

CANADA / JUDGMENT

R. v. Volk

2025 BCSC 2720

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Volk,

2025 BCSC 2720

Date: 20251126

Docket: X085104

Registry: New Westminster

Rex

v.

Damian Volk

Before: The Honourable Justice Schultes

Oral Reasons for Judgment

Counsel for the Crown:

C. Lo,

A. Chang

Counsel for the Accused:

N. Wiberg, K.C.,

D. Ching McNamee

Place and Dates of Trial:

New Westminster, B.C.

March 10-12, July 21-22, 24, 2025

Place and Date of Judgment:

New Westminster, B.C.

November 26, 2025

Introduction

- [1] The accused Damian Volk, a member of the Royal Canadian Mounted Police, is charged with committing the assault of Jason Petrus, a prisoner who had been brought to the Langley RCMP detachment in the early hours of July 1, 2020.
- [2] In essence, S/Sgt. Volk, who was in charge of the general duty watch in Langley on the night in question, is alleged to have used unnecessary force to place Mr. Petrus in his cell and to facilitate a search of him and the removal of his clothing.
- [3] The relevant events were recorded on the video system in the cellblock, but the testimony of the witnesses is also important to determining the intent underlying S/Sgt. Volk's actions, and the extent to which those actions may have been reasonably justified in light of the surrounding circumstances.

The Crown's Case

Arrest and Transport

- [4] Mr. Petrus was arrested by Cst. Dee, a general duty RCMP officer, outside his apartment in Langley. At the time that these matters occurred, Cst. Dee had approximately one year of service in the RCMP.
- [5] He, along with three fellow officers, had gone to the apartment building shortly before midnight on June 30 in response to a call to the police from Mr. Petrus. His call included vulgar statements to the police dispatchers. It is relevant to subsequent events that Mr. Petrus's comments were said to have included telling the dispatchers to "suck [his] dick".
- [6] When Cst. Dee arrived, he saw Mr. Petrus and a woman speaking to each other in loud voices at the front gate of the building. He had dealt with both of them multiple times previously in the course of his duties.
- [7] He testified that when he began to speak to Mr. Petrus, he quickly realized that he was intoxicated, based on his slurred speech, the odour of liquor that he was emitting, and the fact that he was "wobbly in his stance". He added that Mr. Petrus was having difficulty formulating his responses and describing what had happened.

- [8] Later in his testimony he explained that in addition to noting Mr. Petrus's intoxication, he believed that he might have some mental health issues. Specifically, although he was between 25 and 30 years old, his "operating abilities" were more like those of a teenager.
- [9] During their interaction Mr. Petrus was not violent in any way, or posturing in that manner towards the officers. Cst. Dee described the volume of Mr. Petrus's voice as "a little bit loud", and the manner in which he spoke as "the way a drunk would talk".
- [10] Mr. Petrus told him that he had called the police because he wanted the woman to leave his apartment. She was in the process of leaving when the officers arrived, and they were able to determine that no assault had taken place before that.
- [11] Once the woman had been allowed to go on her way, Cst. Dee decided to arrest Mr. Petrus, who in his opinion was grossly intoxicated, for being drunk in a public place, contrary to the provincial Liquor Act. His concern was that if he was allowed to return to his apartment in that condition, it was possible that he might suffer some sort of medical emergency there. An arrest was preferable, he reasoned, so that Mr. Petrus could be kept in custody until he regained his sobriety, with someone at the detachment available to observe him during that period.
- [12] In cross-examination he referred to the possibility that Mr. Petrus had recently consumed a large amount of liquor, which would mean that his intoxication level would increase quickly. He resisted the suggestion that he should have taken him to hospital if alcohol poisoning was a concern.
- [13] He then advised Mr. Petrus that he was under arrest and placed handcuffs on him. Mr. Petrus did not physically resist him or argue about it, and in fact cooperated by putting his hands behind his back. The tone of his voice was "disappointed, a little bit upset, mad", Cst. Dee said, but overall, he was "just kind of reserved to letting it happen" (by which I infer Cst. Dee meant "resigned"). In cross-examination he described Mr. Petrus as being "upset but not angry".
- [14] He opened the back door of his police vehicle and asked Mr. Petrus to get inside, which he did. Cst. Dee said that he would have "escorted" Mr. Petrus by one of his arms to make sure that he was going in the direction that he wanted him to. He agreed that it can be difficult to place a handcuffed person into the back of a vehicle, but did not recall any such difficulties before Mr. Petrus got in.
- [15] Before placing him in in the vehicle he had checked his pockets and waistband, as well as patting down his legs and upper body and looking inside his mouth.
- [16] Once they were in the police vehicle, he radioed the dispatchers that he would be transporting Mr. Petrus back to the detachment.

- [17] There was a transparent barrier between the front and rear seats of Cst. Dee's vehicle, which is known colloquially as a "silent patrolman". As they were driving to the detachment, he heard a bump, after which Mr. Petrus accused him of having slammed Mr. Petrus's head against the silent patrolman.
- [18] Cst. Dee immediately told him something to the effect of "don't start that", adding that they were in different parts of the vehicle, and that he had not hit him. Mr. Petrus did not say anything further of that nature and was quiet for the rest of the drive. Cst. Dee characterized this allegation, which he considered childish, to be something that would be said by a young teenager, and in keeping with Mr. Petrus's manner of presenting himself.
- [19] He gave a radio update of this occurrence to the dispatchers. Like all of his radio communications, this broadcast could also be heard by anyone else who was on the Langley RCMP's radio channel, both through portable radios carried by officers and the stationary ones in the detachment, which broadcast the communications over speakers.
- [20] From the point that he and his fellow officers had determined that there had been no domestic assault or other dangerous situation to his arrival at the detachment, Cst. Dee's assessment was that any threat posed by Mr. Petrus was low. He had never been violent in any of their previous interactions, and he did not give any indications of such behaviour or threats when Cst. Dee began to deal with him this time. He was smaller in stature than Cst. Dee (who estimated Mr. Petrus's approximate height and weight to be five feet eight inches and 150 pounds), was intoxicated, and was secured in the back seat in handcuffs.
- [21] Cst. Dee did not consider the allegation that he had hit Mr. Petrus's head on the silent patrolman to affect his assessment of risk. In his view Mr. Petrus was "messing around" and was "more playful than aggressive", in keeping with the lower age level at which he appeared to be operating. He did not include those kinds of moderating comments in his broadcast about what Mr. Petrus had done, however.
- [22] As I will describe, Mr. Petrus alleged in his testimony that Cst. Dee assaulted him at the scene of the arrest. Cst. Dee denied the suggestions of an assault that were put to him in cross-examination - that he had punched Mr. Petrus when they were still outside of the vehicle, deliberately banged his head on the doorframe when placing him into it, "tossed" him into the back seat so that he ended up lying down on it, and then deliberately operated the vehicle in a way that caused his head to bang on the silent patrolman several times. He also disagreed with the suggestion that Mr. Petrus was "constantly upset" during the drive, and was protesting that the police had arrested the wrong person.
- [23] He testified that he did not recall asking that any other officers meet him at the detachment to deal with Mr. Petrus, but later said, "I don't recall whether I did or not". He has made that request in his career when the arrested person was violent or threatening, or when multiple officers had been required to subdue the person and effect the arrest at the scene.

