Citation: ☼ R. v. Grafton
2023 BCPC 191

Date: ☼20230822
File No: 74206-1
Registry: Prince George

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

JOSHUA GRAFTON

PUBLICATION BAN re: evidence of Mr. Cuyler Aubichon with respect to his charges on Prince George file 75735, and s. 517(1) of the *Criminal Code of Canada*

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE P. MCDERMICK

Counsel for the Crown:	M. Richards and C. Lo
Counsel for the Defendant:	Ravi Hira, KC and Ryan Hira
Place of Hearing:	Prince George, B.C.
Dates of Hearing:	Oct. 25-29, Nov. 1-4, Dec. 6-9, 14-16, 2021; Feb.22, 28, Mar.1-4,10,11, Apr. 4-6, June 15-17, Aug. 9, 23-26, Nov. 28-30, Dec. 1, 2, 2022; April 3-6, 2023
Date of Judgment:	August 22, 2023

A Corrigendum was released by the Court on August 24, 2023. The corrections have been made to the text and the Corrigendum is appended to this document.

I Overview:

[1] In the early morning hours of February 18, 2016, several members of the Prince George Royal Canadian Mounted Police ("RCMP") were conducting surveillance of a stolen Dodge Ram 1500 (the "Truck"). Constable Grafton was called out to assist with the apprehension and arrest of the occupants of this vehicle. He was a dog handler for the Prince George Canine Unit. Eventually, he proceeded to the VLA, which is a high crime area. Ultimately, the Truck was located in the alley between Norwood Street and Oak Street and bounded by Strathcona Avenue and Milburn Avenue. Officers planned to "box in" the vehicle so that the occupants could not flee. At approximately 6:30 a.m., several officers drove into the alley from both entrances. Constable Grafton was the first to arrive behind the stolen truck. He exited his vehicle, procured police service dog ("PSD") Azar, and proceeded forthwith to the driver's side of the truck. He opened the door and utilizing Azar, he extracted the driver, Mr. Aubichon, from the vehicle. Mr. Aubichon was taken to the ground where the PSD continued to apply force and bite his left arm. In summary, during this 52 second engagement, Constable Grafton struck Mr. Aubichon seven times, which includes one knee strike. Eventually, the PSD released him and he was arrested and handcuffed. Other officers apprehended and arrested the passenger, Mr. Basil.

[2] Several hours later, Constable Grafton drafted his dog handler report (the "Report"). He electronically submitted it at 9:52 a.m. on that same date. He also completed a Subject Behaviour Officer Response use of force form (the "SBOR Report") on February 28, 2016.

[3] Unbeknownst to the officers at the time, this incident was captured on CCTV footage (the "Video") from a nearby residence. Constable Grafton became aware of the Video in March 2016. *Inter alia*, it shows him using force on Mr. Aubichon. It

demonstrates some discrepancies between his reports and the incident as recorded by the Video.

[4] It is not controversial that Constable Grafton applied force to Mr. Aubichon by deploying and utilizing PSD Azar, and by striking him while he was on the ground. The main issue to resolve is whether his actions can be justified pursuant to section 25 (1) and (3) of the *Criminal Code* (the "*Code*") as necessary, proportionate and reasonable.

[5] As a result of the differences between his report and the incident as captured by the Video, Constable Grafton has also been charged that between February 18 and March 17, 2016 he wilfully attempted to obstruct, pervert or defeat the course of justice by making false or misleading entries in his dog handler report. A second main issue to resolve is whether he formed the requisite specific intent for this offence, or whether such discrepancies were the product of simple error or mistake.

[6] Both parties have challenged the reliability and credibility of some of the main witnesses including Mr. Aubichon and Constable Grafton. Accordingly, assessing the evidence and making factual determinations are also central themes.

II The Evidence:

A Background and sundry witnesses:

[7] The Crown at all times bears the burden of proof to the rigorous and strict standard of proof beyond a reasonable doubt. As explained in *R. v. Starr*, 2000 SCC 40 [2000] 2 SCR 144, at para. 242, it lies along that measure "much closer to 'absolute certainty' than to 'a balance of probabilities'". Proof beyond a reasonable doubt is achieved if, after considering the totality of the evidence, the court is sure that the accused committed the offence charged.

[8] Additionally, Crown must disprove any attendant defences beyond a reasonable doubt, see *R. v. Mason*, 2022 BCPC 85 at para. 55. Counsel for Constable Grafton, Mr. Hira, argues that section 34 of the *Code*, self defence, also applies and must be

disproved by Crown. While Crown doesn't disagree, they note that there is a significant degree of overlap between a section 25 and section 34 analysis. They submit that the result is likely either a bundled success or failure of these defences. The majority of both counsel's submissions focussed on the section 25 analysis. This will be considered first.

[9] I intend to assess the reliability and credibility of the witnesses in this section and then make concrete findings of fact in the use of force analysis that ultimately follows.

[10] This trial spanned many days. The majority of witnesses gave sundry evidence where neither credibility nor reliability was seriously challenged. Constable Haunts and Corporal Hipkin testified for the Crown. They were both reliable and credible witnesses. No one contended otherwise. They dealt with Mr. Aubichon and Mr. Basil at the police station.

[11] The following two witnesses require brief comment: Allison Carstairs was an investigator for the Independent Investigations Office of British Columbia (the "IIO"), she testified along predictable lines respecting initial scene investigation and the handling of exhibits. With respect to this evidence, she was sure-footed and her credibility and reliability was unchallenged. She then gave some evidence respecting use of force and use of force training she had received. A laconic report she had drafted which included an analysis of officer Grafton's use of force with respect to this specific incident was filed as exhibit 15 in these proceedings. There were further twists and turns that ultimately led to an unsuccessful application by the Crown to have Ms. Carstairs declared adverse pursuant to section 9 of the *Canada Evidence Act*. Mr. Hira sought to cross-examine her on her use of force analysis and her qualifications. Crown was strenuously opposed to this approach. This Court allowed such cross-examination which was predominantly motivated by trial fairness issues, all in a context where she at least had some use of force training.

[12] At the end of the day, I afford her evidence on use of force no weight. I say this, *inter alia*, for the following reasons. First, she has left this business years ago. Second,

she has never been formally qualified as an expert in Canada. Third, her report was characterized as preliminary in nature and it is unclear whether she had fulsome materials before her when it was created. Finally, her report was not entirely her own and may have been influenced and\or authored in part by her late employer.

[13] Mr. Butler was proffered by the Crown as an expert witness in police use of force. Specifically, Crown sought to qualify him in the following areas: Police use of force; police use of force training; police use of force assessments; application of use of force models, including the RCMP Incident Management/Intervention Model (the “IMIM”); police safety training; and police risk assessment.

[14] After a protracted and fiercely contested qualifications *voir dire* where both his qualifications and credibility were strenuously challenged, it became clear that Mr. Butler is indeed an expert in the referenced areas, as the word “expert” is understood in the finest Canadian traditions of scholasticism, training and experience. In oral reasons for judgment rendered April 4, 2022, he was qualified in the areas proposed by Crown. This Court noted he was not a partisan witness and indeed, throughout these proceedings his credibility has remained categorically intact. His evidence is of assistance to this Court.

[15] The reliability and credibility of Constable Grafton, Mr. Aubichon and other witnesses are central themes in this matter, accordingly, the general structure of analysis is set out in the seminal case of *R. v. W.(D.)*, [1991], 1 S.C.R 742, which states at para. 11 that in cases where credibility is important:

> [11] …First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[16] Additionally, I am guided by the language of Justice Wood in *R. v. C.W.H.*, [1991] CanLII 3956 (BC CA) at para. 24., which nuances *W.(D.)* and gives the following further advice: If after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[17] Section 25 and section 34 defences may fail even if a Court accepts the accused's evidence, since these defences require an objective assessment of their subjective beliefs. Accordingly, a modified *W.(D.)* analysis is required for the assault charges, as explained in *R. v. Reid*, 2003 CanLII 14779 (ONCA) at para. 72:

> [72] …I would suggest that in future cases, when the defence of self-defence is raised and the trial judge believes that a W. (D.) instruction is warranted, the jury should be instructed along these lines with respect to the first two principles:
>
> 1. If you accept the accused's evidence and on the basis of it, you believe or have a reasonable doubt that he/she was acting in lawful self-defence as I have defined that term to you, you will find the accused not guilty.
>
> 2. Even if you do not accept the accused's evidence, if, after considering it alone or in conjunction with the other evidence, you believe or have a reasonable doubt that he/ she was acting in lawful self-defence as I have defined that term to you, you will find the accused not guilty.

[18] In *Bradshaw v. Stenner*, 2010 BCSC 1398, Justice Dillon sets out a number of factors to consider when assessing credibility at paras. 186-187:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31

> O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) [*Faryna*]; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para.128…
>
> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 (Alta. Q.B.) at para. 13). I have found this approach useful.

[19] This analysis was categorically adopted in the context of a criminal trial by Justice Ker in *R. v. Scott*, 2019 BCSC 313.

[20] The evidence of a police officer is afforded no special pole position *per se*. Conversely, the testimony of an offender must not be presumptively discounted. Each case turns on its own unique facts and analysis, see *R. v. Chahal*, 2023 ABPC 32 at para 32:

> [32] Though I recognize that Mr. McNabb is a convicted offender with a violent criminal record, this does not mean he should necessarily be disbelieved. In cases such as this one, where a correctional officer is accused of assaulting an inmate or using excessive force, and the public's confidence in the correctional system is questioned, trial judges must be particularly cautious not to make character assumptions. Inmates should not be assumed to be unreliable or incredible witnesses because they have been convicted of an offence, and guards should not be assumed to be credible and reliable witnesses simply because of their position of power. Such assumptions undermine the administration of justice.

[21] See also *R. v. Gelowitz*, 2019 SKQB 183 at para. 61 where the Court reasoned in a similar fashion.

[22] This was a dynamic, high-risk situation. Memory distortion can occur during stressful or traumatic events see for example, *R. v. McCallum*, 2022 BCPC 261 at para. 95:

> [95] As for Mr. McCallum having had an opportunity to calm down prior to his statement, respectfully, this misses the point. The consideration of the impact of anxiety and fear on memory primarily involves the anxiety and fear at the time the event is witnessed, not at the time of the statement. The courts have recognized the common sense understanding that the distortion of memory can occur *during* stressful or traumatic events: *R.* v. *Perlett*, (2006), 212 C.C.C. (3d) ONCA at para. 103.

[23] See also *R. v. Millington*, 2016 BCCA 293 at para. 40:

> [40] The judge concluded, moreover, that he had grave reservations about whether the evidence could satisfy the necessity criteria. In his view, a trier of fact is capable of understanding that stress associated with fast-moving events may lead to misperception and inaccurate memory of what happened: see for example, *R. v. Perlett* (2006), 212 C.C.C. (3d) 11 (Ont. C.A.) at paras. 102-108. In my opinion, this conclusion was open to the judge. Cst. Millington has not pointed out any error in that conclusion and I do not think it can be criticized. Cognitive science may explain why the phenomenon occurs, but the fact of the phenomenon is well known. A scientific explanation of a commonly known matter may be of little assistance, as the judge recognized, to a trier of fact. The trial judge was entitled to conclude in substance that a trier of fact is capable of assessing the relevance of the phenomenon in the particular circumstances of this case.

[24] This analysis applies symmetrically to all witnesses who were present at the scene, including Constable Grafton and Mr. Aubichon.

B The Video:

[25] The Video capturing the incident was filed as an exhibit in these proceedings. It may be used to determine the actions of the participants. Findings of facts may result from the use of the video; see *R. v. Rice*, 2015 ONCA 478 at paras. 2 and 6. It is of assistance in determining whether the force deployed was reasonable, and whether Constable Grafton produced a false or misleading dog handler report.

[26] On the one hand, the Video shows details including, snowflakes, tire movement, vehicular exhaust and the breath of the officers. Conversely, the limitations of the video are obvious: it is from a relatively distant perspective, it is monochromatic, and it has no sound. The incident was darker than events depicted in the Video (see Constable MacDonald's evidence). David McKay, Crown's expert in forensic video analysis, confirmed in cross-examination that pixilation occurs when images are enlarged in it. Ultimately, I agree with Crown's characterization of the Video's overall utility: "While the video may not be able to discern subtle muscle movements while Constable Grafton grapples with Aubichon on the ground, this case does not involve that. It involves gross movements of vehicles, humans and dogs."

