IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. Boliver, 2012 NSPC 33

Date: May 16, 2012
Docket: 2022627, 2022628, 2038892
Registry: Bridgewater

Her Majesty the Queen

v.

Richard Temple Boliver

DECISION

Revised Decision: Paragraph numbering and headings have been corrected. This decision released June 6, 2012 replaces the previously released decision.

Judge: The Honourable Judge Timothy Gabriel

Heard: October 21, 2010, April 12 and 13, 2011, August 31, 2011, November 1 and 2, 2011

Written Submissions Received: December 22, 2011, January 23, 2012, January 30, 2012, March 27, 2012, March 28, 2012

Oral Decision: April 27, 2012

Written Release: May 4, 2012

Charges: Criminal Code Sections 129, 430(4)
Nova Scotia Liquor Control Act Section 87(1)
(Charter Application ss. 7, 9, 10, and 12)

Counsel: Paul Scovil (October 21, 2010, April 13-14,2011);
Lloyd Tancock,(August 31, November 1, 2, 2011), Crown
Wayne Bacchus, Defence

Gabriel, P.C.J.:

Introduction

[1] Richard Temple Boliver is charged that on or about March 14, 2009 at or near Bridgewater, Nova Scotia he did resist police Cst. Jennifer Russell, Matthew Bennett and Morgan Gibson engaged in the execution of their duty by resisting being handcuffed and being placed in the police car, contrary to s. 129 of the *Criminal code of Canada.* He is also charged with mischief, contrary to s. 430(4) of the *Code*, and with public intoxication contrary to s. 87(1) of the *Liquor Control Act.*

[2] The accused has made a preliminary application pursuant to the Canadian Charter of Rights and Freedoms. He seeks a finding that one or more of his rights were infringed pursuant to ss. 7, 9, and/or 12 of the Charter, and, if so, a judicially ordered stay of the charges that he faces, pursuant to s. 24(1) thereof.

[3] Mr. Boliver alleges multiple infringements of his Charter Rights as set out in his Notice of Charter Application, the original of which was filed on April 21, 2010, and the amended version of which was filed on November 18, 2010. Additional amendments were made (with leave) in the post Application written submissions filed by his Counsel.

[4] The Application itself has consumed six full days which days, due to scheduling difficulties, have been spread over roughly 13 months.

[5] In the ensuing reasons, I will refer to Richard Boliver either by name, or as “the Applicant”, or as the “accused”. I remain mindful throughout that Mr. Boliver is the Applicant and the Crown is the Respondent with respect to this Application.

Facts (Overview)

[6] These charges arose out of a series of events that began on March 13, 2009 and culminated in the wee hours of the next day. On the evening of March 13, 2009, the accused, Richard Boliver, his twin brother Royce Boliver, and their nephew Ryan Whynot, decided to go out. Their destination was an establishment called Tomorrow’s Lounge located in the Bridgewater Mall, Bridgewater, Nova Scotia. All three had consumed some alcohol before they left home.

[7] They arrived at the lounge between 9:30 and 10:00pm. They had, in the words of Royce Boliver "a few drinks" inside the lounge. At some point after consumption of these drinks, the three went outside to have a cigarette. The entrance to the lounge itself is located inside the mall, so the three had to leave, traverse the mall interior until they came to the entrance, and then step outside. This was the second time that they had gone outside for a cigarette.

[8] Once the three had finished smoking, they walked into the mall and arrived back at the entrance to the lounge. The accused and his nephew were readmitted, however, Mr. Royce Boliver was not. The bouncer told him that he believed him to be intoxicated, and would not allow him in.

[9] Royce Boliver, then turned and left the mall via the front entrance. He went outside and planned (as he states) to wait for the other two to finish up, so that they could all go home together.

[10] The bouncer, who had moved to the front entrance of the mall to keep an eye on him, apparently perceived (or apprehended) some difficulty with Mr. Royce Boliver during his departure. Whether that difficulty was associated with the latter's persistent questioning of the reasons expressed for his ban on admittance, or whether it was because of repeated attempts to get back inside the mall, after he had exited, ostensibly to use the telephone and to warm up (as he claimed), is somewhat immaterial at this point.

[11] Royce Boliver drew the attention of Constable Jennifer Russell as she approached the Mall in her patrol car. Accompanying her in the vehicle was Arden Weagle, a civilian "ride along". Mr. Boliver was leaning against a pillar outside the mall entrance when they arrived. The bouncer (or door man) from the lounge was looking out at him from the mall entrance window. One thing led to another, and another squad car attended the scene, this one with Constables Matthew Bennett and Morgan Gibson inside. Royce Boliver claims that one of these officers shone a light in his eyes and offered him a choice of either going home or going to jail.

[12] Mr. Boliver's sister, Renee Boliver, happened to walk by at approximately this time. She spoke briefly with Cst. Russell and was then asked by her brother to go inside and get the accused and Mr. Whynot. She did so.

[13] The accused and his nephew exited the mall a short interval thereafter. There was by this time a crowd of people gathered in the vicinity, mostly people who had been or were still in the process of patronizing the lounge. Various estimates of the number of individuals in the crowd have placed it at between 10-20 people.

[14] The accused came out and according to his brother, went straight to Cst. Russell and said "what's going on, what's the matter, why can't he stand there, you don't like looking at a good looking guy, what are you a lesbian" or words to that effect.

[15] According to the Crown witnesses, the accused initially spoke to his brother, Royce, when he arrived on the scene. Some say he initially berated Royce, apparently for "always getting into trouble". At least one witness, Arden Weagle, felt that the accused at first had had a salutary effect on his brother, calming him down.

[16] All witnesses agree that at some point the accused's attention became focused upon Cst. Russell. According to Mr. Whynot, who claimed not to have heard much of the preliminaries, Richard Boliver asked Cst. Russell if she was a "dyke". He agreed upon cross-examination that what the accused said in substance was "don't come at me with your chest all out and inflated you lesbian". From Mr. Whynot's perspective, she lunged at the accused, traversing a space of approximately 4-5 feet in so doing.

[17] Conversely, the Crown witnesses all described an accused that was quickly out of control. He is variously portrayed as coming out and initially berating his brother, then, seeing Cst. Russell, appearing to fixate upon her, referring to her sexual orientation in derogatory terms. There was evidence that he had claimed to have had military training, that the police officers on the scene must have gone to the "Jerome Richard (another local police officer) School of Intimidation", that he squared off in a combative or fighting stance, and that he made a motion in Cst. Russell's direction. Gibson and Bennett described the smell of alcohol emanating from the accused, and the fact that he was unsteady on his feet.

[18] Mr. Weagle described the accused as actually making contact with Cst. Russell. The other officers merely described him as making a motion in her direction as though to initiate contact. According to them, he took a combative

posture, with his fists clenched. He was yelling and swearing (ranting was how at least one witness described it) at the police on the scene, and at police in general. The crowd was becoming restive-several were expressing anti police sentiment.

[19] Officer Gibson testified that he had "had enough" and, satisfied that the accused was significantly intoxicated, and causing a breach of the peace, advised him that he was under arrest. Simultaneously, Gibson and Bennett took hold of him with a view to escort him to the police car. According to these officers, the accused's reaction was swift, so swift that Gibson had no opportunity to tell him the reason for his arrest. He immediately began struggling with the officers, after a step or two, and tried to shrug them off, and to twist away from them, partially turning, once again, in the direction of Cst. Russell.

[20] A violent struggle ensues, whereby the two officers attempt to re-gain control of Mr. Boliver by cuffing him. They are successful in getting only one of Mr. Boliver's wrists attached to the handcuffs. Then Gibson, Bennett and Boliver all fall to the ground. The accused, a very large man, begins thrashing about, with one wrist cuffed, the other uncuffed, and the handcuffs flailing from his one cuffed wrist.

