PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. McCready*, 2020 NSPC 41

Date: 20200925
Docket: Case #8015260-64
Registry: Sydney

Between:

HER MAJESTY THE QUEEN

v.

JASON FRANCIS MCCREADY

Judge:	The Honourable Judge Peter Ross
Heard:	Between September 21, 2017 and July 31, 2020, in Sydney, Nova Scotia
Decision	September 25, 2020
Charge:	s.253(1)(a), s.254(5), s.270(1)(a), s.264.1(1), s.129(a) of the *Criminal Code*
Counsel:	Mr. Darcy L. MacPherson, Public Prosecution Service Mr. William P. Burchell, for the Defense

Summary:

The accused was arrested for impaired driving and given a demand to provide breath samples to determine his blood alcohol concentration. His behavior, including repeated requests to speak with a particular lawyer, prevented police from administering the tests. He refused to exit the police vehicle at the RCMP Detachment. Police, who could neither coax nor pull him out of the back seat, delivered a 'groin strike' to gain compliance with their directions. The accused was lodged in a cell at the lock-up, charged with impaired driving, refusal of a breath demand, resisting arrest, uttering threats and assault on a police officer.

Defence made a *Charter* application under s.12 – cruel and unusual treatment – and sought a stay of proceedings. After a 'blended' hearing on both the substantive charges and the *Charter* motion it was determined that the evidence sufficed to prove the refusal, resisting and uttering threat charges. However, expert evidence indicated that the police used excessive force on the detained, handcuffed accused. The evidence as a whole served to establish a breach of the accused's *Charter* right. Accordingly the court declined to enter convictions, and entered a stay of proceedings.

By the Court:

Introduction

[1] On the Saturday of the 2016 Labour Day weekend, an annual "poker run" played out on the Bras d'Or Lake with boats traversing its various harbours in search of tokens and hospitality. Jason McCready entered his craft, completed the

circuit, and tried a hand at guitar and song afterwards. The rest of the weekend was anything but smooth sailing; it ended with Mr. McCready marooned in a Baddeck RCMP holding cell, charged with impaired driving, refusing a breath demand, and resisting, threatening and assaulting a police officer.

[2] Mr. McCready was released from custody on September 7, 2016 with trial set for September 21, 2017. Although the trial got underway on schedule, the matter was delayed numerous times by illness, the accused's work schedule, a mid-trial *Charter* application and unavailability of witnesses. More testimony was heard in December of 2019, followed by a number of continuances to allow the Crown to call expert evidence in response to a Defence *Charter* motion. When that did not materialize, final arguments were scheduled for July 31, 2020 and the matter adjourned for decision to September 25, 2020, more than four years after the events in question. These are written reasons for that decision.

[3] The primary basis of the *Charter* application is an alleged breach of the accused's right not to be subject to cruel and unusual treatment, as set out in s.12. Less developed was an alleged infringement of the accused's right to counsel, s.10(b). Both are dealt with herein.

[4] Crown and Defence agreed to proceed with the trial and the *Charter* application in a blended hearing. Although there are potential pitfalls in such a procedure, there are certain advantages as well, particularly given the remedy sought here by the Defence – a stay of proceedings. The conduct of both the accused and the police may be fully examined. This in turn gives better context for considering whether a stay ought to issue if a *Charter* breach has been proven, and avoids repetition of evidence if a stay is not granted. It permits a determination of

all the issues in the case and may eliminate the need to remit the matter back for trial should a stay of proceedings be overturned on appeal.

Preceding events

[5] The accused began the all-day "poker run" at 7:00 a.m. on Saturday September 3rd. At the final stop, when all the cards were accounted for, he attended an all-night party. He woke up "sick as a dog" and spent most of the next day recuperating. He steamed back to his home in Big Harbour, paid a brief visit to a friend's house, and then, late on Sunday evening, decided to go in to Baddeck for a pizza with his newly-made acquaintance Austin Deavers. Mr. Deavers was visiting the area from Regina. It was his good fortune to meet and befriend Mr. McCready, who took Deavers on his boat for the poker run and then back to his residence the next day. Judging by his testimony, Mr. Deavers was left with a very favourable impression of Mr. McCready.

[6] En route to Tom's Pizza, noticing that his diesel-powered Dodge Ram was low on fuel, the accused drove to the Irving station on the #105 highway. Deavers made an impulse purchase of chocolate chip cookies as he paid for the fuel. They proceeded to the pizza shop, ordered, parked near the water to wait, and ate cookies.

[7] Meanwhile, an employee at the Irving had called the Baddeck RCMP detachment to voice concern about the occupants of the Dodge Ram. Police responded, locating the accused's vehicle just as he was leaving Tom's with two pizzas. Thus began a fractious encounter which led to an unfortunate conclusion.

At roadside

[8] Cst. Newell said the complaint of the employee was that "two males left the Irving smelling of booze . . . got into a black Dodge Ram and went east." He and his fellow officer, Cst. Beatty, left the Detachment in separate vehicles and approached the village of Baddeck from opposite directions, believing that this is where the vehicle must have travelled. Cst. Newell saw a vehicle matching the description leaving Tom's Pizza on Chebucto St., activated his lights and siren, and stopped it a short distance down the street. Newell says that the Dodge Ram had crossed the centre line twice, had been "¾ in the opposite lane" and went up on the curb when it pulled over to stop. There were two occupants – the accused who was driving and Mr. Deavers in the passenger seat. Newell says he approached, asked for the usual papers, identified the accused from his driver's licence, and noticed a smell of alcoholic beverage from his breath, red eyes, and slurred speech. He said the accused wanted to know why he was stopped. Newell told him that he was under arrest for impaired driving. He said the accused would not get out of his vehicle. He said "the third time I yelled at him and threatened him with resisting arrest." He says Mr. McCready then exited his vehicle, was cuffed, and was taken back to Newell's police car. By this time, Cst. Beatty had arrived in her vehicle. She confirmed that Newell yelled at the accused, finding this "very unusual for Cst. Newell".

[9] On Mr McCready's telling, Cst. Newell approached the accused's vehicle, yelled "you're drunk" and began "pulling at me, ripping my shirt". He denied ever being put under arrest, said he did not understand why the officer was hollering, said Newell was "becoming unglued" and that he "tried to talk him down." Deavers supports the accused's characterization of Cst. Newell, calling his conduct "unbecoming", describing the situation as "scary" and claiming that the accused

did not refuse to get out of the vehicle, indeed that "I don't think he had a chance to refuse to get out." He did not specifically deny that the accused was placed under arrest for impaired driving, but he supports the accused's contention that Newell was overbearing and aggressive from the very beginning. When Newell first appeared at the driver's window Deavers said "we're only eating cookies."