- [24] Mr. Petrus's testimony with respect to his arrest and transport to the detachment followed the same general chronology as Cst. Dee had provided, but the details differed in some important respects.
- [25] Although his own description of his height and weight was similar to what Cst. Dee had attributed to him (five feet seven or eight inches tall and weighing about 150 pounds) he is notably older than Cst. Dee had estimated ("40 or 41" years old at the time of the incident, he testified).
- [26] He agreed that he had been consuming alcohol before his arrest, placing himself at six or seven on a scale in which zero was sobriety and 10 was being drunk. The amount of alcohol that he had consumed would have been based on the period of time that had elapsed between getting home from work and getting arrested (because of his usual drinking practice, I took it), but since he did not know the time of his arrest, he could not carry out that calculation.
- [27] He had called the police in order to have his girlfriend removed from his apartment, as a result of them getting into an argument. He agreed with the suggestion in cross-examination that his girlfriend had provoked him to the point that they were "shouting and screaming" at each other.
- [28] He said that he had "hung up right away" on the call to the police and could not recall anything else that he might have said during it (such as the vulgar statements to the operators that were attributed to him). He recalled in cross-examination that the call must have disconnected because he and his girlfriend were still in "some kind of a scuffle". He agreed that there would have been shouting going on, including him telling his girlfriend to get out, as well of them both behaving in an intoxicated manner, while he was still on the line.
- [29] His girlfriend gathered her belongings and began to leave, and he sat down in front of his building to wait for the police. He said that his only physical action towards her had consisted of guiding her out the door of his apartment.
- [30] When the first police officer, whom we know to be Cst. Dee, arrived, he said something to Mr. Petrus about causing a disturbance, and that there had been a report of a drunk person trying to get someone to vacate the premises. Mr. Petrus said that he tried to explain that the person in question was his girlfriend, who at this point was about 40 feet away speaking to another resident of the complex. Then she began "jokingly" to complain that he had assaulted her, which was not true. He agreed with the suggestion that this behaviour on his part made him angrier.
- [31] He said that the officer punched him right away and placed him in handcuffs. He was arrested without any further inquiries by the officer about the situation. He recalled the officer saying something about public drunkenness. He did not recall having been read his Charter rights.

- [32] He reacted to this treatment by saying that he was the one who had called the police and wanted his girlfriend removed, but that did not have any effect. He described the volume of his voice as "street level" - loud enough to be heard over the traffic - when he was speaking. He said that in the course of placing him into the police vehicle the officer "slammed" his head on the door of the vehicle, by pushing it as he was trying to duck it to get inside, and then "threw" him in, leaving him lying across the back seat, in a state of disbelief that this was occurring.
- [33] He believed that during the drive back to the detachment, he may have renewed his expressions of concern that the wrong person had been arrested, since he had been the one who called the police. He agreed with the suggestion that his emotions were becoming more inflamed during this period, and that he felt that he had been wrongfully arrested. However, he clarified that while he might have said "a few sentences", he did not think that he would have carried on in that manner, since he was handcuffed and the officer "had all the power". He remembered lying in the back of the vehicle and feeling sorry for himself, reflecting that there was nothing that he could do in the situation.
- [34] As they were driving to the detachment it appeared to him that the officer might have been "taking corners extra hard to bang [his] head more", and in general the ride was not a good experience. Like the officer's previous actions, he believed that this was being done to him deliberately.
- [35] He mistakenly testified that the officer who had arrested him and brought him back to the detachment was "Damian Volk", although he later said in his evidence that he did not know that officer's name.

At the Detachment

- [36] Mr. Petrus's arrival at the detachment was carried out in accordance with the usual procedure, which involved the police vehicle pulling into a secure bay (also described in the evidence as a "sally port") that is connected to the cellblock, after which the access door to the bay was closed behind it.
- [37] Cst. Dee explained that according to his training, as the transporting officer he was responsible for escorting Mr. Petrus within the secure bay (and into the cellblock, I took him to mean), then conducting a secondary search of him, allowing him access to counsel, fingerprinting and photographing him, and eventually placing him into a cell.
- [38] In a case of this nature, he would have expected to be met by the station constable - a member of the watch who remains at the detachment to assist in the cells, and a non-commissioned officer (usually a corporal, or the sergeant if none of the corporals were at the detachment), who would be present for the booking pursuant to a detachment policy. Since the corporal in his zone had been at the scene of Mr. Petrus's arrest, he believed that the NCO who would meet him was Sgt. Martin, the sergeant of his watch, along with the station constable, who on that night was Cst. Verstuk.

- [39] The arrival of the police vehicle and the unloading of Mr. Petrus were the first events recorded on the detachment video system. It showed that after he got out of the vehicle and walked around to the rear passenger side, S/Sgt. Volk, followed by Sgt. Martin, came into the bay and stood by the front of the vehicle. The video system does not record audio, but it is clear from their movements that they were having a conversation with Cst. Dee. Cst. Verstuk then entered the bay just before the rear passenger door was opened and Mr. Petrus was removed from the vehicle.
- [40] Cst. Dee said that in a normal situation he would be alone in the secure bay, and would meet with the supervisor and the station constable inside the cellblock once he had brought the prisoner into it. He saw no contradiction between his view of the appropriate number of officers to meet him at the detachment and the fact that four officers had attended the original call. The difference, he explained, was the nature of that original call, which was more serious than what was known about Mr. Petrus by the time he had been arrested. He described four officers being "a bit too much" in the latter situation (that is, at the detachment) but agreed with the suggestion that three would have been adequate.
- [41] He said he was surprised by being met by officers of S/Sgt. Volk and Sgt. Martin's rank for a drunk in public arrest that had not involved any violence or threats.
- [42] The conversation upon his arrival consisted of the two of them strongly suggesting to him that Mr. Petrus's arrest should be for causing a disturbance, a Criminal Code offence, rather than under the provincial statute. He said that the point in the video at which Sgt. Martin can be seen nodding his head up and down was Sgt. Martin seeking confirmation that that was what he would be doing. He said that he eventually conceded that it could be a charge of causing a disturbance instead, at the point in the video at which he was seen shrugging.
- [43] As Mr. Petrus got out of the rear of the vehicle and Cst. Dee escorted him into the cellblock by holding his arm, the other three officers accompanied them. He did not recall Mr. Petrus saying anything at that time.
- [44] Mr. Petrus was wearing an unbuttoned long sleeve shirt (which Cst. Dee described as a hoodie) that had slid off of his shoulder on one side, shorts, and socks with no shoes.
- [45] As Mr. Petrus was escorted past Sgt. Martin, who was standing against the wall of the secure bay, Sgt. Martin put his hand out in front of his face, with the palm facing outward and his elbow bent, as though shielding his face from Mr. Petrus.
- [46] The next video recording was of the booking area, which one enters through the door from the secure bay. It contains a long counter where the booking procedures are carried out. On the floor in front of the counter footprints are painted to indicate where the prisoner is to stand while they are being searched in a more detailed way. This search includes ensuring that they do not bring any items into their cell with them, that they are wearing only one layer of clothing, and that any drawstrings in their clothing have been removed (to prevent self-harm, I infer).

