SUPREME COURT OF NOVA SCOTIA
Citation: *Naugle v. Canada (Attorney General)*, 2025 NSSC 264

Date: 20250811
Docket: HFX No. 498318
Registry: Halifax

Between:

Sean Naugle

Plaintiff

v.

The Attorney General of Canada, representing His Majesty the King in Right of Canada

Defendant

Judge: The Honourable Justice Ann E. Smith

Heard: January 22, 23, 27, 28, 29, 2025 & February 4, 2025, in Halifax, Nova Scotia

Counsel: Michael Dull, K.C. for the Applicant
Corinne Bedford for the Defendant

By the Court:

Introduction

[1] This civil action arises from an arrest that took place on June 3, 2018 in Pictou County, Nova Scotia. The plaintiff, Sean Naugle (Mr. Naugle) was arrested by RCMP officer Constable Daniel Scott MacDonald for obstruction. Mr. Naugle says that as a result of the actions of Cst. MacDonald in conducting the arrest, he suffered an injury to his shoulder. The specifics of the injury and any damages he may have suffered are not before this Court for determination. The parties agree that the only issue for determination by this Court is liability.

[2] The main issues before the Court are whether Cst. MacDonald had lawful grounds to arrest Mr. Naugle for obstruction and if he did, whether he used excessive force in doing so.

[3] For reasons which are elaborated on in this decision, I find that Cst. MacDonald did not have lawful grounds to arrest Mr. Naugle for obstruction, and that any force that he applied in conducting that arrest, were thereby excessive and constitutes tortious battery.

Background

[4] Cst. MacDonald is a Royal Canadian Mounted Police (RCMP) officer who was stationed in Pictou, in June, 2018. At that time, he had been with the RCMP stationed in various parts of Canada since 1992. He retired in 2023.

[5] As a result of what Mr. Naugle claims were the inappropriate actions of Cst. MacDonald during his arrest, Mr. Naugle brought a public complaint against Cst. MacDonald with the RCMP (the Complaint). The RCMP officer who investigated the Complaint and prepared a report with his findings was Corporal Ronald Bryce (Cpl. Bryce). Cpl. Bryce's supervisor received and reviewed Cpl. Bryce's report. The Complaint did not proceed further.

[6] The evidence before the Court included several documented versions of events from the subject arrest, including Cst. MacDonald's handwritten notes and typed occurrence report from the same day, Mr. Naugle's written Complaint and Cpl. Bryce's notes from his investigation. The Court also had the trial evidence of these individuals together with excerpts from the discovery evidence of Cst. MacDonald and Mr. Naugle.

[7] One of the difficulties in this case is the credibility and reliability of both Mr. Naugle and Cst. MacDonald, together with the credibility and reliability of several of the other witnesses who testified at the trial.

[8] The events giving rise to Mr. Naugle's arrest arose from Mr. Naugle being present when third parties were involved in a violent encounter, a fistfight outside a third party's residence at 5161 East River Road (the Property). This encounter ended with one of the two combatants, Eugene Sweet (ES), being arrested and taken to the local hospital for injuries suffered during the fight.

[9] Cst. MacDonald was the first officer present at the Property after the RCMP received an anonymous call of a fight in progress. After subduing the combatants, Cst. MacDonald learned from witnesses to the fist fight that ES had arrived at the Property in a vehicle along with two other males and that one of these males, ES, had an axe with him. The vehicle was parked near the top of a small inclined dirt driveway leading from the residence at the Property to an intersecting roadway. After subduing the combatants Cst. MacDonald approached the vehicle with the intent to search it for the axe. Mr. Naugle was standing close by the vehicle.

[10] Mr. Naugle did not participate in the fistfight which occurred down the hill and close to the residence. Rather he remained standing beside or close to the vehicle. As Cst. MacDonald climbed the driveway and approached the vehicle, Mr. Naugle shouted at him, "Illegal search!". Mr. Naugle apparently directed these comments towards the individual who he thought owned the vehicle, Ryan MacDonald (RMacD), although he was mistaken about the vehicle's owner. The

vehicle was actually owned by RMacD's girlfriend, TC who was present in the residence on the Property.

[11] The interactions between Mr. Naugle and Cst. MacDonald which followed resulted in Mr. Naugle's arrest for obstruction. On the facts, the obstruction is claimed by the Defendant to be Mr. Naugle's interference with Cst. MacDonald's search of the vehicle for weapons.

Position of the Parties in Brief

[12] Mr. Naugle alleges that Cst. MacDonald used excessive force in arresting him. He claims the arrest was unlawful due to the officer lacking the requisite reasonable and probable grounds that he was obstructing the officer's search of the vehicle. Mr. Naugle does not challenge the legality of the vehicle search. Rather, he argues that he was unlawfully arrested and says that this constitutes tortious battery. Mr. Naugle argues that Cst. MacDonald used excessive force and violated his *Charter* ss. 7 and 9 rights.

[13] The Defendant's position is that Cst. MacDonald was acting in his lawful course of duty when he arrested Mr. Naugle for obstruction without a warrant, arguing that the officer used only the amount of force necessary to effect a lawful arrest. The Defendant argues that s. 25(1) of the *Criminal Code* applies and that Cst.

MacDonald is thus shielded from civil liability. The Defendant argues that there were grounds rendering the arrest lawful, and Cst. MacDonald only used the amount of force necessary to gain compliance, and therefore the use of force was not excessive and Mr. Naugle's *Charter* rights were not breached.

FACTS

[14] This matter arises from Mr. Naugle's arrest on June 3, 2018. On that day, Mr. Naugle, Eugene Sweet (ES) and RMacD drove in a vehicle owned by Tanya Curley (TC), together to pick up RMacD's girlfriend, TC from the residence at the Property (the residence).

[15] RMacD testified that he was concerned that TC was using drugs at the residence and he wanted to bring her back to her own home which was close by. He had been to the residence earlier that day and had tried to convince TC to leave with him, but she refused to do so. The trio of ES, RMacD and Mr. Naugle were together at TC's home prior to setting off for the Property. They had met there earlier that day, had played some pool and drank one beer or so each. The three were friendly acquaintances of each other. RMacD told the others that he wanted to go to TC's residence and retrieve his girlfriend, TC. He was adamant that all three go.

[16] Before setting off in TC's BMW SUV (the Vehicle) ES placed an axe and a replica handgun in the back of the Vehicle; actually ES was uncertain whether he placed the handgun in the rear of the Vehicle before leaving for the residence, or whether the handgun was already there when the three left together. Nothing in this case turns on that point. RMacD drove; ESwas in the front passenger seat and Mr. Naugle was in the back seat. When they arrived at the Property, Mr. Naugle exited the Vehicle, but stayed near it, while RMacD and ES approached the residence.

[17] ES brought the axe with him. He testified that he did so because he thought that he might chop some firewood for his girlfriend on the way home. ES and RMacD banged on the door of the residence, but no one initially opened the door. They heard someone from inside the residence yelling to them that they should leave. Eventually the door opened and one of those inside, Daniel Hawley (DH) came outside. He started talking to RMacD when, according to DH, out of nowhere ES started taking "swipes" at him and then sucker-punched him. DH fought back and the two fell to the ground engaged in a fist fight; DH bit ES. At some point which was unclear to this Court, ES apparently either dropped the axe, or brought it back to the Vehicle, or both, and placed it under a blanket in the Vehicle's trunk. Nothing turns on this point, since everyone agrees that there was a handgun and an axe in the rear section of the Vehicle. Here, the Court notes that the Vehicle was a hatch-back,

opening from the rear, but with no separated trunk space. Several occupants of the residence witnessed the fight. Someone called 911; RCMP dispatch notified officers in the community by radio that they had received information about a fight in progress and the RCMP responded to the address provided.