[21] While each (much smaller) officer was engaged in trying to control one of the accused's arms, at one point the civilian, Mr. Weagle, was asked (by Cst. Russell) to assist them by attempting to control the accused's legs. The officers describe a situation that had gotten completely out of control by this point. On top of everything else, the handcuff had become a significant hazard while the accused, a very large man, was thrashing about.

[22] All the while the crowd was becoming more vocal. Royce Boliver admitted that he was yelling at them, asking them to take pictures of what was happening and drawing their attention to his perception of what was unfolding. The officer's testified that they felt they had a volatile situation on their hands. They described Cst. Russell as issuing the standard taser warning, and when that proved to be of no avail, the deployment of the weapon. All witnesses agree that the accused was tasered. Some say the taser was deployed once, some say twice.

[23] Richard Boliver's testimony as to how things unfolded is different, in many respects. According to him, when he came out of the lounge he was merely trying

to figure out what was going on and, in that vein, he approached Cst. Russell, whom he felt acted dismissively and arrogantly towards him.

[24] His remarks about her sexual orientation were intended, as he testified, in a jocular manner, perhaps an ill advised way to approach the situation, but not one in which any real offence was intended, at least initially.

[25] The accused would have it that he was poking fun at the situation - "what's the matter don't you like to see a good looking guy standing outside having a smoke... you must be gay or something".

[26] According to the accused, Russell got up close to him, almost chest bumping him, and that's when the accused added (according to his brother) "don't come at me with your chest all stuck out..." etc, and made the comment about the Jerome Richard School of Intimidation.

[27] Mr. Richard is apparently a Bridgewater police officer with whom the Boliver family had had some familiarity as a result of charges that had been laid against Royce Boliver in the past, charges in relation to which he was acquitted.

[28] It's obvious that the accused, and the defence witnesses in general, describe Richard Boliver in a much more passive light than do those of the Crown. According to the version that they present, Cst. Russell and the other officers were aggressive and arrogant, and, perhaps stung by the reference to Russell's sexuality (she does happen to be gay), did not tell him he was under arrest, did not tell him what he was under arrest for, did not provide him with a taser presentation or a preliminary taser warning. Russell just tasered him twice. And this after Mr. Whynot had yelled to Cst. Russell from the crowd not to do so because the accused had been electrocuted in the past, and suffers from Post Traumatic Stress Disorder as a result.

[29] After being tasered, the accused was cuffed and placed in the back of the police car. Messrs. Royce Boliver and Ryan Whynot got into a cab and went home.

[30] The Crown led evidence that the accused, once in the patrol car, was still out of control. He was screaming, banging his head against the interior, and attempting to kick out the rear door of the vehicle. Although he was unsuccessful in freeing

himself, he did inflict some damage on the cruiser itself, causing one of the rear doors to bow outward.

[31] This is a very broad overview of the facts, at least up to the point where the accused is placed in the patrol car and taken to the police station. As indicated earlier, I am mindful of the fact that this is a Charter Application brought preliminary to the trial on the charges that Mr. Boliver is facing. He is seeking a stay of those charges in the event that I find that his Charter Rights had been infringed.

[32] While agreement between counsel is anticipated (following my Decision in this Application) as to the manner in which the evidence herein is to be incorporated into the trial proper, there is, as of yet, no such consensus between the parties.

[33] There may be other evidence called when the trial starts. Either the Crown or the Defence may do so. They may agree that all or only a portion of the evidence on this Application should be admitted into the trial proper. If they cannot agree on that issue, I may have to rule upon it.

[34] Once the trial is concluded, the issue will be whether the Crown has proven beyond a reasonable doubt all of the elements of each offence that Mr. Boliver faces. That process essentially resolves itself into the question of "does reasonable doubt exist in relation to any of the elements of the offence", rather than "what is the truth of what happened that evening?". As indicated, the onus will be squarely upon the Crown at that time.

[35] A very different standard is in play with respect to Richard Boliver's present Charter Application. Here, the onus is upon the Applicant/accused, to satisfy me, on the balance of probabilities, that he has sustained one or more violations of his Charter protected rights. If so, I must then consider the appropriateness of the remedy that he seeks - a stay of the charges against him.

[36] I will have occasion to refer to more of the evidence as I consider each of the alleged Charter violations set forth in the accused's Amended Notice of Charter Application. Whether specifically referenced or not, however, I have considered all of the evidence tendered over the course of the six days that this Application has

taken, and all of the submissions of counsel as put forth in the several letters and memoranda of each.

Issues

[37] The Applicant has raised the following in his Amended Notice of Charter Application (as amended by his post Application memoranda):

A) Schedule A - Particulars of Charter of Rights and Infringements - s. 7: The Applicant alleges that his right to security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice pursuant to Section 7 of the *Charter* has been infringed in that:

a) The police officers used excessive force on the Applicant when placing him under arrest;

b) There were no urgent circumstances or did the Applicant attempt to flee, thus there was no justification for the force employed by the officers, that being the multiple use of the tazer on the Applicant, such that the pain inflicted caused the Applicant to lose consciousness; and,

c) Such other grounds as may appear at trial or voir dire.

B) Schedule B - Particulars of Charter of Rights and Infringements - s. 7: The Applicant alleges that his right to make full answer and defence, pursuant to Section 7 of the *Charter* has been infringed in that:

a) The video clip of Applicant's tazering event usually capture by the tazer gun's built in video recorder has been lost or damaged or erased;

b) The Applicant was denied an opportunity to have his own expert view or examine the tazer (sic) gun and specifically the video recording device, and storage medium contained therein to see if the relevant video clip could be retrieved*;

c) The Applicant may have been able to examine the tazer (sic) gun and video storage medium if he supplied his expert's resume to the Crown and if his expert was approved by the Crown*;

d) Cst. Russell or the Bridgewater Police Department failed to secure any video from the Bridgewater Mall within 30 days of the Defendant's arrest

and thus it was unavailable for the Defendant when disclosure was requested;

e) Cst. Russell or the Bridgewater Police Department failed to secure any video of the RCMP lockup or jail cell within 30 days of the Defendant's arrest and thus was unavailable for the Defendant when disclosure was requested; and

f) Cst. Gibson, Cst Bennett, and Cst. Russell, failed to make any handwritten contemporaneous notes; failed, or purposely failed, to make accurate electronic report after the arrest specifically omitting Mr. Weagle therefrom; failed to obtain and provide timely statements from Mr. Naugler and Mr. Weagle; and/or, failed to produce and disclose any "can say"statement for Mr. Naugler and Mr. Weagle.

g) Such other grounds as may appear at trial or voir dire.

* - Withdrawn by Applicant

C) Schedule C - Particulars of Charter of Rights Infringements - s. 9: The Applicant alleges that his right not to be arbitrarily detained or imprisoned, pursuant to Section 9 of the *Charter* has been infringed in that:

a) There was no warrant issued for the arrest of the Applicant;

b) There were no reasonable and probable grounds for the police to arrest the Applicant neither under s. 87(2) or s. 111 of the *Liquor Control Act* nor under s. 495 of the *Criminal Code*; and,

c) Such other ground as may appear at trial or voir dire.

D) Schedule D - Particular of Charter of Rights and Infringements - s. 12: The Applicant alleges that his right to be subject to any cruel and unusual treatment or punishment pursuant, to Section 12 of the *Charter* has been infringed in that:

a) The police subjected the defendant to being tripped to the ground with no way to protect his head, his head hitting the pavement, knees being applied to his back, pressure point application, arm lock, multiple punches, being lifted up by the handcuffs, handcuffs being applied too tightly, and multiply (sic) taser discharges; and continued to subject the

Applicant to electric shock via the tazer (sic) gun after the police knew or ought to have known that the Applicant suffered from post traumatic stress disorder as a result of electrocution; or at the very least they knew or ought to have known that the Application had a pre-existing injury or incident related to an encounter with electricity, but continued in any event instead of utilizing a method of control appropriate to the situation; and

b) Such other grounds as may appear at trial or voir dire.