- [47] The video showed Cst. Dee escorting Mr. Petrus towards the footprints. Mr. Petrus appeared to be speaking. Cst. Dee could not recall what he said, but explained that "in my mind, it was just drunk talk".
- [48] As Mr. Petrus reached the footprints, S/Sgt. Volk took him by the arm and began leading him down the hallway towards the cells, with the other officers following them. In cross-examination Cst. Dee described Mr. Petrus as being pushed along. He said that S/Sgt. Volk did this without any sort of discussion or prompt.
- [49] In his experience, a prisoner is only searched in their cell when they are violent or threatening, so that a standing search cannot be conducted because of the risk of them lashing out.
- [50] He said that as S/Sgt. Volk ushered Mr. Petrus towards the cell area, Mr. Petrus began to scream.
- [51] Video from other cameras showed Mr. Petrus being escorted by S/Sgt. Volk through the hallways from the booking area to the cell that he was eventually placed in. They depict the same basic process - S/Sgt. Volk bringing Mr. Petrus along with his hand under his arm, at a quick walking pace, with the other officers following. Cst. Dee said that Mr. Petrus continued yelling or screaming, and that he seemed unsure of what was happening and why, and scared. He did not see Mr. Petrus take any physical action other than walking, and did not recall S/Sgt. Volk issuing him any directions.
- [52] Overall, he described the police dealings with Mr. Petrus as having gone "from zero to sixty" when the seriousness of the original situation was contrasted to this response by S/Sgt. Volk. To the extent that Cst. Dee's risk assessment had changed, it was because S/Sgt. Volk's actions made him a bit more concerned about what Mr. Petrus would do than he had been at the arrest scene.
- [53] Mr. Petrus described the police vehicle pulling into the sally port at the detachment, and the officer getting out and leaving him in the back. This concerned him, because he had been brought to the detachment before, and in those situations he had not been left in the vehicle for that length of time. He also feared a repetition of the unprovoked assault that he had received in connection with his arrest. He described himself as "[a]ngry, cold, kind of roughed up" and "[w]ondering what's going to happen next". He referred to having a wound, or at least feeling the area where his head had been smashed.
- [54] He was then pulled out of the police vehicle, he believed by the officer who had arrested him, and then grabbed by several other officers and pulled towards the processing area. He did not resist being removed. He said that he "assumed" that there were three or four "other" officers present, including the one who was charged with assaulting him, and "maybe" five of them.

- [55] He agreed with the suggestion that he was still frustrated by the circumstances of his arrest, and that as he was being escorted by the officers he would still have been protesting it. He maintained that he was not resisting, but rather protesting the situation, and that there was no way that he could have fought that number of officers while he was in handcuffs. Although he was angry, he could not have done anything "hostile" in that situation.
- [56] In his previous trips to this detachment to be held for the night, he had been brought to the desk to remove all of his jackets and place his belongings in a plastic bag. Instead, the person behind the desk, whom he later accepted was the cell guard, "ran away" and the officers, whom he referred to at this point as "all four of them" took him directly to a cell.
- [57] He was "pretty sure" that as he was being taken from the sally port to the cell he would have been saying that the officer had arrested the wrong person and trying to explain his innocence. He had not been planning on spending the night in a cell, and if he had known that he was going to be arrested he would have been more fully dressed.

Events in the Cell

- [58] According to Cst. Dee, when a search is conducted in a cell it follows a set process. The prisoner is asked to get down on their knees, and then onto their stomach. From there the search is very similar to a standing one, with the prisoner being rolled onto each side to permit a search of their opposite side to be carried out, and then back onto their stomach.
- [59] The video in the hallway outside the cell that was ultimately used showed S/Sgt. Volk guiding Mr. Petrus, who at one pointed grazed the wall opposite the cell door with his elbow, through the door. As Mr. Petrus entered the door S/Sgt. Volk appeared to be swinging him through it, and pushing him slightly downwards.
- [60] Cst. Dee agreed with the suggestion in cross-examination that the width of the door would have made it difficult for two adult males to proceed through it side by side.
- [61] The video taken from inside the cell in the direction of the door showed that S/Sgt. Volk swung Mr. Petrus against the wall of the cell to the right of the door, with Mr. Petrus's shoulder and head coming into contact with the wall. Then, with one hand under Mr. Petrus's chin and the other on Mr. Petrus's hands, which were still handcuffed behind his back, he forced him to the floor.
- [62] Cst. Dee's testimony was that as Mr. Petrus was being brought into the cell S/Sgt. Volk gave him a command to get on his knees, but that he was taken to the ground before he had the opportunity to comply. He clarified in cross-examination that he did not see Mr. Petrus being taken to the ground, and that Mr. Petrus was already on the ground by the time he entered the cell.

