

CANADA / JUDGMENT

R. v. Volk

2025 BCSC 2118

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2025 BCSC 2118 R. v. Volk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Volk,

2025 BCSC 2118

Date: 20251028

Docket: X085103

Registry: New Westminster

Rex

v.

Damian Volk

Before: The Honourable Mr. Justice Gibb-Carsley

Oral Reasons for Judgment

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Place and Dates Hearing:

New Westminster, B.C.

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Place and Date of Judgment:

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October 28, 2025

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I. Introduction

[1] The accused, Staff Sergeant Damian Volk, is charged with one count of assault against Dalibor Kuzmanovic pursuant to s. 266 of the Criminal Code, R.S.C. 1985, c. C-46. The Crown alleges that the accused assaulted Mr. Kuzmanovic on August 17, 2020, while Mr. Kuzmanovic was in custody and being processed or "booked-in" at the Langley, British Columbia, RCMP Detachment (the "Detachment").

- [2] Both parties accept that the accused applied force to Mr. Kuzmanovic without Mr. Kuzmanovic's consent, thus constituting an assault. However, the issue in this trial is whether - given the accused was acting in his role as a police officer at the time of the assault - his use of force was reasonable in the circumstances. The Crown asserts that it has proven, beyond a reasonable doubt, that the accused's actions were not reasonable or proportionate in the circumstances.
- [3] I must determine whether the Crown has negated the elements of the statutory defence provided under s. 25 of the Criminal Code that allows peace officers to apply force to individuals so long as it is necessary, reasonable and proportional in the circumstances. As I will describe below, the test of whether the use of force by a peace officer is justified involves both a subjective and objective analysis and is applied contextually to the circumstances of the alleged assault.
- [4] In these reasons for judgment, I will first provide brief background facts for context. I will then set out the applicable legal principles. Finally, I will turn to my analysis and determination.
- [5] Before continuing, I wish to make two observations. First, there is extensive closed circuit television footage of Mr. Kuzmanovic's time at the Detachment (the "CCTV Footage"). The CCTV Footage does not have audio, but the resolution of the colour images is of sufficient quality to greatly assist my understanding of the events. Second, Mr. Kuzmanovic died on January 30, 2022, from unrelated causes. As such, he was unable to provide his version of events at trial.

II. Background

A. The Circumstances of the Initial Arrest of Mr. Kuzmanovic

- [6] On August 17, 2020, the RCMP received a call that an individual had stolen items from a Home Depot in Langley, British Columbia and fled in a taxi. The initial call to police reported that Mr. Kuzmanovic had brandished a knife and threatened a loss prevention officer at the Home Depot. It was later discovered that there was a miscommunication in the initial call to police. It was not that Mr. Kuzmanovic had threatened someone with a knife on this occasion, but that he had, on a previous occasion, threatened a loss prevention officer with a knife. However, on the Home Depot theft on August 17, 2020, Mr. Kuzmanovic did have a multitool with a knife on it that was seized from him upon his arrest.
- [7] Despite the miscommunication regarding the facts of the original call for police assistance as to whether Mr. Kuzmanovic had brandished a knife, I accept that the accused and the other officers believed that Mr. Kuzmanovic had threatened the loss prevention officer at the Home Depot with a knife on August 17, 2020. Accordingly, I accept that this would be a factor in their consideration of the risk Mr. Kuzmanovic might pose when he was arrested and then processed at the Detachment.

- [8] The RCMP arrested Mr. Kuzmanovic on suspicion of robbery at approximately 8:40 p.m. that same evening while he was in the same taxi from which he fled the Home Depot. Several police officers participated in Mr. Kuzmanovic's arrest. Constable Michael Dee and Constable Kyle Pfeiffer had the most direct involvement in his arrest. Both officers testified at trial. I note that Cst. Pfeiffer was not present while Mr. Kuzmanovic was being processed at the Detachment, he only attended the scene of the arrest.
- [9] Constable Pfeiffer testified that when arrested in the taxi, Mr. Kuzmanovic "wasn't cooperative, if I can say that, if I can say he was passive resistant - or passive aggressive." Constable Pfeiffer described that Mr. Kuzmanovic was not making any efforts to get out of the taxi and they had to grab him and directed him out of the taxi, but it "wasn't too forceful." Constable Pfeiffer testified that there was no struggle with Mr. Kuzmanovic when he was searched and put into handcuffs and put into the police vehicle. Constable Pfeiffer described Mr. Kuzmanovic's demeanor once he was in handcuffs as "placid" and "flat" and that he had "given up." Constable Pfeiffer clarified after that this "doesn't mean that in a split second, he can turn around and hit us or anything like that." I take this to mean that even when a suspect is showing little emotion, Cst. Pfeiffer believed that situations with suspects are dynamic and can become volatile, violent and escalate quickly.
- [10] Constable Dee testified that when he arrived at the scene where Mr. Kuzmanovic was in the taxi, his risk assessment was "very high". This was because he believed that the risk prevention officer at Home Depot had reported that he had been threatened by Mr. Kuzmanovic with a knife. Constable Dee testified that upon being at the scene and arresting Mr. Kuzmanovic he perceived Mr. Kuzmanovic as "cooperative". Constable Dee described Mr. Kuzmanovic as being cooperative because:
- everything we were telling him to do, he was doing. There was no motions from him to either run or fight or anything like that. And he went into handcuffs without any resistance.
- [11] Mr. Kuzmanovic was searched during his arrest. The police found and seized, among other things, a multitool folding knife. Mr. Kuzmanovic was handcuffed and placed in Cst. Dee's police car and taken to the Detachment for processing.