E) Schedule E - Particulars of Charter of Rights and Infringements - s. 10(a) and 10(b): The Applicant alleges that his right upon arrest and detention to be informed promptly of the reasons thereof; and to retain and instruct counsel without delay and to be informed of that right; pursuant to Section 10(a) and 10(b), respectively of the *Charter*, has been infringed in that:

a) At no time during his arrest of the Defendant and his transportation to the holding cell or to the hospital was he informed of the reason for his arrest or detention:

b) At no time during his arrest and detention was he informed of his right to contact legal counsel or given an opportunity to contact legal counsel or provided with the legal aid number to contact duty counsel; and,

c) Such other grounds as may appear at trial or voir dire.

I. Schedule C - Particulars of Charter of Rights Infringements - s. 9: The Applicant alleges that his right not to be arbitrarily detained or imprisoned, pursuant to Section 9 of the *Charter* has been infringed in that:

a) There was no warrant issued for the arrest of the Applicant;

b) There were no reasonable and probable grounds for the police to arrest the Applicant neither under s. 87(2) or s. 111 of the *Liquor Control Act* nor under s. 495 of the *Criminal Code*; and,

c) Such other ground as may appear at trial or voir dire.

[38] At first instance, it is convenient to deal with the allegations under s. 9, given the connectedness of these allegations to some of the other *Charter* violations that have been alleged.

[39] There was no warrant for the accused's arrest on March 13-14, 2009. As such, authority would have to exist under the *Liquor Control Act*, and/or s. 495 of the *Criminal Code*, and/or under the police common law power of arrest, in order for Mr. Boliver to have been lawfully arrested.

[40] S. 87 of the *Liquor Control Act* reads as follows:

> (1) No person shall be in an intoxicated condition in a public place.
>
> (2) Where an officer has reasonable and probable grounds to believe a person is in an intoxicated condition in a public place, the officer may, instead of charging the person under the Act, take the person into custody to be dealt with in accordance with this Section.
>
> (3) A person taken into custody pursuant to this Section may be taken by the officer to any available treatment service, hostel or facility for care.
>
> (4) A person arrested or taken into custody pursuant to this Section shall not be held in custody in a jail or lock-up for more than twenty-four hours after being arrested or taken into custody.
>
> (5) A person taken by an officer to any treatment service, hostel or facility for care shall not be detained there for more than twenty-four hours after he was taken into custody unless the person consents to remain for a longer period.
>
> (6) A person taken into custody pursuant to this Section may be released from custody at any time if
>
> > (a) the person in custody has recovered sufficient capacity that, if released, he is unlikely to cause injury to himself or be a danger, nuisance or a disturbance to others; or

> (b) a person capable of doing so undertakes to take care of the person in custody upon his release. R.S., c. 260, s. 87.

[41] S. 111 of the same *Act* goes on to state:

> (1) Any inspector, constable or other officer may arrest without warrant any person whom he finds committing an offence against this Act.
>
> (2) Every inspector appointed under this Act shall have all the authority conferred by any statute of this Province on constables, special constables, police officers or other peace officers and may execute a summons or warrant issued upon an information laid by himself. R.S., c. 260, s. 111.

[42] I note preliminarily, that the word "intoxicated" as used in s. 87(1) and (2) is not defined anywhere in the legislation. There have been, however, decisions interpreting the meaning of this word both within the context of this *Act*, and similar provisions contained in other provincial legislation.

[43] Judge Alan Tufts in *R v. Hofmeister*, 2008 NSPC 46 summarized the law this way:

> [24] Intoxication has been described as "extreme conditions of alcohol impairment", see *R. v. James*; for a contrary view, see *R. v. E.D.K.* Even where an individual is swaying, has been drinking and is rude and uncooperative this does not mean the person is intoxicated–*R. v Schwalm*. The effects of intoxication must be sufficiently substantial to allow the police to deprive an individual of his or her liberty, *R. v. Ward*, *supra*, and *R. v. Morris*. It means a person is unable to take care of him or herself or is a danger to other persons, see *R. v. Roberts*.
>
> [25] In my opinion the term "intoxicated condition" means that a person must be in such a state or such a condition induced by alcohol that he or she is likely to cause themselves injury or be a danger or nuisance to others, see *R. v. Lively* and *R. v. Morris*, *supra*. The degree of intoxication must be sufficiently substantial to deprive them of their liberty. The term "impairment" often used in drinking and

> driving cases is not an equivalent term to intoxication for these purposes. Impairment of the ability to operate a motor vehicle, for example, is far less than that required for intoxication under the *Liquor Control Act*.
>
> [26] In *R. v. Morris*, *supra*, Judge O'Hearn gave a very good description of the purposes and objectives of the *Liquor Control Act* in arriving at similar conclusions to what I have today.
>
> [27] As I indicated above the defendant was consuming alcohol and his behaviour may have been affected by the effects of alcohol on him, however he did not display any signs which could or would give the officer any reasonable basis for concluding that he was in an intoxicated state, in my opinion. He was not in any condition which objectively could be considered to be in a state where he was a danger to himself or others. He was not causing a nuisance or disturbance to a point where his liberty needed to be restricted. He was not interfering with the traffic and it was not reasonable to conclude that he had any potential for violence and it was not reasonable to conclude that he was being a nuisance to the traffic, for that matter.
>
> (emphasis added)

[44] I find Richard Boliver consumed a minimum of three drinks at his home just prior to his departure for the lounge on the date in question, and a minimum of three more at the lounge itself. I accept the evidence given by those Crown witnesses who testified that they could smell the odour of liquor on his breath.

[45] I also find it more likely than not that he was, or very quickly became, enraged at Cst. Russell and, to a lesser extent, the other officers accompanying her. I also find that he repeatedly referred to her in an abusive, derogatory and taunting manner, and that these actions were accompanied by staggering, bloodshot eyes, and a strong odour of liquor on his breath. Mr. Weagle felt that the accused actually made contact with Russell. I find that he did make a motion or gesture as though he was going to come at her, which caused her to step backward. From Mr. Weagle's vantage at that time, it may have appeared as though he'd struck her- I find he did not.

[46] Interestingly, Richard Boliver acknowledged that he would have likely have been “over the legal limit” had he driven home that night. I accept that this is merely evidence that he had consumed some alcohol - a fact that is already known through other testimony. It provides no basis upon which to conclude that he was intoxicated within the meaning of the *Liquor Control Act*.

[47] However, it was apparent to all of the officers that Mr. Boliver had consumed alcohol. It was apparent to them that he was behaving in a highly agitated, belligerent and irrational manner. In light of the proximity of a large crowd, his actions were not only causing a nuisance and disturbance, they ran a grave risk of inflaming or provoking a large disturbance. If some of the members of the crowd (consisting as it did, at least in part, of lounge patrons who may also have been drinking) were to involve themselves, the attendant risk of injury or harm posed to the police, the accused, and other by-standers, would rise exponentially.

[48] I find that the accused was “intoxicated” within the meaning of that term as contained in the subject legislation as defined by the relevant case authorities. As such, the police had the requisite authority, pursuant to s. 111 of the *Liquor Control Act*, to effect his arrest.

[49] If I am wrong in this analysis, I would have concluded that grounds for the arrest existed under s. 495 of the *Criminal Code*, or under the common law arrest authority.

[50] S. 495 of the *Criminal Code* provides as follows:

> (1) A peace officer may arrest without warrant
>
> > (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
> >
> > (b) a person whom he finds committing a criminal offence; or

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

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

(a) an indictable offence mentioned in section 553,

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

(c)an offence punishable on summary conviction,

in any case where

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

(i) establish the identity of the person,

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

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

maybe satisfied without so arresting the person, and

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

> (3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of
>
> (a) any proceedings under this or any other Act of Parliament; and
>
> (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2). R.S., c. C-34, s. 450; R.S., c.2 (2nd Supp), s. 5; R.S.C. 1985, c. 27 (1st Supp), s. 75.