- [63] Although he was not able to see Mr. Petrus's first movements after entering the cell, he agreed with the suggestion that if he had lurched away from S/Sgt. Volk, so that S/Sgt. Volk had only one hand on him, it would be important to secure him.
- [64] The video shows that once Mr. Petrus was on the floor, S/Sgt. Volk rolled him from his side onto his stomach. He was kneeling at Mr. Petrus's head, while Cst. Dee knelt beside him in his waist area, and Cst. Verstuk knelt at his feet, bending the feet back from the knees towards Mr. Petrus's buttocks. Sgt. Martin stood behind S/Sgt. Volk, closer to the cell door, looking down at the other officers.
- [65] What followed, as depicted in the video, was a process of searching Mr. Petrus and removing his clothes, as he lay face down in that position. As they attempted to remove his shirt, which was impeded by the presence of the handcuffs, S/Sgt. Volk had had his knee on the back of Mr. Petrus's neck for a few seconds. He then took hold of Mr. Petrus' hair above his forehead and lifted his head up, appearing to look on the floor on both sides of his head, before placing it on the floor again.
- [66] By this time Cst. Verstuk had successfully removed Mr. Petrus's pants and socks, which he threw out of the cell. As Cst. Verstuk was in the process of getting rid of the shorts, S/Sgt. Volk, who appeared to have one hand on Mr. Petrus's head and the other on his shoulder area, gestured towards the door of the cell with the hand that had been on the shoulder, after which Cst. Verstuk picked up the thin mattress that is provided for prisoners to sleep on, and gave it to Sgt. Martin to remove as well.
- [67] S/Sgt. Volk appeared to pull on the hair at the front of Mr. Petrus's head again briefly, and was leaning over Mr. Petrus quite close to him, when he appeared to turn his attention to the efforts of his fellow officers to remove the shirt from over the handcuffs. With one hand at the base of Mr. Petrus's neck, he reached with his other hand and pulled Mr. Petrus's wrist upward towards his head, to at or slightly above the shoulder level, while he and the other officers, now joined by Sgt. Martin, struggled with the shirt.
- [68] Mr. Petrus's left sleeve was removed (it appears that before this the handcuffs were taken off, but it is not possible to identify exactly at what point) while his left arm was pulled up above his shoulder level. S/Sgt. Volk then took that left arm and bent it at the elbow, using both hands to pin Mr. Petrus's left hand to the base of his neck, where he kept it pinned until the sleeve was removed from the right arm. He then took Mr. Petrus's right arm and placed it in the same position as the left one, pulling upwards on both wrists several times. Cst. Verstuk was still at Mr. Petrus's feet, holding them together, throughout this period.
- [69] Sgt. Martin got up and left the cell, followed by Cst. Dee. As the latter did so, Cst. Verstuk checked the rear waistband of Mr. Petrus's underwear. Still pinning Mr. Petrus's wrist with his elbows bent upwards, S/Sgt. Volk rolled him onto his side, so that Cst. Verstuk could check the front of his waistband, then rolled him back onto his stomach. Cst. Verstuk bent his legs at the knees and brought his crossed ankles up to the buttock level, then got up and left the cell. As he did so S/Sgt. Volk brought Mr. Petrus's joined hands down to the lower

back level, before bringing them back up to the shoulder level again.

- [70] S/Sgt. Volk was now on his feet bent low over Mr. Petrus. He turned, let go of Mr. Petrus's hands and left the cell. As he left the area where Mr. Petrus was lying, his right heel moved backward and came into contact with the top of Mr. Petrus's head.
- [71] In his direct evidence Cst. Dee had said that he did not remember there being any hazards on the floor of the cell, such as wetness, but in cross-examination he agreed that it was possible that following the struggle there was sweat, mucous or saliva on the floor, and that it was slippery as a result.
- [72] From the point that Mr. Petrus entered the cell to S/Sgt. Volk's heel contacting his head, one minute and 58 seconds elapsed.
- [73] After letting his left hand, which had been lying on his back between his shoulder blades, fall to the floor, Mr. Petrus remained in the same position for most of the remaining 12 minutes or so that were contained in the video excerpt, although he did move his arms, legs and head slightly at times. Just before the end of that period, he sat up and put his back against the wall of the cell.
- [74] With respect to Cst. Dee's own recollections, as opposed to what can be seen in the video, he testified that once Mr. Petrus was on the ground S/Sgt. Volk had his knee on Mr. Petrus's neck at one point, and was using "twists and pain compliance manoeuvres (which are techniques that police officers use to control a resisting subject) in an aggressive manner". In cross-examination he acknowledged that he had not recalled the knee on Mr. Petrus's neck when giving his statement to the investigators, or during his pretrial interview with the Crown, but had noted when watching the video in court.
- [75] He could not recall S/Sgt. Volk using any of the specific pain compliance manoeuvres that he was familiar with from his training, but said that Mr. Petrus's left shoulder was pulled so far behind him, while his hands were still handcuffed, that he was not sure how it had not come out of its socket. He also described S/Sgt. Volk lifting Mr. Petrus's head by the hair, which he thought was to check in Mr. Petrus's mouth.
- [76] In addition, he said that as S/Sgt. Volk was above Mr. Petrus's head, twisting his arm or shoulder in an aggressive way, he said "You're going to tell my dispatchers to suck your dick", which was expressed in the form of a question. He added that S/Sgt. Volk was saying this "right into his ear, into his face", also in an aggressive way. He testified that he was quoting S/Sgt. Volk's comment verbatim.
- [77] However, when it was put to him that in his statement to the investigators he had recounted S/Sgt. Volk's statement as "You're going to fucking talk to my dispatchers like that", he accepted that that was his initial recollection and that he had not reproduced it verbatim.

- [78] His own physical contact with Mr. Petrus while at his side consisted of attempting to remove his hoodie, which was stuck because of the handcuffs. S/Sgt. Volk had directed him to remove it. He said that Mr. Petrus's shorts and the mattress were also removed by Cst. Verstuk at S/Sgt. Volk's direction. Cst. Dee could not see any reason for those actions by Cst. Verstuk to be taken, other than as punishment for the comments to the dispatchers.
- [79] The only circumstances of which he is aware in which a prisoner would be undressed down to their underwear were a strip search, which is done according to specific procedures to preserve the person's dignity, and when the prisoner is so violent and dangerous that removal of their clothing is necessary to carry out an effective search. He described the latter situation as being "very rare".
- [80] All that he heard from Mr. Petrus while they were in the cell were additional screams of pain. He left the cell at the point that he did because S/Sgt. Volk directed him to.
- [81] Once he left the cell he could no longer see what was going on inside, but could still hear Mr. Petrus screaming.
- [82] He went to the booking area, and S/Sgt. Volk and Sgt. Martin met him there. They provided him with what he characterized as a coaching session on why to arrest people for certain offences. In particular he recalled them telling him that whenever possible he should arrest for an offence under the Criminal Code "because it gives us more leeway to put our hands on them." He responded in an agreeable manner, which he explained was in order to keep things calm.
- [83] He agreed with the suggestions that the elements of being drunk in a public place and causing a disturbance by being drunk are similar, and "potentially" a person who was arrested for the Criminal Code offence would be more likely to realize the extent of their jeopardy and decide to contact counsel.
- [84] In the course of challenging Cst. Dee's memory of these events, S/Sgt. Volk's counsel had him confirm that he had made relatively few notes of his involvement, and in particular that he had failed to record having informed Mr. Petrus of his right to counsel on arrest, which he claimed to have done from memory, or that he followed his normal practice of then explaining those rights in layman's terms. Despite having relatively few notes to refer to, he maintained that his memory "specific to certain events" was very good.
- [85] He agreed with the suggestion that RCMP members have an obligation to immediately report a crime that they observe being committed by a fellow member, and that he did not report this alleged excessive use of force up the chain of command to a corporal, or above S/Sgt. Volk's level to an inspector or superintendent. He responded that at the time he did not feel that he could report it to anyone, later he added that he did not feel that he could stop it while it was occurring. His first mention of it to anyone in an official capacity was in 2021, as part of what he described as an internal investigation, although he did not provide all of the details of the incident at that time.