[10] It seems clear that Cst. Newell hollered at the accused and was upset by his non-compliance. It is quite possible that Newell grabbed the accused by his clothing in an attempt to get him out of the vehicle and complete the arrest, but I do not find that he acted with the degree of force alleged by Deavers and the accused. I find that he did tell the accused he was under arrest for impaired driving, and I find that he had reasonable grounds to do so.

[11] Mr. McCready was reluctant to get in Newell's police vehicle, a Chevrolet Tahoe. Beatty seemed to suggest that the accused had trouble getting himself up on the running board and into the back seat because he was intoxicated. Once in he complained about the cuffs being tight. He got out, a substitute set was applied, and was eventually put inside in a second time. Of the difficulty getting the accused into the Tahoe, Newell says "he just wouldn't get in." He says the accused ignored direction and tried to change the subject, but was not, at that stage, belligerent.

[12] Cst. Beatty's vehicle was equipped with a dash-cam. Crown introduced video taken from the time she arrived on scene. The playback starts at 23:34. Beatty's police car is parked behind the Tahoe driven by Newell, which is parked behind the accused's Dodge Ram. This footage generally comports with the evidence of Newell. At 23:35 one sees the accused in custody. Shortly after it

appears he is being cuffed. At 23:39 he gets into the Tahoe, but exits shortly after. It appears a second set of cuffs is applied. At 23:43 both the accused an Newell are back inside the Tahoe. Beatty retrieves something from the front seat and at 23:48 appears to return it – I infer this is a roadside screening device administered to Deavers – and stays by the open front passenger door until, at 23:55, the Tahoe drives away.

[13] Newell testified, and I accept, that he informed Mr. McCready of his s.10(b) *Charter* right by reading from a card containing standard wording. Reading from the identical card, he testified that he told the accused "You have the right to free and immediate legal advice from duty counsel by making a free telephone call to. . . ". After-hours phone numbers were then given. Mr. McCready would not confirm that he understood but his response, "I ain't talking to no one until I speak to Billy Burchell", taken together with subsequent conduct and comment, indicates that he did. When told he had the right to apply for legal assistance through the Nova Scotia legal Aid Program, the accused said that he would not qualify because he earned $215,000 per year.

[14] Newell then provided the standard police caution about the right to remain silent. In response, Newell recorded that the accused complained about the cuffs, said he didn't do anything wrong, but acknowledged being drunk.

[15] A breath demand was given. Again from the card, Newell said "I demand that you accompany me to our office in Baddeck and to provide a sample of your breath that is suitable . . . (etc.)" This demand was in standard form and would clearly indicate to the accused what was required of him. He was told that if he refused he would be charged with the offence of refusal. Mr. McCready did not

give a clear yes or no response but said again that he wanted to speak to Mr. Burchell. Newell then elaborated on the legal effect of refusing, i.e. that it carried the same penalty as did the offence of exceeding the legal limit for blood alcohol.

[16] I find that Newell read a standard breath demand, caution and right to counsel to the accused. I find the accused disingenuous in saying that he did not know what was happening. He saw Cst. Beatty administer a roadside screening device to Deavers and acknowledged that this was done to test Deaver's ability to drive the Dodge Ram away from the scene. He understood that he had the right to speak to a lawyer, immediately insisting that he wanted to speak with Mr. Burchell (his trial counsel). Both the accused and Cst. Newell were under some misapprehension about whether a person who availed themselves of duty counsel had to pay for that service. It is possible that Newell meant to say simply that duty counsel was being paid, but not that McCready would pay him. Be that as it may, the advice given was accurate, and cost was evidently no concern for Mr. McCready, who spoke about how much money he made and later said he could pay thousands of dollars, if necessary, for Mr. Burchell come to the Detachment.

[17] From the testimony of Cst. Beatty I find that Mr. McCready insisted that he speak with Mr. Burchell even before he was placed in the police car. That said, McCready's expressed desire to speak with a lawyer in response to the breath demand should not, in and of itself, be construed as a refusal.

[18] Newell and Beatty recalled that the accused said that he had done nothing wrong but that he was drunk, practically in the same breath. Mr. McCready adamantly denies saying any such thing. I am unable to resolve this discrepancy,

but nothing depends on it. As noted above, I find that police had sufficient grounds to arrest and make a breath demand regardless.

At the Detachment

[19] Newell returned to the Detachment with the accused, arriving there about 23:55. Cst. Beatty stayed at the scene to deal with Deavers and the Dodge Ram. A short time later Newell called her to say that he needed assistance. Newell had parked his Tahoe outside the Detachment. The accused refused to get out of the back seat. He says the accused was yelling "fuck you" and spraying and spitting as he did. Newell says he warned him he could be charged if that behavior continued, in response to which the accused leaned forward and yelled in his face, spraying his face with saliva. Newell is convinced this was intentional spitting. Newell tried to pull him out but was unable to do so. According to Newell this was because McCready was heavy and had "hooked his feet under the seat".

[20] According to Newell, the accused said "if I didn't have these cuffs on I'd kick the shit out of you." The accused admits to saying this but claims to have done it only after he was struck by Cpl. Kuchta (a matter I will return to, below). I find that the threat was made earlier, as Newell says.

[21] Cst. Beatty returned to the Detachment, as requested. Newell also requested help from an off-duty member, Cpl. Kuchta (then a Constable) who drove there from his home. From the evidence of all three it appears that the accused continued to condition any cooperation on speaking with Mr. Burchell. Beatty told the accused that he would have to get out in order to talk to his lawyer. Newell told the accused that he "could speak to a lawyer in private inside." But Mr. McCready dug in, insisting he speak with his lawyer. To accommodate him, and likely to mollify

him, Newell called Mr. Burchell's office on a cell phone. Receiving no answer, he left a message. He next called the after-hours duty counsel number, but again had to leave a "voicemail" there. He called Mr. Burchell's office a second time and held the phone to the accused's face so that he could "leave a voicemail of his own." Kuchta had a private number (home or cell) for Mr. Burchell stored on his phone, and so he tried that. Again there was no answer, and Kuchta left a voice message.

[22] The accused may have spoken to duty counsel had s/he been available at that moment, but it is by no means clear that had he done so he would then have exited the vehicle. During these attempts to contact a lawyer the accused made it clear that he wasn't going to give a sample or otherwise cooperate until he spoke to Mr. Burchell.

[23] Mr. McCready, who is now 44, testified about an experience he had with the Toronto police as a teenager in which he was unlawfully arrested, detained and beaten. The account was rendered convincingly, although there was no way for the Crown to test it. He connected this to allegations of an aggressive approach by Cst. Newell to claim he was afraid he was "going to get it", that he was "scared to death", that he saw "the same mentality I dealt with in Toronto" and thought "here we go again". Police witnesses agree that he raised this matter during their attempts to deal with him that evening.