B. The Events at the Detachment and the Alleged Offence

- [12] Upon arriving at the Detachment, Mr. Kuzmanovic was brought out of the secure unloading area into the main processing area. His hands were behind his back in handcuffs at this time. Constable Dee, Constable Andrews, another cell guard and the accused were in the processing area. At the time of this incident, Cst. Andrews had not yet joined the RCMP as a member but was employed as a cell guard.
- [13] I accept that at the time of the alleged assault, a senior ranking officer at the Detachment was required to be present during booking-in and processing of suspects. I was provided evidence at trial, which I accept, that the reason for this policy was that in the past, there had been incidents while booking in suspects. Specifically, there were incidents in which

officers were assaulted and contraband - drugs or weapons - had been overlooked during searches and brought into the cells with the suspects. Accordingly, the accused, holding the rank of Staff Sergeant and Watch Commander was required to be present when Mr. Kuzmanovic was brought into the Detachment for processing. On this day, he was the highest-ranking officer at the Detachment. I accept that the accused's role was to supervise and provide instruction to more junior officers, such as Cst. Dee, during Mr. Kuzmanovic's booking-in process.

- [14] The CCTV Footage captures the entirety of the time Mr. Kuzmanovic is at the Detachment. The CCTV Footage has no audio. As such, none of the audio of the verbal exchanges are recorded. The CCTV Footage is in colour and the images are of sufficient clarity that I can observe the facial expressions of individuals in the images. I note that the specific altercation that the Crown alleges is the unreasonable assault by the accused of Mr. Kuzmanovic is captured from two different viewing angles. The first is from behind and to the right side of Mr. Kuzmanovic as he faces the wall. The second is from behind and from the left of Mr. Kuzmanovic as he faces the wall.
- [15] I will describe the evidence of the witnesses regarding the specific incident that resulted in the Crown charging the accused below in my analysis. However, in general terms, the following describes what occurred when Mr. Kuzmanovic was brought to the Detachment, during the alleged assault and immediately after. All this activity is captured in the CCTV Footage:
- a) Constable Dee escorts Mr. Kuzmanovic from the vehicle into the booking area in the Detachment. The accused is present when Cst. Dee escorts Mr. Kuzmanovic and holds the door open for them as they leave the sally port where the vehicle is parked;
 - b) Mr. Kuzmanovic's shoes are removed when he exits the police car, as such, he is only in socked feet. He is dressed in baggy knee length athletic shorts and a tee-shirt. He is approximately six feet tall with a shaved head and a solid build. It appears that he was larger in stature and outweighs Cst. Dee and the accused;
 - c) Mr. Kuzmanovic's hands are restrained in handcuffs behind his back. He was transported from the scene of the arrest to the Detachment with his hands restrained in handcuffs behind his back. Mr. Kuzmanovic's hands remain restrained in handcuffs behind his back from the time he arrives at the Detachment until after the alleged assault;
 - d) The booking counter to which Mr. Kuzmanovic is taken is a flat counter. The cell guard, Cst. Andrews, stands behind the counter. There is approximately six feet between the counter and the wall. It is in this area that Mr. Kuzmanovic was searched and where the alleged assault occurs;

- e) Mr. Kuzmanovic is positioned on footprints painted on the ground in front of the counter. The painted footprints face the counter but Mr. Kuzmanovic was placed on the footprints facing the wall, such that his toes were on the painted footprint heels. He is approximately three feet from the wall;
 - f) Constable Dee conducts a search of Mr. Kuzmanovic's shorts through a process described as "blading" where Cst. Dee used his flattened hand to feel inside the waistband of Mr. Kuzmanovic's shorts. Mr. Kuzmanovic's hands remained cuffed behind his back. At one point, Mr. Kuzmanovic raises his handcuffed hands behind his back above his waistband to allow Cst. Dee to search around the waistband of his shorts and underwear;
 - g) I will describe the details of the next events in more detail below in my analysis, but by way of summary, the accused interrupts Cst. Dee's search and starts to perform his own search of Mr. Kuzmanovic's shorts. While searching the front of Mr. Kuzmanovic's shorts, there appear to be words exchanged between Mr. Kuzmanovic and the accused;
 - h) Mr. Kuzmanovic turns his head towards the accused while moving his hips slightly away from the accused. Mr. Kuzmanovic appears to say something and slightly shrugs his shoulders. The accused pauses briefly and then grabs Mr. Kuzmanovic's right arm with his right hand and grabs Mr. Kuzmanovic's head with his left hand and forces him to the ground with what has been described as a controlled takedown manoeuvre. Mr. Kuzmanovic attempts to stay on his feet and the accused takes him to the ground at the end of the hallway. This grabbing of Mr. Kuzmanovic and his takedown is what the Crown submits is the assault against Mr. Kuzmanovic;
 - i) After the takedown, Mr. Kuzmanovic lays prone, and the accused continues his search of Mr. Kuzmanovic. Constable Dee joins and assists the accused in a further search of Mr. Kuzmanovic;
 - j) The accused and Cst. Dee assist Mr. Kuzmanovic to his feet. Mr. Kuzmanovic appears uninjured;
 - k) Constable Dee escorts Mr. Kuzmanovic to a small room at the opposite end of the hallway from where he was lying prone, taken past where he was originally standing before taken to the ground by the accused. Mr. Kuzmanovic's handcuffs were removed, and he is photographed and fingerprinted. Mr. Kuzmanovic is then taken to another room where he makes a phone call; and
 - l) Mr. Kuzmanovic is taken to a cell where he is strip searched and ordered to lie prone on the floor in the cell. He is left with a white paper Tyvek suit - colloquially known as a "bunny suit" - to change into.
- [16] The foregoing provides a general description of the events before, during and after the alleged assault.

III. Governing Legal Principles

[17] I will now set out the legal principles related to the presumption of innocence, the burden of proof and the treatment of circumstantial evidence. I will then set out the legal principles applicable to the charged offence of assault as well as the defence offered to police accused of committing assault in the course of their duties provided in s. 25 of the Criminal Code.