- [86] It was part of the admissions of fact that even after reviewing the videos Cst. Verstuk had no memory of his involvement in the incident.
- [87] Mr. Petrus recalled that his head was slammed into a wall in the cell. He denied the suggestion that the contact with the wall had occurred because he had lurched away from the officer, but conceded that he had reconstructed the memory of that aspect of the incident from having viewed the cell video during his pretrial interview.
- [88] He was then brought down to the ground. He described the officers trying to twist his arms to look in his pockets and remove any belongings while he still had the handcuffs on. He also recalled all his clothes except his underwear being removed, and the mattress being taken from the cell as well. He said that he did not resist any of the police actions, emphasizing that he was in handcuffs. After the officers left he lay in the cell in disbelief, scared that they would return "and have something else to say to me". The only other thing he could remember was trying to sleep in a cold cell in his underwear.
- [89] In cross-examination he added that later that night he had made a motion as though to punch himself in the head, because he wanted anyone who might be monitoring the video to know what had happened. After banging on the door and saying that he was cold, he was brought a paper jumpsuit to wear.
- [90] He described his memory of the events as "good" but added that because of the five years that had elapsed since the incident, it was "not all there". He had given an interview to a police officer in 2022 and had remembered more details at that time, but his memories had "slowly been fading since then". He agreed with the suggestion that being drunk at the time had affected his memory, but maintained that the passage of time had also played a role.
- [91] He explained that he did not complain to the guard who brought him the paper suit to wear about having been assaulted in the cells because he just wanted to stop being cold, and was grateful for having received a form of clothing. He did not want to provoke the guard into denying him the item, on the assumption that the guard and the officers were working together. He also did not feel safe in that environment. Similarly, he did not say anything about having been assaulted in the cells to the officer who released him later that morning because he was scared of the ones who had done it, and felt that the releasing officer would protect them. More fundamentally, he just wanted to get out of there.
- [92] The substance of that 2022 interview had concerned his report of being punched and having his head banged against the police vehicle by the arresting officer. It did not appear that he had described anything of concern having happened in his cell. He agreed that it had been important to give the interviewing officer all of the information that he had about what had happened on that date, and that he wanted to be totally cooperative "to what I could remember."

The Defence

S/Sgt. Volk's Version of Events

- [93] He has been a member of the RCMP since 2004 and his duties have included general duty, an extended period as a member of the Emergency Response Team and, most recently, as a sergeant and then a staff sergeant supervising a general duty watch in Langley.
- [94] He believed that at the time that he first became involved in this matter, he was probably in his office, which was on the third floor of the detachment. Sgt. Martin's office was next to his, and he was adjacent to the dispatchers.
- [95] He received information from the dispatchers that Mr. Petrus was involved in a domestic dispute with his long-time girlfriend. Mr. Petrus was well-known to the police (from previous calls, I took it). The dispatchers believed that he was intoxicated, and he had been "less than polite" to them during the call.
- [96] He also heard Cst. Dee's report over the radio that Mr. Petrus had smashed his head on the silent patrolman and sought to blame Cst. Dee for hitting him. He said that in his 20 years of policing he has never had a prisoner who struck themselves on the silent patrolman who was not also violent.
- [97] This added to his initial concerns about Mr. Petrus's intoxication and the fact that he had been "violent at the scene". He assumed as a result that Mr. Petrus would be "violent coming in" to the detachment as well. His attempt to accuse Cst. Dee of striking him also suggested that he would be completely uncooperative.
- [98] He described himself as having "brought additional members in" to deal with Mr. Petrus's arrival. He was assisting Cst. Verstuk down in the cells by that point, and he did not recall if he had asked Sgt. Martin to come down, or if he came of his own volition. He explained that it was not unusual to have a large contingent of officers in such a situation. The point of doing so was to mitigate the risk of the subject arguing with the officers. The situation is much more serious when an officer is one-on-one with a prisoner. He was not personally familiar with Mr. Petrus at that point and did not know his size and capabilities. His concern was that he would try to fight the officers and that they would not be able to manage him physically.
- [99] It was also not unusual to have two NCOs present in the sally port for a prisoner to be removed and brought in for booking - there are frequent situations in which they have to be dragged out of the vehicle and are continuing to resist even while in handcuffs. Sgt. Martin also needed to be present to hold the door from the sally port to the cells open for Mr. Petrus to pass through.
- [100] Upon his arrival he "would have had" a brief conversation with Cst. Dee about Mr. Petrus and his demeanour. He then made a determination to bring Mr. Petrus out of the vehicle to conduct a controlled search.

- [101] Upon Mr. Petrus's removal from the police vehicle he was immediately shouting and screaming at the officers, S/Sgt. Volk said. He could not recall the words that Mr. Petrus used, but he was "definitely not happy to be there". The significance of this verbal behaviour to his safety assessment was that he could see for himself that Mr. Petrus was not cooperative. In his view he was displaying potentially assaultive behaviour.
- [102] As he was being escorted out of the sally port he turned his head towards Sgt. Martin, who put his hand out to prevent spitting, and yelled at him.
- [103] S/Sgt. Volk said that the goal was to get him to stand on the footprints in the booking area to carry out that process. He then directed his anger at the cell guard as the officers tried to get him to the footprints.
- [104] At this point he decided that Mr. Petrus had gone over the line into assaultive behaviour. He explained that one has to be constantly assessing the level of risk posed by a prisoner, which can go up and down "in a heartbeat".
- [105] The search at the footprints is for cooperative subjects, and once there is a realistic danger, the standard procedure is instead to take the person to the cells and carry out the search on the floor. In his capacity as watch commander, he made the decision to do so, in the interests of safety. He elaborated that he had given Mr. Petrus the opportunity for a controlled search, but that he had become more irate, and directed his attention to the guard and the officers. He added that despite whatever the initial plan for booking is, if the prisoner is violent that plan will change.
- [106] Later in his testimony he said that he believed that Mr. Petrus was planning something, and based on his demeanour and all of his actions he was "ramping up" and was not going to be cooperative.
- [107] Although he deals with yelling arrestees very frequently, and was not surprised or intimidated by Mr. Petrus's behaviour, it still had to form part of his threat assessment, since once again prisoners can go from compliant to violent in seconds.
- [108] He rejected the suggestion that Mr. Petrus was a run of the mill drunk - based on the information that he received before Mr. Petrus came in, he was drunk or high and violent, and he and his girlfriend had frequently had dealings with the police.
- [109] In Cst. Verstuk and Cst. Dee he was dealing with "two junior members", and as he was in control he made the decision that Mr. Petrus needed to go to the cells. Although they were the ones with their hands on Mr. Petrus and able to feel his bodily tension, he noted that he was shouting and "beginning to escalate".