[51] Further, the Supreme Court of Canada, in *R v. Dedman* [1985] 2 S.C.R. 2, has provided guidance as to police authority to arrest pursuant to the common law. There, LeDain J. stated at pages 64 and 65:

> ... at common law the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and liberty...
>
> The common law basis of police power has been derived from the nature and scope of police duty. Referring to the "powers associated with the duty", Ashworth J. in *R v. Waterfield*, *supra*, at pages 661-662, laid down the test for the existence of police powers at common law, as a reflection of police duties, as follows:
>
> > In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty. Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when

> crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited. To cite only one example, in *Davis v. Lisle* [1936] 2 All E.R. 213...it was held that even if a police officer had a right to enter a garage to make inquiries, he became a trespasser after the appellant had told him to leave the premises, and that he was not, therefore, acting thenceforward in the execution of his duty, with the result that the appellant could not be convicted of assaulting or obstructing him in the execution of his duty.

[52] When one considers the criteria in *Deadman* (*supra*), certainly, a breach of the peace was taking place as a result of the accused's actions, and there was a concern on the part of the officers involved, legitimately based, that it could expand. The accused, who had been drinking, was adjacent to between 10-20 other onlookers, many of whom (likely) had been drinking themselves. The accused's brother, Royce, was making statements to the crowd inviting them to get involved in some fashion, and Cst. Gibson testified that many were making known some antipathy towards himself and the other officers. Quite apart from everything else, there was a need to de-escalate that situation immediately. Failure to have done so would have exposed the police themselves, the accused and also potentially some of the crowd to a risk of injury had the matter gotten out of control.

[53] For all of the above reasons, I am not persuaded that the arrest of the accused was unlawful.

II. Schedule A - Particulars of Charter of Rights and Infringements - s. 7: The Applicant alleges that his right to security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice pursuant to Section 7 of the *Charter* has been infringed in that:

a) The police officers used excessive force on the Applicant when placing him under arrest;

b) There were no urgent circumstances or did the Applicant attempt to flee, thus there was no justification for the force employed by the officers, that being the multiple use of the tazer on the Applicant, such that the pain inflicted caused the Applicant to lose consciousness; and,

c) Such other grounds as may appear at trial or voir dire.

[54] The particulars raised by Mr. Boliver under a) and b) above actually resolve themselves into one over arching s. 7 consideration: Did the police use excessive force, having regard to all existing circumstances, when effecting his arrest.

[55] It is important to bear in mind that the validity of the arrest, and the amount of force used incidental to it, are distinct issues.

[56] When the police arrived at the scene in the early morning of March 14, 2009, developments ensued which transcended Royce Boliver, their initial concern. The accused involved himself in the manner previously noted. Cst. Morgan Gibson's testimony, on cross-examination, more than aptly shows the magnitude of what they had to confront at that time (transcript Aug 31, 2011, page 15):

> Q....so the point that you said you had enough of the way he was talking to Cst. Russell, correct?
>
> A. Not the way he was talking to Constable Russell. Had enough of his behaviour. He was intoxicated. Starting to cause a disturbance.
>
> Q. As soon as you arrested him you grabbed his wrists, correct?
>
> A. I told him he was under arrest. Grabbed his wrists and his arm.
>
> Q. You didn't give him any verbal commands to say he was under arrest, please put your hands above your head?

A. No.

Q. You just touched him immediately?

A. I told him he was under arrest and then I touched him.

Q. You touched him immediately without giving any verbal command. Without directing him to lay on the ground or anything?

A. I told him he was under arrest and I grabbed his wrist and his arm.

Q. And at that point in time he was engaged in a conversation with Constable Russell, correct?

A. No, he was engaged in ranting and yelling and screaming at the police in general.

Q. So he was engaged in a conversation with Constable Russell, You just indicated that he said you, that he called her a name and then you immediately arrested him because you had enough?

A. It wasn't exactly a civil conversation like this. He was yelling and screaming at her, the police, all of us.

Q. So when you grabbed his wrist he might not have heard you, correct?

A. No, he heard me.

Q. You wouldn't know that for certain?

A. I can't speak for what he would know. We took a few steps. No problem. Said we had to go to the car. Started to go towards the car, he tried to shrug us off.

Q. You indicated there was a crowd there?

A. Yes

Q. O.K. And you indicated the crowd was becoming more involved? They were getting amped up I believe in your testimony?

A. They were, yes.

Q. O.K. Isn’t it true that that not all, that the crowd was suggesting both that either you let him go or that the defendant go home. That is what the crowd was saying. There weren’t really getting amped up?

A. No they were getting amped up.

Q. What do you mean by amped up?

A. Yelling. Just at them just to go home. Yelling at police. It’s not always very popular for us to be in the middle of a crowd outside a bar.

[57] Then at Page 24:

Q. Well, you, you said in your testimony last time you were here, “I had enough at this point, arrested him for being intoxicated in public”. That was directly after your testimony regarding the defendant’s comments about your (sic) sexuality. You had enough.

A. Yes, and when he took the fighting posture the situation had escalated enough.

Q. So somebody’s not allowed to clench their fists in front of you when, when you’re on duty? Clenched fists is, is cause for arrest?

A. No. It depends on the situation.

Q. Well, you indicated in your supplementary occurrence report that when you were taking him away, he, a few steps he clenched his fists. Correct?

A. Yes.

Q. So isn't it true he didn't, that he only clenched his fist once when you were taking him away?

A. No.

Q. So you're saying he clenched his fist once and then you arrested him and he re-clenched is fist another time when you were taking him away?

A. Yes, he clenched his fists to take the fighting posture. He was not allowed, going to allow him to him or anyone else. I arrested him and after we arrested him, he started to take a few steps, he clenched and tried to throw us off.

[58] Then we have the evidence of Cst. Bennett (Aug 31, 2011 transcript pages 144- 147):

Q. So he (the accused) came out, yes?

A. He came out, he approached the intoxicated male we were dealing with and he said something along the line of why do you always have to be such an idiot when we go out drinking. And then all of a sudden he snapped, and there was a different tone. He saw the police, I guess, and got towards Constable Russell, who was another uniformed member at the scene and said something along the lines of you dyke lesbian. It was very belligerent, causing a disturbance outside. I detected he had slurred speech and was also intoxicated.

Q. Let me just stop you again there. You said he was causing a disturbance. How do you know. Who was affected other than you, the police officers?

A. There was also other patrons outside the establishment.

Q. What was their reaction that you could see that led you to believe they were disturbed?

A. I cannot recall. I was focused on that male.

Q. So, you're talking about his tone of voice and his attitude at this point. Alright, please continue.

A. Um, again he was belligerent, he stepped towards Constable Russell in a (inaudible) fighting stance. I observed he had tense fists, clenched fists and tensed arms. He also said something along the lines of did you come from the school of Jerome Richards, or something to the effect of that.

Q. What was Constable Russell's reaction when he went towards her in that fashion?

A. I cannot recall.

Q. Was there any physical contact that you saw?

A. I did not see any physical contact.

Q. Okay, please continue.

A. Um, at that point, Constable Gibson advised this male that he was under arrest.

Q. You're talking about the person you identified here today?

A. That is correct.

Q. Okay.

A. So at that time I took a hold of that male’s left arm.

Q. Did Constable Gibson advise him what he was under arrest for?

A. Intoxication in public. Yeah.

Q. Okay.

A. At that time I grabbed a hold of his left arm while Constable Gibson took his right arm. We were beginning to escort him to the marked patrol vehicle. While we were escorting him to that vehicle, his arms were tense, again he clenched fists, and he was trying to get away from us. Um, due to his size and his demeanor at that point, we took him to the ground to gain control and place him in handcuffs. Once on the ground, he was you know, actively resisting.

Q. How did you accomplish taking him to the ground?

A. Uh, we placed him on the ground. I had one side and Morgan had the other, Constable Gibson, and forced him to the ground.