C Constable MacDonald:

[27] Constable MacDonald gave evidence as part of the Crown's case. He is an important witness, in part, since he was the only police officer called by the prosecution who was actually at the scene of the incident.

[28] Ms. Richards, on behalf of the Crown, presses that his testimony should be viewed cautiously. She submits that he was excessively pliable in cross-examination and quick to agree with suggestions of counsel which were demonstrably false. For example, counsel put to him that Constable Grafton did not have access to the encrypted channel that he and other members were communicating on. He agreed. Later, counsel suggested to him that he didn't actually know what channels Constable Grafton had access to, and he again agreed.

[29] The foregoing, however, overlooks the full body of his testimony. On a couple of occasions similar exchanges occurred in direct examination. Here are two examples: With respect to the initial part of the arrest, Constable MacDonald testified he heard officer Grafton saying "Stop resisting, you're under arrest". Moments later, Ms. Richards then asked:

> Q: And the police commands on the passenger side were similar, stop resisting and show me your hands?"

A: Yes.

[Transcript of Proceedings, December 15, 2021, page 6, lines 3-5]

[30] This was an innocent, modest mischaracterization of his actual testimony just provided.

[31] Mr. Hira objected on the basis that the question was leading. It was re-asked in an open ended fashion and he returned to his own original testimony:

Q: Passenger side you heard commands?

A: Yes.

Q: Which commands were those?

A: “Stop resisting, you’re under arrest”.

[Transcript of Proceedings, December 15, 2021, page 6, lines 22-25]

[32] Constable MacDonald had earlier testified that he assisted Constable Johnston in handcuffing Mr. Aubichon. The following exchange occurred later in direct examination:

Q: …and this is where you attend to the assistance of Constable Grafton who is on the ground [indiscernible/voice low]

A Yes.

Q -- Mr. Aubichon?

A Yes.

[Transcript of Proceedings, December 15, 2021, page 36, line 47 - page 37, line 5]

[33] This was an innocent yet material mischaracterization of his actual testimony. Mr. Hira objected on that basis which led to the following answer:

A Yes, it was Constable Johnston I was helping.

[Transcript of Proceedings, December 15, 2021, page 37, line 14]

[34] There is no asymmetry respecting his agreeability. Furthermore, these isolated few examples are hardly cataclysmic and cause the Court no concerns respecting his

overall calibre as a witness in light of his full body of testimony which spanned several days. Ms. Richards notes that in ordinary prosecutions the police are “on side” with the Crown which she says is patently not the case here. Obviously, I decline to take judicial notice of any general bias and furthermore, I find no specific partisanship with respect to this witness.

[35] There are however, some concerns with respect to his evidence. He testified that he drove into the alleyway from the north towards the front of the truck. He was the third car in. He got out of his vehicle, drew his firearm and held it in the low ready position. He proceeded towards the driver’s side of the truck. It is not controversial that it is Constable Grafton and PSD Azar who were initially engaged with Mr. Aubichon on the ground by the driver’s side of the Truck. Officer MacDonald, however, testified that as he approached, he saw Constable Johnston holding Mr. Aubichon’s arm on the ground. He had no recollection of seeing the police service dog. He watched the Video and was aware of these discrepancies. He was a fully involved participant in this dynamic, high-risk encounter and so these errors are understandable, but do cause modest concerns with respect to his overall reliability, see *Millington* and *McCallum*.

[36] He was preoccupied with specific tasks that required his attention, especially in the first couple of minutes of the encounter, and was therefore somewhat limited in his ability to observe: After these initial observations at the driver’s side of the Truck, he proceeded to the back of the Truck and briefly dealt with a civilian witness, Simon Gould who had attended with Constable Grafton. Constable MacDonald then went around the back of the Truck and physically helped members arrest Mr. Basil. He then returned to the driver’s side and assisted in placing handcuffs on Mr. Aubichon.

[37] But apart from these referenced isolated concerns, he generally gave his evidence in a reasonable, restrained, and rational fashion, largely consistent with the video of the incident. Besides the foregoing example, there were no jarring internal or external inconsistencies with his evidence. He was neither combative nor haughty with either counsel. His answers were responsive to the questions asked. He had no

apparent motive to lie. His recall was detailed and specific. In summary and in totality, I find he was generally reliable, and fully credible.

[38] As an aside, he was cross-examined about nuanced observations regarding the initial altercation on the ground between members and Mr. Aubichon. I disregard this testimony, since it is the precise area where Constable MacDonald's evidence suffered.

D. Cuyler Aubichon:

[39] Cuyler Aubichon gave evidence for the Crown. He was the driver of the Truck. Crown concedes there are some issues with respect to his testimony, but they submit that his credibility and reliability remain intact and that his evidence ought to be accepted. Defence counsel categorically demurs, characterizing him as a "stranger to the truth."

[40] Crown submits that Mr. Aubichon is not a *Vetrovec* witness and that although he has a history of criminality; it is insufficient to elevate him to the level of "unsavoury". They submit he left his gang lifestyle behind when he was 16. Counsel presses that he is not someone ingrained in a criminal lifestyle. With respect, this understates his antecedents: He has a criminal record with entries of significance including trafficking, and a violent robbery. He has lied to police about his name while he was at warrant status to evade detection. He admitted he was a drug trafficker and made his living as such. He confirmed in evidence that he has robbed hundreds of drug dealers. At the time of his testimony, he was incarcerated awaiting manslaughter charges, which is of limited relevance since he enjoys a presumption of innocence.

[41] Accordingly, I approach his evidence with a degree of caution, but I do not discount it *per se*, and indeed, I note that a court may even believe a disreputable witness, even on disputed facts that are not confirmed if I conclude that the witness is telling the truth, see *R. v. Vallee*, 2022 BCCA 11 at para. 143.

[42] Mr. Aubichon is an indigenous male with a history of interactions with the police. It is not controversial that this status is a relevant consideration when assessing

credibility; see *R. v. Theriault*, 2021 ONCA 517 at para. 146. Crown submits his evidence must be viewed through the lens of a marginalized member of society, which is true. They highlight the following examples in evidence: He thought it was going to be a “regular traffic stop” and that they would be pulled out of the vehicle. He also thought that he was going to be shot if he did not comply with police commands. They submit that these examples highlight his perception of police and make his evidence respecting compliance with police commands more compelling. With respect however, the latter example is partially belied by his own evidence where he forestalled compliance and risked the consequences, at least briefly, to secure his drugs down his pants.

[43] His testimony is corroborated in part by Constable MacDonald and other officers, the Video, scene photographs, a video from a drug house showing some pre-incident activity consistent with his account, and the cell block video.

[44] At the end of the day however, notwithstanding the able submissions of Crown, I do have concerns of significance with respect to Mr. Aubichon’s evidence.

[45] He used methamphetamines just prior to the incident in question, which doesn’t impact the Court’s analysis, since the only evidence on the effect of this consumption is from Mr. Aubichon himself who claimed it made him feel “normal” since he used “more than the usual person.”

[46] In 2020, Mr. Aubichon commenced a civil action against Constable Grafton and the RCMP. The fact that he has sued his alleged assailant is not in itself evidence of a motive to fabricate, see *R. v. Zolman*, 2020 ONSC 6611 at paras. 117 and 128. He filed an affidavit in those proceedings, apparently sworn on December 4, 2020 (the “Affidavit”). I agree with Crown that the circumstances surrounding the making of the affidavit are relevant. He swore it remotely. He believed his lawyer drafted it. He appeared by video conference on his phone and “clicked on it” to submit it. These circumstances appear somewhat detached from the traditional solemnity of swearing such a document. Nevertheless, he testified that he reviewed it and understood that by signing it, he was “swearing the affidavit” which meant he was telling the truth. Mostly

however, this Court is preoccupied with the passages he adopted as true pursuant to his sworn *viva voce* evidence in these proceedings.

[47] He testified that officers called him by significant and troubling racial epithet. He failed to mention this in his IIO statement, which is somewhat surprising since it is a significant assertion, but far more importantly, this evidence is contradicted by the evidence of Constable MacDonald who denies this occurred. Perhaps the officer completely missed such utterance, but it's a salient claim and all in all, causes some concern regarding Mr. Aubichon's account.

[48] This worsened in cross-examination. He admitted to swearing the Affidavit and that it was the truth. A portion was put to him: "Grafton, while he was hitting me, was cursing at me and calling me (the racial epithet)". He had also testified that he did not know who called him that because his face was down in the dirt, which contradicts that passage, but he wouldn't concede that that portion of the Affidavit was false. This is disquieting.

[49] Mr. Hira submits that Mr. Aubichon maintained that Constable Grafton hit him with a baton. Crown submits that this was not his evidence, but rather, the evidence was that he *felt* he was hit with a baton. But this is not quite accurate. While he did give evidence that he *felt* he was hit with a baton, he also went further and agreed with Mr. Hira's suggestion that Constable Grafton struck him with a baton, by answering, "to my memory, yes" [Transcript of Proceedings, April 5, 2022, page 13, line 32].

[50] He then went on and repeatedly asserted that the Video demonstrates Constable Grafton striking him with a baton or hard object. During cross-examination, he identified a point in the Video where he claims this occurred. While the Video is only of medium quality (roughly speaking), it simply does not show Constable Grafton ever striking Mr. Aubichon with a baton.

[51] Crown submits that given the manner in which Constable Grafton's arm moved with the dog leash in that moment, Mr. Aubichon's claim is not unreasonable. I do not

agree with that characterization. It only seems innocuous since we know the assertion is false. Had I accepted his evidence, for example, it would have led to a very different, distorted use of force analysis. It is a troubling exchange.

[52] There are some external inconsistencies in Mr. Aubichon's evidence. As already analyzed, I conclude that Constable MacDonald is a relatively reliable witness and was credible. Mr. Aubichon told the IIO that:

> "I could hear all the police officers chanting, jumping around saying 'Woo', whatever, right? They were all chanting around, jumping. They were saying, 'you'—saying, 'Yeah, you fucking little goof' and going off, 'that's what you get for stealing, for stealing,' and I didn't know what they were talking about, right?"

[53] He confirmed this in his testimony. Officer MacDonald gave evidence that he did not hear police officers saying those things. He testified that no police officers were chanting around and jumping up and down.

[54] I do note that when Mr. Aubichon was shown the video, he confirmed that officers were jumping when dealing with Mr. Basil, which is true. But in totality, the above passages represent a material, external inconsistency between Constable MacDonald's testimony and Mr. Aubichon's evidence which is concerning, *per se*.

[55] Mr. Aubichon testified they were chanting while they were beating him. He told the IIO it was probably six or eight people altogether. In court he clarified that he didn't know how many were chanting, he was just guessing.

[56] He also testified that the officers told him that they wouldn't be making statements, or writing down any notes. Officer MacDonald testified that he did not recall hearing any officers say this. Had it been said he would've remembered it and reported it. Mr. Aubichon's claim is also belied by the existence of the significant volume of police reports, filed as exhibits in these proceedings.

[57] Mr. Aubichon testified that the officers were laughing about it smelling like “shit or piss or something.” Constable MacDonald did not recall any officers laughing at him or anyone saying that, “it smells like piss.”

[58] I am mindful of the limits of Constable MacDonald’s evidence for the reasons already set out, but as already analyzed, he is a relatively reliable and fully credible witness. In summary and in totality, there are a significant number of external inconsistencies in Mr. Aubichon’s evidence.

[59] It is not controversial that towards the end of the encounter on the ground, PSD Azar changed his grip, and bit and held Mr. Aubichon’s right arm. After a few seconds of this, PSD Azar released him and the physical altercation came to an end. Mr. Aubichon was shown stills of this portion of the melee which clearly showed the PSD biting his right arm. Counsel tried to help the witness understand the orientation of his body in the images. He repeatedly testified that the dog did not have his right arm and never had his right arm. The questions were uncomplicated. The Court was somewhat astonished by his answers which were totally disconnected from the real evidence that we could all see. It was clarified that he did not need glasses and was not dyslexic although he noted the images were pixilated. Crown was permitted re-direct in this area over the protestations of counsel. He said the dog only bit his left arm - that’s where he has scars. He was basing his recall on what he felt. He testified that he could now see the dog had his right arm, “kinda, I guess”. While this partially rehabilitates his original answers, the Court remains concerned about what occurred during cross-examination, where his testimony was totally disconnected from the real evidence and counsel’s repeated and simply-worded line of questions. He was intransigent over time, notwithstanding the straightforward manner in which the questions were asked. It remains a troubling body of testimony that impacts his reliability and\or credibility as a witness.

