

CANADA / JUDGMENT

R. v. Dergez

2024 BCSC 1365

COURT

Supreme Court of British Columbia

DECIDED

16 February 2024

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2024 BCSC 1365 R. v. Dergez

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dergez,

2024 BCSC 1365

Date: 20240216

Docket: 55727-2; 55727-4

Registry: Vernon

Rex

v.

Blake Everett Dergez

Before: The Honourable Justice Wilson

Oral Reasons for Judgment

Counsel for the Crown:

J. Park

Counsel for the Accused:

C. Johnson

Place and Date of Trial/Hearing:

Vernon, B.C.

October 30, 31,

November 1 - 3, 6, 29

and December 1, 2023

Place and Date of Judgment:

Kelowna, B.C.

February 16, 2024

- [1] THE COURT: On September 9, 2021, Blake Dergez had in his possession a powerful laser that he pointed at airplanes in the sky. This would undoubtedly be a terrifying experience for any pilot who would be temporarily unable to see. Flying a plane is not like driving a car. The operator cannot simply pull over to the side of the road.
- [2] Mr. Dergez's actions were extremely dangerous and could have caused a very serious accident, serious enough that someone, and indeed numerous people depending on the circumstances, could have been killed. Mr. Dergez's actions were pointless, dangerous and, viewed objectively, completely ridiculous.
- [3] This case is not about Mr. Dergez's dangerous use of the laser. Rather, it is firstly whether he assaulted a group of five people, one of whom was a pilot and, another, that pilot's flight instructor who had been temporarily blinded by the laser that night and had located Mr. Dergez at a bench on a hill in a park. This case is also about whether Mr. Dergez assaulted and uttered threats to a police officer, Constable Carey, who was trying to arrest him.

Background

- [4] I will start by reviewing the background facts. The RCMP in Vernon were first involved in this matter starting at around 9:20 p.m. on September 9th, when they received a call from Navigation Canada that a commercial WestJet flight heading to Kelowna had been hit by a laser. There were other calls that evening making similar complaints.
- [5] One of the pilots hit was Mr. Reid Botwood, one of the witnesses at the trial. Reid Botwood was training to become a pilot. As part of his pilot's training, he was doing what is referred to as a night circuit. This involves landings and takeoffs from the airport during the hours of darkness. His flight instructor was Ms. Kim Alaric, who was also a witness and, along with Reid Botwood, was one of the complainants relating to the charges against Mr. Dergez for assault with a weapon.
- [6] Prior to even commencing the night circuit, Mr. Botwood and Ms. Alaric had received a warning or notice of somebody having pointed a laser at a commercial plane that was headed to Kelowna. When Reid Botwood took off and started a turn, the laser shone directly into his eyes. As they were coming back to land, the laser hit them again, and they decided to abandon the landing and instead overshoot the airport and fly towards Okanagan Lake. Eventually, however, they needed to return to Vernon. As they approached the airport to land, the laser hit them again.

- [7] Mr. Botwood took a video from the plane so that he had a rough approximation of where the laser was coming from. He thought that it was from the Turtle Mountain area in Vernon. He had called the police from the air and they had said something along the lines that they would try to send somebody to the airport to meet with them. However, after half-an-hour to 45 minutes after landing, they gave up and decided to leave the airport.
- [8] They met up with three others: Brett Botwood, who is Reid Botwood's brother, Jonathan Black, and Jordan Melvin. They met them at Turtle Mountain. These three are the others who are the named complainants in the charges against Mr. Dergez for assault with a weapon.
- [9] At some point, one of the group saw the laser hit another plane. By this time, they thought the source of the laser was closer to Alexis Park in Vernon. At some point shortly thereafter, the group further narrowed the source of the laser to Becker Park, which is adjacent to Alexis Park Drive. Brett Botwood and Mr. Black arrived at Becker Park first. They parked at the curling rink parking lot and walked up into the park and on the hill. As Mr. Botwood and Mr. Black approached the top of the hill in Becker Park, they were hit with the laser. Brett Botwood called police.
- [10] Mr. Dergez was on a bench located near the top of the hill in Becker Park. He had a bicycle and a backpack with him. Eventually all five of the complainants were within 30 feet or so of Mr. Dergez. They verbally confronted Mr. Dergez. Mr. Dergez eventually left the bench area and departed from Becker Park. It was approximately midnight. As he departed, he periodically deployed bear spray and shone his laser at the group.
- [11] One member of the group who was familiar with Becker Park, Mr. Melvin, anticipated where Mr. Dergez would be going and he used a rental scooter to head into the area where he expected Mr. Dergez would exit the park. He saw Mr. Dergez as he had anticipated. By this time, the police were arriving in the area. Mr. Melvin flagged down the police car and directed officers towards Mr. Dergez.
- [12] After he left Becker Park near Canterbury Court, Mr. Dergez walked west on 32nd Avenue and crossed Alexis Park Drive, which becomes 37th Street at that location. He then walked south down the laneway between 37th and 38th Streets, and then turned right as the laneway T's mid-block. As he was turning right (or to the west), Constable Carey slowed and then stopped his police car next to Mr. Dergez. Constable Carey told Mr. Dergez they were investigating someone using a laser. Mr. Dergez told Constable Carey that he had been attacked by 'four guys and a girl'. Constable Carey then recognized Mr. Dergez and said, "You're Blake Dergez," but the accused denied that he was Blake Dergez.

- [13] Mr. Dergez continued walking westbound in the laneway before turning right or northbound when he reached 38th Street. As both Mr. Dergez and Constable Carey headed eastbound down the laneway, Mr. Dergez on foot and Constable Carey in his police car, another officer, Constable Samantha McClellan, caught up on foot. She called out to Mr. Dergez that he was under arrest. Mr. Dergez did not stop.
- [14] Mr. Dergez was subsequently arrested on 38th Street by Constable Carey. Mr. Dergez had been carrying a jerrycan of gasoline with the lid off and had been pouring or sloshing gasoline on the ground as he walked. Constable Carey became covered in gasoline, although how that came to happen is disputed. Constable Carey says that Mr. Dergez deliberately doused him as he went to arrest him, whereas Mr. Dergez says it happened when Constable Carey tackled him to the ground.
- [15] Constable Carey punched Mr. Dergez on two occasions, seconds apart, for a total of four or five punches before he was able to place Mr. Dergez in handcuffs.