A. The Presumption of Innocence, Proof Beyond a Reasonable Doubt and Treatment of Circumstantial Evidence

- [18] The accused is presumed innocent. He does not have to prove anything. The burden is entirely on the Crown to prove beyond a reasonable doubt that the accused is guilty of the offence with which he is charged. The Crown's burden to prove its case beyond a reasonable doubt is the foundation of the Canadian criminal justice system. A reasonable doubt is one that is based on reason and common sense, not an imaginary or frivolous doubt, and it is logically derived from the evidence or absence of evidence in the record before the court: *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 30, 1997 CanLII 319.
- [19] Proof beyond a reasonable doubt is much closer to absolute certainty than to proof on a balance of probabilities: *R. v. Starr*, 2000 SCC 40 at para. 242.
- [20] To meet its burden, the Crown must prove each essential element of the offence charged beyond a reasonable doubt: *R. v. Boucher*, 2022 ONCA 40 at para. 63. However, the Crown is not required to prove each individual piece of evidence that makes up its theory beyond a reasonable doubt: *R. v. Vallee*, 2022 BCCA 11 at para. 236, leave to appeal to SCC ref'd, 40087 (28 July 2022); *R. v. Morin*, [1988] 2 S.C.R. 345 at 354, 1988 CanLII 8. Rather, the question is whether, on the whole of the evidence, the Crown has proven beyond a reasonable doubt that the accused is guilty: see *Boucher* at paras. 63-64, citing *Morin* at paras. 354, 361-362.
- [21] The leading authority regarding circumstantial evidence is the Supreme Court's decision in *R. v. Villaroman*, 2016 SCC 33. In *R. v. Duong*, 2019 BCCA 299, our Court of Appeal summarized the principles a court must apply when considering circumstantial evidence.
- [22] Where a case is based entirely on circumstantial evidence, the ultimate question is, "whether, on the whole of the evidence, the Crown has proven that the accused's guilt is the only reasonable inference." *Duong* at para. 64, citing *R. v. Tahirsylaj*, 2015 BCCA 7 at paras. 27, 38.
- [23] A reasonable doubt, or a theory alternative to guilt, may arise from a lack of evidence. Any inference arising from an evidentiary gap must be reasonable in light of the evidence and absence of evidence when assessed logically considering human experience and common sense: see *Duong* at para. 61; *Villaroman* at para. 35. Evidence must be assessed as a whole rather than piecemeal in considering the inferences drawn from circumstantial evidence.

- [24] The Crown must negate any reasonable inferences which are not consistent with guilt, but does not need to negate every possibility, "no matter how irrational or fanciful", which might be consistent with the innocence of the accused: Duong at para. 62, citing Villaroman at para. 37. The issue is whether the circumstantial evidence, "viewed logically and in light of human experience, is reasonably capable of supporting an inference other than the accused is guilty": Duong at para. 62, citing Villaroman at para. 38. The trier of fact is "to assess whether alternate inferences are merely possible or whether they are reasonable," and "to draw the line that separates reasonable doubt from speculation": Duong at para. 65, citing Villaroman at para. 71.
- [25] It is with these principles in mind that I now turn to the elements required to prove beyond a reasonable doubt that the accused committed assault.

B. Elements of the Offence of Assault

- [26] To prove assault under s. 266 of the Criminal Code, the Crown must prove beyond a reasonable doubt that the accused is the person who committed the offence in the indictment. Specifically, the Crown must prove each of the following essential elements of the offence beyond a reasonable doubt:
- a) that the accused applied force to the complainant;
 - b) that the accused intentionally applied the force;
 - c) that the complainant did not consent to the force that the accused applied; and
 - d) that the accused knew that the complainant did not consent to the force that the accused applied.
- [27] As referenced above, the accused concedes that the elements of the offence of assault have been satisfied in this case.

C. Defence of Acceptable Force by Peace Officers

- [28] The crux of this case is whether the accused's use of force against Mr. Kuzmanovic was necessary, reasonable and proportionate in the circumstances. Section 25 of the Criminal Code provides a defence for police officers having to use reasonable force in the execution of their duty. That defence is not absolute and incorporates several common principles from the criminal law, including necessity, proportionality and reasonableness. The relevant portions of s. 25 for the case at bar are as follows:

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.

- (2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.
- (3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

[29] I pause to note that the accused also referred the Court to cases in which the defence of self-defence was raised under s. 34 of the Criminal Code including the Supreme Court's decision in *R. v. Khill*, 2021 SCC 37. I have not applied the analysis provided under s. 34 of the Criminal Code specifically to the case at bar. However, I find that the principles of reasonableness and proportionality apply in both an analysis under the defence of self-defence and the defence offered to a peace officer under s. 25 of the Criminal Code. As I understood, the accused referenced the defence of self-defence under s. 34 of the Criminal Code, to provide a further illustration of the concepts of reasonableness and proportionality when an individual is facing some form of threat of violence or harm.

[30] In *Khill*, Justice Martin provided an analysis of the three inquiries and conditions to be met under s. 34(1) of the Criminal Code to make out the defence. She characterized the three inquiries as follows at para. 51:

- The Catalyst which is defined as "the accused's state of mind and the perception of events that led them to act." The accused's state of mind must be based on an "actual belief" which is objectively reasonable.
- The Motive which is defined as "the accused's personal purpose" in committing the crime. This is a subjective, not an objective, inquiry. Justice Martin summed this up in the following way: "If there is no defensive or protective purpose, the rationale for [self-defence] disappears."
- The Response which requires the Court to examine the reasonableness of the accused's response.

- [31] In short, while not specifically applying the authorities relating to a defence of self-defence under s. 34 of the Criminal Code, I accept that some of the same considerations exist in both the context of self-defence as well as the justified use of force by a peace officer.
- [32] Returning to a consideration of s. 25 of the Criminal Code, the Supreme Court articulates a helpful summary of how courts should consider the analysis of that provision at para. 34 of *R. v. Nasogaluak*, 2010 SCC 6. The Court clarifies that the force used is to be judged on a subjective-objective basis:
- [34] Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis (*Chartier v. Greaves*, [2001] O.J. No. 634 (QL) (S.C.J.), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.
- [33] I note that in *Nasogaluak* the Court was considering the use of force by police officers while effecting an arrest, which is a different context than in the case at bar. Regardless, the same principles of necessity, reasonableness and proportionality apply in the circumstances of this case when the police are acting on reasonable grounds and is authorized or required to do the action they are performing as a peace officer: s. 25(1) of the Criminal Code. Specifically in this case, processing Mr. Kuzmanovic after his arrest.
- [34] Courts are clear that in considering s. 25 of the Criminal Code, the court should not weigh the force to a nicety but must still conduct an objective inquiry into the proportionality of the force: *R. v. Power*, 2016 SKCA 29 at para. 50, citing *R. v. Kong*, 2005, ABCA 255 at paras. 113-115.
- [35] In *R. v. Lopez*, 2016 BCSC 1359 at para. 11, this Court distilled the principles articulated in *Nasogaluak* as follows:
- a. the police do not have an unlimited power to inflict harm on a person in the course of their duties;
 - b. police are limited to using the degree of force which is proportionate, necessary, and reasonable;
 - c. there are special limitations on the use of force that is intended to cause death or grievous bodily harm or is likely to do so;

- d. the use of force is to be judged on a subjective/objective basis, having regard to the circumstances as they existed at the time the force was used; and
- e. police actions should not be judged against the standard of perfection and police should not be expected to measure the force used with exactitude, but instead police actions should be judged with recognition that the police engage in dangerous and demanding work and often have to react quickly to emergencies.