[18] Cst. MacDonald was the first peace officer to arrive on the scene. He was alone before reinforcements arrived. He had just been on a lunch break with RCMP officer Cst. Joshua Dauphinee and Forestry Officer Clarence Fraser when the call came in that a "fight was in progress". Cst. MacDonald left right away in his vehicle, with lights flashing and siren on to attend the scene. He drove a marked RCMP vehicle and was in uniform. Cst. Dauphinee and Forestry Officer Fraser arrived shortly after Cst. MacDonald. By the time they arrived, Cst. MacDonald had intervened in the fight by initially throwing himself on top of ES. DH was underneath ES at this time. Cst. MacD restrained and handcuffed ES. Mr. Naugle was either still in the Vehicle or standing near it throughout these events.

[19] Cst. Dauphinee took custody of ES. Cst. MacDonald interviewed witnesses. He gave evidence that Natalie Taylor (NT) who was at the residence and was RMacD's girlfriend, advised him that ES came to the door with a hatchet over his shoulder.

[20] After speaking with witnesses, Cst. MacDonald proceeded towards the parked Vehicle. He testified that his priority was to secure any weapons. He said he was trained in the "1+1" rule – that when there is one weapon, there could very well be another. Cst. MacDonald testified that he could see a hatchet or axe "in plain view", through the Vehicle's rear window together with what appeared to him to be a handgun. His evidence was that he did not have a recollection of ever opening the Vehicle's trunk/rear hatch area door. He did, however, recall starting his search at the driver's side door. When questioned as to why he did not begin his search in the rear of the Vehicle where he testified that he saw the weapons in plain view and given his evidence that securing those weapons was his priority, Cst. MacDonald explained it was a "logical progression" to start at the front of the Vehicle and move towards the rear.

[21] Cst. MacDonald and Mr. Naugle's version of events as to what happened after the search of the Vehicle started differed dramatically. This raises issues of the credibility of each of their versions. I will outline the differing versions in detail in my analysis, together with the evidence of other witnesses at the scene.

ISSUES:

1. Was Cst. MacDonald's arrest of Mr. Naugle lawful?

a. Was there an objectively reasonable basis to support a belief that Mr. Naugle was committing an indictable offence at the time of the arrest?

2. If the arrest was lawful, did Cst. MacDonald use excessive force in effecting the arrest?
3. If the arrest was unlawful, were Mr. Naugle's ss. 7 and 9 *Charter* rights violated?

LAW and ANALYSIS

Issue 1: Was the arrest lawful?

General Summary of the Law

[22] Mr. Naugle bears the initial onus of proving he was detained and that force was applied by Cst. MacDonald. This is easily met on the evidence since the officer does not dispute that he arrested Mr. Naugle. Cst. MacDonald argues that his use of force in doing so was not excessive. Section 25(1) of the *Code* provides a justification for police officers' use of force, if the criteria outlined in that section are met. However, this provision cannot be used to justify officer use of force if they were acting unlawfully.

[23] Mr. Naugle argues that Cst. MacDonald lacked authority to arrest him for obstruction, and thus acted unlawfully when arresting him. If that is the case, justification cannot be used to shield the officer from civil liability for his use of force. Cst. MacDonald says he was acting lawfully, as he had reasonable and

probable grounds to arrest Mr. Naugle for obstruction, without a warrant, pursuant to s. 495(1) of the *Code,* and therefore he did not use excessive force pursuant to s. 25(1) in effecting Mr. Naugle's arrest.

Legality of Arrest – Shifting Burdens

[24] A plaintiff has the initial onus to prove, on a balance of probabilities, that he was "detained" within the meaning of s. 9 of the *Charter*. The burden then shifts to the defendant (usually the Crown) to establish that the warrantless arrest was legal, and not in violation of s. 9.

[25] There is no question Mr. Naugle was detained, and there is no argument that Cst. MacDonald arrested him. A defendant then bears the onus to establish that the warrantless arrest was lawful and not contrary to s. 9. The onus is met if the arrest complies with the requirements of s. 495(1) of the *Criminal Code* (*R. v. Murphy,* 2018 NSSC 191), at para. 4.

[26] Cst. MacDonald's arrest of Mr. Naugle was without warrant. A police officer's power to arrest without a warrant is codified at section 495(1) of the *Code*:

> 495 (1) A peace officer may arrest without warrant
>
> a) A person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

> b) A person whom he finds committing a criminal offence; or
>
> c) A person in respect of whom he has reasonable ground 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.

[27] The test for lawfulness of an arrest is well established: the officer must believe they have reasonable and probable grounds to arrest the accused, and those grounds must be objectively justifiable: *R. v. Storrey,* [1990] 1 S.C.R. 241, at 250. Cory J., writing for the unanimous Supreme Court of Canada in *Storrey*, commented on the standard for grounds for arrest:

> [16] There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. **Rather, it must be objectively established that those reasonable and probable grounds did in fact exist.** That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest…
>
> [17] In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest.
>
> [Emphasis added]

[28] Mr. Naugle highlights *Storrey,* specifically the Court's commentary on arrests without a warrant and the standard of reasonable and probable grounds required:

> [14] Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important

> protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. **In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.**
>
> [15] The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:
>
> > **The power possessed by constables to arrest without warrant,** whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, **is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection.** The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.
>
> [Emphasis added]

[29] Mr. Naugle was arrested (and not charged) with obstruction pursuant to s. 129 of the *Code,* which reads:

> **129** Every one who
>
> a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

> b) omits, without reasonable excuse, to assist a public officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, or
>
> c) resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure,
>
> is guilty of
>
> d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
>
> e) an offence punishable on summary conviction.
>
> [Emphasis added]

[30] In *Jacquot* 2010 NSPC 13, Mr. Paratte's wife was involved in a motor vehicle accident and Cst. Thomas was investigating. Mr. Paratte was told to attend the scene with insurance papers for the vehicle. Once on the scene, Cst. Thomas told Mr. Paratte on a couple of occasions to stay in his car and not interfere with the interviews that he was conducting, or he would be arrested for obstruction. The court found that Mr. Paratte was standing within an arm's length of the officer, shaking his finger and speaking to him in an "aggressive tone", which the court found to support the officer's evidence that Mr. Paratte's actions interfered with his interviews (para. 32). The court concluded that he intentionally interfered with, and temporarily delayed, the investigation by Cst. Thomas, and that he either grabbed insurance papers from Ms. Jacquot, or refused to give them to the officer (paras. 66 and 72). In analyzing the facts of the case as applied to the elements of the offence, Tax J. wrote at para. 72:

> (2) Constable Thomas had to stop his investigation on at least two occasions to warn Mr. Paratte that he might be arrested for obstruction if he continued to interfere with the officer while he was conducting his interviews. The obstructing actions of Mr. Paratte affected and temporarily delayed Constable Thomas in his execution of his duties as a peace officer.
>
> (3) given the definition of "obstruction" and the findings of fact that I have made, I am satisfied beyond a reasonable doubt that Mr. Paratte's interruptions and his aggressive actions, which at the very least, temporarily frustrated or made the execution of the officer's duties more difficult, were done wilfully.