The charges

- [16] The interactions with the group of five people in Becker Park gives rise to Counts 1, 3, 4, 5, and 10 of the indictment. Those charges are assault with a weapon pursuant to s. 267(a) of the Criminal Code as against Reid Botwood, Brett Botwood, Jordan Melvin, Jonathan Black, and Kim Alaric, respectively.
- [17] The remaining charges that were at issue in the trial pertain to the circumstances surrounding Mr. Dergez's arrest, namely Counts 2 and 6, uttering threats to Constable Carey and assault of Constable Carey. The charge of uttering threats arises because Constable Carey says that Mr. Dergez threatened to light him on fire while the two stood face to face at the time of Mr. Dergez's arrest.

The trial

- [18] There were a number of videos in evidence at the trial. Mr. Melvin and Brett Botwood took videos on their cellphones of their interactions between Mr. Dergez and the group at the top of Becker Park. Mr. Melvin also took a video as Mr. Dergez walked away from Constable Carey's police car heading westbound in the laneway, and also on 38th Street where Mr. Dergez was arrested. Finally, there was video and audio from Constable Carey's police car which was captured on the WatchGuard.
- [19] At a pretrial conference, Mr. Dergez sought permission to attend his trial by video link from Okanagan Correctional Centre ("OCC"). I was told it was a six-hour drive from the correctional centre to the Vernon Courthouse, and although he could spend the nights at the police station, Mr. Dergez advised that on a previous occasion he had not had a blanket and the lights were left on all night, so he was unable to get sufficient sleep.

- [20] The pretrial conference judge granted Mr. Dergez's request, subject to the trial judge's discretion. At the commencement of the trial, I ordered that Mr. Dergez be permitted to attend his trial by video from OCC, but that we would need to revisit the issue if Mr. Dergez intended to testify.
- [21] Because I was satisfied that Mr. Dergez had been able to participate at his trial and the quality of the video and audio had been good, I also granted Mr. Dergez's request to give his evidence by video link from OCC with the agreement of the Crown. The trial was heard concurrently with a voir dire relating to the circumstances of Mr. Dergez's arrest and in particular because Constable Carey had punched Mr. Dergez during the arrest process.
- [22] At the time of the accused's arrest, he was carrying an open jerrycan containing gasoline. Constable Carey became covered in gasoline and, as I indicated before, whether the accused deliberately soaked him or whether it was an inadvertent consequence of Constable Carey tackling Mr. Dergez is in dispute. Regardless of how Constable Carey became covered in gasoline, Constable Carey was concerned about the risk of being set on fire and he punched Mr. Dergez in the course of effecting the arrest. The accused argues that the open jerrycan ought to have been obvious to Constable Carey and that the entire situation could have been and should have been handled differently. The accused argues that his Charter rights were breached when he was punched by Constable Carey.
- [23] The accused's initial Charter application filed well in advance of the trial sought a stay or alternatively declaratory relief in consideration of the breaches for the purposes of sentencing arising out of the use of force at the time of arrest. The accused argues that Constable Carey's use of force deprived him of his right to life, liberty, and security of the person in accordance with s. 7 of the Canadian Charter of Rights and Freedoms.
- [24] At the conclusion of the trial and with the consent of the Crown, the accused amended his Charter application to allege abuse of process. He argues there are significant concerns with regard to the prosecution's case relating to the conduct of the various police officers that necessitates the intervention of the court such that the proceedings ought to be stayed. In particular, he argues the proceedings should be stayed because the proceedings were unfair and that the conduct of the officers undermines the integrity of the judicial system.
- [25] Because the accused testified at his trial, I must be mindful of the principles set out by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. Those cautions are as follows:
- a) first, if I believe the evidence of the accused, obviously I must acquit;
 - b) second, if I do not believe the testimony of the accused but I am left in a reasonable doubt by it, I must acquit;
 - c) third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

- [26] I am mindful that although the trial and voir dire proceeded concurrently, they are distinct and separate parts of the trial process. In the voir dire, the accused has the burden of establishing that his Charter rights were breached on a balance of probabilities.
- [27] If the accused is successful at the voir dire stage of this trial, the remedy would or could be a judicial stay of proceedings, in which case the matter would be at an end. If the accused is not successful in obtaining a stay following the voir dire, I would then go on to the trial stage and consider whether the substantive charges have been proven. At the trial stage, the Crown has the burden of proving each of the elements of the offences charged and the Crown's evidentiary burden is proof beyond a reasonable doubt.
- [28] Although credibility is of critical importance in the trial, this case is not a credibility contest. If the accused's evidence raises a reasonable doubt in the context of the evidence as a whole, I must acquit him. Moreover, even if I reject his evidence, my rejection of his evidence is not, in and of itself, sufficient to convict him. Rather, I must proceed to review the evidence as a whole and decide whether the Crown has proven the accused's guilt beyond a reasonable doubt based on the evidence that I do accept.

Accused's application for stay

- [29] I will start now with the accused's application for the stay.
- [30] The abuse of process doctrine may be engaged in one of two ways:
- a) the conduct of the state affects the fairness of the accused's trial; and
 - b) the state conduct contravenes the fundamental notions of justice and therefore undermines the integrity of the judicial system as a whole.
- [31] Regardless of the category, the test for whether a stay should be granted is the same:
- 1) that the prejudice to the accused's right to a fair trial or to the integrity of the judicial system will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome;
 - 2) there is no alternative remedy capable of addressing the prejudice; and
 - 3) only if Steps 1 and 2 do not clearly answer whether a stay should be granted does the balance of interest favour granting a stay.
- [32] In this inquiry, interests such as denouncing misconduct and preserving the integrity of the justice system are balanced against society's interest in having a final decision on the merits: *R. v. Babos*, 2014 SCC 16 at para. 32.
- [33] The accused points to the following from the trial in support of his argument, the primary focus of which was the conduct of Constable Carey. As it relates to Constable Carey, the accused argues:

- a) there were contradictions between his notes and police narrative that he drafted shortly after the incident that did not accord with the video and audio evidence presented before the court;
 - b) Constable Carey viewed one of the civilian videos overnight while under cross-examination;
 - c) Constable Carey discussed certain issues with both police witnesses and the civilian witnesses, prior to the civilian witnesses providing statements to the member assigned with the task of obtaining them;
 - d) even though Constable Carey admitted he was not assigned to the task of interviewing witnesses and instead was directed to return to the detachment to change his clothing, he nonetheless returned to the parking lot adjacent to the curling club where he had a discussion with witnesses; and
 - e) his police notes contained no references to any of those discussions.
- [34] As part of the abuse of process argument, the accused also argues that the evidence from the officers at the trial included evidence that was not in their police notes and was contrary to their police notes in some instances. As an example of the former, Constable McClellan testified that she saw Mr. Dergez splashing gasoline on Constable Carey, but her notes contain no reference to having seen that occur.
- [35] The accused also argues there are material omissions from the police notes and narratives of the RCMP officers that give rise to concerns about credibility and reliability of the investigating officers.