[36] It is with these general legal principles in mind that I turn to my analysis and determination.

IV. Analysis

A. Did the Accused Assault Mr. Kuzmanovic?

[37] The accused admits that the elements of assault have been satisfied in this case. I accept that the evidence allows me to conclude, beyond a reasonable doubt, that the accused applied force to Mr. Kuzmanovic and that Mr. Kuzmanovic did not consent to the force. As such, the Crown has proven that the accused assaulted Mr. Kuzmanovic.

[38] While the Crown referred to the treatment of Mr. Kuzmanovic during the entirety of his time at the Detachment, during submissions Crown clarified its view as to what it considered to be the assaultive behaviour for which the accused was charged. I accept that the impugned assaultive behaviour which forms the basis for the charged offence commences at the controlled takedown of Mr. Kuzmanovic by the accused and continues until the point when Mr. Kuzmanovic is lying prone on the ground at the end of the hallway. As I will discuss below, the purpose of the Crown adducing other evidence of Mr. Kuzmanovic's treatment at the Detachment by the accused is to support the Crown's assertion that the other conduct provides circumstantial evidence that supports an inference that the accused was angry with Mr. Kuzmanovic during the booking-in process and his assaultive behaviour was not motivated by response to a legitimate threat.

[39] Having found that the accused assaulted Mr. Kuzmanovic, I will now turn to the primary issue at this trial which is whether, pursuant to s. 25 of the Criminal Code, the accused's actions were reasonable in the circumstances thus justifying the force applied upon Mr. Kuzmanovic.

[40] I note that I will continue to refer to the use of force by the accused against Mr. Kuzmanovic as an alleged assault, despite the elements of assault being satisfied. I do so because in my view, the assaultive behaviour remains only an alleged offence of assault unless and until the defence offered under s. 25 of the Criminal Code fails.

B. Was the Use of Force Reasonable in the Circumstances?

[41] To convict the accused, the Crown must persuade me, beyond a reasonable doubt, that the accused has not established the defence offered to him under s. 25 of the Criminal Code.

[42] Considering whether the accused's actions were reasonable and justified requires the court to examine three issues. First, what was the accused's subjective perception of the threat against him? Second, was the accused's subjective belief of the threat against him objectively reasonable? Third, was the accused's response to the threat proportional?

[43] I will consider each of these issues now.

i. What was the accused's subjective perception of the threat against him?

[44] In order to determine if the accused's subjective perception of the degree of threat against him was objectively reasonable, I must first determine what the accused's subjective belief of the threat was at the time of the alleged assault.

[45] The accused testified that he believed that he was under threat of being assaulted by Mr. Kuzmanovic. Given his perception of the threat, he acted to take Mr. Kuzmanovic to the ground using a controlled take down. The accused testified that when Mr. Kuzmanovic turned his head toward him, Mr. Kuzmanovic was angry, irate and screaming in his face. Based on his training he expected that Mr. Kuzmanovic was escalating the situation and was going to spit, put his weight into him or headbutt him. I note that these events took place during the height of the COVID-19 pandemic and as such, I accept that there may have been a heightened risk if there was a reasonable concern of being spat on by a suspect. That said, I note that despite the stated concern of transmission of COVID-19, the CCTV Footage shows that none of the officers, the cell guards, nor Mr. Kuzmanovic were wearing masks at any time while Mr. Kuzmanovic was at the Detachment.

[46] The accused's testimony on how Mr. Kuzmanovic was acting that caused the subjective concern for safety in the mind of the accused was that Mr. Kuzmanovic was "at first irritated, and then instantly angry." The accused's testimony regarding his perception is as follows:

Q. Did he say things that caused you to believe the irritation and then the anger?

A. He said something about it being necessary to look in his shorts. I said, What's in there? And then he looked -- he snaps his head at me and he just starts shouting in my face.

Q. Do you know what he was shouting?

A. I don't remember the specifics, but there was some swearing and that sort of thing, but he had become instantly irate.

[47] The accused further testified about Mr. Kuzmanovic's behaviour as follows:

Q. So you indicated it changed very rapidly from cooperative to yelling in your face?

A. Yes.

Q. Physically, what did you see him do?

A. When he -- he had initially kind of pulled away from me. I was trying to talk to him. I could see him starting to get upset. That's when I took a slight step back to create a little distance. In an attempt to de-escalate the situation, but he snapped his head to me and started screaming at me about this shorts issue. So he was clearly angry, clearly upset, and irate.

[48] The court is required to consider the accused's subjective perception of the degree of violence of the assault or threatened assault against him. The accused testified that he held a certain understanding about the accused based on the information he had related to the suspected robbery at the Home Depot. Based on the call reporting the robbery, the accused believed that Mr. Kuzmanovic had threatened the loss prevention officer at the Home Depot with a knife. While this was later to be determined to be a miscommunication, I accept that the accused would have a belief that Mr. Kuzmanovic had used a knife in the robbery at Home Depot.

[49] The accused also believed that Mr. Kuzmanovic had a knife with a six-inch blade when he was arrested in the taxi after the Home Depot robbery. Further, the accused knew that Mr. Kuzmanovic had a criminal record.