- [110] No advance planning was required for this decision, he said, since it was a matter of standard operating procedure and training. Once Mr. Petrus became "assaultive", he took the lead, and if the less experienced officers had any questions or concerns, there could be a debrief later. It was fine if they were surprised by his action, as they could react accordingly.
- [111] His plan was to use the element of surprise, which was part of his training, to keep Mr. Petrus moving, search him on the cell floor for any drugs or weapons, remove his handcuffs, exit the cell as quickly as possible, and leave him to his own devices.
- [112] In furtherance of that element of surprise, he grabbed Mr. Petrus's arm and began to move him quickly. He said that the other officers took his cue and followed him towards the cell. As he was leading Mr. Petrus to the cell he considered him to be "pre-assaultive" or "borderline assaultive".
- [113] With respect to placing Mr. Petrus in his cell, his intention was to have him enter first, given that the width of the cell door could not accommodate them beside each other. However, as he attempted to move him into the cell in that manner, Mr. Petrus lurched away and twisted into the wall. He elaborated that he had to stretch his arm out to get him through the door, and at that point Mr. Petrus tried to get away. He was able to grab his arm hard enough that he could not do so, but he did hit the wall.
- [114] He responded to Crown counsel's suggestion that he had "tossed" Mr. Petrus into the cell by pointing out that he did not have the strength to throw a grown man into a wall with his own arms extended.
- [115] He then took Mr. Petrus to the ground with a "controlled takedown". According to his training, he needed to regain control after this attempt to break free. He used the controlled takedown so that Mr. Petrus would not strike his head on any of the hard surfaces. He was ultimately placed on his belly.
- [116] The other officers had moved in when Mr. Petrus had attempted to lurch away from him. He described Mr. Petrus as angry and fighting the whole time.
- [117] The search then proceeded. Mr. Petrus was still resisting as it was carried out. S/Sgt. Volk said that his clothes were removed because it is easier to search a violent prisoner in that state. He denied that what was conducted on Mr. Petrus amounted to a strip search, even though the applicable RCMP policy defines such a search as "removing clothing to permit a visual inspection of a person's undergarments". In practice, that term is applied only to searches of a person's body cavities, he explained, but he conceded that his interpretation differs from the language of the policy.

- [118] He defended having directed that the mattress be removed from the cell, despite it being provided for prisoners' comfort. The cell guard is required to monitor prisoners in cells on an ongoing basis, and they have been known to use the mattress to hide from the view of the camera or the view through the cell window, or to successfully tear it. He said it is standard procedure to remove it, and he did not want to have to go back in to retrieve it later.
- [119] He believed that the force used by the other officers to assist him was totally appropriate, and if it had not been he would have dealt with it in his capacity as their supervisor. He said that it is preferable to have a larger number of officers present in order to maintain control. In particular, it avoids a single officer having to use harder control techniques or weapons. As he expressed it, the more hands that are on a prisoner, the more control.
- [120] While he agreed that a plan to deal with situations such as this would be ideal, dynamic situations occur, at which point their training, which is common to all RCMP members "kicks in".
- [121] He denied having knelt on Mr. Petrus's neck, a practice that he considers to be "flat out dangerous" and does not engage in. The technique of grabbing Mr. Petrus's hair was applied to enable him to control his head, and reduce the chance of being spit on.
- [122] With respect to his manipulation of Mr. Petrus's arms after the handcuffs were removed, he said that the best way to control a prisoner is with their arms behind them, which made it difficult to get their arms under themselves to rise up.
- [123] He maintained that despite his ability to move Mr. Petrus's limbs with apparent ease, he was not cooperating, and the other officers were still having to control his body. That apparent ease of movement was a function of the techniques that he was using. He also drew a distinction between his manipulation of Mr. Petrus's arm and shoulder joints, which are intended to put those joints to the limit of their range of motion, and his level of resistance, which still involved his body being tense and rigid and him still trying to move. He was not struggling any less when his joints were at their range of motion; he was just less capable of getting out of the hold.
- [124] Based on his previous experience with resisting arrestees, Mr. Petrus's size was not necessarily an indication of his strength.
- [125] He said that Mr. Petrus started to calm down part way through the search. He had previously told him to lie still on the floor.
- [126] His training for exiting the cell in that situation is for one officer to leave at a time, with the senior officer remaining until last, at which point they tell the prisoner to lie still. He followed that process, and his intention was to get up from beside Mr. Petrus as quickly as he could in order to avoid a further altercation.