[31] The facts in *Jacquot* are distinguishable from this case. Mr. Paratte's actions were clearly obstruction and are not comparable to Mr. Naugle's. Mr. Paratte was an arm's length away shaking his finger at the officer, while Mr. Naugle was 12 to 15 feet away, and then closer but his yelling out is not comparable to Mr. Paratte's withholding the insurance papers from the officer: the former is distracting, the latter is an intentional hinderance of the officer's investigation.

[32] If this Court accepts that Mr. Naugle was engaged in a back and forth with Cst. MacDonald, whereby he was moving towards Cst. MacDonald as the officer was trying to search the Vehicle for weapons, this could constitute obstruction within the meaning of section 129. Further, if this Court accepts that Mr. Naugle initiated physical contact with Cst. MacDonald as he was conducting the Vehicle search, this too, would amount to criminal obstruction.

Use of Force

[33] If this Court concludes that Mr. Naugle obstructed Cst. MacDonald during the Vehicle search, and thereby his arrest was lawful, then an analysis of Cst. MacDonald's use of force in carrying out the arrest is required.

[34] Section 25 of the *Code* provides peace officers with the power to "use as much force as necessary" if they are carrying out a lawful purpose:

> **25 (1)** Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> **(a)** as a private person,
>
> **(b)** as a peace officer or public officer,
>
> **(c)** in aid of a peace officer or public officer, or
>
> **(d)** by virtue of his office,
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[35] Section 25 does not protect police officers' use of force if they had no legal authority – either under legislation or at common law – for their actions: *Fleming v. Ontario,* 2019 SCC 45. The Supreme Court of Canada in *Fleming* held that "[b]ecause the respondents were not authorized at common law to arrest Mr. Fleming, no amount of force would have been justified for the purpose of accomplishing that task. They were not doing what they were "required to authorized to do" withing the meaning of s. 25(1)" (para 118).

What is Tortious Battery?

[36] Mr. Naugle's action against the Defendant is based in tort. A battery occurs whenever unlawful force is intentionally inflicted on another person that is either physically harmful or offensive to their reasonable sense of dignity: *Degen v. British Columbia (Public Safety),* 2023 BCSC 508, at para. 432. If a police officer acts with legal authority, their actions are justified pursuant to s. 25(1) of the *Code.* Justification is a defence to battery: *Degen* at para. 432. The test regarding the applicability of s. 25(1) as a justification for otherwise tortious behaviour is set out in *Degen*, where the court confirmed that the defendant bears the onus of proving, on a balance of probabilities, each element of the following three-part test:

> [444] The applicable legal test to establish justification for use of force under s. 25(1) of the *Code* is a three-part test. The onus of proving each element lies with the defendant and is based on a balance of probabilities. In the context of actions taken during the course of an arrest made by an offer, the three elements that must be proven are that:
>
> a) the officer's conduct was required or authorized by law in administering or enforcing the law;
>
> b) the officer was making the arrest based on reasonable grounds; and
>
> c) the officer did not use unnecessary force in effecting the arrest.
>
> [445] Absent the defendant establishing each of these three elements, the use of force is not justified and liability ensues: *Bencsetler* at para. 149. Accordingly, the use of force is unlawful.

[37] The Supreme Court of Canada in *R. v. Nasogaluak,* 2010 SCC 6, set forth the law on a police officer's use of force:

> [34] Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that is necessary to protect him or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means the use of force under s. 25(3) is to be judged on a subjective-objective basis…if force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.
>
> [35] Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A):
>
> > In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude.
> >
> > [Emphasis added]

[38] Justice S. Norton of this Court in *R. v. Pratt*, 2022 NSSC 390 at para 32 considered the principles governing a judge's after-the-fact review of officer conduct. Justice Norton adopted the following comments of Hill J. in *R. v. DaCosta,* 2015 ONSC 1586:

> 98 Apart from the interpretive caution to consider all the circumstances faced by the police, a reviewing court must guard against the tendency to over-reliance upon reflective hindsight:
>
> > It is often said of security measures that, if something happens, the measures were inadequate but if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. **The role of the reviewing court in assessing the manner in which a search has been conducted is to**

> **appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.**
>
> […]
>
> …the immediate decisions a police officer makes in the course of duty are not assessed through the "lens of hindsight"…
>
> [Emphasis added]

LAW AND ANALYSIS

Issue 1: Was Mr. Naugle's arrest lawful?

[39] Since Mr. Naugle does not take issue with the legality of the search of the Vehicle, the crux of the issue for the Court to determine is whether Cst. MacDonald's arrest of Mr. Naugle for obstruction was lawful.

[40] In determining whether the arrest was lawful, the Court must scrutinize both parties' versions of events, which vastly differ from one another. With regard to Mr. Naugle and Cst. MacDonald, this is no easy task since there are credibility issues arising from the testimony of each.

[41] In the first part of my analysis, I will assess the credibility of the parties, and other trial witnesses in order to reach factual findings as what happened leading up to, and during, the arrest of Mr. Naugle. After that, I will consider the use of force justification test.

CREDIBILITY ASSESSMENT

[42] The parties generally agree that the disposition of this case hinges on the Court's credibility assessment of the witnesses, especially Cst. MacDonald and Mr. Naugle.

[43] The Supreme Court of Canada in *R. v. Kruk,* 2024 SCC 7, observed that assessing credibility and reliability can be the most important judicial determinations in a (criminal) trial, and acknowledged that they are no easy task: "credibility and reliability assessments are…context-specific and multifactorial: they do not operate along fixed lines and are "more of an 'art than a science'" … (para. 81). In his concurring reasons in *Kruk,* Rowe J. noted the following on credibility assessments:

> [155] Similarly, in assessing the *credibility* of a witness, trial judges are also expected to apply common sense and human experience as a benchmark against which to weigh the plausibility of the evidence (Paciocco, Paciocco and Stuesser, at p. 608; see also *R. v. Marquard*, 1993 CanLII 37 (SCC), [1993] 4 S.C.R. 223, at p. 248); thus, the trial judge applies their experiences and common sense when judging the witness's demeanour, character, or the internal or external plausibility of their evidence to decide whether an individual's evidence is believable (Paciocco, Paciocco and Stuesser, at p. 593).
>
> [Emphasis added]

[44] Both parties highlight *Faryna v. Chorny,* [1952] 2 D.L.R. 354 (B.C.C.A.), for its statement on the law of assessing the credibility of witnesses. The Nova Scotia Court of Appeal cited *Faryna* in *Nova Scotia Teachers Union v. Nova Scotia Community College,* 2006 NSCA 22:

[33] There is an equivalent principle in arbitral jurisprudence. Its source is what the arbitrator described as the "venerable case" *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.). *Farnya*, [sic] though a libel case, is a familiar guidepost to assess credibility in arbitration proceedings. See Brown & Beatty ¶ 3.5110 and cases there cited. The arbitrator discussed *Farnya* [sic] as follows:

> 12. The matter of the evaluation of evidence in this case is not exhausted, however, by a description of the relevant burden of proof. This case falls to be decided, in a significant degree, through the evaluation of the credibility of the key witnesses. There were no direct eye witnesses to what allegedly happened other than the Complainant and the Grievor. They tell starkly different, indeed dramatically inconsistent, stories. One of them cannot be telling the truth. Judges and arbitrators have set out the proper manner in which to approach the question of evaluating the evidence in such difficult cases. The common starting point is the venerable case of *Faryna v. Chorney* [sic -*Chorny*], 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) where O'Halleran, J.A. [sic - O'Halloran, J.A.] speaking for a majority of the court stated:
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. ***In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions***. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. ***And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case***.