Evidence of Officers

- [36] I will turn now to the evidence of the officers.

Constable Samantha McClellan

- [37] Constable Samantha McClellan received a report that somebody had been lasering the sky and that both a Vernon pilot and a WestJet flight to Kelowna had been hit with the laser. There was then an update on the file that said some witnesses had located the man in Becker Park, and there was an altercation in the park involving a laser, yelling, and bear spray. She went to Alexis Park Drive and parked north of 32nd Avenue and walked into the park from the west side. She started to go up the hill, but she heard a male on a rental scooter shouting and flagging her down. She then went back down to Alexis Park Drive. She saw the same person on the rental scooter flagging down another police car, so she ran in that direction. She went southbound down the laneway between 37th and 38th Streets and was running to try to catch up with both Mr. Dergez and Constable Carey.

- [38] As she was running, Constable McClellan called out to Mr. Dergez, "Stop, you're under arrest", but he did not stop. While she was running, she saw that Mr. Dergez was splashing gasoline from an open jerrycan onto the ground, which she conveyed on her police radio.
- [39] Constable Carey was trying to conduct the arrest when Constable McClellan next saw Mr. Dergez. She saw Constable Carey and Mr. Dergez face to face, and Mr. Dergez was shaking a jerrycan. Mr. Dergez ended up on the ground and Constable Carey was holding him down. Constable McClellan then went and secured Mr. Dergez's legs. By that time, she could smell the gasoline had been splashed and spilled.
- [40] The concern was that Mr. Dergez might have a lighter, in which case all three of them could be engulfed in flames. Mr. Dergez was given direction to remove his arms from underneath him so he could be put in handcuffs. He kept yelling that he could not, but although he was saying that, Constable McClellan could see that Constable Carey was trying to pry Mr. Dergez's arms from underneath his torso, and that Mr. Dergez kept pulling them back and resisting. She saw Constable Carey punch Mr. Dergez twice, once in the ribs and once in the shoulder area. He continued to squirm. He was given commands on three to six occasions but did not comply. Although Mr. Dergez kept saying, "I'm trying," her evidence was that he was not in fact trying.
- [41] Eventually they were able to get control over Mr. Dergez, and she could not remember whether it was Constable Carey or Sergeant Fayle who ultimately got handcuffs on him. He was then given his Charter rights by memory by Constable McClellan and put in a police vehicle.

Constable Ryan Carey

- [42] Constable Carey had been attending to another call relating to a mental health issue and left Vernon Jubilee Hospital at around 11:45 p.m. He could see what was going on with regard to the investigation involving the call that had originated with Navigation Canada calling on behalf of WestJet and that a pilot had been lasered in the Turtle Mountain area. He went to the area of 30th Avenue and was flagged down by Mr. Melvin, who said, "That's the guy with the laser."
- [43] Constable Carey then drove down the alley in a southbound direction and, just prior to the corner caught up with the man. He recognized Mr. Dergez from previous interactions. He said, "You're Blake Dergez", to which Mr. Dergez responded, "No, I'm not." This happened a couple of times. Mr. Dergez then started to walk faster and he had things in his hands. Constable Carey could not say exactly what he had in his hands, but he did see a stick.
- [44] After Mr. Dergez and then Constable Carey turned the corner from the right, from the laneway onto 38th Street, Mr. Dergez started to cross the street. Constable Carey went past him in his vehicle and angled his car with the purpose of having Mr. Dergez cross the street and come close to the driver side, which is what happened. Constable Carey got out of the vehicle and took 10 steps or three seconds in order to get to Mr. Dergez. As he closed the

distance, he saw Mr. Dergez turn and he felt a cold, wet sensation. It started on his upper chest and ran down his abdomen. He did not appreciate what it was at the time. The first splash was before there was any physical contact between the two.

- [45] He then went to grab a hold of Mr. Dergez and did so with one arm. As Mr. Dergez turned around to face him, he put a second hand on Mr. Dergez and he felt what he described as a second dump of liquid. Mr. Dergez said to Constable Carey, "Let me go or I'll light you on fire." Constable Carey said that Mr. Dergez said this twice. At this point, Constable Carey realized that he might be in significant danger. He realized that he was covered in gasoline and that Mr. Dergez had threatened to set him on fire. Constable Carey was aware of Mr. Dergez from numerous previous interactions and knew that he was a user of methamphetamine and routinely had lighters or blowtorches on hand for the use of smoking drugs.
- [46] He could not specifically recall what Mr. Dergez did with the jerrycan, but he recalls seeing it higher towards head height at some point. He picked Mr. Dergez up by the arms and slammed him hard onto the ground. At this point, he was most concerned about Mr. Dergez's hands. Most of the dangers that people face are from hands, whether it is knives, weapons, or in this case a lighter. Mr. Dergez was lying on his left side and Constable Carey was driving Mr. Dergez's right arm upwards to try to prevent him from reaching into his pockets. Mr. Dergez was wearing a hoodie, which itself would have had pockets.
- [47] Mr. Dergez was not cooperating, and Constable Carey punched him twice in the head. He subsequently threw two other punches, but they were more of a glancing blow. He described it as an attempt to get control over Mr. Dergez. He had no other options. A taser or pistol would spark a fire. OC spray takes time to have effect, and he had no opportunity to use a baton.
- [48] The threat of fire did not change, but the struggle for control moved more in favour of the police as more officers arrived. In short order, Constable McClellan was on Mr. Dergez's legs and Sergeant Fayle had control over Mr. Dergez's head.
- [49] Constable Carey believes that the blows to Mr. Dergez's head were effective. Mr. Dergez looked shocked and his hand that he was struggling to prevent Constable Carey from taking control of stopped moving for a moment before it resumed moving.
- [50] The last two punches were thrown when Constable Carey and Mr. Dergez were already on the ground. At this point, Constable Carey had control over one hand but not the other. Mr. Dergez landed on his left side, and Constable Carey believed that he had Mr. Dergez's right arm above his head. He used his body weight to gain some control, because he needed to gain control of Mr. Dergez's hands.
- [51] The two punches that were thrown when Constable Carey and Mr. Dergez were on the ground were the two punches that Constable McClellan saw.