- [127] When engaging in this kind of departure, backing up is not seen as a workable option, because of the risk of falling and ending up on one's back. It is considered safer to leave facing the door. When reviewing the video in cross-examination, he maintained that he continued to observe Mr. Petrus out of the corner of his eye, although the video showed him turning 180 degrees from his original position.
- [128] Addressing his foot coming into contact with Mr. Petrus's head, he said that it slipped as he was turning. He did not intend to strike Mr. Petrus with his boot and did not realize at the time that he had done so. If he had been aware of it, he would have made a note, he maintained. When reviewing the video in cross-examination he said that it was possible that his foot had touched Mr. Petrus's head, but that Mr. Petrus could also have moved his head at the same time.
- [129] Although his position was that this incident was "nothing unusual", when he watched the video it caused him to remember his foot slipping. He agreed that his foot losing traction was unusual. It was a non-issue at the time because he felt no contact, although he questioned whether he had hit Mr. Petrus's head before concluding that he had not.
- [130] When it was put to him that he then walked out of the cell in a very causal manner, he said that it was because he was out of the cell with Sgt. Martin, an experienced officer, watching his back. He did not agree that it was because Mr. Petrus was lying limp and non-resistant, or that by leaving without looking back he was leaving Sgt. Martin unprotected.
- [131] He said that later, after having left Mr. Petrus secure in his cell, he saw him punch himself in the head repeatedly. He could not recall whether it was with a closed or open fist.
- [132] He denied having had any intention to punish Mr. Petrus. The goal was to lodge him in cells with no contraband, so that he could not hurt the cell guard or other officers. When the allegation that he said "You're telling my dispatcher to suck your dick" was put to him, he responded that he did not remember saying anything like that to Mr. Petrus, and that he did not remember "what was said in there", but that he would just have been telling him to calm down.
- [133] He denied having instructed Cst. Dee to lay a Criminal Code charge of causing a disturbance rather than drunk in public. He was not involved in those issues, and any discussions about appropriate charges would have been between the corporal who had attended the scene of Mr. Petrus's arrest and Sgt. Martin, as the "office NCO".
- [134] He also defended his entry about this incident in the cell log, in which he described having "assisted with lodging a violent prisoner", and rejected the suggestion that he was deliberately downplaying his lead role in the process by doing so. He was not the officer who had brought Mr. Petrus in, and the events that unfolded with respect to him are typical daily activities in the cells. Although he only recorded his own involvement with Mr. Petrus, it would not have been difficult to identify all of the officers involved through other records, particularly the guard's notes, which are supposed to record all of the officers who enter the

cells, and he rejected the suggestion that it was an incomplete note in that respect. He emphasized that this was "an innocuous situation - very straightforward". He recorded that he had "supervised" the booking of another prisoner that night, rather than "assisted" because it had not been necessary to actually assist with that prisoner.

Sgt. Martin's Observations

- [135] He had no independent memory of his involvement in this matter, and his memory was not refreshed by having the opportunity to watch the videos. As a result, his testimony mainly consisted of describing what the events in which he was depicted signified to him, in light of his experience and the usual way that such matters unfold.
- [136] The presence of four officers in the sally port suggested to him that something was going on that required an enhanced presence. He found the presence of two senior NCOs such as himself and S/Sgt. Volk to be odd as well, since they usually prefer to have one of them remain upstairs near the 911 call-takers.
- [137] He believed that he had raised his hand as Mr. Petrus passed him in the sally port as a protection against being spat upon or head butted. He later agreed that he did so in all cases in which prisoners pass by him in close proximity, rather than it being an indication of any particular risk posed by Mr. Petrus.
- [138] He confirmed the usual booking procedure for compliant prisoners at the counter, and that non-compliant prisoners would be taken directly to cells for the search. When he saw the video of Mr. Petrus being escorted directly through the booking area, he made the observation that he was "probably not following directions".
- [139] With respect to the police actions in the cells, he confirmed, as S/Sgt. Volk had indicated, that there was nothing unusual about the mattress being removed. It can be used for a variety of disruptive purposes in addition to blocking the camera and the window, such as tearing it apart or using it to plug the toilet.
- [140] He described himself as taking up a "bladed stance" (one foot forward and one to the rear) to guard the door once he left the cell, which would have enabled him to jump forward or back, depending on any issues arising with the prisoner. He has had previous experience with having to jump forward and take a prisoner who had attempted to leave the floor back to the ground, when there was not enough time to close the cell door.
- [141] Finally, he shared S/Sgt. Volk's understanding, despite the wording of the policy, that a strip search did not include taking a person down to their underwear, but involved searching body cavities or other intimate areas. He noted however that he had not been involved in frontline policing for about four years, and was not as conversant with the policy as he should be.

Expert Opinion

- [142] Joel Johnston was called by the defence as an expert witness on the use of force by police officers. He was qualified in that area of expertise without opposition from the Crown, and his written report, extensive portions of which he adopted during his testimony, was relied on substantively without objection.
- [143] His 30-year career with the Vancouver Police department included 10 years as the use of force trainer for the department, and six years as the use of force coordinator for the entire province. During the latter period he developed standardized programs and a reporting system, and worked closely with the RCMP in redesigning its program for taser use. Since retiring, in addition to offering court opinions in cases involving allegations of excessive force by police officers, he trains officers of various other government agencies, such as Canadian Security Intelligence Service and Immigration, Refugees and Citizenship Canada, in the use of force.
- [144] In preparing his report Mr. Johnston had access to the investigational material, including the cell videos.
- [145] He provided his analysis within the framework of the RCMP's Incident Management Incident Model ("IMIM"), which requires officers to consider the "totality of the circumstances" when arriving at a necessary and proportionate use of force. It avoids a rigidly prescribed level of response, in favour of a range of potential responses in light of those circumstances.
- [146] In overview, Mr. Johnston commented on the limitations of video evidence when assessing interactions involving the use of force by police officers. Even body-worn cameras will not provide the same perspective that the participants themselves had in a physical interaction, because the video will not discern all the kinds of information that was available to the officer. This includes the physical interaction with the subject and their degree of muscle tension, and the emotional content of the confrontation.
- [147] He sought to place the response of S/Sgt. Volk and the other officers at the detachment in the context of the risks that were suggested by the circumstances under which Mr. Petrus was brought to the detachment. This included the fact that five officers originally went to the call at his home despite it being characterized as an incident of causing a disturbance, which would normally require only one or two attendees. This could have reflected a police perception that there was more of a challenge in dealing with the situation (which he later described as a domestic dispute). Further, Mr. Petrus was intoxicated, had been abusive to the dispatchers, had engaged in self-harming behaviour on the way back to the detachment by "repeatedly" striking his head on the silent patrolman, and had threatened to accuse Cst. Dee of having struck him. The information about his condition and behaviour would have been communicated to S/Sgt. Volk and Sgt. Martin through radio calls to the dispatcher, and would have "primed" their assessment of risk, he explained.

- [148] He conceded that further broadcasts that the subject was being arrested for being drunk in public might lower one's assessment of the risk, despite the domestic dispute connotation of the original call.
- [149] He denied that there was any inconsistency between elevating the risk presented by Mr. Petrus based on his being intoxicated and doing so based on his being rational enough to link banging his head on the silent patrolman with the false accusation that Cst. Dee had assaulted him. Such a threat could also have been a consequence of his intoxication, he explained. He was also unwilling to accept that Cst. Dee was in the best position to assess Mr. Petrus's level of risk, since the accuracy of such an assessment is informed by the officer's experience.
- [150] He initially wondered why someone of S/Sgt. Volk's rank would be attending for booking into cells, but later reviewed the detachment policy requiring the presence of an NCO during that process. Although it might have been unusual for a staff sergeant to engage in that process over lower-rank NCOs, some would consider it a "leadership tactic" for the person in charge of the watch to involve themselves in these difficult kinds of tasks.
- [151] With respect to behaviour at the detachment that would bear on the assessment of risk, Mr. Johnston said that screaming by the subject, particularly continuous screaming, could increase the risk level.
- [152] Based on his review of the videos, Mr. Johnston noted that it appeared that Mr. Petrus had caused sufficient concern that four or five officers were involved in conducting him to his cell, the escort was carried out at a fairly rapid pace, and the usual booking procedure was bypassed. Later in his evidence he added that an escort by multiple officers would not be necessary for a cooperative subject. Although Mr. Petrus did not appear to be "demonstrably violent or wildly resistant", he pointed out that:

Resistance can be more easily felt than it can be seen, in many cases. Restive tension in the muscles, along with language that accompanies the behaviour also lends to the assessment around resistance (or cooperation).