[Bolding/italics in NSCA decision, underlining added]

[45] I also note the Court of Appeal's remarks on credibility assessment in *R. v. D.D.S.,* 2006 NSCA 34:

> [77] Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. **There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity**. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. **Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?**
>
> [Emphasis added]

[46] *Faryna,* which has been endorsed by Nova Scotia's highest court, directs trial judges to: "say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion" (para 12).

[47] Cst. MacDonald argues, validly, that Mr. Naugle's credibility is not bolstered by the fact that he has repeated a similar version of events on numerous occasions, despite Mr. Naugle arguing same. Cst. MacDonald notes the general inadmissibility of prior consistent statements. This Court agrees that the number of times a witness

relates the same story does not, in and of itself, make that version of events true; nor does it bolster that witness' credibility. As to the inconsistences in his own evidence, Cst. MacDonald's submits that these should not be characterized as "falsehoods", as Mr. Naugle suggests, but rather are a natural result of the passage of time on memory.

Credibility Assessment of Non-Party Witnesses

[48] The following non-party witnesses gave evidence at the trial:

(1) Eugene Sweet (ES)

(2) Ryan Redmond MacDonald (RMacD)

(3) Daniel Hawley (DH)

(4) Joshua John Dauphinee (Const. Dauphinee)

(5) Clarence Stephen Fraser (Conservation Officer Fraser)

(6) Dave Gagnon (Const. Gagnon)

(7) Ronald Gordon Bryce (Cpl. Bryce)

Eugene Sweet

[49] ES's evidence is primarily relevant because he was the person who brought the axe and replica gun to the Property.

[50] ES testified that the axe and the replica gun found in the Vehicle both belonged to him. He said that he could not remember whether he put the replica gun in the back of the Vehicle that day, but he knew it was in the trunk, and he saw it there when he put the axe back in the trunk, under a blanket. Apparently, he did so after bringing it to the door of the Property but before he was in the fist fight with DH.

[51] When asked on cross examination why he brought the replica gun to the Property, his evidence was that it was not uncommon for he and his friends to practice target shooting. He then clarified that he did not recall he and his friends having plans to practice target shooting on that day. With respect to the axe, ES testified that he had the axe on hand that day with the intention of chopping wood for his girlfriend, who he said had a wood stove. When confronted on cross with the fact that it was warm in June, ES said the nights were chilly. However, in his evidence in chief he also said that he brought the axe with him to the door of the residence for protection because he feared that the people in the residence would be armed. He said that these people were "known drug users".

[52] The internal inconsistencies in ES's evidence as to why he brought the replica gun and axe to the Property undermine his credibility to some extent. I do not believe that he took the axe to the Property and then with him to the door of the residence because he planned to chop wood on the return from the Property. I believe he took it with him as protection, or perhaps to intimidate those present in the residence. However, I believed ES when he testified that he did not see Mr. Naugle physically in Cst. MacDonald's way, prior to his arrest because this aligns with the testimony of other witnesses, including Mr. Naugle. For the same reason, I also believe ES's evidence that he did not hear Cst. MacDonald provide Mr. Naugle with any warning before arresting him.

Ryan Redmond MacDonald (RMacD)

[53] Certain parts of RMacD's testimony lacked credibility. For example, he would not acknowledge on cross-examination that his memory in 2019 may have been better than it was in Court over six years later. In 2019 he gave a statement over the phone to Cpl. Bryce as part of his investigation of the Complaint. RMacD was working out west at the time, and Cpl. Bryce located him there by phone with the assistance of RMacD's father.

[54] RMacD testified that in 2019, he "overexaggerated" events in his comments to Cpl. Bryce over the phone. Cpl. Bryce's notes of his conversation with RMacD provide that RMacD told him that Mr. Naugle was "off the charts drunk" at the time of these events and that he was just making the Complaint in the hope of getting money. RMacD testified he was present in court voluntarily (not under subpoena) and was missing college class in order to do so. He testified that he drove three hours to attend court in order to correct what he had previously told Cpl. Bryce. His explanation as to the change in his version of events, was that he was unhappy with Mr. Naugle at the time (2019) when he gave a statement to Cpl. Bryce. He said that that was why he "overexaggerated". He testified he could not remember why he and Mr. Naugle were not on the best of terms in 2019. Mr. Naugle, however, testified that he and RMacD had a falling out because RMacD brought someone over to Mr. Naugle's girlfriend's home who smashed a window in her home. Mr. Naugle said that this incident resulted in a police complaint and the two distancing.

[55] The Court notes that RMacD did not make any mention of this incident or provide any specific reason as to why he was so unhappy with Mr. Naugle that he was prepared to be untruthful to Cpl. Bryce concerning the events of June 3, 2018. I find this negatively impacts his credibility. The Court also notes that RMacD minimized the fact that he purportedly lied to police in 2019, by saying that the

conversation was “unsworn testimony” and that he was speaking with his father so he was using a more casual tone. However, Cpl. Bryce’s testimony, which I believe, was that RMacD spoke directly with him.

[56] The Court notes that RMacD prepared an undated, handwritten document which he said he produced in order to “clarify” what he said to Cpl. Bryce. It reads: “On June 3, 2018, I witnessed the arrest of one Sean Naugle. While being arrested I noticed that he was incapacitated and on the ground, he was not resisting in any way and I noted this to the officer at the time.”

[57] I agree with the Defendant’s counsel’s submissions that this note, even if its content is believed, does not resolve the issue of RMacD’s initial statement that Sean was “off the charts drunk” and that he was making the Complaint for money.

[58] The note does not change much, in my view. No witness testified that Mr. Naugle was drinking at the scene of the arrest or was intoxicated, except for Cst. MacDonald when he gave discovery evidence in 2023. However, in that regard, the RCMP records do not indicate that Cst. MacDonald noted in his Occurrence report completely shortly after these events that Mr. Naugle was intoxicated. Nor did Cst. MacDonald record that Mr. Naugle was “slurring his words”, evidence which he gave on discovery, but not at trial.

[59] Further, Cst. MacDonald noted in the Occurrence report that several of the witnesses, but not Mr. Naugle, were “intoxicated”.

[60] RMacD’s trial evidence was that he did not hear any warnings provided by Cst. MacDonald to Mr. Naugle and that he was nearby and would have heard these. This is consistent with the evidence of Cst. Dauphinee and Conservation Officer Fraser. I believe RMacD’s evidence on this point.

Daniel Hawley

[61] I found Daniel Hawley (DH) to be a credible witness.

[62] DH’s girl friend was a friend of TC. On the morning of June 3, 2018 he went to the residence of TC. His girlfriend, Natalie Taylor (NT) was there visiting with TC. He stayed at the residence and had drinks with NT and TC. At some point RMacD showed up and had a heated conversation with TC. He said that RMacD then left but showed up again a few hours later with two others. This was around 12 noon or 1 p.m. One of those others, was ES, who he said banged on the door of the residence.

[63] DH testified that ES and RMacD returned to the residence later that day, around noon or 1 p.m. ES and RMacD came to the door and banged on it. He

opened the door eventually and started to talk with RMacDonald. Suddenly, ES began striking him, and then "sucker-punched" him. The two fell to the ground and engaged in a fist fight. Before the fistfight started he saw the other man (Mr. Naugle) get out of the Vehicle. He thought that this person had an alcoholic bottle in this hand, but did not see him drink from it.