- [52] Constable Carey, and indeed all of the officers, confirmed that police officers receive training at RCMP depot on how to respond with subjects of various levels of cooperation: passive resistance, active resistance, assaultive, all the way to the risk of grievous bodily harm or death. The responses for each vary, but they are part of a continuum, as opposed to clear delineated steps. For example, use of a taser is an option, but only once the subject becomes assaultive.
- [53] Officers are taught to take physical control, which can be anything from grabbing a wrist to applying pressure points for physical pain that have the effect of enabling an officer to take control of the subject.

Sergeant Fayle

- [54] Sergeant Fayle was the senior officer on the scene. When he arrived -- and he can be seen arriving in the video -- Mr. Dergez was already on the ground with Constable Carey, and Constable McClellan was trying to gain control. Mr. Dergez refused to take his arms out. Constable McClellan was on his legs and Constable Carey in his shoulder area.
- [55] Sergeant Fayle recalled a strong smell of gasoline. He could not recall if Mr. Dergez was on his stomach or not whether he first arrived. He held down Mr. Dergez in the chest area and later his head. The purpose of taking control of the head is to stop the person thrashing around. He could not recall whether the others were on him or simply adjacent to him. When he controlled Mr. Dergez's head, Sergeant Fayle put his hand on the side of Mr. Dergez's head in the ear area. The purpose of holding the head is to take away mobility from the body.
- [56] From Sergeant Fayle's assessment, Mr. Dergez was assaultive in the totality of his behaviour. Assaultive can result in anything from verbal to lethal force depending on the subject. He did not see gasoline at all but could smell it, and indeed could see it on Constable Carey.
- [57] Sergeant Fayle did not recall a conversation with Constable Carey where Constable Carey said that he 'wailed on' Mr. Dergez. He said he would only make a note of something if he thought it was out of line, and there was nothing out of line from what he could see. Sergeant Fayle said not every punch is inappropriate. From his perspective, there was nothing about what he saw that caused him any concern.

Evidence of the accused

- [58] Mr. Dergez testified about the circumstances preceding his arrest. When Constable Carey drove alongside him, Mr. Dergez told Constable Carey that he had been attacked by 'four guys and a girl'. Constable Carey said nothing about Mr. Dergez's report that he had been attacked, but instead said, "You're Blake Dergez." Mr. Dergez then walked away, removed the cap from the jerrycan, and started to pour the gasoline on the ground to protect himself from his assailants.

- [59] As he rounded the corner from the alley, he was still dumping gas on the ground. Constable Carey then tackled him and punched him repeatedly in the face. He was carrying the jerrycan in his right hand.
- [60] Mr. Dergez said the gasoline ended up on both he and Constable Carey because the gas can was open and he was pouring it when Constable Carey spun him around. Gas splashed everywhere as a result.
- [61] Although he heard the command to take his arm out, he could not do so because he had been pinned down. He described Constable Carey's demeanour as angry and aggressive.

Findings with regard to the circumstances of arrest

- [62] When Constable Carey first stopped his vehicle next to Mr. Dergez, he did not know who the person was, other than the person had been identified by the civilian, Mr. Melvin, as the person who had been pointing the laser at airplanes. Constable Carey slowed and stopped next to Mr. Dergez and said that he wanted to ask him some questions. Mr. Dergez then said that he had been attacked by four guys and a girl, and it was at this point that Constable Carey recognized Mr. Dergez from previous encounters.
- [63] I do not accept that Mr. Dergez walked away from Constable Carey because Constable Carey had not taken his complaint about having been attacked by the group of five people seriously or that Mr. Dergez left because he needed to get away from his pursuers.
- [64] By this point, Mr. Dergez had left four of the five people behind and he had seen the other, Mr. Melvin, flag down a police vehicle. It would have been obvious to Mr. Dergez at this point that he was no longer being pursued and that the group of five people were dealing with police, as opposed to pursuing him directly.
- [65] I find that Mr. Dergez walked away from Constable Carey because he had been recognized. Mr. Dergez knew that he was in breach of his release orders and wanted to get away from police because he realized that he had been recognized. Mr. Dergez knew that once Constable Carey realized that Mr. Dergez was in breach, he was going to be arrested.
- [66] Mr. Dergez acknowledged that he poured gasoline on the ground in order to aid in his escape. He wanted to create a barrier. Although he said he wanted to create a barrier between himself and the group of five people, the group of five people who confronted him in Becker Park were no longer a concern. If they had been, he would have been safer to stay closer to Constable Carey than if he created separation. I conclude that the only barrier he wished to create was between himself and the police.

- [67] Mr. Dergez was not arrested at the time of his initial conversation with Constable Carey. He was free to walk away and he did so. However, once he had gone approximately halfway down the alley, he heard Constable McClellan tell him to stop because he was under arrest. At that point, he was no longer free to go. However, he continued to walk away, and it was at this time that he removed the cap from the jerrycan and started to pour the gasoline to create his barrier.
- [68] Constable Carey told Mr. Dergez to stop after he turned onto 38th Avenue, but again Mr. Dergez did not comply. Constable Carey then stopped his police car and approached Mr. Dergez. Constable Carey did not appreciate that Mr. Dergez was carrying an open jerrycan when he went to arrest him.
- [69] Although Constable McClellan had made note by way of her comments on the police radio that Mr. Dergez was emptying gasoline, there was no evidence that Constable Carey heard that or that he would have known about it at the time. Mr. Dergez was actively resisting both Constable Carey and Constable McClellan as he tried to escape. It was reasonable for Constable Carey to take steps to try to stop him.
- [70] Regardless of how Constable Carey came to be covered in gasoline, it is not disputed that this occurred. I accept Constable Carey's evidence that when it dawned upon him that he was covered in gasoline, the situation had become potentially a life or death situation. Constable Carey knew from past dealings that Mr. Dergez was a drug user, specifically methamphetamine, and that it was therefore likely that he had lighters or torches in his pockets.
- [71] I conclude that Mr. Dergez was not cooperating with Constable Carey at the moment Constable Carey realized he was covered in gasoline and in the seconds that preceded it.
- [72] Although Mr. Dergez denied in his testimony that he threatened to light Constable Carey on fire, the WatchGuard video includes audio. While it was much more difficult to determine what was being said when the audio was played in court through the speakers attached to the television, I have listened to the audio that accompanies the video that was submitted into evidence by agreement of the parties. Discernable on the audio are the words "fucking light you on fire". The words preceding the profanity on the recording are not audible because of engine noise from a vehicle.
- [73] Constable Carey's evidence was that Mr. Dergez said words to the effect of, "Let me go or I'll light you on fire." In other words, Constable Carey did not recall the profanity that is audible on the recording.
- [74] I do not accept that Constable Carey failed to de-escalate the situation when he recognized Mr. Dergez and said, "You're Blake Dergez", as opposed to taking Mr. Dergez's complaint of having been attacked by five people seriously. No one was chasing Mr. Dergez. Mr. Dergez did not seem to be particularly excited at the time of his initial words and there was no heightened circumstance that necessitated any form of de-escalation. With the benefit of

