that Cst. Morgan acted appropriately. ZB was agitated. He lay down voluntarily. Handcuffs were quickly placed on ZB, and he was then brought to his feet.
218. However, I am of the view that Cst. Morgan, without sufficient cause, used unnecessary force with respect to ZB, in relation to a strike while ZB was being escorted, contravening 3.(1)(b) and 3.(1)(j) of the Regulations. I do not believe he counseled or procured Cst. Wagner to use unnecessary force. As can be seen above, Cst. Wagner did not use unnecessary force nor did Cst. Morgan counsel or procure her to do so.
219. I am relying heavily on the video evidence in relation to this finding, and as such I will first discuss two issues raised by Cst. Morgan. Those are: whether an expert should have been called by the Commission to speak to use of force, and the weight to be given to the video footage.

Expert evidence re use of force

220. While Cst. Morgan takes the position that the Commission should have called an expert in relation to use of force with such expertise being helpful and vital to my determination, Cst. Morgan did not point me to an authority which prescribes this to be the case. The Commission, however, pointed me to *R. v Reddick*⁴⁰, a Newfoundland and Labrador case which applies the seminal decision in *R. v. Mohan*⁴¹.

⁴⁰ 2017 CarswellNfld 545.

⁴¹ 1994 SCC 80.

221. In *Reddick*, the Defendant was charged with disturbing a humpback whale contrary to the *Marine Mammal Regulations*. The Defendant challenged the qualification of an expert witness on the basis that her evidence was not necessary, and that she did not meet criteria for qualified expert. The relevant piece of that decision insofar as I am concerned here, is necessity.

222. Quoting from Alan D. Gold, *Expert Evidence in the Criminal Law the Scientific Approach*, (2003), Judge Brazil noted at paragraph 10 in relation to the necessity piece of a framework laid out in *Mohan*:

... expert testimony must be more than merely relevant or even helpful or useful; it must be necessary, in the sense that a correct result could not be reached without it.

223. Judge Brazil then went on to further references the necessity element as discussed in *Mohan*:

This element of the Mohan framework focuses on whether the trier of fact could reach a decision without the benefit of expert testimony:

....I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information “which is likely to be outside the experience and knowledge of a judge or jury”: as quoted by Dickson J. in *R. v. Abbey, supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of) v. Smith*, 1931 CanLII 1 (SCC), [1931] S.C.R. 672, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, “[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge”.

224. Cst. Morgan, it seems based on comments during final submissions, is of the view I need an expert to speak to how much force was used in relation to the strike by Cst. Morgan to ZB. To paraphrase comments in *Reddick*, this matter is not one of such complexity in my opinion, that I need an expert’s assistance. While expert evidence may have been useful, I do not see it as necessary to get to a correct result. The video evidence depicts what occurred with sufficient clarity (as will be further discussed below) such that I can make a determination. That determination is whether only as much force as is necessary was used by Cst. Morgan and whether the force was excessive, all under the light/burden of a balance of probabilities. I do not believe I require assistance of someone with special

knowledge of use of force in the circumstances of this matter. I have the video footage, and the relevant RNC policies at my disposal. I believe I can form a correct judgment. This brings us to the next issue.

Weight to be given to video evidence

225. The video evidence, while not of theatrical quality in the visual sense, and not a perfect representation of the incident, is satisfactory for my purposes. It is not in my view as Cst. Morgan suggests, of “very poor quality”. Cst. Morgan takes the position that while he did not challenge the admissibility of the video evidence, the weight to be ascribed to the video evidence is entirely a separate issue. (Notably, the Constables themselves frequently utilized the video evidence during hearing testimony/questioning.)
226. Cst. Morgan points me to *R. v. Montison*.⁴² There, a police officer was charged with, amongst other charges, manslaughter and aggravated assault. These charges were the result of a man going into cardiac arrest and dying, after having been handcuffed and struck by the police officer. There was video of the incident. Defence counsel relied on an expert for the proposition that the video evidence should be approached with caution, and they noted concerns as to the reliability of the video evidence. The judge acknowledged that video has its limitations and noted that such limitations would be kept in mind, by using “caution when using the video to assess issues like speed, force, timing, elapsed time, impacts or contacts...”.
227. Like Kelly J. in *Montison*, I am using this video (as will be seen) to observe and assess events and not as the basis for *calculating* speed or force. I have viewed it countless times, and am using caution. Also, like Kelly J., it is not the only evidence I have in relation to the strike and it is being weighted in light of the evidence on the whole to the extent that I can such as that of Cst. Morgan, and ZB. But, the video has value, and as noted in the circumstances of *Montison*, in my view, “is entitled to substantial weight.”
228. I will move now to the substance of the complaint in relation to Cst. Morgan’s use of force.