[50] The accused testified regarding his experience that he is aware of members of the RCMP being attacked during the booking in process. He testified that he is aware that individuals being processed can have weapons or contraband hidden on their person when being brought into cells:

Q. They know the officers are not going to let up until they're satisfied that the safety concerns are gone?

A. They should know that, but I can't speak for every officer because, I mean, we had a multitude of situations where prisoners had got into our cells with contraband, and with -- like, and contraband is drugs and weapons. And some of those prisoners were searched by senior NCOs. Not on my watch, thankfully, but on other watches

[Emphasis added.]

[51] I also accept that the accused had significant experience in policing generally and with incidents during the booking in process that had resulted in violence and injury against police officers and cell guards. The accused was also aware that in the past searches were not properly conducted and suspects were unintentionally placed in cells with weapons and contraband.

[52] I will have more to say on the accused's subjective belief of the threat he believed Mr. Kuzmanovic posed to him and the other members in the Detachment later in these reasons but accept that this is the accused's testimony on why he subjectively believed he perceived that the use of force was necessary in the circumstances.

ii. Was the accused's subjective belief of the threat against him objectively reasonable?

- [53] The second phase of the analysis requires me to consider, based on the evidence, whether the accused's subjective belief was objectively reasonable.
- [54] I accept that it was reasonable that the accused would have a general and initial concern about dealing with Mr. Kuzmanovic. This would be based on his experience as a veteran police officer who would be aware that situations can escalate very quickly into violence. Further, as referenced, the accused testified that he had experience of negative altercations during processing of suspects.
- [55] I also accept that given the report that Mr. Kuzmanovic had a knife and threatened the loss prevention officer during the Home Depot robbery had been made to the police, the accused would have that information and thus a concern of the potential for Mr. Kuzmanovic to be violent. However, the accused was also aware that Mr. Kuzmanovic had already been searched at the roadside and again by Mr. Dee at the Detachment before the accused took over the search. Further, the accused was aware that Mr. Kuzmanovic's hands were handcuffed behind his back.
- [56] Additionally, I accept that the accused would have known that Mr. Kuzmanovic had a criminal record which supports that it might be reasonable for the accused to have a subjective concern that Mr. Kuzmanovic could be less compliant with authority.
- [57] Finally, the fact that Mr. Kuzmanovic is physically imposing supports the accused's belief that should Mr. Kuzmanovic turn violent it could be a credible threat that could result in injury to the accused or the other members at the Detachment. However, Cst. Dee testified that upon arriving at the station he did not report any safety concerns to the accused:

Q. Do you can you describe what you were doing during that period that you were off screen?

A. As I described, went into the cell block, just checked in with the guard and Staff Sergeant Volk to advise that I was back with this guy from the Home Depot call, and give a description as to how he's been.

Q. And during that period, did you communicate any safety concerns with respect to Mr. Kuzmanovic to either Staff Sergeant Volk or the cell guard?

A. No.

Q. Did you have any safety concerns at this time?

A. No.

- [58] Additionally, Mr. Kuzmanovic had been entirely compliant with Cst. Dee and the accused throughout his interactions after arriving at the Detachment. The CCTV Footage shows that Mr. Kuzmanovic is escorted without any resistance by Cst. Dee and appears to be following all directions of the officers. Indeed, the accused and Cst. Dee both testified that Mr. Kuzmanovic was compliant up to the time of the alleged assault.

[59] Constable Dee testified about Mr. Kuzmanovic's demeanor as follows:

Q. And can you describe Mr. Kuzmanovic's behaviour as he exits your vehicle and you escort him into the cell block?

A. Again, cooperative. I asked him to step out and I was simply escorting him. He was walking on [his] own. There was no force by me to have to push him or drag him through the door.

[60] During the secondary search of Mr. Kuzmanovic and leading up to the alleged assault Cst. Dee described Mr. Kuzmanovic's demeanor as follows:

Q. And during Staff Sergeant Volk's search of Mr. Kuzmanovic, up to this point can you describe Mr. Kuzmanovic's behaviour?

A. The same as I've previously described, placid, cooperative.

Q. Any displays of verbal aggression?

A. No.

Q. And what was your risk assessment, if any, at this time?

A. Still low.

[61] Constable Andrews, who was a cell guard at the time of the alleged assault, also testified regarding his observations of Mr. Kuzmanovic's demeanor before he was grabbed by the accused. Before turning to Cst. Andrew's testimony, I note that prior to trial there was an application by the accused to have the Court call Cst. Andrews as a witness of the Court. The accused brought the application because the Crown - while initially indicating that Cst. Andrews would testify at trial, informed the accused that it would not call Cst. Andrews as a witness. I was persuaded that it was appropriate to call Cst. Andrews as the Court's witness and allowed both counsel for the Crown and the accused to cross-examine Cst. Andrews. My reasons for that decision are indexed as R. v. Volk, 2025 BCSC 1593.

[62] Constable Andrews testified that he did not have a strong memory of the incident. At trial, counsel used a transcript of his recorded statement from 2021 with Staff Sergeant Harder to refresh his memory. Constable Andrews said the following regarding the alleged assault and Mr. Kuzmanovic's demeanor:

Q. And Staff Sergeant Harder asked you, quote, [as read in]:

What -- I mean is there anything in particular that you recall about possibly something that's occurring there?

Andrews: I don't remember a lot of specifics just based off this but it's starting to get more familiar uh because I remember Dee was having trouble. He's got the um the metal detecting wand in his hand. He's having a little trouble getting it to work I believe. And if I'm remembering this correctly, the prisoner was getting a little bit um uh mouthy. He was -- he was uh um saying some things that the members didn't particular appreciate, particularly appreciate. And I

remember um Staff Sergeant Volk um got -- I can see in this photo when he's getting kind of close to him, sort of telling him off, I guess saying, telling him to knock it off.

End quote. Does that accord with the - your recollection of the answer you provided, Sergeant Harder, at the time?

A. Yes, Justice, it does.

[63] In addition, Cst. Andrews testified that:

Q. So, you don't recall any sort of discussion between Staff Sergeant Volk and Mr. Kuzmanovic that suggested that there would be a takedown?

A. The conversation I recall was Mr. Kuzmanovic, being verbally aggressive and antagonistic towards the members, beyond that, no, I didn't see any other indications.