hindsight, it may be that Constable Carey would have had the opportunity to observe the jerrykan in Mr. Dergez's hand, but this does not detract from the fact that Constable Carey was entitled to effect an arrest. The only reason Mr. Dergez opened the jerrykan was for the express purpose of resisting arrest. There was no other purpose.

- [75] While the arrest may have been done differently had Constable Carey observed the jerrykan, it does not follow that Constable Carey was obligated to allow Mr. Dergez to walk away and avoid arrest. The fact that things could have been done differently does not necessarily mean that Constable Carey's conduct was wrongful.
- [76] In the circumstances, I conclude that Constable Carey's use of physical force in order to detain Mr. Dergez was justified. I accept that it was absolutely essential for Constable Carey to obtain control of Mr. Dergez's hands to prevent him from reaching for a torch or a lighter. I find that the punches were designated to effect a safe arrest and for no other purpose, and in so observing, I note that Constable Carey's demeanour at the instant Mr. Dergez's hands were secured is consistent with the blows having been strategic as opposed to for retribution.
- [77] Shortly afterwards, Constable Carey can be heard on the audio telling Sergeant Fayle that he whaled on Mr. Dergez. When he was asked during cross-examination what "wailed" means, Constable Carey says it means an unstoppable barrage of blows. However, based on all of the evidence, both oral and on the video, Constable Carey's description of what he did overstates his actions; that is, there were two and perhaps three blows at separate times, but there was no unstoppable barrage.

Abuse of process

- [78] I will turn now to the abuse of process aspect of the accused's application for a judicial stay. The accused says the proceedings should be stayed because they were unfair and/or the conduct of the police in this matter sufficiently undermines the integrity of the judicial system, such that a stay should be ordered. The accused refers to a number of matters that arose during the trial that gave rise to his amended Charter notice. He says that even if no single one of these is sufficient to warrant a judicial stay, the cumulative effect of the various concerns are such that a stay ought to be ordered.
- [79] It is well established that police officers have a statutory duty to provide complete, accurate, and timely accounts of their observations by way of contemporaneous notes. The accused refers to the following passage from *R. v. Shakes*, 2009 ONCJ 172 at para. 21:
- [21] The purpose of police notes is not to record ever[y] detail, and even the omission of an important observation in isolation might not raise the issue as to the reliability of testimony not supported by recorded notes, but the repeated absence of admittedly important details - in this case, the most important details which formed the very basis for undertaking the investigation - raises the issue of credibility and reliability of the testimony.

- [80] In *R. v. Karunakaran*, 2008 ONCJ 397, the Court stated the following with regard to the officer's notes in an impaired driving investigation:
- [22] His notes were little more than cryptic jottings. There were significant omissions. For example, there was no detail in his notes about how he came to stop the defendant's car. There was no indication of where the smell of an alcoholic beverage came from. There was no note that he asked Mr. Karunakaran if he had consumed any alcohol. In fact, there was no note of any of his conversation with the defendant.
- [81] It must be kept in mind, however, that police notes cannot be expected to be, nor are required to be, a blow-by-blow chronology or account of every minute detail that occurs during an investigation.
- [82] The difference between the circumstances in *Karunakaran* and the present case is that the notes in issue were the notes of the lead investigating officer. Those notes represented the entirety of the Crown disclosure. The court ordered a stay of proceedings based on a breach of the accused's s. 7 rights, because the notes were insufficient to constitute adequate disclosure. The Court at para. 25 said the following:
- [25] More significantly, the officer's notes were insufficient to enable the Crown to provide proper disclosure and resulted in a breach of Mr. Karunakaran's section 7 Charter rights. In this case, as is --
- [83] Although the accused complains that Constable McClellan's notes make no reference to her seeing the accused splashing gasoline onto Constable Carey, there can be no doubt that this formed the substance of the allegations against Mr. Dergez. Constable McClellan took sparse notes at the time, but completed her narrative report within a couple of hours when she was back at the detachment. She was not the lead investigator on the file, nor was she the victim of the pouring of gasoline. She would not have known what charges were going to be laid against Mr. Dergez.
- [84] By contrast, it would have been reasonable to expect that Constable Carey's notes would make reference to the sloshing of gasoline, and indeed they did so.
- [85] Constable McClellan's failure to record the sloshing of gasoline in either her contemporaneous notes or her narrative does not give rise to a breach of the accused's rights to receive full disclosure, because the event was contained in the disclosure package by way of Constable Carey's notes. This can be contrasted with the circumstances in *Karunakaran* where the Court compared the complete lack of detail set out in the investigating officer's 10 lines of scribbled notes with the significant level of detail he was able to recount on the witness stand, which gave the Court significant concern because his sparse notes were the only Crown disclosure. No such concern arises here.