Use of unnecessary force

229. The relevant portions of the Use of Force Policy within the RNC Policy and Procedure Manual are as follows:

⁴² 2020 ONCJ 464

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*.
- 1.3 Principle: Police officers have a responsibility to be fully versed in the use of force guidelines as contained in the *Criminal Code* and associated police policies. Decisions are subject to review in criminal, civil and/or disciplinary proceedings.

2.0 Police Officer Use of Force

- 2.1 Legislation governing the use of force is found in the *Criminal Code Sections 25 to 27*. Under this legislation, police officers are justified in doing what they are required to do and in using as much force **as is necessary for that purpose**. However, police officers are **not justified in using excessive force** and will be held criminally responsible for use of force that is considered to be excessive.
- 2.2 Police officers have discretion in exercising their authority in many instances; however, they are duty-bound to respond to the aid of a citizen and to give whatever assistance is necessary to protect him/her from harm. If this means that a certain amount of force must be used to accomplish that purpose, police officers will have no alternative but to use that amount of force. To do less would amount to an act of negligence and a breach of a police officer's sworn duty to protect the public.
- 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 reasonably 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.

- 2.7 A police officer's failure to stop an assault by a third person may be grounds for a charge of assault (or assault causing, assault with a weapon, aggravated assault or murder as the case may be) for that police officer. The courts have held that because a peace officer has a duty to protect persons in their custody, that the failure to protect them in the face of an assault is in fact an encouragement of the assault. The passive police officer is therefore a party to the offence and criminally liable.

....

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

- 5.1 The authority of police officers the 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 grounds, 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.
- 6.2 The decision as to whether force is to be used, and the amount to be applied, shall rest solely with the police officer at the scene who is personally involved. It is important to bear in mind that the decision to use force and the amount thereof must be reasonable and not excessive. Such decisions are subject to review.
- 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 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 Behaviors

7.1 There are essentially five categories of subject behaviors:

a. Compliance

It is the goal of all officers to achieve compliance. When displaying compliant behavior, the subject responds appropriately to the officer's presence, direction and control. At anytime, a subject can always choose to comply.

b. Passive Resistance

The subject refuses to cooperate with the officer's lawful direction with no physical action. This can assume the form of verbal refusal.

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 Behavior

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

8.1 Dialogue and communication are those verbal skills which an officer may use to gain voluntary compliance from a non-compliant subject.

8.2 If dialogue and communication skills fail and/or prove to be inappropriate and 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.

8.3 Dialogue and communication should be viewed as an option at every use of force incident when appropriate and reasonable to do so.

9.0 Authorized Force Options

9.1 The approved force options that are authorized to be used within the RNC are;

- a. presence;
- b. dialogue and communication;
- c. soft and hard physical control techniques;
- d. oleoresin capsicum spray;

...

10.0 Use of Force Weapons

...

b. Soft Physical Control Techniques

- (1) Soft physical control techniques are those techniques in which officers use their physical strength to employ pain compliance techniques such as joint manipulations, throws and takedowns to gain compliance and physical control of a non-compliant subject.
- (2) Soft physical control techniques should be considered for use when reasonable and appropriate to do so, on a subject who needs to be controlled and has become non-compliant and is either passively or actively resistant towards the officer or others and attempts at a lower force option had failed or were inappropriate or unreasonable.
- (3) The Use of Force Report Form RNC # 096 shall be completed when this type of force is delivered.

c. Hard Physical Control Techniques

- (1) Hard physical control techniques are those which employ punches, kicks, elbows, knees and other similar techniques.

- (2) Officers employing hard physical control techniques are required to complete the Use of Force Report Form RNC # 096.

d. Oleoresin Capsicum (OC) Spray

...

Video(s)⁴³

230. The video depicts the portion of the evening's incidents where ZB is being escorted from the rear of the Complainants' home, to a police vehicle, by Cst. Morgan and Cst. Wagner. Based on my review, it shows as follows: Cst. Morgan steps off the back patio with ZB, and shortly after they step off the patio, Cst. Wagner joins in by catching up and physically assists with the escort, with her left arm, and they walk around a vehicle already on the property, and toward the vehicle Cst. Simmons had been operating, which is parked roughly parallel to the vehicle already on the property. As they reach the vicinity of the rear driver's side tire of the Cst. Simmons vehicle, Cst. Morgan's right hand comes off of ZB (having come off ZB and been placed back on in the next moment) and ZB makes an abrupt move, quickly bending his upper body forward and away from the Constables. ZB then seems to briefly stop short and is then immediately struck by Cst. Morgan using what looks to be his right fist, leaning ahead and having briefly bent at both knees before the strike, with the strike landing to either the back of head, or the neck. ZB's head moves forward after the strike. Cst. Morgan's right arm lowers and ZB is then pushed toward the police vehicle, and secured by both Constables against the rear trunk side of the vehicle, after which they move toward the vehicle they were operating, and out of the video frame.