Q. Okay. Since we're talking about that, when we say verbally aggressive, I mean, what do you mean?

A. I recall that Mr. Kuzmanovic was -- he had an elevated tone of voice, was talking loudly, bordering on yelling at some points. He was certainly using crass and crude language, swearing at the members. I don't have an exact recollection of the words that he chose or the exact context or content of what he was saying. I just remember the tone and the -- kind of the general gist of the things he was saying. It's fairly common that prisoners do that.

Q. And how long was this verbal aggression going on for?

A. I would say for a few minutes.

[Emphasis added.]

[64] There is clearly some conflict between the description of the events of Mr. Kuzmanovic's behaviour during the booking-in process. The accused testified that Mr. Kuzmanovic was angry, irate, and snapped his head towards him screaming in his face. On the other hand, Cst. Dee testified that Mr. Kuzmanovic was cooperative the entire time. Constable Andrews' testimony seems to fall somewhere in between, as he describes Mr. Kuzmanovic as "mouthy" and "verbally aggressive" for "a few minutes." Fortunately, the CCTV Footage allows me to view, from two angles, the events leading up to, during and after the alleged assault.

[65] I have reviewed the CCTV Footage carefully. In my view, the description provided by the accused is not supported by the videos. It appears to me that Mr. Kuzmanovic is complying with the search up until the time that the accused takes him to the ground using the controlled take-down manoeuvre.

[66] In my view, Mr. Kuzmanovic turns, not "snaps," his head towards the accused after the accused says something to him. I accept the evidence of Cst. Dee that the accused said something along the lines of "what did you say to me?" after Mr. Kuzmanovic asks him if it's necessary for him to go that far into his waistband again. The CCTV Footage shows that after

Mr. Kuzmanovic swivels his head to his right from facing forward to facing the accused, his face appears calm. He does not appear to be screaming or yelling. In fact, his mouth is barely moving at all. Mr. Kuzmanovic gives a slight shrug of his shoulders. Nothing in the CCTV Footage appears to be menacing or an indication of foreboding danger or that an act of violence was about to occur.

- [67] The body language and interaction I see on the CCTV Footage accords with the testimony of Cst. Dee. I accept that the CCTV Footage appears consistent with Cst. Dee's evidence that Mr. Kuzmanovic questioned if it was necessary for the accused to search the front of his shorts again. The CCTV Footage also appears to confirm Cst. Dee's evidence that the accused said something to Mr. Kuzmanovic in the nature of challenging Mr. Kuzmanovic as to what he had said to the accused. The CCTV Footage shows Mr. Kuzmanovic turn his face towards the accused, looking confused. The accused pauses before then grabbing Mr. Kuzmanovic by the arm and head and taking him to the ground.
- [68] I do not accept the accused's testimony that Mr. Kuzmanovic "snapped his head" towards the accused and started screaming. Nor do I find the accused's description that Mr. Kuzmanovic was "irate" or "clearly upset" or "angry and assaultive" accords with the CCTV Footage or Cst. Dee's testimony.
- [69] In addition, the CCTV Footage shows the accused's face during the alleged assault which appears to redden, and his mouth and jaw tighten after he says something. This circumstantial evidence leads me to infer that the accused was angry or frustrated with Mr. Kuzmanovic. There is a momentary pause and then the accused grabs Mr. Kuzmanovic's right arm with his right arm and grabs the back of Mr. Kuzmanovic's head with his left hand. He then forces Mr. Kuzmanovic's head downward and as Mr. Kuzmanovic's struggles to keep his balance he is pushed and pulled to the ground first in a seated position then to a prone position.
- [70] Mr. Kuzmanovic had his hands restrained behind his back in handcuffs during these events. As referenced above, there is a time during the search performed by Cst. Dee in which Mr. Kuzmanovic raises his hands behind his back above his waist band to allow Cst. Dee to continue his search around his waistband. Mr. Kuzmanovic continues to keep his hands in this raised, and somewhat unnatural position, behind his back while he is being searched by the accused. Mr. Kuzmanovic keeps his hands in this position until he is grabbed by the accused. I am aware that the accused may not have observed that Mr. Kuzmanovic held his hands in this compliant position during their interaction. As such, I put minimal weight on the fact that this would undermine the subjective view held by the accused. However, objectively, it is a factor that physically demonstrates that Mr. Kuzmanovic was compliant to the instructions of the officers. The corollary of this is that it is some additional evidence that Mr. Kuzmanovic was not preparing to lash out aggressively as asserted by the accused.

- [71] I accept that there is a luxury to hindsight, and it can be dangerous to reconstruct events with too myopic a focus on the minutiae of the events which, in real life, occur in an instant with little time for an officer to make a decision and react. I am also aware that I am not to hold police officers to perfection in assessing threats. I recognize it is a difficult job with real danger, and they are professionally trained to identify risk. Further, they are entitled to take steps to eliminate or minimize risk to themselves and the public when appropriate.
- [72] During the trial I had the benefit of hearing evidence from Joel Johnston, a use of force expert. I qualified Mr. Johnston to give expert opinion evidence in the use of force by police officers and training in use of force to police officers. Mr. Johnston prepared a report on his findings dated June 24, 2025.
- [73] In Mr. Johnston's report he stated that the fact that a knife (in the multitool seized at the roadside arrest) was in the possession of Mr. Kuzmanovic at his arrest would cause concern in the accused. Mr. Johnston spoke of the "one plus one" or "plus one" rule in which officers are trained that if a suspect has one weapon, they should search for and expect another. Mr. Johnston opines that this is a factor that would support an objective view that the accused was concerned that Mr. Kuzmanovic could have another weapon on him while he was being searched thus creating a greater danger to the accused and other officers.
- [74] In my view, while a belief that Mr. Kuzmanovic might have another weapon could increase the accused belief that Mr. Kuzmanovic should be searched thoroughly, it does not accord with the accused's testimony that he thought he would be spit upon, headbutted or have Mr. Kuzmanovic "throw his body weight" into the accused. As referenced above, at the time of the alleged assault, Mr. Kuzmanovic had been searched at the roadside, his shorts had already been searched in the Detachment once by Cst. Dee and once by the accused. Further, Mr. Kuzmanovic's hands remained handcuffed behind his back.
- [75] I do not accept it to be objectively reasonable that the accused would believe that Mr. Kuzmanovic could use a knife or other weapon at the time he initiated contact with Mr. Kuzmanovic. Nor did the accused testify that he believed that Mr. Kuzmanovic was going to use a weapon against him before he took him to the ground. He testified that his concern was being spit upon, headbutted or shoved.
- [76] Given the factors I have just referenced, I find that the accused's subjective belief that the threat posed by Mr. Kuzmanovic was not objectively reasonable given the totality of the circumstances.
- [77] Unfortunately, in the case at bar I find it necessary to go further than merely find the accused's subjective belief was unreasonable. Put bluntly, I do not accept the accused's evidence that he was motivated by a safety concern when he assaulted Mr. Kuzmanovic. While I do not know the nuance of why the accused acted the way he did, based on the direct and circumstantial evidence before me, I find that the accused assaulted Mr. Kuzmanovic out of anger or frustration, not a concern for safety. This is further supported by the strip search that occurs after the alleged offence and the forcing of Mr. Kuzmanovic