[24] As noted elsewhere, I do not find that Newell behaved as the accused describes when they first came face to face on Chebucto St. But accepting that Cst. Newell became visibly upset by the accused's failure to comply with directions (get out of his vehicle, accompany the officer, etc.) and accepting for the sake of

argument that Mr. McCready was victimized by Toronto police as a teenager, his claim to be afraid to enter the Detachment seems implausible. He acknowledged a couple of encounters with the authorities since, without any mention of misconduct. He has been successful in his career, being now a heavy equipment technician for CNR Ltd. In Fort MacMurray. The present encounter was near his residence in Big Harbour. He has family and friends in the immediate area. He had a friend with him in his vehicle who witnessed the interaction on Chebucto St. He presented as self-reliant and self-confident and not as one who would be easily cowed or intimidated. When he complained about the hand cuffs another set was applied. I am left with the impression that Mr. McCready is exaggerating the effect of this teenage experience to justify his failure to comply with the directions of the police. He was being obdurate. If he was fearful of anything, it was the breath test.

[25] At about 00:30 the police drove the Chev Tahoe into the secure bay of the Detachment "for safety reasons." Police continued their attempts to get the accused out of the vehicle. They tried to negotiate with him. The accused said "there was a lot of discussion" and eventually they told him to "walk, or go the hard way". Shortly after 00:40 the accused was successfully removed from the back seat of the police car and taken to a holding cell. There, as Newell was taking off the cuffs, he asked him point blank "Are you going to take the breathalyzer?" The accused replied, "Go fuck yourself".

Extricating the accused

[26] Cpl. Kuchta says that a few minutes after the police vehicle entered the secure bay he concluded that they were "talking in circles". He says the accused had threatened to fight with them, had his feet "wedged under the silent

patrolman", and seemed "stocky and strong". Newell told Kuchta he'd been spit upon, which Kuchta saw as a sign of disrespect and possible transmission of disease. Attempts to get the accused out by tugging at him had been unsuccessful. He considered what to do. He ruled out a conducted energy weapon (Tazer), believing it was against protocol to use it on an accused in handcuffs inside a car. He couldn't use a spray because they were in an enclosed area. Carotid control (headlock) did not fit the bill; he thought a headlock should only be used where police were in serious danger.

[27] Kuchta was especially perturbed at the thought that the accused had spit on a fellow officer. He said the accused was threatening to fight if they took him out of the car. He felt the accused had been given ample time and opportunity to exit the police car "cooperatively." The fact he had been woken up at home to come to the Detachment to deal with Mr. McCready likely didn't help matters.

[28] Although the Detachment had ordered spit hoods the previous year, Kuchta had never used one and it appears none of the three officers had been trained in their use.

[29] Kuchta decided that his best option was to deliver a punch to the accused's genitals. He was aware that there were other areas of the body he might have struck and "pressure points" he might have targeted but said he worried that such attempts might cause more damage than a blow to the testicles. He believed that because the accused was intoxicated even multiple strikes to these other sites might not be effective. He said "it came to the point where I thought this was appropriate."

[30] The accused says he was in a "leaning to one side . . . one foot kind of hanging out the door . . . facing the floor" when he was "hammer-fisted in the privates . . . it crippled me . . . there was excruciating pain . . . I had no way to protect myself". The accused said "I'm not a wimp – I do rugged work – but this did me in." He says he couldn't walk and was dragged in rough fashion to a cell. He says he was in pain while in custody (he was released two days later) and "couldn't urinate properly for days."

[31] Kuchta says the accused was sitting when struck, one foot near the open door, the other under the silent patrolman. The single strike had the desired effect – they were able to pull him out. He says they "dragged him right to the cell" maintaining that even then the accused was not cooperative. As Beatty remembers it, the one punch was enough to make Mr. McCready "release his feet" and "permit Newell to drag him out." He "refused to stand up" and so they dragged him through the bay until he relented, saying "ok, I'll walk". As she recalls, the accused walked down the hallway to the cell.

Detachment video

[32] RCMP security cameras captured video of Newell's Tahoe outside the Detachment, starting around 12:03 a.m. The video is quite dark - one cannot see inside the police car and it is even difficult to identify the people outside. At 12:09 the rear door is opens and one sees police milling about the vehicle. At 12:17 a police officer moves toward the front of the Tahoe, possibly holding a cell phone. At 12:20 a police officer is standing at the front of the Tahoe, using a cell phone or tablet. At 12:25 a police officer is holding a cell phone to his ear. At 12:29 both driver's side doors are open. Three seconds later three doors are open and police

are standing by them. Within a few seconds the doors close, an officer gets in the driver's seat, the lights go on and the vehicle drives into the bay. This supports testimony of Cst. Beatty that Kuchta "had to pull the accused into the truck" so that they could close the rear door of the vehicle in order to drive it inside.

[33] Video was also obtained from inside the secure bay. Again it is impossible to see anything occurring inside the Tahoe and even under better lighting it is difficult to identify police officers as they move around the vehicle, stand near open doors, and occasionally lean in. Again, there is no audio.

[34] At 12:31, inside the bay, the garage door closed, one sees that both rear doors of the Tahoe are open and a police officer is leaning in the driver's side rear door. A short time later an officer is at each of the rear doors. From 12:33 to 12:37 an officer on the passenger side appears to be speaking to the accused, then both officers are at the driver's side rear door. Over the next three or four minutes the officers, barely identifiable as Kuchta and Newell, are back and forth from one side to the other.

[35] At 12:44 all the doors are closed; there appears to be nobody in or around the vehicle.

[36] Video from inside one of the holding cells starts at 12:45. Three officers are present and appear to be sitting the accused on a bench. Another clip starting at 12:46 shows the accused alone in the cell, sitting, in no apparent distress (although the view is from above and behind and one cannot see his face). He extends his legs at one point, gestures with his hands, and feels the cushion he is sitting on.

[37] Video footage of the hallway leading from the car bay to the holding cells begins at 12:02. It ends at 12:45. Nothing of note is seen, just the empty hallway.

[38] Although I have described the Detachment video as if it were continuous, it is in fact comprised of a series of segments of varying lengths, each contained in a separate digital file. Cst. Eric Latwaitis (who was not involved in the events) compiled the videos, introduced them in court, and handled the playback. Displaying them in sequence, he explained that the recorded images had to be reproduced this way because the file sizes were "too large to put on a single dvd". Only the proprietary software "HD Viewer" could be used to open and view the files. He said that "the system breaks it down into pieces, but how this is done is out of our control." He termed these "manageable sections".