Q. What happened to him as a result of being forced to the ground, if anything?

A. He was just on his stomach. Once on the ground, I had two arms, or two hands sorry, on his left arm, trying to place it behind his back. I was yelling at him to stop resisting. He continued not to comply. I continued to issue those commands to him. I noted that he was extremely strong, you know, he was goal oriented. He was not going to put his arm behind his back. Again, I gave him that command, and he actually managed to twist and he grabbed a hold of my uh, I had a fleece, on, my marked police fleece. He grabbed a hold of that vest and tried to pull me forward. Um, at that time, I again advised him to stop resisting and had two of my hands on his arm. I also noticed that Constable Gibson managed to have one handcuff on him, and the other one was loose and flailing. I deemed that to be a

> threat, if that handcuff was to hit myself or Constable Gibson it could be very dangerous. He managed to get the one handcuff on. I then, he became too, I could not put his left hand behind his back in order to place him in handcuffs. I told him to stop resisting, he wouldn't do so. At that time I heard Constable Russell telling him that if he wouldn't stop resisting he would be tazed. I then heard the Taser discharge and I was still struggling trying to put his arm behind his back. There was no compliance. At that time I heard the Taser discharge again, and we managed to get his arm behind his back and place him in handcuffs.

[59] Cst. Bennett continues on page 147-148 of his testimony:

> Q. Alright, the second time you heard, did that change his, the efforts that he was doing to resist?
>
> A. No, in my mind he was still resisting, and it was just we managed to put his arm behind his back and place him in handcuffs. Once he was in the handcuffs, he still continued to be belligerent and was agitated and extremely aggressive. Myself and Constable Russell lifted him up when I stood up I had the Taser coils wrapped around my leg from the Taser being deployed. I managed to bring him over to the police vehicle. He would not get in the back, so we managed to force him inside. Once he was seated in the rear of the police vehicle he began kicking the rear passenger door and was screaming and continuing to be belligerent towards us. We managed to push his legs inside and close the door. He also began banging his head off the silent patrolman, and kicking and screaming. Then myself and Constable Gibson transported him to...
>
> Q. Just before you get there, what was the ultimate result to his kicking actions with respect to the door of the police car? Just, did it result in anything?
>
> A. Yeah, the door was actually bowed, it didn't shut as it normally would

[60] Among other things, I am mindful of the Supreme Court of Canada's decision in *R v. Genest*, [1989] 1 S.C.R. 59 at Paragraph 51 which states as follows:

> In the passage from *Therens* quoted earlier, Le Dain J. made the point that the assessment of the seriousness of a constitutional violation must take into account

> the reasons for the conduct. He gave the example of a situation of urgency, where rapid action is necessary to prevent the loss or destruction of evidence. To this I would add another factor that can be considered, whether the circumstances of the case show a real threat of violent behaviour, whether directed at the police or third parties. Obviously, the police will use a different approach when the suspect is known to be armed and dangerous then they will in arresting someone for outstanding traffic tickets. The consideration of possibility of violence must, however, be carefully limited. It should not amount to a *carte blanche* for the police to ignore completely all restrictions on police behaviour. The greater the departure from the standards of behaviour required by the common law and the *Charter*, the heavier the onus on the police to show why they thought it necessary to use force in the process of an arrest or search. The evidence to justify such behaviour must be apparent in the record, and must have been available to the police at the time they chose their course of conduct. The Crown cannot rely on ex post facto justifications.

[61] In the Applicant's brief, reference has been made to the *Hofmeister* case (*supra*), and specifically, to Paragraph 29 of that case:

> Finally, if I am wrong on any of the above, in my opinion Constable Blouin used excessive force when he placed his arms around the defendant from behind. At that point the defendant was not a risk to the safety of the officer and he was simply walking to the other side of the street. He was not avoiding the police.

[62] In deciding the issue of the reasonableness of the force used, I accept the evidence of Gibson and Bennett as to the extent of the struggle with the accused, and the vigour with which he resisted their efforts to place him under arrest. The rapid escalation of Mr Boliver's efforts in that regard placed these officers, in particular, and Cst. Russell and Mr Weagle, potentially, in danger of harm, whether from the accused's flailing arms, the handcuffs hanging from one of his wrists, his thrashing legs, or from the potential intervention of certain members of the crowd.

[63] Prior to the deployment of the Taser, Gibson and Bennett tried a number of holds, hand strikes, and pressure point applications against the much larger accused, all to no avail. The risk posed by the actions of the accused had to be concluded, and quickly.

[64] I accept Cst. Russell's evidence as to what she did prior to deploying the Taser. In particular, I accept that she issued the proper warning to the accused in that regard, and the fact that it had no effect. I further accept the evidence of Sergeant Crowell as to the appropriateness of Russell's actions given the circumstances as they took place.

[65] Although things had unfolded very quickly, the evidence demonstrates that an escalation of the level of force was administered to the accused in a manner appropriate to what the officers were confronting.

[66] In particular, the Taser was deployed only after the other less forceful methods had failed to bring the accused's resistance to an end. The first time it was deployed, whether it struck him or not, it did not succeed in rendering him compliant. Only after the second deployment did Mr. Boliver's struggles subside to the point where he could be handcuffed and brought to the patrol car. Once inside the vehicle, his violent struggles persisted to the point where damage was inflicted on one of the rear doors.

[67] Having considered the evidence in its totality, I am unable to conclude that the force administered by the officers on the night in question, was excessive, under all of the circumstances.

III. Schedule B - Particulars of Charter of Rights and Infringements - s. 7: The Applicant alleges that his right to make full answer and defence, pursuant to Section 7 of the *Charter* has been infringed in that:

a) The video clip of Applicant's tazering event usually capture by the tazer gun's built in video recorder has been lost or damaged or erased;

b) Withdrawn by the Applicant;

c) Withdrawn by the Applicant;

d) Cst. Russell or the Bridgewater Police Department failed to secure any video from the Bridgewater Mall within 30 days of the Defendant's arrest and thus it was unavailable for the Defendant when disclosure was requested;

e) Cst. Russell or the Bridgewater Police Department failed to secure any video of the RCMP lockup or jail cell within 30 days of the Defendant's arrest and thus was unavailable for the Defendant when disclosure was requested; and

f) Cst. Gibson, Cst Bennett, and Cst. Russell, failed to make any handwritten contemporaneous notes; failed, or purposely failed, to make accurate electronic report after the arrest specifically omitting Mr. Weagle therefrom; failed to obtain and provide timely statements from Mr. Naugler and Mr. Weagle; and/ or, failed to produce and disclose any "can say"statement for Mr. Naugler and Mr. Weagle.

g) Such other grounds as may appear at trial or voir dire.

[68] I will deal with the above-noted points sequentially, in the order referenced by the Applicant.

A) The video clip of the Applicant's tazering (sic) event usually capture (sic) by the tazer (sic) guns built in video recorder has been lost or damage (sic) or erased.

[69] This contention is premised on the assumption that a) such a video recording at one time existed and, b) that the material captured thereon would have been helpful to the accused's contentions.

[70] From these two premises, the thrust of the Applicant's argument appears to run in the direction of an assertion that the Crown, through it's agents the police took steps to see to it that this evidence was unavailable and/or negligently or recklessly caused it to be compromised and therefore unavailable.

[71] What the evidence does establish, and I refer principally to the testimony of Deputy Chief Collyer in this regard, is that the taser unit operated by Cst. Russell on the date in question was equipped with a camera which downloads recorded data to a memory chip contained in the unit. This is "...an accountability issue that Taser International built into the device so that you can't be accused of trying to hide something".

[72] When the taser is turned on the camera is designed to automatically turn on. When the unit is turned off, the camera turns off. There is no way to access the memory chip or "tamper" with it without damaging the taser unit itself. There is no evidence of any such damage to the unit.