[60] He testified he had never been beaten up by police or corrections prior to February 18, 2016. His Affidavit was put to him where he swore that he’s “been beaten

up by police and Corrections staff many times." This contradiction was put to him and he then said he had been "roughed up" many times. Eventually he confirmed that the above portion of his Affidavit was indeed false. Since the subject matter is collateral and not central to the incident at hand, it is not of major concern, but nor is it totally irrelevant to an assessment of the overall quality of his evidence.

[61] In summary and in totality, there are numerous problems with respect to Mr. Aubichon's evidence. These problems are cumulative and cause this Court to have material concerns with respect to his reliability and\or credibility as a witness. It would be dangerous to rely upon the details and nuances of his testimony where it stands all alone. I do not accept his evidence except where it is consistent with other evidence.

E: Corporal Sharpe:

[62] Corporal Sharpe gave evidence for the defence. He was one of the investigators at the scene in question. In summary, he entered the alley from the north and was the first to arrive in front of the stolen Truck. He exited his vehicle, drew his service pistol and held it in the low ready position while remaining behind the driver's door to provide concealment. He issued commands to the occupants of the Truck, including "show me your hands". Seeing that Constable Grafton was dealing with the driver, he then proceeded to the passenger side of the vehicle and dealt with the passenger, Mr. Basil, who had exited the vehicle. It is not possible to determine the nuances of Corporal Sharpe's interactions with Mr. Basil by viewing the Video, since the Truck mostly occludes these events. He testified Mr. Basil was attempting to flee and was non-compliant and so force was used by officers in his arrest, which included Corporal Sharpe jumping onto Mr. Basil. Officer Connell also assisted in this arrest. Defence counsel submits his evidence should be accepted, while Crown argues that it should be categorically rejected.

[63] I will say at the outset that I have concerns with respect to Corporal Sharpe's evidence. He was cross-examined repeatedly about shortcomings and omissions in his police report. His steadfast answer to this was that the sole purpose of his notes is as

an *aide memoire* to refresh his memory. This culminated in an exchange with counsel where Crown read to him swaths of RCMP policy, setting out the purpose of note taking which includes: to refresh memory, justify decisions, record evidence, lend credibility to testimony, and substantiate information years after the original entry. And conversely, the policy sets out that inadequate note taking can compromise an investigation and subsequent court proceedings. When this was all put to Corporal Sharpe, he categorically maintained that note-taking is just there to "refresh our memory". He's wrong about that, and this reflects an intransigence with counsel and a disconnectedness with the cross-examination process which is concerning.

[64] He testified that he saw the brake lights of the Truck blinking on and off multiple times. They were blinking rapidly and there were slow blinks as well, "back and forth". This is a protracted, detailed and nuanced set of observations which is contradicted by the Video. He also testified that the Truck went slightly backwards which is also inconsistent with the Video. This latter testimony respects a subtler, briefer event that is far less concerning than the evidence respecting the brake lights. When asked to explain these discrepancies, he suggested that perhaps there were inadequacies with the Video, which for these purposes, there weren't. This causes reliability concerns.

[65] Corporal Sharpe testified that it is likely he disclosed to his colleagues that he jumped on Mr. Basil during the arrest so that they could make a proper medical assessment. The Video was played for him. It shows him standing with officers near the front of the Truck after the arrests had been completed. Officer Connell had Mr. Basil in his charge and care by the rear of the vehicle, distinctly separated from this group of officers. During this time, the Video shows Corporal Sharpe jumping up and down once. When asked about why he did that, he testified in summary that he was demonstrating the use of force he used, to assist with a proper medical assessment of Mr. Basil. He was then asked why he didn't go and tell Officer Connell directly (since he had care and custody of Mr. Basil). He replied that he assumed he would've seen it, "when he first came with me at the time." The Video was then played depicting events after Officer Connell and Mr. Basil had left the scene. Corporal Sharpe can be seen standing in a

group of five officers. The Video shows him hopping again a couple of times. He was asked to explain the purpose of this since Mr. Basil had been removed from the scene. He replied in summary, that he had no recollection of the details of any conversation among officers at that time and it could have been about any number of things including "family matters". In sum, these are troubling exchanges.

[66] Finally, he testified that he couldn't take notes afterwards at the scene because the VLA is a high crime area and so he had to remain vigilant at all times. I agree with Crown that this seems somewhat contradicted by the Video which shows him walking around the alley casually with his hands in his pockets. This is a relatively minor issue however, for the following reasons. First, it is not controversial that the VLA is a high crime neighbourhood. Second, it is difficult to determine Corporal Sharpe's thought process based upon gait alone. Third, with respect to risk management, casually walking around is one thing, writing with your head down over your notebook is quite another.

[67] The foregoing in aggregate, at the very least, gives rise to significant reliability concerns with respect to the witness' testimony and I decline to consider it, except where it is corroborated by other evidence, where it retains a residual utility.

F: Constable Grafton:

[68] Constable Grafton testified in his own defence. Crown submits his evidence should be disbelieved, as it was self-serving, non-responsive to questions in cross-examination and is internally and externally inconsistent. They submit he was not a credible witness. Mr. Hira submits he was believable and credible and withstood Crown's "meandering" cross-examination which spanned almost four days. I have carefully considered counsels' submissions respecting this witness' credibility and reliability. Some of counsel's submissions do not require comment.

[69] Constable Grafton put his character in issue. Despite the strenuous opposition by defence counsel, Crown was permitted to cross-examine him on prior acts of alleged

discreditable conduct to attempt to neutralize the good character evidence led by him and for credibility purposes. These areas shall be addressed as they arise in the analysis of the evidence.

[70] When an accused has put character into evidence, the Crown may elicit evidence to rebut the good character of the accused and impugn his credibility generally, See *R. v. Dalen*, 2008 BCCA 530 at para. 42. Even uncharged allegations may be the subject of cross-examination, see *R. v. Moores*, 2020 NLCA 23 at para. 23. In summary, the evidence is not propensity evidence and may not be used as such. Rather it is evidence that may neutralize the good character evidence led by the accused and may be relevant for a credibility assessment, see also *R. v Sipes,* 2012 BCSC 351 at paras. 27-28.

[71] In any event, to the extent that the good character of Constable Grafton has been established and\or remains intact, I am of the view that this is of little utility in correctly adjudicating the core issues at hand, to wit: whether the Crown has established the elements of the offences charged to the rigorous standard of proof beyond a reasonable doubt. See, *R. v. Dobbs*, 2016 ONSC 4957, at para. 23, where the Court reasoned in a similar fashion.

[72] I do have some concerns with respect to Constable Grafton's evidence which shall be analyzed in due course. Some of Crown's submissions however, can be dealt with expeditiously.

[73] Constable Grafton testified that he was called out to assist with the arrest of the occupants of the stolen truck. He asked his roommate at the time, Simon Gould, who was a fire captain in Prince George, whether he wished to attend with him on this high-risk call. Simon Gould was proficient in dog training "from a civilian side" as he regularly trained with the canine unit. They attended to the scene in question. Officer Grafton got out of the vehicle, procured Azar and proceeded forthwith to the driver's side of the Truck, leaving Mr. Gould behind in the police car. This ultimately placed him in the arc of fire of the police officers who had arrived in front of the Truck, exited their vehicles

and pointed their firearms towards the suspects. He testified that Mr. Gould had a higher degree of medical training as a fire captain with the Prince George fire unit than he had, and therefore believed this would be of value if there were any injuries. Constable Grafton categorically acknowledged that upon reflection, bringing Mr. Gould along on a high-risk call such as this was poor judgment. Crown submits that the proffered justification for Mr. Gould's attendance, his medical experience, is a lie and impacts Constable Grafton's credibility.

[74] I agree with Crown that this alleged reason for bringing him seems to be somewhat belied by the fact that Mr. Gould does not appear to have checked upon or assisted Mr. Aubichon after the incident. Furthermore, Officer Grafton had no recollection of telling Mr. Gould to check on the well-being of him while he was on the ground, which seems strange if he was supposed to be there as a medical expert.

[75] But this in turn is met by the following: Crown witness, Constable MacDonald was of the view that Mr. Aubichon did not require medical attention. Constable Haunts likewise testified that his injuries were superficial and did not require medical treatment. There is no evidence before this Court that Mr. Aubichon was in any obvious and imminent medical distress. Furthermore and importantly, Mr. Gould did not testify in these proceedings. His evidence and perspective on all of this is totally absent, including his understanding of what his role was on scene (observer, medical, or otherwise), and\or any attendant explanation from him about why he didn't check on the well-being of Mr. Aubichon. Accordingly and collectively, this testimony simply does not impact the credibility of Constable Grafton. What this body of evidence demonstrates fundamentally, is what the officer has acknowledged and already knows: It was simply a bad decision to bring Mr. Gould to this high-risk incident.

[76] The following exchange took place on the fourth day of cross-examination. Constable Grafton testified that when Mr. Aubichon got bit by PSD Azar, it was an "occupational hazard". Crown fastened upon this and suggested: "He's a criminal, oh well if he gets beaten up? Is that what you mean?" Constable Grafton replied as follows:

> "He's in a stolen vehicle, Your Honour. His choice was to steal a vehicle. That -- I'm not making a slight, suggesting that he is a full-time car thief. It's just saying that he's put himself in a stolen vehicle and then decided to not comply with our directions during the arrest. There's an amount of a risk that comes with that behaviour."
>
> [Transcript of Proceedings, December 2, 2022, page 17, lines 34-40]

[77] Crown submits this is a telling exchange and demonstrates an "attitudinal bias…if someone gets hurt that's too bad for them because they were breaking the law". They submit it shows a complete disregard for the harm inflicted to "his subjects", ignoring proportionality.

[78] I am of the view that his exchange is of no moment. The larger body of evidence must be considered. Essentially all professional witnesses who were called in this matter gave evidence that this was a high-risk situation for all involved, including the police present at the scene. That is not controversial. Constable Grafton had just been cross-examined at length about the dangers and safety risks he faced as an officer while standing by the driver's side of this stolen car. This then led to the following testimony respecting his decision to deploy the dog and extract the driver, immediately prior to the referenced passage: "So, it is [sic] ideal? It was a decision. It was a good decision. It was the safest decision at that point, for everybody involved." In other words, he has just had in mind the safety of "everyone involved" including his fellow officers. He has just given that evidence.

[79] The conclusions Crown asks the Court to draw simply do not causally flow from this body of evidence. All he is saying in paraphrase, is that Mr. Aubichon chose to engage in behaviour that ultimately caused risks to himself during apprehension and arrest, and when read in conjunction with the immediately preceding passage, also

caused risks for the officers who were present. There is nothing shocking or jarring in that assertion and it simply doesn't lead to the conclusions suggested by Crown.

[80] Crown goes on and notes that this all gains further significance in light of Constable Grafton's and the other officers' complete disregard for the well-being of Mr. Aubichon after he was handcuffed. They submit that although Mr. Aubichon may have been injured it was of little concern to them, as it was "just an occupation hazard". But this is met by Constable Grafton's testimony that he did not observe any obvious injuries to Mr. Aubichon, which is corroborated by the evidence of Constable MacDonald and Constable Haunts. Constable Grafton said he did not check on him to see if he had a concussion because that would require a "specialized assessment." Roughly five minutes after Mr. Aubichon was placed in handcuffs, Constable MacDonald took him into his charge and custody, picked him up from off the ground and eventually removed him from the scene. Crown submits that in totality, this is preposterous, shocking and incredulous. While leaving Mr. Aubichon on the cold ground for a period of time and not closely checking him for a concussion in the aftermath of this high-risk arrest may have been suboptimal, it simply does not rise to the level of concern noted by Crown and does not impact Constable Grafton's credibility and\or reliability as a witness.