[39] It is regrettable, to say the least, that the section which might be of greatest interest – the three or four minutes just after 12:40, at which time the accused was extracted from the Tahoe and moved to the cell – is missing. Cst. Latwaitis indicates that he inputted the relevant times in extracting the electronic files which were disclosed. He cannot explain this unfortunate lacuna except as a limitation of the system. I don't know whether the same system is still being employed in the Baddeck Detachment, but one has to wonder whether a recording system which fails to capture (or reproduce to its user) a continuous representation is worth having.

[40] The video as we have it does not conflict with the narrative evidence of any of the witnesses. It cannot resolve any discrepancies between Crown and Defence evidence. Possibly footage of the condition of the accused between the Tahoe and the cell would have been instructive, but we will never know. Defence

understandably made a pointed complaint about the gap, but there is no expert analysis of the evidence and nothing to contradict Cst. Latwaitis. I note there were other gaps in the video, immaterial omissions, for instance at 12:15 in the hallway video. In the result, will not make a negative inference against the Crown.

[41] Curiously, both Deavers and the accused say they saw Cst. Newell at the Irving Station when they were buying gas. Newell says nothing of the sort. It is difficult to reconcile this stark difference. Possibly Deavers saw another RCMP officer altogether, for Deavers said the vehicle being driven was a typical "police cruiser", which does not fit the Tahoe driven by Newell. As well, Deavers said the vehicle left the Irving and turned away from Baddeck, headed in the opposite direction. Possibly it was indeed Newell, that he got the call about the impaired driver while in his vehicle, but has simply forgotten what would, at the time, be an unremarkable occurrence.

[42] In a similar vein the accused and Deavers say that the accused had no ID on him when arrested by police, that he had left his wallet on the boat. Newell and Beatty say they saw McCready's driver's licence in his vehicle. Again, this is an odd discrepancy on a collateral point, one where neither version favours either side. The only importance is in the difference, but I am unable to determine which is more likely true. Hence there is no impact on either party's credibility.

Substantive offences

[43] I have assessed the evidence in this blended voir dire / trial as it regards the substantive offences. The evidence meets the criminal burden of proof that the accused resisted arrest, uttered a threat and refused a breath demand without lawful

excuse. The evidence leaves reasonable doubt on the impaired driving and assault peace officer charges.

S.253(a)

[44] There is some evidence to support the allegation of driving while impaired. However, the accused pulled his vehicle on to Chebucto St. from a driveway, which could account for him crossing over the centre line. It was late at night, with no oncoming traffic. He may simply have been lax about getting the vehicle into the proper lane. McCready denies going up over the curb when he stopped. The dash-cam video doesn't show that he did. He admits he hit the curb, but hearing a siren and seeing police lights could cause a driver to make this slight error. There was a strong smell coming from the empty beer bottles in the truck. McCready and Deavers say it "smelled like a brewery". McCready says he may have had a smell of booze on his clothes because he "was just coming off a party." He says his eyes could have been red from being hung over. He was not in the best of shape after the all night party and there may even have been some residual smell from his breath. The observations of driving were made over a short distance and span of time. The picture is not flattering but not sufficiently clear to prove that the accused was driving while impaired.

s.270

[45] While I don't doubt that Newell felt spray as the accused was mouthing off, I am not convinced that this was purposeful spitting. Various witnesses acknowledged that a person might emit some saliva from their mouth if they were shouting. The accused testified that he did not and would not spit on a police

officer. While the accused may have been insolent and upset, there is some doubt that this was an intentional act of assault.

s.129

[46] McCready displayed active resistance to the arrest process. The police acted lawfully and in the course of their duty in attempting to extricate the accused from the police car and take him into Detachment for a breath test. As discussed below, it would not be feasible to leave the accused in the back of the police car for a lengthy period of time. The evidence proves this charge to the criminal standard.

s.264.1

[47] I have noted above a finding that the accused uttered a threat to the police before he was struck. The evidence leaves me with no reasonable doubt on this.

[48] As an aside, it may be argued that in a literal sense the phrase “If I didn’t have these cuffs on I’d kick the shit out of you” is not a threat, whereas the phrase “When these cuffs come off I’ll kick the shit out of you” would be. The latter is a conditional threat; the former is simply a statement of fact - the speaker acknowledges being unable to do what he would like to do. Strictly speaking, this is not a threat posited on a condition materializing. It is easy to say what you will do when you can’t do it. However, given the surrounding circumstances and the fractious nature of the interaction the police would reasonably construe these words as communicating a threat to act violently whenever the cuffs were taken off.

s.254(5)

[49] While insufficient to prove impaired driving, Newell's observations gave him sufficient grounds to make a demand for breath samples. In response to the initial breath demand the accused said "I want to speak to Bill Burchell first" which, at that point, was perfectly proper. The mere fact that Mr. McCready balked at giving a breath sample when given the demand in the police vehicle on Chebucto St., but instead insisted on speaking with his lawyer, does not make out an offence under s.254(5). However, in making this a condition of getting in and getting out of the police car, he sought to use the right to counsel as a tool to prevent the police from fulfilling their duties. His own obstinacy was an impediment to police implementing the right to counsel which he himself had invoked. It is apparent that both at roadside and later at the Detachment the accused demanded to speak with a particular lawyer as a means of obstructing the police in what was a proper arrest, detention and demand for evidence.

[50] The police were attempting to obtain breath samples from an impaired driving suspect. Commonly suspects are taken from their vehicle to a police vehicle, transported to the station, and then brought inside. It is fair to assume that had Mr. McCready complied with the directions of the police he would also have been taken to a room for a breath sample, and, upon request, to a room where he could use a phone and speak privately with a lawyer. The idea that a stubborn accused could be left in the police car indefinitely is untenable. The car might be needed to respond to other situations. The police would be forced to watch over the vehicle, further tying up resources. The accused is safer in a monitored area, free of handcuffs.

[51] At trial Mr. McCready professed that he would have spoken to duty counsel. That may be, but that does not indicate to me that he would have exited the police

vehicle having done so. From the outset he conditioned a number of things on speaking with Mr. Burchell. His insistence on speaking with counsel of choice when first given the demand in the police vehicle on Chebucto St. was perfectly appropriate. But proper procedure would see him exercise that right in a private room inside the Detachment. A detainee has no right to instant access to a particular lawyer from the moment of arrest and at every stage thereafter. He continued to insist on speaking with Mr. Burchell before giving police an answer to their lawful demand, despite the failed attempt to reach this lawyer at two different numbers. From the evidence of Cst. Beatty, he conditioned getting into the police car on Chebucto St. upon speaking to Mr. Burchell (although he eventually relented and got in). At the Detachment, for some 40 minutes, he refused to exit the vehicle until he spoke to Mr. Burchell.