[73] As Collyer further testified:

> So, at the beginning of the day shift at 7 in the morning when a member goes to take out a taser, they would do a spark test to ensure that it is functioning properly. They don't download, they're not testing the camera, they're testing whether the device is sparking properly. But, if I go in and plug this into the computer, it prints out each and every time the taser was turned on and the camera came on.

[74] Each "test run" or "sparking" involves essentially turning the unit on. Each time it is turned on, even in a test run, the camera should turn on as well. However, the camera data is not required unless the unit is actually deployed against an individual, such as Mr. Boliver, during the time that it is in the possession of a member or members of the police force.

[75] Thus, the unit used to taser the Applicant during the early morning hours of March 14, 2009 was subjected to the usual video data retrieval process in the aftermath of the incident. It was plugged into the computer to download the video

of the event. That was when it was discovered that, due to an (apparent) video malfunction, a visual of the events which unfolded after the taser was turned on (on that date) was unavailable.

[76] Deputy Chief Collyer and his department concluded that the Taser X26 model in question was not functioning as it should, and sent it away to be analysed and/or repaired. As he stated:

> A. What I'm saying is, when the Taser, that particular Taser was connected to the computer, the computer did not accept the data from the X26, that particular X26. So we sent it away. Apparently what we are now being told is that if we had sent it away with explicit instructions to do what they call "forensic download", they believe the data was on the Taser all along. But when Taser International received this particular Taser from ND Charlton, they looked at, they dealt with it as a fault, and they replaced the computer chip in it and any data that was on that computer chip they replaced is gone. If we had asked for a forensic download, which we didn't know even existed at the time, um. We were fairly new to utilizing this technology. If we had known we would have asked for a forensic download, and apparently Taser, at our cost, would have downloaded the data off the Taser for us. We did not know it existed and it's gone forever.

[77] The case of *R.v. La* (1997), 116 C.C.C. 97 (SCC) offers some guidance to my consideration of this evidence:

> 20 ... The right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant. Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost. The principle in *Stinchcombe (No. 2)*, *supra*, recognizes this unfortunate fact. Where the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached. Where the Crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has accordingly been a breach of s. 7 of the *Charter*. Such a failure may also suggest that an abuse of process has occurred, but that is a separate question. It is not necessary that an accused establish abuse of process for the Crown to have failed to meet its s. 7 obligation to disclose.

> 21. In order to determine whether the explanation of the Crown is satisfactory, the Court should analyze the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.
>
> 22. What is the conduct arising from failure to disclose that will amount to an abuse of process? By definition it must include conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play. The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category. An abuse of process, however, is not limited to conduct of officers of the Crown which proceeds from an improper motive. See *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 78-81, *per* Justice L'Heureux-Dubé for the majority on this point. Accordingly, other serious departures from the Crown's duty to preserve material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In some cases an unacceptable degree of negligent conduct may suffice.

[78] A video capture of what was actually going on when the taser was deployed may certainly have been helpful. Whether it would have necessarily helped the Applicant's case, that of the Respondent, or either, is conjecture at this stage. However, it would have been known at the time to Collyer, and the members of his detachment, to be a very important piece of evidence. No hindsight is required for that.

[79] Evidence was tendered of the computer readings generated when the computer camera download was attempted. It shows that there was an apparent problem with the retrieval of a video record not only on March 14, 2009, but on two earlier occasions in February, when "spark tests" of the unit had been conducted. These earlier malfunctions or anomalies were not discovered at the time

because all apparent indications were that the unit was working and there was no perceived need to test whether the unit was capturing visual footage as it should. Footage was not needed until it was actually deployed on someone. And it was not so deployed until March 14, 2009, when it was used on Mr. Boliver.

[80] The police attempted to download data which they were certain would exist. I am satisfied that Collyer and the members of his department, after the attempt was made, genuinely felt that the functioning of the unit's camera was impaired to the extent that footage of the tasering of the accused was unavailable.

[81] Collyer volunteered that the manufacturers of the X26, to whom he sent the unit for analysis and repair, "simply dealt with it as a fault, and replaced the computer chip in it, and any data that was on that (prior) computer chip was lost." He further testified that an unspecified individual or individuals at the manufacturer opined afterwards (we get this from Collyer second hand) that he/she/they believe the data was on the first chip all along, and it could have been retrieved had the police given them instructions to do a "forensic download" instead.

[82] I am unable to conclude that this is indicative of any *mala fides* on the part of the Deputy Chief, or any members of the Bridgewater Police force. Nor am I persuaded that the conduct or omission here rises to the level of recklessness, or unacceptable negligence in the sense intended by the Supreme Court of Canada in *La* (supra).

[83] Moreover, it has not been demonstrated that the police were improperly trained to either use the Taser in question, or how to go about downloading the video capture that was supposed to be there. It is not terribly surprising that neither Collyer nor others in his department were conversant with all of the myriad possibilities that may exist as a result of the unavailability of the Taser camera data, with which they were confronted here. This appears to be the first time that Collyer and his department encountered a situation where this particular model of Taser had been deployed on an individual, and the video feed was irretrievable.

[84] I move on to further consideration of *La* (supra) :

24. The Crown's obligation to disclose evidence does not, of course, exhaust the content of the right to make full answer and defence under s. 7 of the *Charter*. Even where the Crown has discharged its duty by disclosing all relevant information in its possession and explaining the circumstances of the loss of any missing evidence, an accused may still rely on his or her s. 7 right to make full answer and defence. Thus, in extraordinary circumstances, the loss of a document may be so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial. In such circumstances, a stay may be the appropriate remedy, provided the criteria to which I refer above have been met.

25. It is not necessary to elaborate a test to be used in such cases in order to deal with the case at bar. <u>Suffice it to say that, where the Crown has met its disclosure obligations, in order to make out a breach of s. 7 on the ground of lost evidence, the accused must establish actual prejudice to his or her right to make full answer and defence</u>. This requirement is seen most clearly in lost evidence cases reviewed by my colleague Justice L'Heureux-Dubé in her reasons in *Carosella*, *supra*; see paras. 76-80 (emphasis added).

26. The appellant sought to draw a parallel between this case and *Carosella* which was released immediately before the hearing of this appeal. The two cases, however, are clearly distinguishable. In *Carosella*, the documents which were destroyed were relevant and subject to disclosure under the test in *O'Connor*, *supra*. The conduct of the Sexual Assault Crisis Centre destroyed the accused's right under the *Charter* to have those documents produced. That amounted to a serious breach of the accused's constitutional rights and a stay was, in the particular circumstances, the only appropriate remedy. Where, however, the evidence has been inadvertently lost, the same concerns about the deliberate frustration of the court's jurisdiction over the admission of evidence do not arise. As the following passage from the majority judgment (at para. 56) attests, we expressly distinguished the case from the lost evidence cases generally:

The justice system functions best and instils public confidence in its decisions when its processes are able to make available all relevant evidence which is not excluded by some overriding public policy. Confidence in the system would be undermined if the administration of justice condoned conduct designed to defeat the processes of the court. The agency made a decision to obstruct the course of justice by systematically destroying evidence which the practices of the court might require to be produced. This decision is not one for the agency to make.

> Under our system, which is governed by the rule of law, decisions as to which evidence is to be produced or admitted is for the courts. It is this feature of the appeal in particular that distinguishes this case from lost evidence cases generally.

[Emphasis in original.]

[85] This does not constitute, in my view, “extraordinary circumstances” giving rise to a finding that the loss of the camera data (if, indeed, it ever existed - as suggested by the unnamed individual at Taser International who spoke to Collyer) was so prejudicial to:

> ... the right to make full answer and defence that it impairs the right of an accused to receive a fair trial.

[86] Since the Supreme Court of Canada was understandably reluctant to formulate a test to determine what could constitute “extraordinary circumstances” in such cases, I shall respectfully not attempt the task either.