[81] It is here that I will taciturnly address defence counsel's submissions respecting the assumption of risk by Mr. Aubichon. Counsel presses that Mr. Aubichon was the author of his own misfortune, and by his actions, he has assumed a degree of risk, which must factor into the overall analysis. "*Volenti* is at play for him". Counsel cited para. 48 of *R. v. Kempton*, 2022 BCPC 21 as support for this proposition:

> [48] I also find, although not necessary for my conclusion here, that Mr. Swain voluntarily assumed risk of physical harm when he fled from the police on a bicycle and not wearing a helmet or other protective gear.

[82] Clearly, however, this was not central to the Judge's core reasoning. He said it himself in the introduction of the paragraph. Counsel also cites para. 125 of *R. v. Tsonos*, 2022 BCPC 265, decided by the same Judge.

[83] For my purposes, and with the greatest of respect, whether or not there was a voluntary assumption of risk by the complainant is just a distraction from the main issue at hand which is whether Constable Grafton's actions can be justified pursuant to section 25 of the *Code* as necessary, proportionate and reasonable. *Volenti non fit injuria* doesn't factor into my ultimate reasoning and I decline to consider it.

[84] Constable Grafton testified in direct examination about the force used against Mr. Saugstad in September 2015. He used a stun strike with his fist and two elbow strikes: "I ended up deploying two elbow strikes with my right front – the front of my right elbow, at which point it had the desired effect of the distraction, pain compliance, immobilization, disorienting Mr. Saugstad." Mr. Saugstad sustained serious injuries including a broken jaw and orbital bone. Crown submits that notwithstanding the magnitude of the injuries, he maintained throughout cross-examination that the force was a distraction strike, or "physical control soft". However, upon adjourning court for the day and returning the following morning, Constable Grafton changed his evidence. He testified that having slept on it, the force deployed to Mr. Saugstad was elevated and it was a "poor articulation" to call them distraction strikes.

[85] Crown submits Constable Grafton nefariously changed his testimony since he realized he was beginning to look foolish for characterizing the force that resulted in a broken jaw and orbital bone as a distraction strike, which in turn negatively impacts his credibility. Indeed, whenever someone alters their testimony, a court must closely scrutinize that change and the rationale therefor. Whether it demonstrates a credibility or reliability problem, of course, is case specific and depends entirely upon the substance of the testimony.

[86] The force of Crown's submissions is restrained by the following. First, this isn't a fulsome reflection of his evidence. He didn't just characterize them as distraction strikes. His evidence in direct examination is that the strikes had the desired effect of "distraction, pain compliance, immobilization, disorienting Mr. Saugstad". This is not

irrelevant because the witness seems to get confused early in cross-examination on these points:

> Q All right. And you called those distraction strikes, am I right?
>
> A I don't believe I called those distraction strikes on Mr. Saugstad.
>
> Q You said, "I ended up deploying two elbow strikes, front of my right elbow, desired effect of the distraction, pain compliance, disorienting him. He complied, conceding, surrender verbally." Do you recall that?
>
> [Transcript of Proceedings, November 29, 2022, page 33, lines 25-33]

[87] He seemed somewhat unclear on this point at the outset. Crown then paraphrased his evidence. There is an innocent ellipsis in this summary, but an ellipsis nonetheless: They have left out the word “immobilization”, which is not immaterial - immobilization and distraction are not necessary the same thing.

[88] The following exchange then ensues:

> Q So you're indicating that they are desired effect of distraction, that being distraction strikes?
>
> A The desired effect of distraction. I just did not call them distraction strikes *per se*.
>
> [Transcript of Proceedings, November 29, 2022, page 33, lines 44-47]

[89] And he is right about that. The following is then put to him:

> Q "Deployed two elbow strikes at the front of my right elbow, had the desired effect of distraction, pain compliance, disorienting him. He complied, conceding surrender verbally."
>
> A Yes, Your Honour.
>
> [Transcript of Proceedings, November 29, 2022, page 34, lines 2-6]

[90] Crown again innocently mischaracterizes his evidence. He agrees with their summary. Here is the final exchange:

> Q So they're distraction strikes. Are we clear on that? Is that what you're suggesting?

A Yes, Your Honour.

[Transcript of Proceedings, November 29, 2022, page 34, lines 7-9]

[91] In summary, although he did finally agree with Crown's suggestion that they are just distraction strikes, the following is important. First, he seemed somewhat confused at the outset of the exchange. Second, Crown innocently mischaracterized his evidence by ellipsis. Third and importantly, his primary evidence is that he punched Mr. Saugstad in the face and then utilized two elbow strikes. His evidence that these strikes were "distraction, pain compliance, and immobilization techniques", is a secondary characterization of that primary evidence, which is one subtle step removed. And it is in this language that there was some confusion, all in a context that when his evidence was put to him, it wasn't fully accurate or complete. In light of this fuller understanding of these exchanges, when he sought to clarify all this and changed his evidence, it is not momentous and does not materially impact his general reliability or credibility as a witness.

[92] Crown submits that Constable Grafton was evasive, quibbled, was non-responsive, feigned to not know what words meant and was unwilling to answer questions directly. They cited a few examples. I don't intend to give extensive reasons on these points. I have carefully considered his full body of testimony which spanned over four days. In general, I did not find him to be particularly evasive, combative, or non-responsive in a way that would give rise to reliability or credibility concerns. His testimony, generally speaking, was connective with the questions asked.

[93] The main area of concern with respect to Constable Grafton's evidence surrounds his reports. Crown submits that aspects of his Report (and subsequent SBOR Report) don't match the video, or are otherwise problematic. Defence counsel calls these discrepancies "minor sequencing errors" while Crown submits they are a "gross misstatement" of events. I disagree with both of these polarized characterizations.

[94] Constable Grafton testified that as he approached the rear of the Truck he observed that the reverse lights were illuminated, which was significant to him as it was indicative of flight. This evidence is consistent with his Report. The Video however does not show any reverse lights going on. I conclude Constable Grafton is incorrect in his evidence about this.

[95] He also testified that upon opening the door to the Truck he heard it rev as though in neutral which is consistent with his report.

[96] Crown submits he is lying about all this because the sequence of events makes this evidence implausible. They note that for this to be true, Mr. Aubichon would have had to put the vehicle in drive, move forward slowly in the alley and stop the vehicle for the approaching police. As Constable Grafton arrives behind him, he would have had to put the Truck into neutral (or park) and as the driver's side door opens, rev the engine and put the vehicle back into drive so that as he is extracted, the Truck would then move forward. I removed any reference to putting the vehicle in reverse in that sequence since I conclude that didn't happen. I agree with Crown that these are tight time frames and this does seem somewhat implausible, but I also note the following: The Video doesn't assist as it is silent. I don't know exactly what was happening inside the cab of the Truck with respect to gear shifting as Officer Grafton is approaching and opening the door during this brief, dynamic encounter. As analyzed previously, I cannot trust Mr. Aubichon's evidence where it stands alone, nor do I trust Corporal Sharpe's evidence on this point. Officer MacDonald did not recall the engine revving which is subtly different than firmly testifying that it didn't happen. The tight time lines make it seem somewhat unlikely, but irrespective of Constable Grafton's account, I cannot conclude with any certainty that the engine didn't rev.

[97] Crown submits there was collusion between Corporal Sharpe, Constable Johnston and Constable Grafton in their reports. They submit that since all reports similarly referred to engine revving and reverse lights or reversing, which didn't occur,

this raises serious concerns respecting collusion, which if established to any degree would be cataclysmic to Constable Grafton's credibility.

[98] These reports cannot be utilized for the truth of their contents because they are hearsay, but they can be compared to consider the possibility of collaboration among the three officers, see *R. v. Bentley*, 2013 BCSC 1125 at para. 62.

[99] *R. v. U.(F.J.)*, 1995 CanLII 510 (ON CA) sets out a logical methodology for addressing collusion at para. 42:

> [42] When two statements contain similar assertions of fact, one of the following must be true:
>
> 1. The similarity is purely coincidental.
> 2. The similarity is the result of collusion between the two declarants, before one or both of their statements were made.
> 3. The second declarant knew of the contents of the first statement, and based his or her statement in whole or in part on this knowledge.
> 4. The similarity is due to the influence of third parties, such as an interrogator, who affected the contents of one or both of the statements.
> 5. The similarity occurred because the two declarants were both referring to an actual event — that is, they were both telling the truth.

[100] I conclude that collusion has not been established to any extent for the following reasons. I can't determine whether or not the engine of the Truck revved and so I can't rule out the possibility that the declarants were telling the truth on this point.

[101] With respect to the Truck reversing, first, this is simply not a major or jarring mistake. It does not involve a protracted or complicated fact pattern that simply did not occur, see for example, the astonishing yet imaginary wrestling match that the accused claimed occurred in *R. v. Millington*, 2015 BCSC 515. But rather, this reflects a brief yet incorrect observation during a dynamic, high-risk event, which naturally diminishes concerns. Second, there is no troublingly polished language and\or identical turns of

phrase used in the reports. Constable Grafton refers to reverse lights, Corporal Sharpe refers to the Truck moving slightly backwards and Constable Johnston writes that the truck “lurched” backwards and forwards. Finally, Constable Grafton agreed there was some kind of debrief among officers, at the scene after the incident, which may or may not have been influential in some way, yet distinct from intentional collusion. In my view, based on these unique facts, there is absolutely no high water mark inference available that the officers came together, and collectively agreed to lie in their reports.

[102] Constable Grafton wrote in his Report that as he approached the Truck it drove forward and rammed the police vehicle in front of it. He notes the engine then revved and he decided to deploy PSD Azar to apprehend the driver, writing: “Getting the driver away from the controls of the stolen vehicle was paramount as he was visibly attempting to flee and was not concerned about ramming the police vehicles to aid in his escape.” The Video shows that the vehicle moved forward and did strike the police vehicle in front of the Truck, but this occurred during the extraction of Mr. Aubichon, not beforehand. Defence counsel calls this a minor sequencing error which isn’t true: it’s material *per se*, because it provided the written *a priori* grounds for deploying PSD Azar. Conversely however, the Truck did indeed move forward and strike the police vehicle. He’s not describing an event which categorically never happened. In that regard, it is unlike the fanciful and imaginary events articulated in cases such as *Millington BCSC*, for example.

[103] In his evidence, Constable Grafton acknowledged he was wrong in his Report with respect to this. He referred to the possibility that he suffered from tunnel vision with respect to the vehicle ramming. Crown submits that this testimony is circular, self-service and telling of a lie. I disagree. Officer Grafton gave evidence, repeatedly, that these events caused heightened adrenaline and anxiety. He testified that this was a high – stress dynamic situation, and that the dangers perceived to himself and other officers created a very high anxiety, high adrenaline situation. There is nothing untoward in this portion of his account. This is consistent with the other professional witnesses who gave evidence in general that this was a high-risk situation. This may or may not

funnel into an analysis that memory distortion can occur during stressful or traumatic events, see *McCallum,* and\or *Millington BCCA*. When Officer Grafton went further and gave evidence he may have suffered from tunnel vision he was restrained. He was neither zealous, nor overconfident, nor was he trying to be particularly persuasive with this testimony and explanation, especially during cross-examination. He said that it was a “fair belief” and “very possible” that he suffered from this. He said he couldn’t definitively say this phenomenon had occurred. This diffident evidence is hardly troubling with respect to credibility and is equally consistent with someone earnestly grappling with the errors in his perception of events. Whether this testimony was presumptively-inadmissible expert evidence was not thoroughly litigated. Assuming that it ought to have been tendered through an expert, notwithstanding his purported personal experience with same, I don’t substantively rely upon it all in deciding any extant issues before this court other than to note that it doesn’t negatively impact his credibility.