- [86] I accept that there are inconsistencies between Constable Carey's recollections, notes, and what is shown in the video recordings. The accused also argues that there were contradictions, revisions, and that Constable Carey was evasive and revised his evidence in accordance with the videos.
- [87] I accept that Constable Carey's evidence on direct was not identical in all respects to what is depicted on the videos. For example, Mr. Dergez did not run away after Constable Carey recognized him, as apparent from the WatchGuard video from the police car, and that Mr. Dergez walked away but did not run. That said, he continued to ignore Constable Carey and subsequently Constable McClellan when he refused to stop.
- [88] In many cases before the courts, the court is asked to consider credibility only in the context of direct and cross-examination, but in this case there is the benefit of the videos, including the video shot by the civilian, Mr. Melvin. On the question of credibility as distinct from reliability, the trier of fact needs to determine whether the witness is being honest and forthright. Reliability is focused on the accuracy of the testimony.
- [89] I accept that Constable Carey's recollections, and indeed those of Constable McClellan, were not perfect to the extent that they did not accord exactly with what was shown on the videos. However, I did not find that either Constable Carey or Constable McClellan were attempting to mislead the Court. I also conclude that their evidence is not materially different from what is depicted in the videos, and in particular from the video taken by Mr. Melvin's cellphone.
- [90] For example, during her testimony, Constable McClellan did not recall having seen gasoline coming out of the jerrycan until Mr. Dergez had turned onto 38th Street. However, the transcript of the police radio, coupled with the WatchGuard video from Constable Carey's car, suggest that she was aware Mr. Dergez was splashing gasoline from the jerrycan while he was still in the alleyway, before he turned onto 38th Street.
- [91] I do not consider this difference to be material. It must be remembered that the events happened over two years ago. The precise timing of when Mr. Dergez started to pour gasoline out of the jerrycan is not a particularly significant event in terms of the primary charges or what the police were investigating that night. It is to be expected that witnesses will have imperfect recollections of precise details. While imprecision can impact upon the reliability of a witness's evidence, it does not give rise to concerns about the integrity of the prosecution or the judicial system.
- [92] I find that both officers, Constable Carey and Constable McClellan, attempted to accurately summarize the events as they saw them.

- [93] Constable Carey admitted during his cross-examination that he spoke to the witnesses before they gave their statements. He admitted that he was embarrassed to see from the WatchGuard video that he had spoken to the civilian witnesses before they had had an opportunity to give their statements to the officer tasked with taking those statements. Obviously this is not an ideal situation because there is the potential for the witnesses to change their evidence based upon what they were told.
- [94] The Court has the benefit of the full audio of any conversations Constable Carey had with witnesses. I conclude that they are benign. The first interaction was with Ms. Alaric while Constable Carey was still at the arrest scene. This interaction is entirely innocuous and does not touch upon the substance of what is before the Court.
- [95] The second interaction occurred when Constable Carey went to the parking area by the curling club at the bottom of Becker Park, where the witnesses were congregating, as opposed to his going back to the detachment to change. Constable McClellan was still on the hill, but she was going to be taking the statements. She was with the other civilian witnesses to try to locate physical evidence in the park.
- [96] Even on this exchange, which is primarily with Mr. Melvin, Constable Carey was not initiating a conversation on any matters of substance and, while he answered a question for Mr. Melvin when he should not have done so, there was certainly no attempt on the part of Constable Carey to have Mr. Melvin change his evidence. As such, while the conversation with Mr. Melvin about the gasoline should not have occurred, it does not impact on his evidence before the Court.
- [97] Constable Carey also should not have reviewed the video evidence overnight while he was under cross-examination. That said, I accept the Crown's submission that the video was part of the police file and it had been shown to him during his testimony. Had he reviewed the video in detail before his cross-examination as opposed to during it, there would be no issue with the propriety of his doing so and his evidence was that he accepted, as one might imagine, that the video was a more accurate depiction of his events than his recollection was.
- [98] The accused argues that even if no one of these factors relating to the evidence of Constable Carey and the perceived inadequacy of the notes standing alone would be sufficient to warrant a stay of proceedings, the cumulative effect is such that a stay is warranted.
- [99] I do not agree. I conclude the accused was able to obtain a fair trial. Not only were all of the witnesses thoroughly examined and cross-examined, there were numerous sources of video available, such that the lion's share of the underlying facts could be determined objectively by way of objective source.
- [100] Although there were aspects of the trial that were imperfect for various reasons, I am satisfied that Mr. Dergez received a fair trial. His counsel had every opportunity to cross-examine the officers, and indeed did so effectively.

- [101] While there were aspects of the police conduct, and in particular Constable Carey reviewing evidence during cross-examination and speaking to the witnesses before giving their statements, that are not ideal, the nature of that conduct was not such that a judicial stay would be warranted.
- [102] As for his review of the video evidence, there was no attempt to disavow the accuracy of the videos. Rather, Constable Carey explained, and I accept, that he looked at the videos to confirm the accuracy of the questions that were put to him and he acknowledged his error where his recollection was contradicted by the video.
- [103] As for his conversations with the witnesses, none of these were substantive, and although he did mention to the lay witnesses in response to a question from them that he had been doused with gasoline, he did not give any particular details and I do not consider the witnesses' evidence tainted.
- [104] Mr. Melvin was the primary witness with whom Constable Carey conversed. However, Mr. Melvin's evidence, much of which I did not accept in any event, was not identical to the contents of his conversation with Constable Carey.
- [105] In all of the circumstances, the accused's application for a judicial stay is not granted because he received a fair trial and the conduct of the investigating officers, while imperfect, was not so far from acceptable standards so as to justify a stay of proceedings without consideration of the matter on its merits.
- [106] I will now turn to the substantive charges.

Charges

Assault with a weapon of the group of five civilians

- [107] I find the most logical method of dealing with the various charges in this matter is to deal with the charges of assault with a weapon against Brett Botwood, Reid Botwood, Mr. Melvin, Mr. Black, and Ms. Alaric first.
- [108] These charges are essentially indistinguishable, in that they arise from the same set of events, albeit with different victims in each case. I will return to the interactions between Mr. Dergez and Constable Carey and the other officers later.
- [109] Starting then with the charges with regard to the group of five. The Crown must prove each of the following essential elements of the offence beyond a reasonable doubt:
- a) that Mr. Dergez applied force to the complainant;
 - b) Mr. Dergez intentionally applied that force;
 - c) the complainant did not consent to the force that Mr. Dergez applied;
 - d) that Mr. Dergez knew that the complainant did not consent to the force; and

e) that Mr. Dergez used or threatened to use a weapon or imitation weapon.

[110] There is no question that Mr. Dergez applied force intentionally towards the five victims, nor is there any suggestion that any of them consented. Similarly, there was no doubt that bear spray constitutes a weapon for the purposes of s. 267(a). What these charges turn on is whether Mr. Dergez's actions were justified in order to defend himself.

[111] Mr. Dergez is justified in using force to defend himself and must be acquitted if all four of the following are present:

- 1) Mr. Dergez used force to repel an unlawful assault or what he perceived to be an unlawful assault upon him;
- 2) Mr. Dergez did not provoke the assault;
- 3) in using force, Mr. Dergez did not intend to kill or cause grievous bodily harm to the complainant; and
- 4) Mr. Dergez used no more force than was necessary to defend himself.