[64] At some point during the fist-fight ES was on top of him. He then felt more weight on his back. He looked to one side and saw a person with pants with a stripe up the side. At that point he knew that an RCMP officer was present. That officer was telling ES again and again to stop resisting arrest.

[65] Eventually this officer subdued ES and put him in handcuffs. The officer (Cst. MacDonald) took an audio statement from him; a transcript of the statement was in evidence.

[66] DH saw Cst. MacDonald go towards the Vehicle. He knew at some point that the Vehicle had been searched. He said that Cst. MacDonald talked to him again after taking his first statement and told him that he had found a "replica handgun". DH's evidence was that he did not hear any warnings given by Cst. MacDonald before he arrested Mr. Naugle.

[67] Cpl. Bryce interviewed DH as part of his investigation of the Complaint in 2019. Although Cpl. Bryce's says in his report that DH advised "in his statement to Cst. MacDonald on June 3, 2018 that Naugle was "interfering" with police at the scene", this Court notes that the transcript of Cst. MacDonald's audio interview of DH that day, does not contain anything like that. There is no mention whatsoever of Mr. Naugle interfering with Cst. MacDonald.

Constable Joshua Dauphinee

[68] Cst. Dauphinee was stationed as an RCMP officer to the Antigonish/Guysborough/Picou detachment in June, 2018 and had been so stationed since 2015. He started his career with the RCMP in 2009.

[69] On June 3, 2018 he was conducting uniform traffic control in Pictou Co. He stopped to have lunch with his partner that day, Conservation Officer Fraser. The two were doing joint patrols that day, which included matters related to fishing and forestry offences. Cst. MacDonald joined the two for lunch. It was then that a call came over the radio that a fight was in progress at the Property. Cst. MacDonald left rapidly for the scene. He and Officer Fraser joined him in their own RCMP vehicle shortly thereafter.

[70] When they arrived, Cst. MacDonald had two males on the ground and was lying on top of them. Cst. Daphinee ran towards the three. He grabbed the person on top, ES. He testified that he heard something about an axe at some point. He also testified that he remembered Cst. MacDonald yelling, "Get back" and "you're under arrest". He said that this was directed at Mr. Naugle, who was resisting. Cst. MacDonald took Mr. Naugle to the ground and arrested him.

[71] The Court notes that Cst. Dauphinee's notes in the Occurrence Report of June 3, 2018 record that "Cst. MacDonald advised him there was mention of a handgun". He corrected this notation, for the first time at trial. He said rather that Cst. MacDonald told him that there was an "axe" and that his notation about a handgun was incorrect. Cpl. Bryce's notes of his interview with Cst. Dauphinee in 2019 refer to being told by Cst. Dauphinee that there were "weapons". Cst. Dauphinee said that he did not have the Occurrence Report notes with him when he was interviewed by Cpl. Bryce.

[72] Cst. Dauphinee also testified that Mr. Naugle was approaching where Cst. MacDonald was standing near the Vehicle, and that Cst. MacDonald told him several times to get back. His evidence was that he didn't see "any strikes thrown". He volunteered that he thought that Cst. MacDonald's actions in arresting Mr. Naugle that day were appropriate.

[73] On cross-examination, Cst. Dauphinee agreed that if he saw physical contact between a citizen and an officer who was searching a vehicle, he would probably make note of that in his Occurrence Report notes. He recorded nothing to that effect. Nor did he go to the aid of Cst. MacDonald, which he agreed he would have, if he had seen Mr. Naugle make physical contact with Cst. MacDonald while he was attempting to search the Vehicle.

[74] Nor did Cst. Dauphinee recall seeing a "back and forth" between Mr. Naugle and Cst. MacDonald, as was the evidence of Cst. MacDonald. Nor did he remember anything being said about a search warrant. Both Mr. Naugle and Cst. MacDonald gave evidence that Mr. Naugle yelled something about the officer not having a search warrant.

[75] On balance, I note that the evidence of Cst. Daphinee on key points around the interaction of Cst. MacDonald and Mr. Naugle which led to Mr. Naugle's arrest does not fully support Cst. MacDonald's version of events.

Conservation Officer Fraser

[76] Officer Fraser testified that he had been a conservation officer for 27 years at the time of trial. On June 3, 2018 he was conducting joint patrol in Pictou Co. with Cst. Joshua Dauphinee. He corroborated the evidence of Cst. MacDonald and Cst.

Dauphinee that the three were having lunch when the call advising that a fight was in progress at the Property came over the radio from dispatch. Cst. MacDonald left immediately for the scene, and he and Cst. Dauphinee followed shortly thereafter. By the time he arrived Cst. MacDonald had the two combatants on the ground. He helped with ES and eventually accompanied ES to the local hospital.

[77] He recalled hearing something at the scene about an axe. Officer Fraser's evidence was that there were "people interfering with Cst. MacDonald who was trying to look in the car"; there were people with raised voices who were encroaching and he heard Cst. MacDonald say, "stay back". Officer Fraser said that Cst. MacDonald arrested someone by the Vehicle.

[78] Officer Fraser didn't hear anything about a "handgun". Nor did he see anyone initiate physical contact with Cst. MacDonald.

[79] Officer Fraser was the only witness who gave evidence about "people" being around the Vehicle who were encroaching.

Constable Dave Gagnon

[80] Cst. Gagnon joined the RCMP in 2009. He was first stationed to the Pictou detachment in 2009 and has been carrying out general duty work since then, including on June 3, 2018.

[81] He too, arrived at the Property after receiving the dispatch over the radio. Constable Gagnon had no first hand knowledge of the events before he arrived, including the events around the arrest of Mr. Naugle.

Corporal Ronald Bryce

[82] In my view, Cpl. Bryce was a credible witness in that he attempted to be truthful to the Court. He was candid that investigating other RCMP member peers was a difficult task and was uncomfortable at times. He was not defensive or combative. He testified that in his conversation with Cst. MacDonald as part of the investigation, the officer would not provide a written or audio-recorded statement, so Cpl. Bryce recorded notes.

[83] When Mr. Naugle's counsel confronted him with discrepancies between his notes and Cst. MacDonald's trial testimony, he maintained that his notes would have reflected accurately what he was told at the time.

[84] This witness did not go out of his way to defend Cst. MacDonald which bolsters his credibility, in my view. For example, when Mr. Naugle's counsel asked Cpl. Bryce if he would be surprised that Cst. MacDonald started to search the Vehicle at the front instead of the rear area, he agreed that that would surprise him and that it would be "strange" for the officer to start at the front if he had seen weapons in the back and was concerned for his safety.

[85] Cpl Bryce's notes indicate that Cst. MacDonald told him in their 2019 phone call that Mr. Naugle pushed him while he was trying to search the Vehicle. There appears to be no reason why Cpl. Bryce would have fabricated what Cst. MacDonald told him on such an important point. None of the other individuals that participated in the RCMP investigation said that Mr. Naugle made any physical contact with Cst. MacDonald before he was arrested.

[86] The Court notes that at trial, Cpl. Bryce agreed with counsel for Mr. Naugle that upon collecting evidence in the investigation, and in particular the statement of Cst. Dauphinee, that he now preferred the version of the other independent witnesses over that of Cst. MacDonald, with respect to whether Mr. Naugle pushed Cst. MacDonald or not.

[87] Although Cpl. Bryce told this Court that it was unclear to him at the present time whether Mr. Naugle actually pushed Cst. MacDonald away from the Vehicle prior to being arrested, that it is what he stated in his report. Cpl. Bryce stated that, "Witnesses advise that it was Naugle who was being vocal toward Cst. MacDonald and was clearly obstructing him physically, leading to his arrest".