into the "bunny suit." I accept the Crown's submissions that the accused treatment of Mr. Kuzmanovic after the alleged assault provides some circumstantial evidence that the treatment was a form of punishment to Mr. Kuzmanovic for questioning the accused's actions during the search of his waistband and underwear.

- [78] In coming to this conclusion, I accept Cst. Dee's evidence of the events leading to the accused grabbing Mr. Kuzmanovic. Constable Dee's evidence of Mr. Kuzmanovic's body language is supported by the CCTV Footage. Constable Dee's version is also supported by other evidence showing Mr. Kuzmanovic's compliance with the requests of the officers from the time he was arrested in the taxi, and throughout the entire time he was in the Detachment. Even after the takedown when he was brought back to his feet after being taken to the ground, Mr. Kuzmanovic continued to be compliant. I conclude that Mr. Kuzmanovic was compliant for the entirety of his time in the Detachment.
- [79] I also accept Cst. Dee's evidence that he was "shocked" when the accused applied force to Mr. Kuzmanovic. Further, I accept Cst. Dee's evidence that he perceived the accused as "angry" when he had Mr. Kuzmanovic in a prone position on the ground. As set out above, the perception of anger by Cst. Dee accords with my interpretation of the CCTV Footage that the accused's demeanor immediately before he applied force to Mr. Kuzmanovic was one of anger or rage.
- [80] Given my conclusion that the subjective belief held by the accused was not objectively reasonable, I will now turn to a discussion of whether the accused's responsive use of force was proportional in the circumstances.

iii. Was the accused's response to the threat proportional?

- [81] The accused's response of force must be no more than necessary in the circumstances. This is an objective test only, i.e. was the force reasonable given the nature and quality of the threat, the force used in response to it, and the characteristics of the parties involved in terms of size, strength, gender, age and other immutable characteristics.
- [82] As referenced above, Mr. Johnston testified as an expert in the use of force by police officers. Mr. Johnston reviewed the CCTV Footage. In his report he described the technique used by the accused as follows:

The takedown did not appear to be a "throw" of any kind, or even a "hard" takedown (i.e., a trip throw, shoulder throw, hip toss, leg sweep, or the like - MR. KUZMANOVIC was not taken off his feet). It appeared to be a controlled takedown through leverage and strength. It looked like SSGT VOLK pulled on MR. KUZMANOVIC's right handcuffed arm, at the elbow, then moved both hands towards MR. KUZMANOVIC's head, as he lowered his center of gravity and rotated clockwise, pulling MR. KUZMANOVIC down to his knees on the ground in a circular direction

- [83] Mr. Johnston described other uses of force such as striking an individual that could also have been used:

Moving beyond communication, we look at the realm of physical control, and it ranges from the low end of soft physical control, which is superior physical strength, restraint, pain compliance techniques, joint locks. They basically have a low potential for injury. But they only you know, they have their place as well. They're not going to be effective in certain situations, but they can be effective. So the joint lock, like the head control takedown or the inside takedown or an arm bar takedown, they would all fall within the spectrum of physical control soft. As we move sort of deeper into that green, the darker part of the band of hard physical control, we're talking now about strikes, punches, knee strikes, elbow strikes. Vascular neck restraint would fit within the higher end of that spectrum, or carotid control it's sometimes called. It's mostly associated with striking techniques, however.

- [84] Mr. Johnston described the controlled takedown used by the accused as less intrusive, falling in the "physical soft control" category. Mr. Johnston also testified that an officer, in the place of the accused, would be best placed to determine if an assault would be imminent from a suspect. He described that the officer could feel the tensing of muscles in the preparation of an attack or movement. I accept this evidence, but also note that leading up to the takedown, the accused only has his right hand on Mr. Kuzmanovic's shorts. He is not touching Mr. Kuzmanovic's body. When the accused removes his hand from his shorts to begin the controlled takedown, you can see in the CCTV Footage the elastic waistband of Mr. Kuzmanovic's shorts snap back into place on his body after the accused's hand is removed. As such, the accused was not in a position to have felt any tensing of Mr. Kuzmanovic's muscles.
- [85] Mr. Johnston has provided evidence that if the threat perceived by the accused was objectively reasonable, then the controlled take down would have also been reasonable. Differently stated, if I had found that the accused's belief that he was going to be spit upon, headbutted or shoved by Mr. Kuzmanovic was objectively reasonable, then the takedown was a proportionate response.
- [86] Mr. Johnston's testimony and report made clear that officers are expected to use control measures that are slightly greater than the resistance they are facing. Mr. Johnston testified that police want to end the conflict decisively and quickly to protect the health and safety of the officers as well the suspect. Any prolonged violent engagement has the potential for greater harm to everyone.
- [87] I accept Mr. Johnston's opinion that if the accused believed that the threat of Mr. Kuzmanovic to spit or headbutt or shove the accused was genuine then the controlled takedown was proportionate. Mr. Johnston further testified that if there was no threat then the use of the controlled takedown was excessive and not in proportion to Mr. Kuzmanovic's behaviour of simply questioning the accused as to whether the continued search of the front of his shorts was necessary. In his report, Mr. Johnston stated this view in the following terms:

If the Court finds that:

- MR. KUZMANOVIC, as described by PC DEE, presented no threat to police
- MR. KUZMANOVIC did not "actively resist" or become "combative" or "assaultive"
- MR. KUZMANOVIC was, in essence, a "Cooperative" subject

Then the application of force by SSGT VOLK would be unnecessary and disproportionate with MR. KUZMANOVIC's behaviour, and would constitute a physical assault. It would not be consistent with RCMP use of force policy, training, and the principles of the Incident Management Intervention Model (IMIM). Nor would it be consistent with generally-accepted use of force principles, and policing practices in Canada.