[104] Constable Grafton struck Mr. Aubichon seven times during the ground melee. He failed to record this in his reports. He testified that he did not believe he had to record his use of force on the ground, because the force used was “physical control soft”. Mr. Butler testified that “physical control soft” techniques have a lower likelihood of causing injury, while “physical control hard” are techniques that have a higher likelihood of causing injury which typically include elbow strikes. According to the SBOR reporting policy, which Constable Grafton thought governed his reporting requirements, physical control soft techniques are to be recorded when they cause injury. Injury is a defined term in the policy, akin to bodily harm. He asserts that because the elbow strikes were intended to be a distraction strike, he had no obligation to record the use of force, which connects with the fact that Mr. Aubichon wasn’t “injured” as that term is defined. While Constable Grafton is correct in his articulation of this SBOR policy, he is mistaken with respect to his general obligations respecting investigator’s notes pursuant to RCMP policy, which *inter alia* sets out that detailed notes are critical and serve to justify decision making including of course, use of force decisions. See also RCMP policy 17.1 on the IMIM model where the officer must be able to explain the intervention methods

they choose to manage an incident, including the totality of the situation, which in turn includes peace officer's perceptions, assessment of situational factors present and subject's behaviour, all of which form the risk assessment by which a peace officer explains clearly, concisely, and effectively the events that occurred before, during and after an intervention. The SBOR report however, is a standardized method to record and explain intervention strategies. Importantly, it is a supplementary report to an officer's notes, and is utilized in part to simply track statistics on use of force. So his explanation that the SBOR policy governed reporting requirements seems somewhat odd. He doubled down and testified he had applied this framework of reporting historically as well.

[105] Crown says this all interconnects with his triceps-strikes testimony. Constable Grafton struck Mr. Aubichon twice using his left fist. He then delivered two elbow strikes to Mr. Aubichon's torso and eventually two more elbow strikes to his head. The officer testified that the elbow strikes, more subtly, were strikes using the triceps area of his arm, slightly distal from the elbow "where the triceps meets the elbow". He also characterized the location as "elbow\triceps". Crown submits this nefariously ties back to his disingenuous belief about his reporting requirements under the SBOR. They submit that since elbow strikes are typically physical control hard, the only way he can categorize them as physical control soft (hence justifying the non-reporting of same) is through the false narrative of calling them triceps strikes since that is a softer part of the arm. The problem with this theory is that Constable Grafton didn't embrace it. When it was put it to him that the triceps is a softer part of his arm and hence lower force, he balked, testifying firmly and repeatedly that the force utilized is determinative of this issue. This latter evidence is consistent with Mr. Butler's testimony, where he indicated that intention and energy used is critical with respect to whether it's a soft or a hard strike.

[106] Constable Grafton's testimony that he struck Mr. Aubichon with his triceps\elbow remains a slightly strange, jarring piece of evidence. It is somewhat inconsistent with Mr. Butler's evidence: He testified that triceps strikes are not a known RCMP tactic. He

went further and noted that there is a specific downside to using this as a technique, since there are bundles of nerves in your triceps area that could cause momentary dysfunction in one's arm. This technique is not trained by the RCMP, which is important, since the point of training is to build muscle memory in order to use those techniques automatically when you are in a high-stress situation. Conversely, he noted that it could be effective as a distraction technique. Constable Grafton answered all this by testifying that in the heat of the moment, he made a split-second decision to use the "triceps where it meets the elbow" noting further that nothing is "off limits."

[107] I have repeatedly reviewed the Video which is of medium quality. It is difficult to say with precision whether the four elbow strikes were indeed elbow strikes or whether the strikes were from the area "where the triceps meets the elbow" – which would have been very close to the elbow. I will refer to these strikes as "elbow area" strikes hereinafter.

[108] At the end of the day, while not cataclysmic by any means, this foregoing testimony respecting elbow\triceps strikes remains a somewhat odd piece of evidence.

[109] The assertion that Mr. Aubichon wasn't showing his hands, both in the vehicle and on the ground was a core theme in this case. Numerous professional witnesses, including Constable Grafton, testified that control of a suspect's hands and being able to see a suspect's hands is vital to the safety of a police officer. Constable Grafton gave evidence that while observing Mr. Aubichon in the Truck, his right hand was down and out of view. Additionally, he testified that during the ground melee, Mr. Aubichon did not show his right hand despite numerous police commands to do so. He did not document this in his police reports. The only taciturn references to hands in his reports are as follows. From the Report: "Once the driver complied with directions from police to stop moving and keep his right hand visible, PSD Azar was instructed to release his bite." From the SBOR Report: "Subject rammed a police vehicle while occupying the driver's seat of a stolen vehicle. Ignored commands to surrender and show his hands." It is not controversial that the location of a suspect's hands is a crucial point. Crown submits that

it defies credibility that an experienced police officer, aware of the significance of a subject's hands, would omit such an important detail in his reports.

[110] At the end of the day and in summary, for all the reasons set out above, I do not agree with the vast majority of submissions setting out categorical problems with respect to Constable Grafton's evidence. The primary area where his evidence suffered is with respect to his reports. I have addressed his testimony in a sequential manner but I do not analyze his evidence in a piecemeal way, but rather I consider it in totality and in totality with the full body of evidence before this Court. By far, the most significant concern raised by Crown is that his errors in reporting are unidirectional: they tend to amplify risk and minimize the officer's force used. Depending upon the specific fact pattern, this could be devastating to a witness' credibility.

[111] Here, the impact of this is restrained for a number of reasons, recapitulated as follows: (i) This is unequivocally a high-risk, dynamic situation. It is not controversial that memory distortion can occur during stressful or traumatic events, see *McCallum* and *Millington BCCA*. This may reduce or eliminate credibility concerns, depending upon the unique circumstances at hand. (ii) I can't say with certainty whether or not the engine revved. (iii) With respect to the reverse lights, this reflects a brief yet incorrect observation during this dynamic, high-risk incident. (iv) With respect to the assertion that the Truck rammed the police vehicle, while this is more troubling, I note that the Truck did eventually move forward and strike the police car in front of it during the encounter. It's not a fanciful depiction of events, like the imaginary assertions of the officer in *Millington BCSC*, or like the tragic circumstances of *R. v. Forcillo*, 2018 ONCA 402, where the accused officer claimed that the moribund victim impossibly rose up after being repeatedly shot. (v) Constable Grafton didn't report that he struck Mr. Aubichon seven times. He explained this decision by asserting that the SBOR policy applied with respect to his reporting requirements. He is mistaken about this, but the mistake is not so outlandish that it strains credulity. The errors in sum are not immaterial, but nor do they overwhelm the analysis.

[112] He didn't report in any detail the assertion that Mr. Aubichon failed to show his hands which was an important risk factor to the officer. With respect to the pace of the production of the Report, completed and submitted roughly three and a half hours after the incident, he explained somewhat pragmatically:

> Q: What were you trying to do with the dog handler report? What was going through your mind?
>
> A I was aware that there was a [sic] investigation against the occupants of the stolen vehicle. There would be a bail hearing that day. My deployment of the police dog and the use of force needed to be captured in my report. It was a reflection of my memory of the event…
>
> [Transcript of Proceedings, November 29, 2022, page 20, lines 6-13]

[113] He testified in cross-examination that when he was preparing the Report, he was aware Mr. Aubichon was in custody, noting, "the clock is ticking on a bail hearing in this case…" He said he wasn't trying to deceive anyone.

[114] Subject to the above-referenced concerns respecting Constable Grafton's reports, I generally found that he gave his evidence in a reasonable, cogent and rational fashion, free from jarring internal\and\or external inconsistencies. Generally speaking, his answers were connective with the questions asked. He was not an evasive witness and was neither haughty nor combative with counsel.

[115] Accordingly and in conclusion, holding this all in balance, I do not have credibility concerns with respect to officer Grafton. I am left with moderate, medium concerns with respect to his reliability as a witness that does not disentitle his evidence from being given serious consideration and weight.

III Use of Force:

[116] It is not controversial that Constable Grafton applied force to Mr. Aubichon by deploying and utilizing PSD Azar, and by striking him while he was on the ground. The issue is whether his actions can be justified pursuant to section 25 (1) and (3) of the *Code*.

[117] The offence of assault is defined in s. 265 of the *Code* as follows:

> **265(1)** A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

[118] Assault with a weapon defined in s. 267(a) of the *Code* as follows:

> 267. Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault
>
> (a) carries, uses or threatens to use a weapon or an imitation thereof.

[119] A police service dog is an intermediate weapon within the IMIM and is considered a weapon within the provisions of the *Code*.

[120] Section 2 of the *Code* reads:

> **"weapon"** means any thing used, designed to be used or intended for use
>
> (a) in causing death or injury to any person, or
>
> (b) for the purpose of threatening or intimidating any person.

[121] Section 25 of the *Code* provides a defence for police officers who use force in the execution of their duty. It states:

> **25(1)** Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,
>
> (b) as a peace officer or public officer,
>
> (c) in aid of a peace officer or public officer, or
>
> (d) by virtue of his office,

> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
>
> **25(3)** Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

[122] The lead case on police use of force is *R. v. Nasogaluak*, 2010 SCC 6. The use of force that a police officer may use in executing their duties is constrained by the principles of proportionality, necessity and reasonableness. A defence under section 25 will apply where officers "use no more force than is necessary having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves."

[123] Paras. 32 and 34 of *Nasogaluak* state:

> [32] The Crown emphasized the issue of excessive force in its submissions to this Court, arguing strenuously that the police officers had not abused their authority or inflicted unnecessary injuries on Mr. Nasogaluak. But police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.
>
> [34] Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis (*Chartier v. Greaves*, [2001] O.J. No. 634 (QL) (S.C.J.), at para. 59).

> If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.

[124] In *R. v. Lopez*, 2016 BCSC 1359 at para. 11, the court summarized the law set out in *Nasogalauk*:

> [11] I would summarize [paras. 32-35 of *Nasogaluak*] as follows:
>
> a) the police do not have an unlimited power to inflict harm on a person in the course of their duties;
>
> b) police are limited to using the degree of force which is proportionate, necessary, and reasonable;
>
> c) there are special limitations on the use of force that is intended to cause death or grievous bodily harm or is likely to do so;
>
> d) the use of force is to be judged on a subjective/objective basis, having regard to the circumstances as they existed at the time the force was used; and
>
> e) police actions should not be judged against the standard of perfection and police should not be expected to measure the force used with exactitude, but instead police actions should be judged with recognition that the police engage in dangerous and demanding work and often have to react quickly to emergencies.

[125] See also *Kempton* at para. 38 which articulates some of the foregoing principles and provides some additional guidance:

> [38] In considering this issue, I bear in mind the following principles: police actions are not to be judged against a standard of perfection; some allowance must be made for an officer facing a dynamic situation and misjudging the degree of force necessary to restrain a prisoner; there is no obligation on an officer to impose the least amount of force which might achieve their objective; it is often necessary for police officers to take control of a situation as quickly as possible to prevent an escalation; and finally, an officer cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course.

[126] *R. v. Power*, 2016 SKCA 29 at para. 35 sets out three factors to consider in determining whether the force used was reasonable in all the circumstances:

> [35] On the basis of the foregoing, a determination of whether force is reasonable in all the circumstances involves a consideration of three factors. First, a court must focus on an accused's subjective perception of the degree of violence of the assault or threatened assault against him or her. Second, a court must assess whether the accused's belief is reasonable on the basis of the situation as he or she perceives it. Third, the accused's response of force must be no more than necessary in the circumstances. This needs to be assessed using an objective test only, *i.e.*, was the force reasonable given the nature and quality of the threat, the force used in response to it, and the characteristics of the parties involved in terms of size, strength, gender, age and other immutable characteristics.

[127] Despite not weighing force to a nicety, courts must still conduct an objective inquiry into the proportionality of the force, see *Power* at para. 50.