[88] It is puzzling to this Court why Cpl. Bryce would so state in the Summary section at the end of his report, when he had the same conflicting evidence before him at that time (2019) that he had in Court six years later. Cpl. Bryce's notes of his recorded interview with Cst. Dauphinee do not record that Cst. Dauphinee told him that he saw Mr. Naugle initiate physical contact with Cst. MacDonald, let alone that Mr. Naugle pushed him. Nor do Cpl. Bryce's notes indicate that he was so told by anyone else.

[89] Further, Cpl. Bryce's report states that "Mr. Naugle was, by all accounts, clearly intoxicated and <u>was standing over Cst. MacDonald</u> as he was searching (the Vehicle)". There is no evidence before this Court from any witness, other than the recanting witness RMacD, that Mr. Naugle was intoxicated. Cst. MacDonald said in his discovery evidence that Mr. Naugle was intoxicated and slurring his words, but he did not record those observations at the time in the Occurrence Report, and nor did any other officer.

[90] Further, there is no evidence from any witness before this Court that Mr. Naugle was "standing over" Cst. MacDonald as he searched the Vehicle.

[91] Cpl. Bryce on cross examination by counsel for Mr. Naugle admitted that Cst. MacDonald may not have been "entirely truthful" with him in 2019 when he told him that Mr. Naugle physically pushed him away from the Vehicle while he was actively conducting the Vehicle search.

[92] With that review of the evidence of the non-party witnesses, the Court turns to the evidence of Mr. Naugle and Constable MacDonald, focussed at this point on credibility concerns.

Inconsistencies in Mr. Naugle's evidence

[93] Cst. MacDonald argues that Mr. Naugle's evidence is "rife with hyperbole/exaggeration". The main inconsistencies in Mr. Naugle's evidence relate to the physical nature of the arrest and his interactions with Cst. MacDonald at the police station.

i. The physical nature of the arrest

[94] At trial Mr. Naugle testified that he held out his right arm while Cst. MacDonald was running toward him, that the officer then grabbed his right arm and swung him around at least three times, almost taking his feet off the ground, with

both arms on Mr. Naugle's right arm, taking him to the ground. Mr. Naugle maintains that he was not resisting. He stated he believed he landed on the hood of the Vehicle briefly on the way down to the ground. Once down, he stated that Cst. MacDonald "yanked" his right arm three times toward his left butt cheek. Mr. Naugle says that he yelled at this time saying he was "sorry" and that he was not resisting.

[95] Cst. MacDonald says it defies credulity that Mr. Naugle could have been swung in circles three times, regardless of how many times he repeated this same account. He argues that Mr. Naugle's version of his actions/behaviours are at odds with the general picture revealed by a consideration of the whole of the evidence.

[96] Here the Court notes that no other witness to these events saw Mr. Naugle being swung in the air three times; nor does anyone say that he landed on the hood of the Vehicle. Cst. MacDonald does describe his interaction with Mr. Naugle before the two fell to the ground as being circular, or close to a 360 degree turn.

ii. The police station interactions with Cst. MacDonald

[97] After his arrest, Mr. Naugle was taken by Cst. MacDonald to the police station at Pictou. He testified that Cst. MacDonald took a computer from the dispatcher at the police station to look up his past criminal record. The Court notes that Mr. Naugle

testified that he did not give Cst. MacDonald his name, whereas Cst. MacDonald testified that Mr. Naugle provided him with his full name and date of birth when he was *Chartered* and cautioned post-arrest, as recorded in his notebook.

[98] Video recordings from two vantage points in the station were shown to the Court. These depicted the booking process. Cst. MacDonald says it is clear from the video that at no point did he use a computer at all. When confronted with this on cross-examination, Mr. Naugle suggested there was another computer that could not be seen from the vantage point taken by the video.

[99] Mr. Naugle also testified that once Cst. MacDonald looked up his record, he made comments to the effect of "do you think you're hard because you have a prior assault against an officer charge?" and "I should squash you like a bug and punch your teeth down your throat." Cst. MacDonald denies making these comments. When confronted with the apparently casual/relaxed body language of the parties, including him, in the CCTV footage, Mr. Naugle noted that the cameras did not capture the audio of the conversation. Cst. MacDonald argues that these are examples of Mr. Naugle shifting the narrative once confronted with objective evidence, and that this undermines Mr. Naugle's credibility.

Inconsistencies in Cst. MacDonald's evidence

[100] It is dangerous to rely on demeanour alone when assessing the credibility of a witness. Witnesses can be good actors. However, I observed that Cst. MacDonald was defensive at times during his cross-examination, and at times even combative when challenged. Cst. MacDonald frequently would not make basic admissions. For example, when asked by Mr. Naugle's counsel whether he first saw the weapons in the trunk of the Vehicle, he refused to acknowledge that the Vehicle even had a trunk and instead referred to it as the "rear hatch area,". This was the case despite using the word "trunk" himself when giving his discovery evidence in 2023: "I was in the process of opening the trunk to get the weapons" and "I don't recall if the trunk was locked." At trial, Cst. MacDonald was combative and unclear about what he meant by the "rear hatch area".

[101] Another example of the sometimes evasive nature of Cst. MacDonald's testimony, is his evidence about a replica gun that was found in the Vehicle. At discovery, his evidence was that he would need a firearms specialist to determine whether what he saw was a replica gun, absent which he believed it was a handgun. However, in the recorded conversation between Cst. MacDonald and DH at the scene, the officer is heard to say, "and for the record I'm holding up a replica pistol, silver and black."

[102] Mr. Naugle submits that these examples on their own are not fatal, but when placed in the context of other inconsistencies in Cst. MacDonald's evidence, it calls into question his version of events. Further, Mr. Naugle contends that that version is not corroborated by the other witnesses.

i. Whether he saw weapons in the Vehicle prior to the search, and where the weapons were found and photographed

[103] Cst. MacDonald testified at trial that he walked up to the Vehicle, looked in the window, and saw an axe and what appeared to be a handgun in the rear hatch area. He said he did not remember which window he saw them through. He stated that his number one priority after seeing the weapons was to secure them. He did not recall shouting to his colleagues or opening the rear hatch once he saw these items. Cst. MacDonald gave no evidence about opening the trunk/rear hatch area. Rather, his evidence was that he checked the driver's side and glove compartment. He said it was a "logical progression" to move from the front to the back of the Vehicle in his search, despite allegedly seeing the weapons in the back.

[104] Cpl. Bryce described searching the Vehicle from front to back, after seeing weapons in the back, as a strange approach, and not what he would expect an RCMP officer to do in that situation.

[105] Cst. MacDonald swore during his discovery evidence that seeing weapons in the trunk of the Vehicle created an urgent situation, and his priority became securing the weapons. As noted earlier in this decision, ES testified that he put the weapons under a blanket, because he did not want them to be seen. Although I do not believe that ES gave credible evidence about why he brought an axe and replica gun with him, his evidence in this regard makes common sense in all of the circumstances.

[106] When considering the totality of the evidence on this point, in my view, Cst. MacDonald's evidence that he viewed weapons in the rear of the Vehicle prior to the search does not accord with the "preponderance of probabilities." Considering the evidence before the Court, I conclude that Cst. MacDonald fabricated this portion of his evidence to justify and bolster his grounds for arresting Mr. Naugle.