[87] Both sides had opportunity to call eye witness testimony. Findings of credibility were made. Perhaps a video recording would have assisted that determination, perhaps not. I observe, for example, that it would not be unheard of for a video to have been made under circumstances which involved a lot of movement on the part of the operator, or on the part of the participants, or in which things were moving very quickly, in which it is impossible to get a clear view of what is happening.

[88] I am not persuaded that the accused’s s. 7 Charter rights have been infringed on the basis of the unavailability of a video recording of the events of March 14, 2009, having regard to all of the circumstances of this case.

D) Cst. Russell or the Bridgewater Police Department failed to secure any video from the Bridgewater Mall within 30 days of the Defendant’s arrest and thus it was unavailable for the Defendant when disclosure was requested;

E) Cst. Russell or the Bridgewater Police Department failed to secure any video of the RCMP lockup or jail cell within 30 days of the Defendant's arrest and thus was unavailable for the Defendant when disclosure was requested;

[89] It is convenient to treat both of the above contentions as one. I have concluded that there is no substance to either of these issues as framed by the Applicant.

[90] With respect to the Bridgewater Mall video, the evidence of Cst. Jennifer Russell was that she was aware that the mall cameras were purposely focussed on the mall interior, and as such they would not have captured the events in question, since the latter occurred outside the mall. There was no evidence to suggest that video footage of the events in question was ever captured by the mall cameras. Nor was there any evidence adduced, whether from Mall personnel or otherwise, that the cameras were ever configured at any time, let alone in the early morning of March 14, 2009, so as to make it even remotely possible that these events involving the accused could have been captured. In the complete absence of any evidence that the mall cameras were situated differently than Cst Russell testified, or that relevant video footage could possibly have existed at some time, I cannot fault the Crown or police for having failed to obtain or preserve it.

[91] The Applicant has also raised an issue as to the unavailability of video of the RCMP lockup or jail cell where he was housed after being taken to the police station in the early morning hours of March 14, 2009. It is not contested that this video would be stored and maintained for up to 30 days following the date in question.

[92] It is important to bear in mind, however, that what the police knew within that time frame was that they had to preserve and disclose evidence related to the charges that the accused would be facing as a result of his actions on March 14, 2009 at Bridgewater Mall. It is with respect to those charges, that the police and/or the Crown could have reasonably expected to provide disclosure. There was at that time nothing before the police that would have made it appear relevant to obtain video recorded data with respect to the Applicant while he was housed overnight.

[93] In any event, I am unable to see (on the basis of the evidence presented by the Applicant), that there is anything flowing from the unavailability of such video capture which impedes his ability to make full answer and defence to the charges that were laid against him.

F) Cst. Gibson, Cst. Bennett, and Cst. Russell, failed to make any hand written contemporaneous notes; failed or purposely failed to make accurate electronic report after the arrest specifically omitting Mr. Weagle therefrom; failed to obtain and provide timely statements and Mr. Naugler and Mr. Weagle; and/or failed to introduce and disclosure "can say" statement for Mr. Naugler.

[94] Dealing first with the argument that the three named constables failed to make hand written contemporaneous notes, it is sufficient to refer back to some of the events as they unfolded that evening without repeating them exhaustively once again. The police were focussed on dealing with the Applicant's brother Royce. The events quickly shifted to the accused after he exited from the mall and attended the scene.

[95] He proceeded very quickly to a state of increasing agitation and hostility towards the police in general and Cst. Russell in particular, punctuated with outbursts of hostility, and abusive anger, both focussed and unfocussed. When Gibson and Bennett attempted to place him under arrest, he violently resisted them, to the extent that the taser had to be deployed. After finally being cuffed and placed in the back of the police car he inflicted such damage upon it that the rear passenger door was bowed.

[96] Throughout this entire process Csts. Gibson and Bennett were engaged in attempting to gain control of the Applicant, and Cst. Russell was engaged in first, verbal interaction with Mr. Boliver then, when the efforts of Officers Bennett and Gibson failed to bring him under control, with the administration of the taser warning and finally with the deployment of the taser itself. It appears obvious that the officers could not have been expected to make notes as this was all happening.

[97] It certainly may be true, as the Applicant asserts in his brief, that had the officers' memory been preserved via hand written notes "immediately after taking the Defendant to the RCMP cells, these notes could have been used to refresh their respective memories".

[98] That said, witness recall, and it's accuracy, is a live factor in virtually every trial, to a greater or lesser extent. The contemporaneity, or lack thereof, of notes made by an officer and, indeed, whether notes are made at all, are two of many factors which may assist the Court in determining the weight to be given to the officer's evidence. I have considered all of these factors, and others, in determining which evidence to accept for the purposes of this Application, and the weight to be given it. Moreover, I am not satisfied that there was anything untoward in the manner in which the notes were made by any of the Crown witnesses that can rise to the level of an infringement of one of the Applicant's *Charter* protected rights, including his ability to make full answer and defence, when his Trial on the offences with which he is charged takes place.

[99] It is true that Cst. Gibson's report, when entered electronically, made no mention of Mr. Weagle, the civilian ride along. That said, Mr. Weagle was referenced in the Crown's disclosure that was provided, even if the phone number at which he could be reached was inaccurate. The Applicant had plenty of time from the disclosure of the Crown materials to the day of the hearing, to correct this and obtain the proper contact information with respect to Mr. Weagle.

[100] There is further evidence that the Applicant was notified of Mr. Weagle's existence in a timely fashion. To cite but two examples, Mr. Weagle's existence was referenced in an email between Counsel in January 2011, and his status as a Crown witness was addressed squarely on April 13, 2011 in the discussion between counsel and the Court captured on pages 244-255 of the transcript of the evidence taken on that date.

[101] During that discussion, there was reference to an email sent by counsel for the Applicant to the Crown in January 2011 requesting disclosure information with

respect to Mr. Weagle. Obviously his existence as a potential witness was known at least by that date.

[102] Finally, Mr. Weagle's testimony was adjourned to a much later date (August 31, 2011), a period of four and one half months after the prior (April) Court date, to ensure that Counsel for the accused had ample time to prepare, even within the context of this Application. Any inconvenience, or potential inconvenience, or prejudice to the Applicant, whether perceived or actual, would have more than been cured by the combination of the above referenced remedial measures, most importantly the lengthy delay in the actual taking of Mr. Weagle's evidence, and the additional option which was offered to Counsel for the accused, namely, the option of re-opening his case (which had been closed) if he felt it necessary to do so upon the conclusion of Mr. Weagle's evidence.

[103] Finally, it may be sufficient to point out that both Messrs. Naugler and Weagle were examined and cross-examined extensively in the course of this Application. The benefit of this testimony is now available to the accused when his trial (with respect to the charges that he faces) takes place.

[104] There is nothing in the Applicant's contentions either in relation to disclosure made or not made with respect to either Mr. Weagle or Mr. Naugler, that gives rise to an inability or an impediment to the Applicant's ability to make full answer and defence with respect to the offences with which he is charged.

(IV) Schedule D - Particular of Charter of Rights and Infringements - s. 12: The Applicant alleges that his right to be subject to any cruel and unusual treatment or punishment pursuant, to Section 12 of the *Charter* has been infringed in that:

a) The police subjected the defendant to being tripped to the ground with no way to protect his head, his head hitting the pavement, knees being applied to his back, pressure point application, arm lock, multiple punches, being lifted up by the handcuffs, handcuffs being applied too tightly, and multiply (sic)

> **taser discharges; and continued to subject the Applicant to electric shock via the tazer (sic) gun after the police knew or ought to have known that the Applicant suffered from post traumatic stress disorder as a result of electrocution; or at the very least they knew or ought to have known that the Application had a pre-existing injury or incident related to an encounter with electricity, but continued in any event instead of utilizing a method of control appropriate to the situation; and**
>
> **b) Such other grounds as may appear at trial or voir dire.**

[105] This particular contention may be dealt with relatively quickly. There is evidence, particularly that of Mr. Whynot, that the police were advised, through him, that the Applicant had been electrocuted in the past, and as such he ought not to be tazed. As he put it:

> "The other officer pulls a taser onto him and I was standing behind her. And I started yelling at her to tell her not to taser him that he had PTSD from an accident at work, from being electrocuted and ah, she just didn't listen to me and I said that a few times, she tasered him. Um, a cab driver come grabbed me and put me over the cab and put me into the cab as they were tasering my uncle".