[Emphasis added.]

- [88] Given that I have found that the threat perceived by the accused was not objectively reasonable, the controlled takedown manoeuvre was not in proportion with Mr. Kuzmanovic's behaviour.
- [89] I wish to make a further comment on the circumstances in which the alleged offence occurred. As I found above, I accept that Mr. Kuzmanovic may have questioned the accused about the need to search the front of Mr. Kuzmanovic's shorts a second time. I understand that this could be viewed as some form of non-compliance. However, surely, police officers who have been granted significant power in our society must have some tolerance for questions or even verbal non-compliance without resorting to heavy handed physical interventions. This is likely even more true for a veteran officer such as the accused.
- [90] I accept that policing is an extremely difficult job. There was some evidence before me that officers regularly face verbal aggression from suspects. However, the resort to violence upon being questioned about an activity absent a reasonably believed threat should not be tolerated. While each case will rest on its own facts, in this case, I find that the accused's actions were not proportionate.

C. The W(D) Analysis

- [91] Because the accused testified in this case, I must also consider the analytical framework articulated by the Supreme Court in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 743, 1991 CanLII 93. The framework is intended to ensure that the process of reviewing the evidence is not a credibility contest - the act of choosing one version of events over the other - and requires the Court to consider:
1. If I believe the evidence of the accused, I must acquit;
 2. If I do not believe the testimony of the accused but am left with a reasonable doubt, I must acquit; and,

3. Even if I am not left with a reasonable doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by the evidence of the guilt of the accused.
- [92] Since W.(D.), appellate courts have suggested a fourth step: where the trier of fact, after careful consideration of all the evidence, is unable to determine whom to believe, the accused must be acquitted: *R. v. C.W.H.*, 68 C.C.C. (3d) 146, 1991 CanLII 3956 (B.C.C.A.).
- [93] However, given the analysis required in this case pursuant to s. 25 of the Criminal Code, specifically, that there must be an objectivity analysis applied to the accused's subjective belief about his perception, the W.(D.) analysis is somewhat modified. Put another way, it is not sufficient for me, if I were to believe the accused, to acquit him regarding his subjective belief of his perception, because to do so would fail to apply the objective analysis to his belief to ensure that his subjective belief was objectively reasonable in the circumstances.
- [94] As I referenced above, I reject the accused's testimony regarding his subjective belief that he perceived a threat of violence from Mr. Kuzmanovic. Further, I do not find that the accused's belief, even if subjectively held, is objectively reasonable. Accordingly, in applying the modified W.(D.) test to a consideration of the elements of s. 25 of the Criminal Code, I conclude that I am not left with a reasonable doubt as to the guilt or innocence of the accused based on his testimony.
- [95] In commenting on the credibility and reliability of the evidence in this case, for the reasons set out above, I accept the versions of events as testified to by Cst. Dee. I find they accord with the CCTV Footage and also a commonsense review of the interaction based on my analysis of the testimony of the witnesses within the context of the events captured on the CCTV Footage.

V. Determination

- [96] In *R. v. Pompeo*, 2014 BCCA 317, the Court held at para. 41 that in applying s. 25, "the ultimate issue is not what a doppelganger would or should have done, but rather the reasonableness (on a subjective-objective basis) of the police officer's belief that the force used was necessary." A subjective-objective analysis of reasonableness "requires the court to place itself in the shoes of the police officer, and to take into account considerations unique to the individual. Once those considerations are taken into account, however, objective elements of the analysis are applied.": *Pompeo* at para. 47.
- [97] I have applied these considerations to the totality of the evidence before me in coming to my conclusion.

- [98] I accept that police officers have a very difficult job. They deal with threats and insults often in their work. The consequences can be deadly or at least pose a serious risk to their physical and mental health. That said, police officers hold great power in society. They must exercise that power with care. In my view, the force used by the accused was excessive and not justified in the circumstances.
- [99] Based on the CCTV Footage and the testimony at trial I am satisfied that the accused was not justified in applying the force he did in the circumstances.
- [100] Given the foregoing, the Crown has met its burden to prove the guilt of S/Sgt. Volk.
- [101] S/Sgt. Volk, would you please stand? I find you guilty on count one of the indictment.

VI. Conclusion

- [102] I wish to note that S/Sgt. Volk has had a long career with the police and obviously received several promotions to rise to the rank of Staff Sergeant. Of course, I do not know the details of his career history, but based on receiving promotions, I expect he has excelled as a police officer.
- [103] I acknowledge that policing is an extremely difficult and dangerous job, and officers put themselves in harms way constantly. However, there is significant power and responsibility vested in peace officers. Police officers are amongst one of the few professions in society that can legally inflict force and violence and can seriously constrain individual liberties. These powers are necessary for police to maintain order, but those individuals wielding that power must also be held accountable if they fall below the standards expected in our justice system. Force may be used when necessary, reasonable and proportionate. It is crucial that in a well-functioning criminal justice system that the power is not abused or unchecked. Protecting society requires that police are held to account when they exceed their powers.
- [104] I also wish to commend Cst. Dee for his courage to come forward to express his concern about something he perceived to be unfair, unjust and improper. I expect that taking those steps to come forward and testify was not easy given the hierarchical nature of police forces. I expect that taking the actions he did, required courage and conviction and a desire to improve policing. Without individuals such as Cst. Dee, individual incidents can grow to become systemic issues and lead to society normalizing unacceptable behaviour.
- [105] I thank counsel for their well-prepared and argued submissions throughout these proceedings.

"Gibb-Carsley J."

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