[107] However, if I am wrong on this point, nothing turns on it except the credibility of Cst. MacDonald, since the legality of the Vehicle search was not challenged. Further, even if I accepted fully Cst. MacDonald's evidence on the point of seeing the handgun and axe in the back of the Vehicle, there were many other troubling aspects to his credibility, the greatest of which, in my view, was whether, and to what degree, there was physical contact between him and Mr. Naugle.

ii. Whether there was physical contact between Mr. Naugle and Cst. MacDonald prior to arrest

[108] This is the aspect of Cst. MacDonald's evidence which was of greatest concern to this Court. Had Cst. MacDonald's evidence been that he arrested Mr. Naugle because Mr. Naugle kept coming toward him, and then retreating and then coming again, and had that evidence been corroborated by other witnesses, this Court finds that that could have grounded a lawful arrest for obstruction.

[109] However, I do not accept that this back and forth occurred. No one except Cst. MacDonald testified to anything like that taking place.

[110] Further, and importantly, it was Cst. MacDonald's evidence that he and Mr. Naugle made physical contact with each other and it was that contact which prompted his arrest for obstruction. Yet, Cst. MacDonald's evidence on this point, and he alone gave evidence about that contact, changed and varied over time. This Court lost confidence in the credibility of Cst. MacDonald as a result, especially when taken with other inconsistencies in his evidence.

[111] Because I find it to be such an important issue of credibility, I will spend some time reviewing Cst. MacDonald's evidence in this regard.

[112] At trial, Cst. MacDonald testified that as he was proceeding to search the vehicle that Mr. Naugle got behind him at some point. "All of a sudden someone is behind me and I felt contact." He testified that he was not sure who initiated the

contact, that since Mr. Naugle was behind him, he could have stepped back and bumped into him. The notes he made shortly after the events in the Occurrence Report refer to Mr. Naugle moving behind him and he pleads that in his defence.

[113] As noted above, Cpl. Bryce conducted the investigation into the Complaint. Cst. MacDonald was the only witness interviewed who declined to provide an audio-recorded statement to Sgt. Bryce. On cross-examination, Cst. MacDonald explained that he did not "feel like" giving, nor did he see the point in providing, a recorded statement. Indeed, it appears he was under no obligation to do so from the perspective of the RCMP investigation.

[114] As noted previously in this decision, Cpl. Bryce testified at trial that during the Complaint investigation, Cst. MacDonald told him, in his statement, that Mr. Naugle physically pushed Cst. MacDonald away from the Vehicle prior to the arrest. At trial, Cst. MacDonald suggested that he could not speak to what Cpl. Bryce wrote but denied telling Cpl. Bryce that Mr. Naugle pushed him. Mr. Naugle argues that Cpl. Bryce had no reason to mislead the court, unlike Cst. MacDonald.

[115] Here the Court notes that despite the fact that Cst. MacDonald's evidence was that he was concerned and keeping a close eye on Mr. Naugle, he also testified at

trial that somehow Mr. Naugle was behind him all of a sudden, when the contact occurred.

[116] Cst. Joshua Dauphinee testified that he saw the arrest, although he was down the hill at the sight of the original fight between ES and DH when he did so. His evidence was that he saw Mr. Naugle move forward towards Cst. MacDonald but could not say how close he got – all he could say was Mr. Naugle was not "tens" of feet away. Cst. Dauphinee could not remember seeing any contact between the two prior to the arrest. Mr. Naugle says that Cst. Dauphinee's evidence is consistent with his testimony, as well as that of RMacD and ES. Mr. Naugle says there was no physical contact between himself and the officer prior to arrest, and that Cst. MacDonald fabricated the assertion that there was contact.

[117] On cross-examination, Cst. MacDonald confirmed that he could not say who initiated the physical contact, whether Mr. Naugle lunged or fell into him, or if he walked backwards into Mr. Naugle. He stated that if Mr. Naugle initiated physical contact with him in a manner so as to push him away from the Vehicle, it would have been an assault of a peace officer, which he would have documented. There was no such documentation before the Court. There was no documentation of any contact between Cst. MacDonald and Mr. Naugle.

[118] Cst. MacDonald testified that he warned Mr. Naugle three times to stop obstructing him or he would be arrested. Mr. Naugle's denies that the officer gave him warnings. Rather, he says that he called out, saying something to the effect of "this cop is doing an illegal search," at which point the officer looked at him from over the top of the Vehicle, ran towards him, and arrested him without warning.

[119] In the view of this Court, it defies logic or plausibility that Mr. Naugle, whom Cst. MacDonald was closely watching, concerned about, and focused on, could somehow suddenly appear behind him.

[120] Cst. Dauphinee's evidence was that he would come to the aid of Cst. MacDonald if he saw a citizen contact an officer who was searching a vehicle for weapons. He did not do so. Nor did he record any such contact in his notes at the time. For that matter, nor did Cst. MacDonald record that he had contact with Mr Naugle in the immediate aftermath of these events. Yet, somehow when he knew his conduct was under investigation by the RCMP, Cpl. Bryce records in his notes that he was told by Cst. MacDonald that Mr. Naugle pushed him away from the Vehicle. I dot not ground my credibility assessment on the basis of this aspect of Cp. Bryce's report.

[121] In the context of all the evidence, I do not believe that any physical contact occurred between Cst. MacDonald and Mr. Naugle prior to the contact that formed the arrest.

iii. Whether there was a "dance" between Mr. Naugle and Cst. MacDonald, whether there were verbal commands, and whether Cst. MacDonald warned Mr. Naugle he would be arrested for obstruction

[122] Cst. MacDonald's evidence was that there was a "dance" between the two prior to the arrest. Mr. Naugle would move in closer to him, the officer would tell him to step back, and Mr. Naugle would, but then would move closer, and they continued to go back and forth in this manner. Then, somehow, the officer lost track of Mr. Naugle, who got behind him, and there was physical contact of some kind. That was when, according to Cst. MacDonald's trial evidence, he concluded that "enough was enough". He testified on discovery in 2023 that he could have arrested Mr. Naugle before that point in time for public intoxication or for creating a disturbance. However, the fact remains that he did not do so, and by his own trial evidence what caused him to arrest Mr. Naugle was the fact that he appeared suddenly behind him and there was contact between the two.

[123] RMacD testified that he did not hear Cst. MacDonald give any warning to Mr. Naugle, and that there was no back and forth "dance" between the two. Rather, his evidence was that Mr. Naugle shouted out, questioning the lawfulness of the search,

and Cst. MacDonald came around the car and arrested him. This is consistent with Mr. Naugle's evidence. None of the civilian witnesses saw a back and forth or "dance" occur.

[124] DH testified that when he was engaged in the fistfight with ES, he heard Cst. MacDonald tell ES several times to "stop resisting". However, he did not hear Cst. MacDonald say anything to Mr. Naugle before making physical contact with him and arresting him. He did not see Mr. Naugle initiate physical contact with Cst. MacDonald.

[125] Cst. Dauphinee's evidence was that nothing happening in the driveway caught his attention. He did not hear any proclamations in the vein of "get back" or the like. He was several feet away with a subdued ES at the time. Nor did he recall seeing a "dance" or back and forth between Mr. Naugle and Cst. MacDonald.

iv. The physical nature of the arrest itself

[126] Cst. MacDonald's discovery evidence was that he placed his hand on Mr. Naugle's arm, and Mr. Naugle attempted to turn, run and drop. When he dropped, Cst. MacDonald still had a hold on his arm, and dropped with him. Essentially, his evidence as I understand it was that Mr. Naugle was trying to escape while Cst. MacDonald still had hold of his arm.