[106] It is worthwhile that to observe that, other than the contentions of the Applicant and the various witnesses who testified on his behalf, there was no formal evidence led of a professional diagnosis of PTSD having been rendered with respect to him. Moreover, there was no evidence led to suggest that the risk of injury attendant upon someone with such a history is any more severe than that which is to be encountered in any event.

[107] Finally, even if the diagnosis and heightened risk of greater harm to the accused had been established, it would still not suffice, in my view, to render the use of force that was administered upon him that evening, including the use of the taser, inappropriate, let alone cruel and unusual punishment.

[108] Without recounting once again all of the various external factors that the police were facing that evening, and which required them to bring the situation under control quickly, I am unable to conclude that taser and consequent electronic shock, as well as the other lesser applications of force upon the accused that preceded it, were anything other than what was strictly necessary under the circumstances.

[109] I am certainly not suggesting that under no circumstances can force used to effect a legitimate arrest ever rise to the level of cruel and unusual punishment - that would be contrary to the decided authorities. However, I have found that the police had grounds to lawfully arrest the accused, and that they did not use excessive force in so doing. Even if the accused's contentions both of having PTSD, and the effect of the taser upon someone with that condition (neither of which has been satisfactorily demonstrated) were to be granted, it would not vitiate the danger presented by the accused that evening, or the need to bring him under control quickly before he or someone else was injured, perhaps more severely, due to his actions.

[110] I therefore find that no breach of the accused's s. 12 rights has occurred.

V. Schedule E - Particulars of Charter of Rights and Infringements - s. 10(a) and 10(b): The Applicant alleges that his right upon arrest and detention to be informed promptly of the reasons thereof; and to retain and instruct counsel without delay and to be informed of that right; pursuant to Section 10(a) and 10(b), respectively of the *Charter*, has been infringed in that:

a) At no time during his arrest of the Defendant and his transportation to the holding cell or to the hospital was he informed of the reason for his arrest or detention:

b) At no time during his arrest and detention was he informed of his right to contact legal counsel or given an opportunity to contact legal counsel or provided with the legal aid number to contact duty counsel; and,

c) Such other grounds as may appear at trial or voir dire.

[111] I accept the evidence of Cst. Gibson that the Applicant was informed of the fact that he was being placed under arrest. I further accept Cst. Gibson's evidence that the reason for the arrest was public intoxication and a breach of the peace that had unfolded as a result of the Applicant's actions that evening, and the effect that it was either having on the crowd or could potentially have on the crowd.

[112] Notwithstanding Cst. Bennett's recollection to the contrary, I find that Cst. Gibson did not get an opportunity to say any more than "you're under arrest". He and Bennett simultaneously placed their hands on either side of the accused to get him to the patrol car, but didn't get more than a step or two in that direction before he began to violently resist, which resistance ended up with him being tasered and handcuffed.

[113] After being placed in the vehicle, his actions remained out of control. They were violent. Ward Beck's testimony is illustrative in that respect. Sgt. Beck had attended the scene just after the Applicant had been placed in the patrol car. As he states at pages 178 of the Aug 31st transcript:

> Q. And what officers were present when you arrived?
>
> A. Uh, Constable Jen Russell was there, and Constable Morgan Gibson and Constable Matt Bennett.
>
> Q. Okay. What about the defendant in these matters, was he there then still?
>
> A. Yes. He was in the back seat of Constable Gibson's and Bennett's patrol vehicle.
>
> Q. Alright. Did you have any interaction with him?

> A. Not at that time. I could hear him in the back seat of the patrol car. He was screaming and cursing and banging on the window, I believe it was the side window.

[114] I earlier made reference to testimony that he was banging himself into the interior of the vehicle, and also kicking the rear door with so much force that he ended up doing damage to it, leaving it bowed outward.

[115] Beck, Bennett and Gibson then transported the Applicant to the RCMP cells for lodging. As Beck continues the narrative from pages 178 and 179:

> A. They transported him over there. I attended there also. He was being searched and, prior to that I had called EHS because the Taser had been deployed. I contacted EHS, Emergency Health Services, to remove the darts which is a common practice. When we arrived there, he wouldn't listen to simple commands. Some of his belongings were removed, he was placed in a cell. We awaited arrival of EHS. When they arrived they started doing an assessment on him and then he refused to be further assessed. EHS left the area, we removed the rest of the belongings and we left the area. We left the RCMP office.

[116] Even upon being transported to the police station, the accused did not moderate his actions to the point where it was possible to have meaningful interaction with him.

[117] He is noted as being uncooperative with the police attempts to remove his handcuffs, and he is not prepared, at least initially, to allow EHS personnel to perform an assessment with respect to him. They are accordingly sent away, only to be called back moments later after the accused changed his mind. He is then taken to the hospital.

[118] The accused's emotional state was such that it was not possible for the police to have explained to him the reasons for his detention and/or the nature of the charges that he was facing, and/or his right to counsel, until after his return to the police station from the hospital. I find on the balance of probabilities that it

would not have been possible to have provided him with his rights and caution prior to that.

[119] There is not a great deal of evidence before me as to his status after his return to the police station. That said, it strikes me as somewhat of a common sense proposition that the accused's demeanor and emotional state must have reached a point at some time during the night whereby the necessary information could have been provided to him.

[120] I find, therefore, on a balance of probabilities, that the accused's s. 10(a) and 10(b) rights were violated by the police in this instance. Having made such a finding, I must next determine what (if any) is the appropriate remedy to address this breach.

Remedy

[121] I have not found that the breaches of the Accused's *Charter* protected rights were multitudinous or cumulative, as alleged. The only breaches were with respect to ss. 10(a) and (b), and under the circumstances indicated.

[122] These provisions nonetheless represent two of the cornerstones of an individual's rights. To say that they are fundamental to the integrity of our Justice System is trite and, if anything, understates their importance. Under no circumstances will the court ever be seen to condone a failure to comply with these rights. The court must examine all of the circumstances under which the breach has occurred to determine what remedy, if any, is appropriate to the accused under the circumstances.

[123] I find that the police both individually and collectively, did not act in a malicious or high handed manner, nor do I find that they acted out of animus or spite. There was a prolonged period of time during which it would have been

pointless to have attempted to explain to the accused his rights and the nature of the charges he was facing. It is a much more likely scenario, under all of the circumstances, that the officers in question simply forgot that the accused had not been provided with this information.

[124] It light of the significant efforts that it took to gain control of the accused, effect his arrest, get him in the patrol car, get him some medical attention, get him to the hospital, and then get him back to the station, it is possible to understand how this omission may have occurred, without condoning it.

[125] There is no evidence that I am being asked to exclude. In any event, none was obtained as a result of, or flowing from, the failure of the police in this respect. Virtually all of the actions alleged to constitute elements of the offences with which he is charged were committed long before the police would have had a reasonable opportunity to explain the charges to him and his right to counsel.

[126] Mr. Boliver has requested a stay. I cannot conclude that this is "one of those clearest of cases" where continuing the prosecution would represent an inevitable affront to society's sense of fair play and decency. Even if I had, I would have concluded that the affront does not outweigh society's justifiable and understandable interest in seeing cases such as this prosecuted effectively.

[127] Accordingly, although I find that there has been a violation of the accused's s. 10(a) and (b) rights, under the circumstances I am not persuaded that this is an appropriate case in which to grant the remedy sought, or any remedy, to the accused. The Application, in its entirety, is therefore dismissed.