[52] A person in Mr. McCready's position is under a positive obligation to comply with the breath demand and all that this entails – being transported in custody to a place where a test may be administered as soon as practicable, entering and exiting a police vehicle, taking advantage of a private line to call a lawyer and to wait, if necessary, for a response. Passivity is not an option. This is not akin to a witness to a crime who refuses to talk to police. Mr. McCready was required to do something.

[53] In *R. v. Siskotin*, 2020 SJ 119, the accused was given two lawful breath demands but displayed belligerent and aggressive conduct towards the police. The court was convinced by his words and actions that he did not intend to comply with the breath demand, saying, at par.34:

> I adopt the statements of Watson J (as he then was) in *R v Nagy*, 2003 ABQB 690, where he found that: (1) "an officer, and later a Court, may infer failure or refusal

> from the conduct of the subject of the demand, even if the subject does not expressly refuse"; and (2) the accused's "intent can be inferred from his conduct - as is usually the case about a person's intent and state of mind."

[54] After being lodged in the cell, the accused was asked one final time if he would give breath samples. His reply, "go fuck yourself", is unequivocal. It is a direct refusal. I will presently deal with the treatment he received just minutes earlier, which understandably would have put him in a foul mood. That considered, Mr. McCready's cognition wasn't affected by the efforts to extricate him from the vehicle. He knew what was going on the entire time. In his testimony he claimed a clear memory of everything.

[55] I find that his conduct in the 40 minutes he was in the back of the police vehicle at the Detachment constitutes constructive refusal of the breath demand, capped off by an explicit refusal in the cell. As noted in *R. v. Fraser*, 2018 NSPC 35 at par. 69

> He knew, or at the very least was willfully blind to the unavailability of his lawyer of first choice. . . He did not demonstrate, either on the day in question nor in testimony at trial, that he was making genuine efforts to contact other private counsel. His obfuscation was meant to delay a choice which had been explained to him and which he fully understood. He wanted to frustrate a due process by which evidence could be obtained and used against him. The law does not permit a person in Mr. Fraser's situation to do this; rather, it makes it an offence.

The *Charter* issues

s.10(b) – the right to counsel

[56] In *R. v. Sinclair*, 2010 SCC 35 the court states at par. 27:

> Section 10(*b*) fulfills its purpose in two ways. First, it requires that the detainee be advised of his right to counsel. This is called the informational component.

> Second, it requires that the detainee be given an opportunity to exercise his right to consult counsel. This is called the implementational component. Failure to comply with either of these components frustrates the purpose of s. 10(*b*) and results in a breach of the detainee's rights: *Manninen*. Implied in the second component is a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult counsel. The police obligations flowing from s. 10(*b*) are not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duties on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended: *R. v. Tremblay*, [1987] 2 S.C.R. 435, at p. 439, and *R. v. Black*, [1989] 2 S.C.R. 138, at pp. 154-55.

[57] Defence alleged a breach of Mr. McCready's s.10(b) right to counsel. If proven it could lead to exclusion of evidence, notably his pointed reply to Newell's last request for samples (above at par.25). However, as the evidence does not establish such a breach, no evidence will be excluded.

[58] The seminal decision of *R. v. Prosper*, [1994] 3 S.C.R. 236, holds that where a detainee indicates a desire to speak with counsel, police provide a reasonable opportunity to do so. Police will typically put the accused in a room with a telephone, a telephone book and/or a list of local lawyers, and information about duty counsel, and allow a reasonable time to make a private call. Police were thwarted in the performance of this duty by Mr. McCready's own actions.

[59] The facts here involve an interplay between the implementational duties of the police and need to exercise the s.10(b) right diligently and in good faith. This court last considered such a situation in *Fraser*, above, a case which bears some similarities.

[60] Here the police were attempting to obtain breath samples from an impaired driving suspect. Commonly police must convey a suspect from roadside to a nearby police station where tests may be properly administered and where an

accused may exercise their right to counsel. It is fair to assume that had Mr. McCready complied with the directions of the police he would have been taken to a room where he could use a phone and speak privately with a lawyer prior to being administered the breath test.

[61] The idea that a stubborn accused could be left in the police car indefinitely is untenable. The vehicle itself is tied up when it could well be needed for another purpose at any moment. Police would be forced to guard the accused, making them unavailable for regular police duties. The safest place for the accused, and the place where he could most effectively exercise his right to counsel, is inside the Detachment. Any further detention of the accused ought to be in a holding cell designed for that purpose.

[62] It is true that police did not wait for duty counsel to call back before ending their efforts to obtain a sample. It was an hour before duty counsel returned their call. However I find that the accused had no real interest in taking advice from duty counsel that night. He seemed to think that "you get what you pay for." In his own testimony he said that as he "negotiated" his exit from the car, as he "stalled going into the Detachment", he kept saying "did you talk to Billy Burchell?". He testified that he "accepted" talking to duty counsel, but he did not act or talk that way on the night in question.

[63] Realistically there was no possibility McCready would get through to Mr. Burchell. Police had tried both an office number and a cell number, had left messages with each, and had been unable to get through. It was after midnight, early Sunday morning, on a holiday weekend. As Crown asked rhetorically, can an accused say "I refuse until I speak to someone who is not available?"

[64] In *R. v. Williams*, [2018] O.J. No. 3217 at par.231, Hill J. quotes these passages from *R. v. Taylor*, [2014] 2 S.C.R. 495 at par.24 – 27

> Insofar as the police duty to facilitate access to counsel, a duty which "arises immediately upon the detainee's request to speak to counsel", the police obligation "does not create a "right" to use a specific phone" and "in light of privacy and safety issues, the police are under no legal duty to provide their own cell phone to a detained individual". However, the duty implies an obligation "to provide phone access as soon as practicable . . ."

[65] With respect to the implementational duty, which entails facilitating contact with counsel, the police did everything which could be expected, and perhaps more, by attempting to contact Mr. Burchell through two telephone numbers before the accused had even exited the police vehicle. It has been said that police should not dial numbers for an accused, suggest lawyers, or speak to lawyers on his or her behalf. But where police do provide some such assistance this is not a factor unless it amounts to interference with the right to contact counsel. While police here did dial numbers, both for Mr. Burchell and duty counsel, this was reasonable in circumstances where the accused refused to get out of the vehicle and police likely wished to avoid trouble. The police did not withhold any means by which he might have located his lawyer's number. They did not show bad faith or reckless disregard for his s.10(b) rights.

[66] This not a case where police "took over" contact between an accused and counsel. Here Police went further than they needed to. They were prepared to permit the accused to speak to a lawyer on an officer's cell phone from the back of the police car, likely to placate him. Police did not prevent the accused from contacting a lawyer or channel him in the direction of duty counsel against his wishes. Rather, the accused squandered his right to counsel by refusing to go inside

the Detachment and speak to counsel using a room and phone expressly provided for that purpose.