[127] At trial, Cst. MacDonald testified that Mr. Naugle spun himself into an arm bar. Cst. MacDonald then actively brought him to the ground, the pair did a 90-degree pirouette from the momentum, and the officer handcuffed him while on the ground. He said he had no memory of Mr. Naugle resisting while they were on the ground.

Findings of Fact

[128] The Nova Scotia Court of Appeal in *Nova Scotia Teachers Union,* citing *Faryna,* has instructed trial judges to do the following when determining credibility between competing versions:

> [33] …The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses…

[129] There is no doubt that Mr. Naugle had inconsistencies in his testimony, the most troubling being his allegation regarding Cst. MacDonald's conduct towards him at the police station, which is contradicted by the CCTV video evidence, although there is no audio capturing what either Mr. Naugle or Cst. MacDonald said. However, Mr. Naugle's evidence about what occurred immediately prior to, and during his arrest is corroborated by other witnesses. In my view, Mr. Naugle's

evidence regarding the events surrounding the arrest is within the "preponderance of possibilities".

[130] Conversely, much of Cst. MacDonald's evidence does not fall comfortably within the "preponderance of probabilities." On key points, such as his search of the Vehicle, his evidence is not aligned with common sense or evidence of police training. This includes his evidence that he saw the weapons in the rear of the Vehicle, and yet he began his search at the front of the Vehicle. It is also unbelievable that somehow, in a back and forth "dance" between the officer and Mr. Naugle, Cst. MacDonald lost sight of him long enough for Mr. Naugle to sneak up behind the officer and make physical contact that the officer did not record in his notes and did not remember the specifics of. I do not believe these aspects of Cst. MacDonald's evidence.

[131] Based on these findings of fact, I conclude that Cst. MacDonald lacked reasonable and probable grounds to arrest Mr. Naugle for obstruction. The evidence which I believe supports the following sequence of events:

- Cst. MacDonald was told by witnesses that there was an axe in the Vehicle;
- Cst. MacDonald did not see the weapons inside the Vehicle because they were covered by a blanket;
- He went to search the BMW to secure the weapons, and began his search at the front of the Vehicle because he did not know the axe or the handgun was located in the rear of the Vehicle;

- Mr. Naugle yelled from approximately 12 to 15 feet away from the Vehicle that the search was illegal, but did not move towards Cst. MacDonald;
- Cst. MacDonald reacted to the distraction by raising his head from the front of the Vehicle where he was searching, running towards Mr. Naugle, and taking him to the ground. He arrested Mr. Naugle without warning;
- At some point after arresting Mr. Naugle and putting him in the police cruiser, Cst. MacDonald found the axe and replica handgun in the back of the Vehicle and photographed them.

[132] Based on the facts I have found, combined with the essential elements of obstruction, and the law on a peace officer's right to arrest without warrant, I find that Mr. Naugle's conduct did not sufficiently warrant reasonable and probable grounds to arrest him for obstruction. Even if Cst. MacDonald had subjectively held reasonable and probable grounds to arrest Mr. Naugle, these grounds are not objectively justifiable. (*Storrey* at para 250)

II. USE OF FORCE

[133] If I am wrong, and the arrest was lawful, then I must conduct the three-part justification test for use of force by a police officer pursuant to s. 25(1) of the *Code* as discussed in *Degen* was outlined above but bears repeating:

> [444] …In the context of actions taken during the course of an arrest made by an officer, the three elements that must be proven are that:
>
> a) The officer's conduct was required or authorized by law in administering or enforcing the law;
>
> b) The officer was making the arrest based on reasonable grounds; and
>
> c) The officer did not use unnecessary force in effecting the arrest.

> [445] Absent the defendant establishing each of the three elements, the use of force is not justified and liability ensues: *Bencsetler* at para. 149. Accordingly, the use of force is unlawful.

[134] The wording from this test is taken from the Supreme Court of Canada's decision in *Nasogaluak*:

> [34] Section 25(1) [of the *Criminal Code*] essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and use only as much force as was necessary in the circumstances…

[135] In *Degen,* the Supreme Court of British Columbia wrote that "the onus of proving each element lies with the defendant and is based on a balance of probabilities" (para. 444). What follows is my analysis of the facts of this case applied to the three-part *Degen* test.

a) Whether the officer's conduct was required or authorized by law in administering or enforcing the law;
b) The officer was making the arrest based on reasonable grounds;

[136] If the arrest for obstruction was lawful, these parts of the test are made out.

c) Did the officer use unnecessary force?

[137] The Defendant argues that the arrest was lawful and that the force used was proportionate to the situation Cst. MacDonald faced. The defendant points to the RCMP Incident Management Intervention Model ("IMIM") to explain the framework by which officers are trained to assess risk in their encounters with the

public. The defendant argues that Cst. MacDonald's assessment of the circumstances after viewing the weapons in the vehicle amounted to "assaultive aggression" according to the IMIM.

[138] The corresponding "physical control" indicator on the IMIM for assaultive aggression is "hard". Cst. MacDonald testified that he received training on the "1+1 rule", which indicates that when officers see one weapon, they should not assume it is the only weapon. He testified that he had to proceed as if there were more weapons on the scene, and he did not know why Mr. Naugle wanted to prevent him from securing same. Cst. MacDonald said he began his response with communication, which escalated to commands and consequences – he told Mr. Naugle to get back or he would be arrested for obstruction. The officer maintains that he utilized "soft control techniques" by grabbing Mr. Naugle's arm and putting it behind his back to place him in handcuffs. Defendant's counsel submitted that as an "active resistant subject", hard physical control like blows or slaps could be appropriate, as well as "intermediate weapons" such as a baton or taser. Ultimately, Cst. MacDonald argues the force used was not excessive and the force deployed was based on the perceptions he was confronted with at the time. He argues that more significant interventions were available to him, and would have been justified in this situation.

[139] Both the plaintiff and defence directed the court's attention to commentary from the Supreme Court of Canada with respect to police officer's use of force, in *Nasogaluak*:

> [35] **Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances.** As Anderson J.A. explained in *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A):
>
> > In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude.
>
> [Emphasis added]

[140] The Defendant argues the case law is clear that "resulting injury is not determinative of whether force used was reasonable": *R. v. Vincent,* 2011 ONSC 139, at para. 83. This Court cannot make a finding that excessive force was used simply because Mr. Naugle was injured as a result. It must make its finding based on the s. 25(1) inquiry.

[141] The Defendant bears the onus to prove each element of s. 25(1) on a balance of probabilities (*Degen* at para. 444). Cst. MacDonald has not met his burden to prove that his use of force was justified. I conclude that his use of force was excessive.

[142] If I had found Cst. MacDonald to be a generally credible witness, I would also have likely found his version of events concerning Mr. Naugle's resistance to the arrest as credible, including that Mr. Naugle attempted to run away from him. I would give Cst. MacDonald the benefit of being at the scene and making difficult decisions quickly in all of the circumstances. I would not have found his use of force to be excessive.

CONCLUSION

[143] Cst. MacDonald lacked reasonable and probable grounds to arrest Mr. Naugle for obstruction and thus the arrest was unlawful. Flowing from this, Cst. MacDonald failed to meet his burden to justify the use of force in effecting the arrest pursuant to s. 25(1).

[144] Cst. MacDonald is liable for tortious battery and the *Charter* breaches claimed. Costs are awarded in favour of Mr. Naugle.

Smith, J.