Cst. Morgan

231. Cst. Morgan indicated it is not unusual to encounter some level of resistance when arresting somebody.

232. He discussed the definition of an impact strike, which he says is to draw the arm back and use a fist or palm with 100% of force. He said the strike we see on the video is not an impact strike. Cst. Morgan indicated he was not even aware of the strike to ZB until he was able to review the video footage with the OPP during their investigation.

⁴³ There are 2 channels of video from the Ball household. The first is focused on the rear area of the home, including the back patio. The second is positioned on the side/front of the home, and gives a view of where the strike took place. Each of the videos capture ZB being escorted off the back patio.

233. Cst. Morgan's evidence in relation to the escort from the home, and then the strike, was convoluted (on direct and cross examination) in relation to what he had independent recollection of, and what he was able to recall based on being refreshed by the video evidence. As best as I can tell, he recalls escorting (at least a portion of the escort) ZB and that ZB was agitated. He recalls ZB challenging him to a fight, and that he told ZB "Everybody's a tough guy when they have the handcuffs on." – this was recalled after reviewing video evidence, he says. He then recalls placing ZB in a police vehicle. On review of the video, he says what he saw in terms of the resistance and strike is that ZB made a sudden movement, and he reacted to the movement by using his right forearm to secure ZB's upper back to the police vehicle. He says the video shows him not striking ZB, but shoving him into the police car. He acknowledged in his statement to the OPP, saying it was his left arm that was used. He says he does not remember the resistance and reaction to ZB, but acknowledged telling the OPP that ZB offered an insignificant amount of resistance.
234. Cst. Morgan confirmed that he underwent use of force training, both before and after the subject events.
235. Cst. Morgan referenced his notes and indicated that they said in reference to ZB "Placed in Unit 256 without incident", and that this note would have been in reference to escorting him to the car. He also said that a lesson he learned here was that he would have documented ZB's resistance and his response had he remembered it.

Cst. Wagner

236. As noted above under the use of force commentary in relation to Cst. Wagner, she indicated in her testimony on review of the video that it appears she lost control of ZB's left arm, but she did not seem to indicate (on cross examination) she had an independent recollection of that. In a prior statement to the OPP she did not indicate that ZB looked to be resisting. But, and at the time of her testimony at this hearing, she had opportunity to see the video multiple times.
237. She characterized Cst. Morgan's actions as, establishing control. She characterized the escort as "an average walk back to the vehicle". She indicated she was surprised when watching the video, as she had not recalled resistance by ZB during the escort to the police vehicle.

Zackary Ball

238. ZB says that Cst. Morgan told him to "stop being a tough guy" after he was struck. He says Cst. Morgan punched him in the back of the head but at the time he did not know who it was. He indicated he did not feel he was posing any issues for the officers. He said, "I

mean, I was pepper sprayed, handcuffed. I mean, I can barely see where I'm walking, let alone try to run away." He felt he did not resist or pull away. He noted the strike to have felt like a punch. In reference to a prior OPP statement put to him wherein he said in relation to the strike, "I **later learned** I was punched in the head", (emphasis mine) he indicated this was not correct and he had told paramedics on the night of the events that he was struck in the head, and he told them he had a headache. This was also internally inconsistent with a point earlier in his testimony when asked if he told the paramedics about a punch in the head, he said they asked him if there were any injuries and he said he had a headache. The prior OPP statement was also put to him in relation to the nature of the strike, where he intimated it could have been a forearm used, but on testimony at the hearing, he was adamant it was a punch.

239. He admitted to not caring for the RNC.

Did ZB resist?

240. Before determining issues in relation to use of force, I first need to determine if ZB resisted. In other words, was there an event which precipitated a use of force? I was not provided with any authorities by the parties in terms of what constitutes resistance other than the definitions within the Use of Force Policy provided to me by the Chief. 7.1(c), quoted above, discusses Active Resistance, where 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.