[112] Mr. Dergez had been living at his father's apartment in Kelowna, but his father had told him he would lose his home if Mr. Dergez stayed, so he went back to live on Turtle Mountain. He left his father's home a couple of days before these events. He had purchased a generator that he intended to take back up Turtle Mountain that night. He had left the generator chained to a tree near 39th Avenue and Alexis Park Drive near the bottom of the trail.

[113] It was roughly a two-hour hike to where he was camping on Turtle Mountain. He had been sitting in Becker Park since sundown, having a drink and playing on his phone and generally killing time. He had also used methamphetamine during the day.

[114] He was sitting at the second bench in Becker Park when he saw a group of people approaching him with flashlights. He shone his laser at them to see who was coming. They confronted him and said that he had tried to kill them. They were aggressive and came at him. He wanted to leave, but they told him he was not leaving and that the police were coming. They threw rocks at him, and he used bear spray to keep them away.

[115] The bear spray cannister did not function very well. Rather than spraying 10 to 15 feet as it usually would, the spray came out of the cannister but most of it ended up on his hand. He had purchased bear spray earlier in the day from someone in the park.

[116] Mr. Dergez believed and stated that he thought he was being surveilled by the RCMP with drones. He had gone to live on Turtle Mountain because he says that bylaw and RCMP do not have jurisdiction there and cannot go in there without permission of the local Indian band.

- [117] He says he saw drones off the deck at his dad's apartment, and he now understands that one of the drones he believed he saw on the night in question was in fact Ms. Alaric's plane. The plane was flying around and around in circles above him and he saw the blinking lights.
- [118] He described sitting, minding his own business, on the bench in Becker Park when the civilians approached him and accused him of trying to kill them. He agrees that he told them to tell the police to stop following him with drones. They said they were not going to let him leave. The five people were very angry and he felt threatened and outnumbered.
- [119] Mr. Melvin confirmed that the group's plan was to surround Becker Park and converge on the person who was lasering at the plane. Mr. Melvin agreed that Mr. Dergez was not confrontational at first, but that it changed when others arrived and he was clearly outnumbered.
- [120] As Brett Botwood and Jonny Black approached, Mr. Dergez shone the laser on them, and Brett Botwood was not certain how many people there were at the top of the hill. Reid Botwood was in front and Mr. Melvin was behind a tree. Mr. Botwood was further back. He described Mr. Dergez as hostile and he said that drones were following him and told them to get the police to stop it. Reid Botwood said, "I was the pilot, you could have killed me."
- [121] The closest Brett Botwood got was approximately six feet away, but he could not get close enough to see facial features because of the bright headlamp on Mr. Dergez's head.
- [122] Reid Botwood and Kim Alaric were understandably upset, given that they were flying in a plane that Mr. Dergez had hit with a laser. The five people were in an approximate semi-circle although they were not evenly distributed and they were not all the same distance from Mr. Dergez. The verbal accusations were made, rocks were thrown, and Mr. Dergez deployed bear spray that he had been carrying in his backpack when one or more of the group got close to him.
- [123] Mr. Dergez was very familiar with Becker Park and knew not only that there were three trails that were discussed by the civilian witnesses during their testimony, but there were other trails as well. When he departed from the top of the hill, he initially rode his bike but ditched it because he had to go down a rocky area. He then dropped the laser and bear spray. He took some stuff in a garbage bag and also took the jerrycan.
- [124] When Mr. Dergez started to leave the area at the top of Becker Park using his bicycle, some of the group of five followed him on foot, but Mr. Dergez kept them at bay by intermittently shining the laser and spraying the bear spray behind him. He was able to increase the distance from his assailants as he walked briskly down the path. He was not looking around, but rather was focused at getting away.
- [125] Although Reid Botwood, as the pilot trainee who had the laser shone in his eyes, had the most reason to be angry with Mr. Dergez, and while it is apparent from the audio that accompanies Mr. Melvin's cellphone video that his verbal exchanges with Mr. Dergez displayed aggression and hostility, Reid Botwood gave his evidence in a measured way and I

found him credible. He described the group's positions with clarity and, even though he thought he had remained further from Mr. Dergez than was depicted in the video, he acknowledged that he never actually saw or heard the deployment of bear spray. He saw the bear spray cannister afterwards, but did not see it actually getting deployed.

- [126] Reid Botwood willingly conceded on cross-examination that five people, two of whom were very angry and said that Mr. Dergez had tried to kill him, would be a potentially scary situation for someone in Mr. Dergez's position.
- [127] Ms. Alaric's evidence was consistent with Reid Botwood's evidence. She said that when she came out from behind the bush where she had been hiding, Mr. Dergez had the laser in his hand and was pointing it towards the guys, while also deploying the bear spray. She is not sure what had occurred that prompted the spray. She could see and hear the spray being deployed but said that Mr. Dergez did not appear to be targeting anyone in particular, but was rather aiming it in the direction of the group as a whole. She did not see anybody closer than roughly five to six feet away. When she was asked whether she walked into a waft of bear spray or whether it was directed at her, she conceded it could have been a bit of both.
- [128] Turning to the other two witnesses, Brett Botwood said someone got close to the bench where Mr. Dergez was located and that was when the bear spray was pulled out, after which whoever that person that was close by then ran back.
- [129] As for Mr. Melvin, he was hiding behind a tree and never got particularly close to Mr. Dergez.
- [130] Brett Botwood was a confrontational witness and to the extent his evidence differed from that of Reid Botwood or Kim Alaric, I do not accept it.
- [131] As for Mr. Melvin, I do not accept much of his evidence to the extent that it is inconsistent with other evidence either. I find that his evidence was embellished. First, he said that when he first called the police, he was told they would not go into Becker Park, but if the group could get the person with the laser out of the park, they would get involved. This evidence was not corroborated and is contrary to common sense, because police actively discourage civilians from confronting potential suspects. Second, although he testified to seeing Mr. Dergez douse Constable Carey with gasoline, it was apparent from cross-examination that he did not actually see this event.
- [132] Mr. Dergez deployed the bear spray three or four times, and I accept Mr. Dergez's evidence that although it did not spray as it was intended, some spray, nonetheless, came out. Mr. Dergez conceded there were no verbal threats of harm from anyone in the group. However, I am satisfied that Mr. Dergez's deployment of the bear spray was defensive in nature and was only done when one or more of the group of five people who surrounded him got uncomfortably close.