[128] *R. v. Pompeo*, 2014 BCCA 317, provides guidance in assessing the reasonableness of a police officer's belief on a subjective-objective basis, particularly at paras. 41 and 47:

> [41] It is essential that the judge recognize that the ultimate issue is not what a doppelganger would or should have done, but rather the reasonableness (on a subjective-objective basis) of the police officer's belief that the force used was necessary…
>
> [47] The analysis of reasonableness on a subjective-objective basis includes both subjective and objective elements. It requires the court to place itself in the shoes of the police officer, and to take into account considerations unique to that individual. Once those considerations are taken into account, however, objective elements of the analysis are applied…

[129] *R. v Jacobson*, 2015 BCPC 291 provides additional guidance when conducting a review of police use of force. *Inter Alia* the court states that caution is required when conducting a frame by frame analysis of a video, after the fact, and in the calmness of a courtroom and\or engaging in “Monday morning quarterbacking”, see paras. 137-144:

> [137] A number of the witnesses were asked to comment on the video footage as it was advanced frame by frame. Life is not experienced in slow motion or freeze frame. I must remind myself that I had the luxury of watching the video frame by frame in the calmness of the courtroom. Constable Jacobson did not have this same luxury…
>
> [139] Judges must guard against an over-reliance on hindsight. In *R v Cornell*, 2010 SCC 31 (CanLII), [2010] 2 SCR 142 the Court said at para. 24:
>
> > . . . [police] cannot be expected to measure in advance with nuanced precision the amount of force the situation will require: *R. v. Asante-Mensah*, 2003 SCC 38 (CanLII), [2003] 2 S.C.R. 3, at para. 73; *Crampton*, at para. 45. It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.
>
> [140] It is the reasonable belief of the officer in light of all the circumstances that is important in the analysis. Detached reflection cannot be demanded in dangerous circumstances…
>
> [142] Police are not obliged to wait and see what will happen. Doing so would invite injury...
>
> [144] Furthermore, where an officer acts within a reasonable range of forcible response, s/he is entitled to the protection of section 25 even if they fail to use the least amount of force that would achieve the desired result. Police are entitled to be wrong but they must be reasonable - they need not demonstrate the correct decision was made but a reasonable one.

[130] Police use of force training and policies are not determinative of the reasonableness of the force used, see *R. v. Tranter*, 2022 ONCJ 51 at para 63: “Police training should correspond to what the court considers objectively reasonable and not the other way around.” Police training on use of force may be relevant but it is not binding on the trier of fact, see *Deslauriers c. R.*, 2020 QCCA 484 at para. 122.

A The deployment of the dog:

[131] In commencing this analysis, it is important to determine the *a priori* risks Constable Grafton faced.

[132] It is not controversial that this was a high-risk situation. More or less, all professional witnesses in these proceedings gave that evidence.

[133] The risk factors are as follows. The officers were attempting to box in a stolen truck. Mr. Butler testified that stolen vehicles are usually a means to further other criminal activities: “drug use, gang activity, whatever”. The truck’s engine was running at all material times. Mr. Butler noted that running engines are dangerous. Boxing in a stolen vehicle is a “potentially a very high-risk manoeuvre because officers can end up getting seriously injured or killed as part of that box if the driver of the vehicle attempts to ram their way out of the box.” He went further and noted that *any* vehicle stop has the potential to become dangerous. See also, para. 42 of *Pompeo*: “there is no such thing as a routine traffic stop.”

[134] It was dark. This is a risk factor. Mr. Butler noted that in a low light situation, an officer’s visual acuity is often impaired, and so they are unable to see things as accurately and clearly as they ordinarily would. Constable MacDonald testified that the scene was darker than it appeared in the Video. It was icy. Constable MacDonald testified that it was “incredibly icy”, so icy he had to hold the Truck for balance. This latter evidence is corroborated by the Video. Mr. Butler confirmed that if the ground is frozen, if it is difficult to maintain balance, this increases the risk for the officer. These two environmental factors cannot be lightly glossed over.

[135] There were multiple suspects. Mr. Butler addressed this and noted that if a single individual wants to fight with police it may take “two, three or four” police officers to control those individuals. Conversely, where there are multiple officers on scene, as was the case here, this tends to reduce the risk.

[136] The VLA is a high crime neighbourhood. That increases the risk. Constable MacDonald agreed that if he was working in the VLA as an officer he would have a very high-risk assessment, *per se*, generally speaking. See also a similar analysis in *Pompeo*, where the Court noted at paras. 38-40 that local knowledge of the area (in that case, a thriving drug trade with guns and violence) has a bearing on the reasonableness of the officer's beliefs.

[137] These risk factors are not controversial. They were extant upon Constable Grafton's arrival. Constable Grafton confirmed these factors in his testimony, save and except the element respecting multiple suspects. He testified that the VLA was the epicentre of all things criminal in Prince George. This was a factor he considered in his risk assessment. With respect to how stolen vehicles impacted his risk assessment, he noted they are often used to ram police vehicles in an attempt to flee. They are used in an assortment of crimes, and with that comes a risk of weapons including screwdrivers, knives and firearms. He testified it was dark and the "ground itself was a sheet of ice to put it simply."

[138] He got out of his vehicle, procured PSD Azar and proceeded to the driver's side door of the Truck. He testified that during this time, he could hear loud, clear commands from police for the occupants of the stolen vehicle to show their hands. It was his belief that given the loud, urgent and repetitive commands, that the occupants were not complying. This increased Constable Grafton's risk assessment.

[139] This is consistent with Constable MacDonald's evidence. He testified that as he opened his car door he heard police screaming commands, "Show me your hands", "Stop resisting", "Put your hands up" and "You're under arrest". This caused his risk assessment to "increase even higher" because it indicated the suspects were not cooperating with police, notwithstanding that officers had drawn their service pistols. He noted it was unusual for suspects to not cooperate when service pistols have been dawn on them. He testified that this yelling of commands continued.

[140] This interconnects with an intriguing exchange between Crown and Mr. Butler during direct-examination. Mr. Butler testified that repetitive commands are often required before compliance is obtained. Crown then asked, “Is it within the training of the officers then to be told that because someone isn’t immediately complaint doesn’t mean that they are non–complaint?” He answered that it is still technically non-compliance and then asserted: “All failure to obey police commands is non-compliance.” This is all corroborative and supportive of Constable Grafton’s above-referenced evidence, which I accept.

[141] The foregoing risk factors which elevated Constable Grafton’s risk assessment by the time he reached the driver’s side of the Truck are significant. They synergistically interrelate with each other and cumulatively cause this Court to conclude that this was a very high-risk situation indeed. It was not a routine traffic stop (and even that can become dangerous), nor was it even a stolen vehicle stop *per se*; there were additional unique risk factors above and beyond that.

[142] Officer Grafton testified he approached the driver’s side door of the Truck. He said that during this time, he could hear loud, clear commands from police for the occupants of the stolen vehicle to show their hands. It was his belief that given the loud, urgent and repetitive commands, that the occupants were not complying. This concerned him. His mind “was alive that” the driver’s hand was not being shown.

[143] As he reached the driver’s door he saw the left hand of the driver clearly in the air but he could not see the right hand, it was “down and away out of my sight…This is a dangerous point for me to be standing beside a stolen vehicle where the driver’s hand is out of sight, knowing that there was multiple commands to show that right hand…So my risk assessment elevates the potential that if there was a weapon accessible, that I was in a very dangerous position.” In Cross-examination he confirmed “that if there was a weapon in that vehicle there was a possibility that that hand, we’ve talked about the dangers of what hands can do with suspects. That was just something that I was alive

to in a risk assessment." He confirmed that was an increase of risk to him and the other officers.

[144] He opened the door and confirmed he could still not see the right hand of the driver. He instructed Azar to apprehend and bite him. The driver was extracted and fell to the ground. Azar had a hold of his left arm, but Constable Grafton still could not see his right hand. Eventually he said, "Clearly, I have concerns about the driver accessing a weapon that may be used to cause death or grievous bodily harm to myself."

[145] He said he was making split second decisions during this time. He was "prepared to make a split-second decision to not allow the dog to enter the cab if they were compliant". He confirmed in cross-examination that he was conducting a risk assessment "all along" as he approached the Truck and eventually deployed PSD Azar.

[146] Crown says this is all a lie. First, because he didn't include this reference to the driver's hands in his reports. While it would have been optimal to include this in his reports, based upon this Court's full assessment of this officer's credibility and reliability and upon consideration of the full body of evidence before this Court, I do not rule out his testimony on that basis.

[147] Second, Crown submits that the Video shows a police officer who has set into motion a course of events upon exiting his vehicle and that he is not making any efforts to conduct a risk assessment. I agree with Crown that he appears to walk with determination from his car to the driver's side door, but I can't determine with precision the officer's thoughts based upon gait alone.

[148] Finally, Ms. Richards notes that because of the compressed timelines at the driver's side door it is "very unlikely that he conducted the observations he testified to." From the perspective of the Video, I cannot tell what the officer himself is seeing. I agree that the timelines are tight from the time he arrives at the driver's side of the truck to the time Azar is deployed, but the officer said it himself: he is making split-second decisions. I accept this officer's sworn testimony on these points, and with respect to the

entire encounter in question, (including by the Truck's door, and later with respect to the altercation on the ground).

[149] I have reviewed the Video many times. From the moment the door of the Truck opens and Azar enters the cab, I can't determine with precision exactly where Mr. Aubichon's hands had just been or had been in the preceding few moments.

[150] Mr. Butler ranked intermediate weapons on the basis of the likelihood of injuries that require hospitalization. With respect to police canines, he noted that the injury rate from bites requiring some type of inpatient-hospital treatment is 42%, which is the highest of the intermediate weapons.

[151] The pre-existing risk factors are significant and they interrelate: Officers had boxed in a stolen Truck. Its engine was running at all material times. It was dark and icy. It was a high crime neighbourhood. There were two unknown suspects in the truck, but conversely, multiple members were on scene.

[152] Beyond these risk factors, the suspects seemed to Constable Grafton to be non-compliant with police direction, which is important, and finally, when he was at the Truck, he testified that the driver's right had was "down and away", which he noted elevated his risk assessment. It would be difficult to overstate the sharpness of the risk factors and dangers faced by Constable Grafton and the other officers. It is in the context of this high-risk situation that he deployed his police canine, which is an intermediate weapon that has a significant chance of injury requiring some type of inpatient hospital treatment.

[153] None of the following should be construed in any way as detracting from my responsibility to conduct a rigorous assessment of whether the degree of force used was proportionate, necessary and reasonable, but I reiterate: Police actions should not be judged against the standard of perfection and police should not be expected to measure the force used with exactitude, but instead police actions should be judged with recognition that the police engage in dangerous and demanding work and often

have to react quickly to emergencies (*Lopez* at para 11). Some allowance must be made for an officer facing a dynamic situation and misjudging the degree of force necessary to restrain a prisoner; there is no obligation on an officer to impose the least amount of force which might achieve their objective; it is often necessary for police officers to take control of a situation as quickly as possible to prevent an escalation; and finally, an officer cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course (*Kempton* at para 38). Police are not obliged to wait and see what will happen. Doing so would invite injury. Police are entitled to be wrong but they must be reasonable - they need not demonstrate the correct decision was made but a reasonable one (*Jacobson* at paras. 142 and 144).

[154] The accused's subjective perception of the degree of threats and risks against him and other members was high. His beliefs were reasonable on the basis of the situation as he perceived it. This is consistent with the evidence of Constable MacDonald and Mr. Butler as already analyzed. Using an objective test only, the force used was reasonable given the nature and quality of these threats which were very sharp indeed.

[155] In light of the significant risks and dangers Constable Grafton and others faced, the decision to utilize an intermediate weapon with a significant chance of injury requiring some kind of hospitalization was proportionate, necessary and reasonable. It was critical to everyone's safety to take control and resolve the situation as quickly as possible.

[156] Both counsel put a number of hypotheticals to Mr. Butler respecting the initial deployment of the PSD. I wish to be taciturn through this analysis since none of the fact patterns precisely match this Court's determination of the facts. The hypothetical most closely resembling the findings I have made, was the third example put to Mr. Butler by the Crown: (i) Assume the pre-existing risk factors consistent with this Court's findings

(more or less), and (ii) assume that upon opening the driver's door, the driver's left hand is up but the right hand is in the waistband of his pants.

[157] In this case, Mr. Butler testified that if the officer believes the driver may be accessing a weapon, based on the IMIM, all intermediate weapons (which includes a police canine) would be "appropriate". Importantly, Mr. Butler noted that the officer doesn't have to wait until the individual pulls a weapon out because by then, it will be too late. See also *R. v. Dobbs*, 2016 ONSC 4957 at para. 32, where the Court reasoned in a similar fashion.

[158] I am mindful that a suspect that specifically and dangerously has his right hand in his waistband is somewhat distinguishable from a suspect whose hand is just generally "down and away". Additionally, although in totality Constable Grafton did link the possibility of weapons to the driver's hand being out of sight, he didn't crisply and simply say, "I believed he may be accessing a weapon". Nevertheless, the hypothetical has some similarities to the facts at hand, and Mr. Butler's conclusions are probative and offer an additional degree of support for the conclusions I have already drawn respecting proportionality, reasonableness and the necessity of the deployment of the PSD.