241. There is no question that ZB resisted. His assertion that he did not flies in the face of the above definition, and is inconsistent with the video evidence, as well as a view offered by Hollett during testimony that ZB appeared to "pull away". In this regard, ZB appears to be suffering from selective memory. I accept that he was not trying to get away, but indeed his motions indicate non-assaultive physical action, by way of pulling away.

Was the force unnecessary and in contravention of policy?

242. Having established that ZB resisted, I must look at the force used in response.

243. Based on the evidence from the video, combined with the evidence of ZB, I determine that Cst. Morgan used his right hand to strike ZB in the head or possibly his neck. More weight is attributed to the video here, than the testimony of ZB, which showed some

inconsistencies. Cst. Morgan's right hand may have been in the shape of a fist, or he could have used his palm. The evidence of Cst. Morgan and Wagner is not of complete utility to me in this regard, as it seems neither has an independent recollection of the strike. It is troubling, that Cst. Morgan does not remember the strike. I appreciate this all happened very quickly, and that we are far removed from these events now, but he too appears to be suffering from selective memory in relation to the escort, and his view that the video shows him not striking ZB, but shoving him into the police car, shows an inability to perceive and fails to separate out two distinct uses of force evident on the video at this juncture (the strike, and, the movement toward/pinning to the police car). I have no way to measure the force of the strike, but only to say that based on the video, Cst. Morgan's arm moves quickly and he bends both knees prior to moving his right arm forward, and the strike caused ZB's head to move forward. The push to the vehicle is secondary and happens after and in supplement to the strike. Whether connection was made with the head or neck, or by an opened or closed hand, is not pertinent to my determination, as either point of contact with either manner of strike leads me to say that a hard physical control technique was used, and that manner of physical control technique was unnecessary.

244. Cst. Morgan is not permitted to use unnecessary force in the execution of his duty. The guidelines at 6.0 under the Use of Force Policy expand on this by noting that officers

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

245. The Use of Force Policy also references authorized force options at 9.0, with both dialogue and communication, and soft and hard physical control techniques, approved. If dialogue and communication are not appropriate to gain compliance of a subject (see 8.0) than an appropriate and reasonable force option may be used.

246. Under 10.0 of the Use of Force Policy, soft and hard physical control techniques are defined. As referenced above, soft physical control techniques are defined as

techniques in which officers used their physical strength to employ pain compliance techniques such as joint manipulations, throws and takedowns to gain compliance and physical control of a non compliant subject.

These techniques should be considered for use when

reasonable and appropriate to do so, on a subject who needs to be controlled and has become non-compliant and is either passively or actively resistant towards the officer or others and attempts at a lower force option had failed or were inappropriate or reasonable.

247. Hard physical control techniques

are those which employ punches, kicks, elbows, knees and other similar techniques.

248. ZB had become actively resistant, albeit briefly. Soft physical control techniques in this circumstance were appropriate as per 10.0 b.(2), as a lower force option may not have been reasonable at this point in the escort. The movement toward and reestablishment of control at the police vehicle by use of Cst. Morgan's strength would have certainly been enough. The strike qualifies as a hard physical control technique, as per the definition under 10.0 c.(1). This use of force, was not required. ZB was handcuffed with hands behind his back, had recently been OC sprayed, and was being accompanied by two officers. As such, he was severely diminished insofar as his being a threat or viably running away. There was no need for Cst. Morgan to strike ZB. It was wholly unnecessary. Less violent means could have been used (see 6.1). ZB's resistance while active in nature, was not significant, by Cst. Morgan's own admission and as can be seen on the video. More force than necessary was used. This has been proven to my satisfaction on a balance of probabilities, with the video being entitled to substantial weight. The reasonable member of the community, would be shocked by the strike, and I do not believe that Cst. Morgan exercised his discretion appropriately. The objective of containment and gaining compliance could have been accomplished without striking ZB. The privilege to use force is limited and that privilege was misused.

Conducted himself contrary to 3.(1)(c) - be discourteous to a member of the public, and, 3.(1)(j) carried out his duties in a manner contrary to the Policy and Procedure[s] Manual.

249. This complaint relates to the allegation that Cst. Morgan was discourteous to KB, using profanity, having done so in contravention of RNC policies which relate to courtesy, and deportment (each of which are already referenced above at paragraphs 202-203).

250. KB testified that Cst. Morgan cursed at her in telling her to remain away from a police vehicle, and that she felt belittled by the Constables. She says she was upset when she arrived.