S.12 and s.7 – alleged misconduct

[67] Attempts to coax the accused out of the police vehicle were fruitless. Tugging at his clothing and arms was insufficient. What additional force would be justified in such circumstances?

[68] Section 25 of the *Criminal Code* states that a peace officer who is authorized to do something in the enforcement of the law is justified in using "as much force as is necessary for that purpose" provided s/he "acts on reasonable grounds".

[69] In R. *v. Nasagoluak*, [2010] 1 S.C.R. 206, the court stated at par.32:

> 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, what allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness.

Expert opinion on use of force

[70] Sgt. Kelly Keith was called by the Defence as a "use of force expert". He appears to be well-credentialled in this field. He has been permitted to give such evidence before other tribunals in this province and elsewhere. No issue was taken with Sgt. Keith's qualifications to give an opinion about the level of force police officers are justified to use in various circumstances. He was familiar with the "use of force training framework" used by the RCMP. He was familiar with the facts of the case.

[71] The Crown gave notice of its intention to call an expert in rebuttal, from whom it had obtained a written counter-opinion. Keith had an opportunity to review this. But after considerable delay the Crown was not in a position procure the attendance of its expert witness. The expert's written report could not become evidence without the opportunity for the defence to challenge it in court. The report was returned to the Crown, unread, leaving Sgt. Keith's opinion uncontradicted. Keith's views are entitled to considerable weight.

[72] Sgt. Keith acknowledged that the proposed Crown expert would have known more about RCMP training in use-of-force techniques. That said, he was familiar with RCMP policy on various use-of-force techniques. He was familiar with a National Use of Force Framework, a rather dated document intended to be used as a model by police forces across Canada, which he says has been "tweaked" or interpreted differently by provinces such as Alberta, Ontario and Quebec, as well as by the RCMP. He said "generally, I am familiar with the training Kuchta would have received".

[73] The factual situation posited to Sgt. Keith was fairly simple –

- a heavy-set man seated in the back of a police car refusing to get out
- cuffed behind his back
- spitting on police
- actively and physically resisting removal
- belligerent in his manner; verbally threatening to harm the police if he got out
- braced in position by wrapping his feet around some part of the interior
- intoxicated by alcohol

[74] The foregoing puts the situation in the worst possible light; the accused denied much of this, claiming that police were the aggressors throughout. As noted, I am not certain he was attempting to spit at the police – there were two times when Newell believed he had done so purposefully, but there is no indication he acted this way against the other two officers

[75] However, assuming police were confronted with a situation described above, what should they do? Keith credits the police with their initial attempts to coax Mr. McCready out of the vehicle, and with tugging on his clothing, before resorting to more stringent measures. He agrees that a vascular neck restraint might pose a serious risk to the accused if not done properly. He was unsure about RCMP policy regarding use of a Tazer inside a vehicle, but appears to accept that Kuchta used good judgement in not resorting to this device, and in not utilizing pepper spray in a confined space. However, he states that the officers "did not exhaust other lower levels of force" before resorting to a groin strike. This is the crux of the issue.

[76] Keith begins by pointing out that the police had a decided advantage over the accused. They were in a controlled environment, inside the bay of the Detachment. They were three; he was one. The accused was cuffed and although "he can voice his intent to hurt the police, his means to follow through are nullified by the cuffs." He puts the risk of physical harm to the police as very low.

[77] Keith is firmly of the view that a blow to the testicles is a high-level use of force, causing significant pain and risk of injury, and unwarranted in the circumstances. If police were spontaneously assaulted then such a measure might be necessary, but this was not a "reactionary strike". It was a targeted one. He said

it was unreasonable to jump to a high level of force before first trying other readily available options.

[78] What police should have done, according to Keith, is a "muscle strike" to the shoulder, thigh or calf. He saw no reason why such could not be delivered to an intoxicated person even though they may be less sensitive to pain and less amenable to persuasion. He described a method by which two police might extricate a person from the police car by stretching him out, pulling on his arms from behind, pushing down on his legs to unlock the feet. In the process police could use a muscle strike if necessary and could also resort to "pressure points" near the chin and ear to gain compliance (presumably by imparting temporary pain). His report describes muscles and pressure points as "less injurious targets." At paragraph 45 of his report he describes the testicles as "an unprotected organ albeit a resilient organ". What he meant by "resilient" wasn't fleshed out by counsel.

[79] Keith pointed out that while Kuchta was concerned about spit and safety, "if you can strike someone in the groin you can strike in the thigh just as safely." Although Kuchta voiced concern about getting too close to the accused, Keith did not see how a punch to the groin alleviates concern about getting close "given where the testicles are located."

[80] It appears spit hoods may have been available at the Detachment, but I accept that Kuchta was not comfortable using one. He said he had no training in the use of a spit hood. It didn't seem to cross his mind to employ one. While Keith suggested that a spit hood would have been useful, he noted that they could also

have defeated the ability to spit by pushing the accused's chin down toward his chest, or by temporarily pulling his shirt over his head.

[81] In a concluding paragraph, Keith states "If McCready was not handcuffed and seated in the back of a patrol unit and he was being violent towards the officers, this would be a very different risk . . . and set of circumstances. The fact is, there was time and limited risk to the officers to at least try other lesser means than striking to the groin/testicles."

[82] Newell first parked the Tahoe outside the Detachment, by the doors to the secure bay. They had the rear door open as they dealt with Mr. McCready. Evidently some part of the accused was protruding from the vehicle. Beatty testified that "Kuchta pulled the accused into the truck so they could close the door and drive into the bay." The video supports this. Keith notes the success of this manoeuvre. It supports his view of measures which might have worked later.

Discussion

[83] There is some overlap between the *Charter* rights sections, s.7 and s.12, and the remedy section to which they point, s.24(1). Constituent elements of the breach are also critical components of the decision on whether to grant a stay of proceedings.

[84] Defence has brought its application for a stay of proceedings on the basis of a breach of the accused's s.12 right against "cruel and unusual treatment". It appears most cases which have considered police misconduct have viewed it as a potential breach of the accused's s.7 right to "security of the person".

[85] In *R. v. Walcott*, [2008] O.J. No.1050, at par.22 the court states

> The use of excessive force in arresting a person, or during the currency of an arrest, has been held to be a breach of the section 7 *Charter* right of "security of the person" - *R. v. Lafleur*, (1986) 52 C.R. (3d) 275 para. 40; *R. v. Gladue*, [1993] A.J. No. 1045 (Prov. Ct.), at para. 17 - and the section 12 right not to be subjected to cruel treatment: *R. v. Fryingpan*, [2005] A.J. No. 102 (Prov. Ct., Crim. Div.); *R. v. J.W.*, [2006] A.J. No. 1097 (Prov. Ct.).