[159] Turning to the applicability of section 25(3) of the *Code*. The section states: Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

[160] Grievous bodily harm is not defined in the *Code*, but has been interpreted to mean, "serious hurt or pain", not "any hurt or pain", see *R. v. Bottrell*, 1981 CanLII 339 (BCCA).

[161] In *Kempton*, the accused police officer chased the complainant in order to arrest him for theft. The accused's SUV unintentionally collided with the complainant's bicycle. Officer Kempton then forthwith and without warning, deployed his police dog who bit and apprehend the complainant. During the course of the arrest, Officer Kempton also pushed him to the ground. The dog bite lasted approximately 60 seconds and as a result, the complainant required 19 stitches. At para. 45, the Court taciturnly concluded: "I am not satisfied that the use of force in this case was intended or likely to cause death or grievous bodily harm to Mr. Swain."

[162] In *R. v. Roberts*, 2018 BCPC 358, the accused, *inter alia*, was bit by a police dog. He sought a judicial stay of proceedings, or at least a reduction in sentence as a result of what he alleged was an excessive use of force by police. As part of her analysis, Judge Flewelling addressed whether the dog bite fell within section 25(3) of the *Code*. At para. 269, she concluded:

> **[269]** Is the delivery of a dog bite to Mr. Roberts' leg one that falls within s. 25 (3) in that it is likely to cause grievous bodily harm? I think generally not. This section is to impose constraint against use of deadly force — force that will either kill or result in very or extremely serious injuries. I do not accept that a dog bite is likely to cause such a serious injury that it is equated with something as significant as death.

[163] Crown submits that the additional evidence led in the case at hand from Constable Haunts and Mr. Butler respecting dog bites ought to cause the Court to distinguish *Roberts* and conclude that section 25(3) applies.

[164] The anecdotal evidence of Constable Haunts and Mr. Butler respecting the injuries that can be caused by dog bites is neither here nor there. Just like in this case, the one-off fact that Mr. Aubichon's injuries seemed superficial, is irrelevant to whether section 25(3) applies.

[165] Mr. Butler went beyond anecdotal evidence and also testified that the injury rate from bites requiring some type of inpatient hospital treatment is 42%. Section 25 (3) is drafted disjunctively: "intended or is likely to cause". There is no developed body of

evidence before this Court of an intention to cause death or grievous bodily harm. And at the risk of putting far too fine a point on this, 42% is not “likely”, which means probable, having a better chance of existing or occurring than not. The evidence of Mr. Butler does not the carry the day in this analysis.

[166] I see no reason to derogate from the analysis and conclusions in *Kempton* and *Roberts*. Likewise, I conclude that section 25(3) does not apply. Something materially more is required than the force that was used in this case.

B The use of force on the ground:

[167] PSD Azar extracted Mr. Aubichon from the Truck and he fell to the ground. The dog bit and held his left arm for almost the entirety of this approximately 52 second melee. The Video shows that during this time, Constable Grafton deployed several strikes while Mr. Aubichon was on the ground, consisting of: two blows and a knee strike. Additionally, while on his knees, he delivered two elbow-area strikes to his torso followed by two elbow-area strikes to his head.

[168] Constable Grafton testified as follows. The driver was extracted by Azar and landed on the ground. Constable Grafton could not see his right hand. It was under his torso near his waistband. He testified he had concerns about the driver accessing a weapon that “may be used to cause death or grievous bodily harm to myself.” He deployed two distraction strikes with his left fist to the ribcage area of the driver. He was continuously telling the suspect to show that right hand. The distraction strikes were ineffective in changing the behaviour. “I reassess….I reposition.” He delivered two more strikes with his elbow/triceps area to the torso area of the suspect. There was no change in the behaviour. As a result of the strikes and ongoing commands he hoped the suspect would “show that right hand and pull it out of his waistband.”

[169] “My risk assessment is going up the longer the struggle ensues and the longer his hand is under his body.” He repositioned and delivered two more “elbow/triceps” strikes to the head of the suspect. He got to his feet. The driver produced his right hand.

PSD Azar immediately grabbed the suspect's right arm. Constable Grafton can now visibly see that there is nothing in the right hand of the driver and the dog is instructed to let go of his bite which he does immediately.

[170] He was steadfast in this testimony in cross-examination. He testified he believed the driver was wilfully and with great effort, hiding his hand, "on his own volition."

[171] I have reviewed the Video many times. There is nothing depicted that forecloses Officer Grafton's account. When Mr. Aubichon is first removed from the Truck, his right hand can be seen very briefly. For the remainder of the altercation, there is no point on the Video where his right hand is clearly visible to me. At the very end of the encounter, Azar takes hold of his right arm. The dog then releases his bite forthwith and there is no further application of force. This last fact is probative and is at least moderately corroborative of Constable Grafton's account: He testified he couldn't see the driver's right hand and so applied force. Eventually, the driver produced his right hand, Azar immediately grabbed the right arm, he's instructed to let go which he immediately does. I am most mindful of the limited, distant perspective of the Video. Nevertheless, I can't determine where the right hand is in the Video for the vast majority of the melee. But as soon as I can see that the dog has his right arm, the dog almost instantly releases his grip and there is no further application of force whatsoever. This is at least somewhat corroborative of the officer's account. I accept his evidence respecting this entire altercation.

[172] Here are some additional factors that assist in understanding the scene as depicted on the Video: it's darker than it looks. The pre-existing risk factors are still extant during this encounter. Mr. Butler testified as follows: You cannot deliver maximal force while on your knees, but elbow strikes from that position still might be physical control hard. The following doesn't detract from the rigorous section 25 analysis that must be conducted. Mr. Butler also testified that Officers aren't trained to square off and fight with suspects, *qua* pugilists. They are not trained to use "accommodating force."

They are there to establish control and end encounters as quickly as possible using dominating force. An officer can't afford to lose any fight.

[173] I note that there is no evidence that Constable Grafton was acting out of anger, frustration, or impatience, or that he had lost control of himself. For example, in *R. v. Tait*, 2005 BCPC 40, the accused police officer tried to secure the complainant in the back of his police vehicle. The complainant spat in the officer's face. The officer then struck him three times in the face in response to this, which fractured the victim's jaw requiring surgery and wiring to correct. The officer was convicted. The encounter at hand has no commerce with the troubling circumstances of *Tait*. Here, for example, there are temporal gaps in between the three sets of strikes, suggesting they were measured, at least to a degree.

[174] Crown submits as follows: Constable Grafton's evidence that he subjectively believed Mr. Aubichon was wilfully fighting to not show his hands is not reasonable. The Video shows that Mr. Aubichon was not fighting, struggling or moving at all beyond what was caused by the dog. Crown argues that at no time does Constable Grafton reassess the risk. On an objective view, his justification falls short. Had he conducted an ongoing risk assessment and attempted to locate Mr. Aubichon's hands, it would have been apparent he wasn't resisting or concealing his hands. He never contemplates whether he was able to comply with his commands to show his hands.

[175] These submissions are met by the following: His testimony, which I accept, suggests he is assessing the situation. For example, he testified that the distraction strikes were ineffective in changing the behaviour. "I reassess…I reposition". He noted his risk assessment was going up the longer the struggle ensued, and in that context he delivered two final strikes. This is all indicative of assessment in what he says is the categorical non-compliance of Mr. Aubichon to show his hands throughout the encounter, which he concluded was wilful. This is to some extent corroborated by the Video which shows that there are gaps in between the three sets of strikes, suggesting a degree of contemplation. He is not incessantly delivering blows, for example. There

was a 15 second gap between the first and second set of strikes, and a further 13 second gap between the second and third set of strikes.

[176] Finally, the Video shows that at the end of the 52 second encounter, seconds after the dog takes hold of Mr. Aubichon's right arm, the PSD releases his grip, and no further force is applied whatsoever, which is somewhat supportive of the officer's account.

[177] I agree with Crown that Mr. Aubichon is lying still except when the dog appears to be moving him. However, it is dark, darker than the Video. It is a high-risk, dynamic encounter. Constable Grafton is entitled to some leeway. Some allowance must be made for an officer facing a dynamic situation and misjudging the degree of force necessary to restrain a suspect. There is no obligation on an officer to use the least amount of force to achieve their objective. He's entitled to be wrong as long as it's reasonable. We've watched the Video frame by frame in the courtroom numerous times, after the fact. Constable Grafton did not have this luxury. He lived it once, first hand. We've heard interminable evidence respecting risks to an officer when a suspect doesn't show their hands. Constable Grafton testified that the driver failed to show his hands over the span of the entire altercation despite repeated police commands, and that this failure was wilful. This is not an unreasonable conclusion. I note that Mr. Butler testified that officer perceptions are critically important, because officers often don't understand subject motive. In cross-examination it was suggested to Constable Grafton that he didn't turn his mind "to the knowledge he had" which is that people may not be able to comply with police commands while under the control of a police dog. He replied that this was always a consideration when deploying the dog. He went on, noting the totality of circumstances in this instance was also a consideration and confirmed his belief that this was a motivated person fighting to keep his hand hidden. This isn't an unreasonable response.

[178] Crown submits that the force deployed on a purely objective basis exceeded any risk Mr. Aubichon posed to Constable Grafton. The force was not proportionate. He was

struck numerous times while he lied limp and motionless on the ground. “He was not a risk to the officer.” They argue that the force used on the ground was not objectively reasonable. Defence counsel submits that an appropriate amount of force was used.

[179] The pre-existing risk factors as already analyzed, were sharp and remained extant during this encounter. It was a very high-risk situation. Additionally, Constable Grafton testified the driver’s hand was under his torso near his waistband. He testified he had concerns about the driver accessing a weapon that “may be used to cause death or grievous bodily harm to myself.” He gave evidence that the driver failed to show his hands over the entire altercation despite repeated police commands. He believed this was wilful. Mr. Butler viewed the Video and testified that assuming Mr. Aubichon’s right arm was not visible because it was underneath his torso, this would be a very dangerous situation for Constable Grafton, and that all of his actions on the ground were consistent with police training and policy. He gave evidence that if his right arm was concealed under his torso, there was an elevated risk to Constable Grafton and an elevated risk that a weapon would be produced.

[180] The risk factors are very high. This is important. It is in this context that Constable Grafton struck Mr. Aubichon seven times (including the knee strike) and continued to apply the PSD to him. As a result of this encounter, Mr. Aubichon apparently suffered only superficial injuries. Crown emphasized the risk of injury to Mr. Aubichon’s head was great, while defence counsel pointed out that Mr. Aubichon was uninjured. I agree with both submissions. Striking someone in the head is more likely to cause injuries than other locations, but the fact that Mr. Aubichon suffered only superficial injuries from all of Constable Grafton’s strikes is not totally irrelevant to the Court’s analysis.

[181] The Crown submits that the final two elbow strikes to Mr. Aubichon’s head are particularly dangerous and egregious. As Mr. Butler testified, blows to the head are more likely to cause injury, particularly when the head is braced by something, which was the case here since Constable Grafton struck Mr. Aubichon in the head while it was

backstopped by the icy ground. This submission however is met by the evidence of both Constable Grafton and Mr. Butler. Constable Grafton testified that after the first two elbow strikes, his risk assessment continued going up the longer the struggle ensued and the longer the driver's hand was under his body. It is in this context that he deployed the final two strikes to Mr. Aubichon's head. This is connective with Mr. Butler's following evidence: The longer the struggle, the more an officer becomes metabolically exhausted. This begins to occur after 20-25 seconds. The longer the struggle, the greater the risk to the officer. Their risk goes up dramatically and in order to get control of that individual, "the officer will have to escalate the level of force that they're using." And again: Officers are there to establish control and end encounters as quickly as possible using dominating force. The fact that the force escalated is not unreasonable.