251. Cst. Morgan submits that the evidence demonstrates that KB was irate when she arrived at the scene. He says he was assertive. He says he did not curse at her, and points to a previous statement which was put to KB, which KB gave to PCC investigator Robert Cuff, wherein she did not note discourteous acts by Cst. Morgan. This inconsistency leads me toward uncertainty as to whether it happened.
252. While I do not agree that cursing at KB by Cst. Morgan, if proven, “does not meet the *de minimus* threshold for a charge of professional misconduct” (in part because I believe an officer cursing at someone would contradict the reasonable expectations of the community), I am unable to say that Cst. Morgan cursed at KB. I certainly believe it to be possible that he did, but I cannot say that it is more probable than not.

Synopsis

253. Much of the above can be summarized succinctly as follows: Cst. Morgan and Cst. Wagner attended at the Ball household after receiving an emergency alert from a fellow officer. They arrived to find a fellow officer in the midst of a struggle. They were advised to be aware of another person on site and that he was to be arrested. They acted quickly in that regard, as was required in the circumstances, keeping in mind safety for others and themselves while on the back patio of the Ball home. All of this happened extremely quickly as can be seen on the video footage. It was a dynamic situation. When ZB showed resistance, Cst. Morgan did more than was necessary to bring him back under control. Neither Constable can be said to have been discourteous to KB. The complainants are upset because they feel none of this should have happened in the first place, all of it stemming it seems from DB driving inappropriately through an accident scene and intersection. They may be right in that regard, but that is an issue and those are questions better dealt with in relation to the complaint as against Cst. Simmons. Insofar as Cst. Wagner and Cst. Morgan were introduced into the events of November 8 2017, my view is that of all charges laid in the reference(s), only in relation to the charge against Cst. Morgan under 3.(1)(b) and 3.(1)(j), can it be said an officer conducted themselves (himself) in a manner unbecoming.

Penalty

254. Section 33 of the *Act* indicates various orders I may make following my determination, and in this case particularly relevant are those noted under 33.(1)(b). Both Cst. Morgan and the Commission should have the opportunity to present submissions in this regard, and as such I invite them to do so, on dates to soon be agreed upon.

Costs

255. Section 33 of the *Act* under section 33.(1)(c), 33.(1)(d) and 33.(1)(e) speaks to costs that I may order. I invite submissions on costs as well. The Commission has requested “reasonable costs”. Cst. Wagner has asked for “an order for costs against the Commission”. I do not know Cst. Morgan’s position on costs. The result here is a mixed one with each of the parties having success, and only Cst. Wagner having been fully successful on the merits (but not on the *Charter* Application). Any costs awarded may be taxed in accordance with the *Judicature Act*.

Submissions of the Chief of Police

256. Section 35 of the *Act* states as follows:

Recommendations

35. Notwithstanding section 33 and an order which the adjudicator may make, the adjudicator may also make recommendations respecting matters of concern or interest to the public relating to police services by sending the recommendations, with supporting documents, to the minister.

257. Submissions of the Chief of Police (the Chief) in this public complaint relate to general matters of policing and public interest that arise from the subject matter of this public complaint, including, RNC policy, training and recommended legislative amendments respecting RNC disciplinary hearings. The Chief, in anticipation of recommendations I may make arising as a result of issues raised within the public complaint proceedings, has made submissions as to such possible recommendations.

258. The Chief’s main area about which he seeks recommendations from me, is in relation to the need for public transparency and openness respecting RNC internal disciplinary proceedings before disciplinary panels. Specifically, the Chief takes the position that it is in the public interest and in the interest of the RNC as a police service that RNC disciplinary proceedings (a separate forum from this one) conducted under the *Regulations* be made open to the public.

259. Also worth noting, is that the Commission has asked for commentary and recommendations from me with respect to the improvement of training for RNC officers in relation to the following subjects: De-escalation techniques; arrest with or without a

warrant; attendance at private property and entry into private residences with or without a warrant.

260. The Chief has provided me with extensive materials in relation to possible recommendations, as well as made very useful and interesting submissions on this topic on our second and final day of submissions. He wants public confidence increased, as well as the confidence of officers themselves, in the RNC.

261. The Chief agreed with me that any recommendations I may make need not be contemporaneous with the decision in the complaint. The *Regulations*, while prescribing a timeline at S.28 as to a written decision in respect of whether the complaints have been made out, are silent on a timeline insofar as S.35 recommendations under the *Act* are concerned. As such, I intend to examine the submissions/requests in relation to potential S.35 recommendations to the Minister responsible, at a time following the making of an Order under 33.(1)(b) of the *Act*.

Thank you very much to all Counsel for their extensive submissions, both oral and written.



Signed electronically

Dated this 25th day of November 2021
Andrew J. Wadden, QC - Adjudicator