[86] In closing argument Defence cited, among other cases, *R. v. Bellusci*, [2012] 2 S.C.R, 509. Yet in that case the trial judge found a s.7 breach. At par.4 one reads

> This appeal relates solely to the charge of intimidation. The trial judge found that Mr. Bellusci's guilt on that count had been established by the Crown. He nonetheless declined to enter a conviction on the ground that Mr. Bellusci's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* had been violated.

[87] While the decision in *Bellusci* concerns s.7, I note that the SCC states at par. 22: “The trial judge held that this was a case of unlawful extrajudicial punishment that would shock the public.” That characterization neatly fits s.12.

[88] In *R. v. Douglas*, [2020] S.J. No.80, the court at par.17 *et seq* suggested that s.12 of the *Charter* was meant to address state-sanctioned punishment, or treatment authorized by statute, or court-imposed sentences or penal institution actions, but not the actions of police officers. At par. 41 the court said “it is conceptually problematic to categorize the use of force motivated by personal factors such as anger, a desire for retribution or some individual motivation to gratuitously inflict pain as state misconduct.” Having stated that the issue should properly be dealt under s.7, the court in *Douglas* does not explicitly proclaim a s.7 breach. It must be assumed that the judge found one because s/he proceeds to a lengthy consideration of whether a s.24(1) remedy should be given. I infer that the court found a breach, and that the discussion at par. 17 *et seq* was meant to characterize the seriousness of the breach, just as the earlier discussion was meant to describe the seriousness of

the underlying offences (dangerous driving, etc.). Both are properly taken into account in the balancing of interests which the court sets out in par. 31 *et seq*.

[89] While s.7 may be the preferable framework, and the one most often employed, I have entertained the instant application under s.12 bearing in mind that police are employed by the state and exercise arrest powers both conferred and constrained by statute. In some cases, e.g. *R. v. Maskell*, [2011] A.J. No. 740, mistreatment by police was found to be a breach of both sections. Whichever lens is used to view the conduct of police in this case, s.7 or s.12, the outcome would be the same.

[90] In *R. v. Hamed*, [2017] O.J. No.1426, a police officer delivered two punches to the accused's face while his hands were cuffed and he was sitting in the back or a police car. This was determined to be a breach of his s.7 right to security of the person. Because the court also found breaches of s.8, 9 and 10(b) rights which led to exclusion of evidence, it was unnecessary to consider a stay of proceedings.

[91] In *R. v. Nasagoluak*, [2010] S.C.J. No.6 at par.3 the court states:

> Police should not be judged against a standard of perfection. It must be remembered that police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances.

[92] In the present case there were no exigent circumstances. The force used might be termed responsive (to McCready's overall attitude) but it was not reactive (requiring protective or defensive measures).

[93] In *R. v. Abdillahi*, [2019] O.J. No.3061, the accused, who had been armed with a knife and being pursued, was hit on head with the butt of a police rifle. He

was found in possession of controlled substances and charged with trafficking. The court found a violation of s.7.

[94] *R. v Hemmings*, [2019] O.J. No.5387, involved a routine impaired driving investigation in which a McDonalds' employee reported the accused to police. When police located his vehicle he fled on foot. He alleged being repeatedly tazered and punched in the face by police. He was charged with impaired care or control of a motor vehicle, assaulting a police officer and possession of a small quantity of cocaine. He alleged a breach of his s.7 and s.12 *Charter* rights. There was some 'blending' of the evidence on the trial for the substantive charges and the *Charter* hearing. The court concluded that the *Charter* breaches had not been established, based largely on what it described as a "dynamic arrest" where there was active resistance. The court found that the force used was not gratuitous, and that the police did not deliberately set out to injure the accused. There was also no indication that police attempted to cover up their actions.

[95] Cst. Kuchta said that he was taught to use a testicle strike at a "police defence tactics" course in 2004. Defence correctly notes that the hammer-blow delivered to Mr. McCready was not a defensive tactic.

[96] In *Nasogaluak, supra*, the accused refused to comply with an officer's orders to get out of the vehicle. The accused was punched in the head multiple times and wrestled to the ground. One punch in the back resulted in broken ribs, although he was subsequently able to provide breath samples. The accused pled guilty to impaired driving and fleeing the police. A finding, at sentencing, that his s.7 right was breached was upheld on appeal. The remedy employed in that case was a reduced sentence.

[97] *R. v. Mohmedi*, (2009) 72 C.R. (6th) 345, is a case where a belligerent accused being deliberately provocative was struck while handcuffed. The court noted that he was not a flight risk and that the scene was completely under police control. The court states at par.63

> In this case, faced with an unruly, intoxicated and rude accused, the police failed to meet society's standard. The rude accused was able to get under the responding officer's skin. Despite the accused's unruly behaviour, in circumstances in which there was no urgency, there was no attempt to flee, Mr. Mohmedi was handcuffed, there was no present or future threat to the officers' safety and only two minutes had elapsed from the time the accused was placed under arrest, and when he was struck by the police, the officer's use of force was premature and excessive in the particular circumstances.

[98] I find a breach of Mr. McCready's s.12 right has been proven and would have found a breach of his s.7 right as well. The more difficult question concerns the remedy - whether a stay of proceedings ought to issue.

S.24(1)

[99] The law governing the remedy of a stay of proceedings is set out in the Supreme Court decision *R. v. Babos*, [2014] 1 SCR 309. I reproduce parts of that judgment here:

> 30 A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.
>
> 31 Nonetheless, this Court has recognized that there are rare occasions -the "clearest of cases" - when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73) . . .

> 32 The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> > (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";
> >
> > (2) There must be no alternative remedy capable of redressing the prejudice; and
> >
> > (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits"
>
> 34 Commencing with the first stage of the test, when the main category is invoked, the question is whether the accused's right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is *ongoing* unfairness to the accused.
>
> 35 By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial - even a fair one - will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.
>
> 41 However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

[100] In *R. v. Pan*, 2012 ONCA 581, the court noted at paragraph 49:

> In ordering a stay of the charges against Pan for abuse of process, the trial judge relied on this court's decision in *R. v. Tran*, 2010 ONCA 471, 103 O.R. (3d) 131. He held, correctly, that under s. 24(1) of the *Charter*, the court retains discretion to stay proceedings "where to do otherwise would amount to a judicial condonation of unacceptable practices." This discretion is to be exercised in exceptional circumstances. It may be exercised even where abusive police conduct does not affect trial fairness if the abuse is so "egregious that the mere fact of going forward in the light of it will be offensive". In those exceptional circumstances, a stay under s. 24(1) is an "appropriate and just" remedy: see *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391;

[101] Having found no breach of Mr. McCready's s.10(b) right, no evidence is excluded under s.24(2). The most notable and discrete bit of evidence which might have been excluded was the accused's final refusal in the lockup, i.e. saying "go fuck yourself" to Newell's final inquiry as to whether he would comply with the breath demand. As discussed above I have considered this comment could properly be considered (along with the rest of the accused's conduct in the police vehicle) in deciding that he committed the offence of refusal. I have found that the accused was thinking clearly enough when he uttered that phrase to match his words with his intent - i.e. to refuse.