[182] The accused's subjective perception of the degree of threats and risks against him and other members was high. His beliefs were reasonable on the basis of the situation as he perceived it. This is consistent with the evidence of Mr. Butler. Using an objective test only, the force used was reasonable given the nature and quality of these threats which were very sharp indeed. In light of the significant risks and dangers Constable Grafton and others faced, the decision to deploy seven strikes to Mr. Aubichon and to continue to apply force with the PSD over the 52 second encounter was proportionate, necessary and reasonable. It was critical to everyone's safety to take control and resolve this situation. Police actions should not be judged against the standard of perfection and police should not be expected to measure the force used with exactitude, but instead police actions should be judged with recognition that the police engage in dangerous and demanding work and often have to react quickly to emergencies (*Lopez* at para 11). The officer doesn't have to wait and see whether a weapon will actually be produced. Doing so would invite injury.

[183] In cross-examination, the following hypothetical was put to Mr. Butler. He testified that If someone is on the ground with their left hand being shown and their right hand not shown and apparently reaching for the waistband while they're on their stomach,

with loud commands being uttered, “show me your hands, stop resisting,” that would demand a very exigent physical control to get control of that concealed arm including at a minimum stun strikes and intermediate weapons. I note that this fact pattern doesn’t precisely match Constable Grafton’s evidence. He testified the driver’s hand was under his torso near his waistband. He didn’t testify he was reaching for the waistband. But still, the hypothetical is similar and has some probative value.

[184] In direct-examination, Mr. Butler was asked to (i) assume the pre-existing risk factors consistent with this Court’s findings (essentially) and (ii) assume the dog is firmly attached to the complainant’s left arm and he’s being dragged by the dog while laying limp, right arm pinned under his body from the force of the dog. He testified that if the officer perceives this as wilful non-compliance, physical control hard which includes strikes, stuns, elbow strikes and intermediate weapons would be appropriate under the IMIM.

[185] Mr. Butler’s evidence provides further support for the conclusions I’ve already reached.

[186] In summary, I conclude that all force used by Constable Grafton in this entire incident was proportionate, necessary and reasonable. The Crown has not negatived the section 25 defence to the rigorous standard of proof beyond a reasonable doubt. Accordingly, I acquit Constable Grafton on counts one and two. In light of this conclusion, I do not find it necessary to address the section 34 defence.

IV Obstruction of Justice:

[187] Constable Grafton has been charged that he did wilfully attempt to obstruct, pervert or defeat the course of justice by making false or misleading entries in his Report.

[188] The elements of obstruction of justice are set out in paras. 20-22 of *R. v. Robinson*, 2012 BCSC 430:

> [20] The Crown must prove beyond a reasonable doubt that Robinson's statement to Swallow about having two shots of vodka post-accident had a tendency to obstruct, pervert, or defeat the course of justice and that Robinson specifically intended by this statement to obstruct, pervert, or defeat the course of justice...
>
> [21] The *actus reus* of the offence is an act that has the tendency to defeat or obstruct the course of justice. This includes an attempt to affect a police investigation (*R. v. Spezzano* (1977), 34 C.C.C. (2d) 87 (Ont. C.A.); *R. v. Dosanjh*, [2006] B.C.J. No. 2637, 2006 BCPC 449 (B.C. Prov. Ct.) at para. 59; *R. v. Watson*, [2010] O.J. No. 5341, 2010 ONSC 6765 (Ont. S.C.J.) at para. 15 (*Watson*)). It is sufficient if an accused has done enough that there is a risk that injustice will result (*R. v. Graham* (1985), 20 C.C.C. (3d) 210 (Ont. C.A.) aff'd [1988] 1 S.C.R. 214 (S.C.C.)).
>
> [22] The *mens rea* requires specific intent so that an accused must in fact have intended to act in a way tending to obstruct justice (*R. v. Hawkins*, 2002 BCCA 3 (B.C. C.A.) at para. 5, (2002), 48 C.R. (5th) 21 (B.C. C.A.)). It is a defence if the act was done for another purpose (*R. v. Hearn* (1989), 48 C.C.C. (3d) 376 (Nfld. C.A.) aff'd [1989] 2 S.C.R. 1180 (S.C.C.)). It is not enough if Robinson's actions were accidental or the result of mistake or a simple error in judgment (*Watson* at para. 17). Robinson must have known that what he was doing when he told Swallow that he took two shots of vodka post-accident would obstruct or interfere with the investigation of his impairment and that he intended that it would do so.

[189] “Course of justice” is defined broadly and includes judicial proceedings, either existing or proposed, and is not limited to such proceedings. The offence under section 139(2) includes attempts by a person to obstruct, prevent or defeat a prosecution which may take place, notwithstanding no decision to prosecute has been made. It includes the investigative stage of proceeding. See *R. v. Melo*, 2014 ONSC 1364 at para. 23.

[190] A knowingly false statement given to police during the course of an investigation can amount to an attempt to obstruct justice. The falsity of the statement can be based on a material omission. Absent a duty to provide the information, a mere omission may not suffice. The entire statement, as a whole, must be assessed to determine whether it is false in the sense that it has the tendency to obstruct, defeat or corrupt the ends of justice. See *R. v. Theriault*, 2020 ONSC 3317 at para. 235.

[191] *Mens rea* may be inferred from the circumstances. An attempt by the accused to conceal his or her actions may often provide evidence of an improper intent, see *R. v. Boulanger*, [2006] 2 S.C.R. 49 at para. 57.

[192] Submissions were made resecting the importance of the timing of the disclosure of the Report to Crown Counsel. I agree with Crown that this matters not. The offence is complete once the false or misleading are recorded, with the intention to obstruct. This is because the course of justice does not have to be actually obstructed, rather it is sufficient that there was an attempt, albeit without success, see *R. v. Hansen*, 2016 ONSC 548 at para. 41, cross-referencing a number of examples of unsuccessful or frustrated attempts: an unaccepted bribe, an approached witness who remained un-dissuaded, and a false name given but rejected.

[193] Crown submits that the Report is deliberately false or misleading. False or misleading reports have the tendency to obstruct, pervert or defeat the course of justice and hence, Crown argues that the *actus reus* has been met. As for the *mens rea*, the court must infer from the circumstances of the reporting that the accused had the specific intent to obstruct, pervert or defeat the course of justice. Crown submits that all elements of the offence have been established beyond a reasonable doubt.

[194] In my view, the main issue to resolve is *mens rea* and whether Constable Grafton, had the specific intent to obstruct, pervert, or defeat the course of justice.

[195] Both parties made submissions on the issue of motive. Motive isn't an element of the offence but may be probative of intent and\or design, see paras. 80-81 of *R. v. McCallum*:

> [80] As noted in R.v. Lewis, [1979] 2 SCR 821, evidence of motive is particularly important in circumstantial cases, specifically, in relation to the issue of intention.
>
> [81] Motive is not an essential element of the offence of mischief, rather, it is relevant to prove criminal responsibility in any allegation, simply, it makes it more likely than not that the accused (the person with motive) committed the offence: R. v. Roncaiolo, (2011), 271 C.C.C. (3d)

> 385 ONCA. In other words, the accused had a specific reason for committing the offence and that reason is evidence that they committed the offence.

[196] Defence counsel argues that Constable Grafton had no motive to falsify his report. Conversely, Crown submits that there is a motive, to wit: he was being investigated by the IIO at the time of the offence for a strikingly similar assault on Mr. Saugstad. They submit that Constable Grafton deployed excessive force and lied to cover it up. But Constable Grafton responded persuasively to this charge. The Crown pursued this rigorously in cross-examination and it culminated with the following testimony in paraphrase: He can't control if he is investigated. It's not uncommon and it's part of his employment. As a member of both the ERT "world" and the Canine Unit, he uses force with regularity. He goes to work and does the same job regardless of how many use of force investigations there are, noting of course, that he'd rather not be investigated by the IIO. This is a reasonable answer.

[197] In my view, the issue of motive is somewhat unclear in this case. Just like the Court reasoned in *Hansen* at paras. 68-69, I find that there is no overwhelming or compelling evidence of motive, but nor is there clearly an absence of motive. I find it to be a neutral factor in the analysis.

[198] Portions of the Report don't match the Video. Much of the obstruction analysis overlaps with the analysis already done respecting the interrelation of these errors with respect to the credibility and reliability of Constable Grafton's evidence. There is no way to avoid at least a degree of repetition.

[199] Constable Grafton wrote in his Report, "The PDS vehicle pulled directly in behind the stolen truck which now had its reverse lights on." The Video doesn't show that and I conclude he is incorrect in his evidence and Report about this.

[200] With respect to the issue of the engine revving, I've already analyzed and concluded that I can't determine whether or not the engine of the Truck revved.

[201] Constable Grafton wrote the following in his report:

> "Constable Grafton…approached the the [sic] drivers [sic] side of the vehicle. At this point The [sic] truck drove forward and rammed into the police vehicle on the north. Cst Grafton was able to open the drivers door and yell at the driver that he was under arrest and to stop trying to ram the police vehicle…Getting the driver away from the controls of the stolen vehicle was paramount as he was visibly attempting to flee and was not concerned about ramming the police vehicles to aid in his escape."

[202] Defence counsel calls this discrepancy a "minor sequencing error", while Crown submits this is a "gross misstatement" of events. I disagree with both of these polarized characterizations. It's not a minor sequencing error. It's material *per se*, because it provided the written *a priori* grounds for deploying PSD Azar. Conversely however, the Truck did indeed move forward and strike the police vehicle. He's not describing an event which categorically never happened. In that regard, it is unlike the fanciful and imaginary events articulated in cases such as *Millington BCSC*, for example.

[203] Constable Grafton didn't record striking Mr. Aubichon seven times. As already set out and analyzed, he explained that he didn't have to report this due to his interpretations of his use of force, when reporting is required under the SBOR policies, and the fact that such reporting policy governed his reporting requirements. He's wrong about that.

[204] I have already conducted a full analysis respecting the meaning of these errors when analyzing the reliability and credibility of Constable Grafton's testimony. I reproduce my conclusions as follows.

[205] By far, the most significant concern raised by Crown is that his errors in reporting are unidirectional: they tend to amplify risk and minimize the officer's force used. Depending upon the specific fact pattern, this could be devastating to a witness' credibility.

[206] Here, the impact of this is restrained for a number of reasons, summarized as follows: (i) This is unequivocally a high-risk, dynamic situation. It is not controversial that

memory distortion can occur during stressful or traumatic events, see *McCallum* and *Millington BCCA*. This may reduce or eliminate credibility concerns, depending upon the unique circumstances at hand. (ii) I can't say with certainty whether or not the engine revved. (iii) With respect to the reverse lights, this reflects a brief yet incorrect observation during this dynamic, high-risk incident. (iv) With respect to the assertion that the Truck rammed the police vehicle, while this is more troubling, I note that the Truck did eventually move forward and strike the police car in front of it during the encounter. (v) Constable Grafton didn't report that he struck Mr. Aubichon seven times. He explained this decision by asserting that the SBOR policy applied with respect to his reporting requirements. He is mistaken about this, but the mistake is not so outlandish that it strains credulity or points inexorably to intent and design.

[207] Constable Grafton gave evidence with respect to the obstruction charge. He testified that he wasn't trying to deceive anyone when he was writing his reports. It was a reflection of his memory of the event. He acknowledged that the Video and his reports don't align, particularly with respect to when the Truck struck the police vehicle.

[208] In an obstruction charge, often the conduct is not only obviously intentional in the general sense, but it is also obviously done with the specific intent to obstruct the course of justice. The specific intent can be inferred because an obstruction of justice is the obvious consequence of conduct of that nature, see para. 28 of *R. v. Kirkham*, 1998 CanLii 13866 (SK KB). Here, the errors in reporting are indeed problematic and troubling to an extent, but they don't overwhelm the analysis and inexorably determine design. And when I consider the full body of evidence before me, including the testimony of Constable Grafton on this issue, I do not reject or rule out his evidence on these points, and I am left in reasonable doubt with respect to whether Constable

Grafton had the specific intent to obstruct, pervert, or defeat the course of justice. Accordingly, I acquit him on count three.

The Honourable Judge P.A. McDermick
Province of British Columbia

CORRIGENDUM - Released August 24, 2023

In the Reasons for Judgment dated August 22, 2023, the following changes have been made:

[1] The Publication Ban on the front cover has been changed to:

> **PUBLICATION BAN re: evidence of Mr. Cuyler Aubichon with respect to his charges on Prince George file 75735, and s. 517(1) of the *Criminal Code of Canada***

The Honourable Judge P.A. McDermick
Province of British Columbia