- [133] Mr. Dergez was alone in the park and it was almost midnight. The five people were all younger and no doubt fitter than Mr. Dergez, and at least two of them were extremely angry with him. Not unreasonably so in all of the circumstances, it must be said, but even two of the group acknowledged that this would likely have been a scary situation for Mr. Dergez.
- [134] I find that Mr. Dergez's use of the bear spray was not excessive, and that it was only used defensively, both at the top of the hill and when he was trying to get away and some of the group were following him. The specific interaction was not provoked by Mr. Dergez, even though obviously his actions earlier in the day precipitated the group's attendance at Becker Park.
- [135] I find that he only used the bear spray to keep the group of five civilians at a distance, as opposed to for the purpose of causing harm to others. I find that Mr. Dergez acted in self-defence when deploying the bear spray, and I therefore find him not guilty of the five counts of assault with a weapon relating to the bear spray.

Charges relating to Constable Carey

- [136] I turn now to the events involving Constable Carey and Mr. Dergez's arrest.
- [137] Mr. Dergez is subject to two charges relating to Constable Carey: first, uttering threats pursuant to s. 264.1(1)(a) of the Criminal Code; the second, assaulting a police officer pursuant to s. 270(1)(a).
- [138] I have already outlined the elements of assault earlier, albeit in the context of the charge of assault with a weapon. The main difference between an assault charge and a charge under s. 270(1)(a) is that the victim is a police officer acting in the course of his or her duties. There is no question that Constable Carey was acting in his capacity as a police officer.
- [139] As for uttering threats, the elements are:
- a) the accused, in any manner, uttered, conveyed, or caused Constable Carey to receive a threat to cause death or bodily harm to him; and
 - b) the accused knowingly made the threat.
- [140] The offence will be made out if a reasonable person aware of the circumstances in which the words were uttered would have perceived them to be a threat. It is not necessary that the intended recipient of the threat was intimidated, nor is it necessary to prove that the accused either intended to act on the threat or had the ability to act on it. The Crown must, however, establish that the accused intended to intimidate or that the threat be taken seriously.
- [141] I have already set out the essential elements with regard to assault. I reiterate that since Mr. Dergez testified about the events, the principles summarized in D.W. apply to these charges as well. It is important to keep in mind that this is not a credibility contest and the Crown has the onus of proof on all of the essential elements of the offence.

- [142] Constable Carey's evidence with regard to his being covered in gasoline and the threats he said Mr. Dergez made to him was summarized earlier. That is, as he closed the distance behind Mr. Dergez, he saw him turn and felt a cold, wet sensation that started in his chest and ran down his abdomen. He did not initially appreciate what it was. The first splash of the liquid was before he made any physical contact with Mr. Dergez. He then reached to get a hold of Mr. Dergez and, as Mr. Dergez turned to face him, he felt the second dump of liquid. It was at this point that Constable Carey said that Mr. Dergez said, "Let me go or I will light you on fire."
- [143] Constable McClellan testified, as I said earlier, that she saw Constable Carey and Mr. Dergez face to face, and that Mr. Dergez was shaking the jerrycan.
- [144] Mr. Dergez's evidence is that he did not deliberately splash gasoline on Constable Carey, but rather that they both became covered in gasoline when Constable Carey tackled him. Although there is video of the majority of the interactions between both Mr. Dergez and the group of five people in Becker Park, and also the interactions between Mr. Dergez and the police leading up to and including his arrest, the events that give rise to Constable Carey becoming covered in gasoline is not captured in any of the videos.
- [145] Mr. Dergez admitted that he removed the cap from the jerrycan because he wanted to create the barrier. I have already found that Mr. Dergez was attempting to create separation from the police and not the group of five, because that group had already been left behind. There were no safety concerns regarding the group of civilians.
- [146] Mr. Dergez knew that he was in breach of the terms of his release order by being on the streets in Vernon at that time of night, and he had been recognized. He would have known that he was going to be in trouble with the police, regardless of anything to do with the laser. The sole purpose of pouring the gasoline was flight from police.
- [147] I accept Constable Carey's evidence that Mr. Dergez threatened to light him on fire. His evidence in this regard is corroborated by the audio captured on the WatchGuard from the police vehicle, which was while he was affecting the arrest. As I indicated earlier, the beginning of whatever Mr. Dergez said is not audible, but the words "fucking light you on fire" are audible.
- [148] Gasoline in and of itself is simply a liquid, but the threat or danger it poses is due to the possibility of ignition. It would serve no purpose for Mr. Dergez to try to create a barrier between he and the police as he attempted to flee, unless there was an intention to convey the risk or threat of fire.
- [149] I am satisfied beyond a reasonable doubt that Mr. Dergez did threaten to set Constable Carey on fire, and I find him guilty of uttering threats to Constable Carey which were not only intended to be taken seriously, they were taken seriously.

- [150] The remaining issue is whether Mr. Dergez deliberately sloshed gasoline onto Constable Carey prior to issuing his threat, or whether it was simply the consequence of Constable Carey spinning Mr. Dergez around when he grabbed his shoulder. Put another way, did Mr. Dergez simply take advantage of a fortuitous set of events when he issued the threat to set Constable Carey on fire, or did he deliberately throw gasoline to start with?
- [151] I find that Mr. Dergez deliberately threw gasoline on Constable Carey. Constable Carey's evidence is that he felt the first splash before there was any contact with Mr. Dergez. That evidence remained consistent throughout cross-examination and I accept his evidence in this regard. I also accept Constable Carey's evidence that there were two distinct events when gasoline struck his body.
- [152] On Mr. Dergez's version, Constable Carey may have been covered in gasoline when he was spun around by Constable Carey, but I am satisfied from Constable Carey's evidence, and indeed the evidence of others, that the amount of gasoline on Constable Carey would not be consistent with incidental spillage as a result of having been spun around.
- [153] I find that Mr. Dergez knew that he was about to get arrested and threw gasoline on Constable Carey, as he tried to use the gasoline and the threat of fire as a means to effect escape. The sole purpose of pouring the gasoline was to create a barrier to facilitate the escape and the threat of fire. I find that Mr. Dergez first threw gasoline on Constable Carey before Constable Carey made physical contact with Mr. Dergez, and the second time was after Constable Carey put his hands on Mr. Dergez's shoulder.
- [154] I therefore find Mr. Dergez guilty of assaulting Constable Carey, contrary to s. 271(a) of the Criminal Code.
- [155] That concludes my decision.
- "Wilson J."

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Prepared on 26 October 2026 · Esheria