[102] At the same time I have little doubt that he was angry at what Kuchta had just done. It is possible that if McCready had been handled in a different way he might have availed himself of the final opportunity given to him to provide samples. Once in the Detachment he might have taken a more reasonable approach to contacting a lawyer and pursued the possibility of duty counsel. In this sense, the police conduct – the blow to the testicles – has elicited incriminating evidence on the refusal which, in turn, invokes the "main category" described in *Babos*, above. The "residual category" is also engaged.

[103] The question asked in *Babos*, and other cases, is "whether proceeding with a trial" in the face of the misconduct would harm the integrity of the justice system. Having here proceeded with a blended *Charter*/trial hearing, I will be weighing at "step three" (i) the interests in favour of a stay against (ii) the interest that the state has in *securing a conviction* (rather than "having a trial"). I have found, after a full public hearing, that the evidence suffices to prove the refusal, obstruction and threat charges. While a stay of proceedings would mean that the accused is not punished and would not gain a criminal record, I have *not* spared this accused all the social stigma which ensues from a trial. His conduct has been examined publicly and found wanting. The public has not been completely deprived of a trial on the merits.

[104] I have looked at cases where courts considered a stay of proceedings to remedy a *Charter* breach. Comparing the facts of such cases with those in the present case provides some guidance.

[105] In *R. v. Dickie*, [2014] O.J. No.1174, the accused was charged with an assault upon his son. He brought a s.7 application based on being beaten at the police station. Gaps in the videotaping of the accused were characterized at trial as "not satisfactory, but not in any nefarious or criminal way because of course purposeful suppression of relevant evidence would be obstruction of justice" The facts are more egregious than those in the instant case. Trotter, J. upheld the granting of a stay of proceedings. In balancing (a) the societal interests of having a trial on the merits with (b) the interests served by granting a stay, he considered the seriousness of the charges on the "trial" side of the ledger.

[106] In *R. v. Abdillahi*, noted above, the court was not persuaded that it was a clear case requiring a stay.

[107] The facts in *Douglas*, above, may be summarized as follows. After a long and dangerous police chase during which the accused slammed the side of a police car, causing injuries to the police officer, the accused and a passenger ran away from their disabled vehicle. A tracking dog was employed who located the accused in a field. He was bitten in the arm. When brought back to the police car there was an altercation during which he was slammed against the vehicle and the ground. The judge analyzed the conflicting evidence at par.21 *et seq* and concluded that "there was some excessive use of force by (the Constables) and at least one intentional punch or kick which resulted in audible expressions of pain by the accused." The judge noted that the police "were in a state of heightened stress and vulnerable to the responses that stressful situations can trigger" and found that "while excessive force was used and while it caused temporary and limited pain" there was no lasting injury.

[108] The facts in *Douglas* may be distinguished from those of the instant case. Douglas engaged in more serious behavior than did Mr. McCready. He had put the police and public in extreme danger. While Mr. McCready was stubborn and belligerent his actions did not pose nearly as great a risk. There is consequently a less-compelling interest in seeing him punished upon conviction.

[109] Defence submission was interspersed with personal anecdotes inviting a sympathetic understanding of the facts. The facts here have the potential to push the doctrine of judicial notice into dangerous territory. I am spared that journey. Expert evidence serves to establish the seriousness of the impugned conduct and its

potential for harm. The “testicle strike” was not reflexive or defensive. I do not have acceptable evidence that police were taught to use such a tactic in such circumstances.

[110] On the one hand, Mr. McCready has suffered no long-term physical damage. Nor do I think that Kuchta intended such. McCready is not a vulnerable accused and I doubt there will be serious psychological effects. This is the first time I have heard of the use of this tactic. There is no indication that this or similar conduct is part of a systemic, ongoing problem. I am not aware of other such circumstances nor of a pattern of gratuitous use of violence at this Detachment.

[111] In some cases the accused’s offending conduct preceded contact with police; in the present case the proven offences occur during the interaction with police. This creates a closer nexus, which weighs in favour of a stay.

[112] The offences committed by the accused are not particularly “high-end”. Refusal of a breath demand leads to suspicion that an accused tried to avoid proof of impairment. That certainly seems to be the case here. Testing drivers is an integral part of the battle against drunk driving. Refusal is a serious offence. But it has not been shown that McCready was engaged in violent or reckless behavior which endangered the public. Threats to police and obstruction are not trivial either. Law enforcement personnel deserve the protection of the law. However I think it is fair to say that while this accused inconvenienced and upset the police, he did not endanger them.

[113] I have taken instruction from the decision of Justice Casey Hill in *R. v. DaCosta*, [2015] O.J. No. 1235, at par.98 to 103 where he summarizes much of the law in this area. Having done so I am mindful that police should be accorded a

certain degree of discretion in how they deal with difficult subjects. They should not be held to a standard of perfection. I have also kept in mind that police have a right to their own safety. However, Mr. McCready did not present a significant danger to the police. The video shows police putting themselves in proximity to the accused, leaning in the back door of the police car. This undermines the claim that they were concerned about being spat upon.

[114] It has been said that courts should not rely too heavily on hindsight, not become a "Monday morning quarterback". Here the facts are different from the situations which typically prompt this concern. It is more appropriate to judge police action on the basis of hindsight when the police themselves had the benefit of foresight.

Conclusion

[115] I conclude that this is one of the exceptional cases where a stay of proceedings is warranted. I will enter a stay of proceedings pursuant to s.24(1) of the *Charter* on the all the charges for which I made findings of guilty. I am concerned that bringing this trial to a conclusion by convicting the accused and imposing punishment, even a reduced punishment, would be seen as condoning the excessive and unwarranted conduct of the police.

[116] Police officers do demanding work and are faced with situations which would try anyone's patience. They are in the front lines. The work they do deserves respect, and respect is something which must be maintained. As much as society requires the protection of the police, individuals in police custody, including wrong-doers, are entitled to protection from excessive use of police force. The actions here smack of retribution.

[117] Justice may never be perfectly served, but if retribution is to be exacted, it ought to be through the courts. The process of determining guilt and accountability should not be short-circuited by law enforcement personnel. Police are required not only to enforce the law; they are required to uphold the law.

Dated this 25th day of September, 2020

Judge A. Peter Ross