- [153] In his view, the number of officers in the escort and the bypassing of the usual booking procedure "indicated" that Mr. Petrus was actively resistant "and there may have been concern about him becoming assaultive if he was not restrained by multiple officers." In contrast, a cooperative subject will essentially walk themselves into the cell.
- [154] Despite this, he conceded that other than appearing to be yelling, there was no indication that Mr. Petrus was engaging in any obviously combative or assaultive behaviour as he was removed from the police vehicle and walked into the booking area. He also agreed that before S/Sgt. Volk took over control of Mr. Petrus, Cst. Dee and Cst. Verstuk, who had control of him, would have been in the best position to determine whether he was pulling away or tensing up.

- [155] He rejected the suggestion that best practices in a situation like this, where there is time to plan, is to make sure everyone is on the same page when dealing with the prisoner. He said that there is a "commonality of training and of past practices for dealing with such prisoners" and that "you just do it [y]ou just go through the process."
- [156] Addressing the manner in which Mr. Petrus was placed into his cell, during which his head and shoulder came into contact with the cell wall, Mr. Johnston observed S/Sgt. Volk appeared to be wrestling with Mr. Petrus, trying to control his head and keep him moving in a certain direction. He elaborated that it appeared to him that Mr. Petrus wanted to keep walking past the open cell door, perhaps following the cell guard who had just done so. It appeared to him that Mr. Petrus "sort of almost got away a little bit" from S/Sgt. Volk, whose arms extended before he pulled Mr. Petrus back into the cell. Mr. Johnston later described it as pulling on his arm to steer him into the cell, although he later accepted Crown counsel's suggestion that S/Sgt. Volk had essentially "swung him into the cell".
- [157] From a professional point of view, he had no difficulty with such a manoeuvre, which involved applying a low level of force, as it was "essentially in line with training". He stressed the need to maintain physical control of prisoners in cells at all times, to prevent their behaviour from causing any problems. A common expression in this field is not to leave prisoners any "wiggle room" - gaps in control that make it necessary to re-establish control. A further factor to be considered with respect to the manner in which Mr. Petrus was placed into the cell is that it would be challenging for him and S/Sgt. Volk to have passed through its door side by side, making it necessary that one of them precede the other.
- [158] Mr. Johnston said that a form of "maximal restraint" was used on Mr. Petrus once he was in the cell, which is normally reserved for "highly-actively resistant and/or assaultive subjects".
- [159] His key opinions with respect to the force used at that point were contingent on the court's findings with respect to Mr. Petrus's level of resistance. If he was actively resisting, then none of the physical tactics that were employed by S/Sgt. Volk or the other officers, which fall within the category of "Physical Control-Soft" in the IMIM (wrestling, grappling, head or hair control, joint locks or an arm extension that involved raising the shoulder) were inconsistent with RCMP policy or training, or with accepted policing practices in Canada. Conversely, if he was not actively resisting, the force used would have been excessive. He pointed out that a subject struggling and squirming while in the grasp of officers is a form of active resistance.
- [160] He agreed with the suggestion that if the use of force was done to punish Mr. Petrus for being vulgar or to teach him a lesson, then the officers involved in applying it would not have been in the lawful execution of their duties.

- [161] Focusing on the individual aspects of the control of Mr. Petrus in the cell, Mr. Johnston pointed out that because the normal booking process was bypassed, it was necessary to conduct the safety search in the cell, to prevent him from accessing any hidden weapons, using some other hidden item as a weapon, or having contraband with him in the cell.
- [162] Although he conceded that there were "quite a number of factors that favoured the officers", that did not remove the risk.
- [163] While the officers had a numerical advantage, that was not determinative of his ability to offer resistance, and there is a significant history of outnumbered detainees still inflicting serious harm. In particular, a person under the influence of alcohol can be emotional and aggressive, and have a higher level of pain tolerance.
- [164] Similarly, Mr. Petrus's size was also not conclusive of his ability to offer significant resistance.
- [165] While handcuffs restrict one aspect of a subject's movements, they are also not a complete means of preventing resistance, since a handcuffed suspect is still able to generate physical force in a variety of ways.
- [166] He said S/Sgt. Volk took Mr. Petrus to the floor using what is known as a "balance displacement technique", which he later called a "rotational takedown". It significantly reduced the risk of injury to Mr. Petrus while he was in handcuffs by bringing him to a kneeling position first. He also described some head and arm control and "body rotation" to bring him into a fully prone position. He then engaged in a form of control that involved grabbing Mr. Petrus's hair and turning his head to the side. He also looked under Mr. Petrus's torso as the other officers were beginning the search and clothing removal process. His assessment of the techniques of extending Mr. Petrus's arms towards his shoulders and the "bent arm bar position" that was used on his left arm, were in the context of the struggle to remove one of the sleeves of his jacket and the handcuff from one of his wrists.
- [167] He "did not recall" seeing S/Sgt. Volk kneeling on Mr. Petrus's neck, and maintained that he could not see it when that portion of the video was replayed for him in cross-examination. He then conceded that it could "possibly" have occurred but that "those happen in transitional moments in use for force encounters all the time."
- [168] Nor were any elbow or knee strikes ever directed at Mr. Petrus at any point, and he was not banged on the floor to stun him, Mr. Johnston pointed out.
- [169] The manner in which Cst. Verstuk immobilized Mr. Petrus's legs, which is usually done to prevent the subject from kicking, is usually reserved for a situation in which the officer feels that the person is more rather than less resistant. There is a less restrictive hold available for lower degrees of resistance.

- [170] Mr. Johnston agreed with the suggestion that the IMIM contemplates communication with the subject in an attempt to gain their cooperation even once force has been utilized, "where practical". There has to be a receptivity on behalf of the subject for that to be a workable option, however. Subject to the same qualification, there is also the capacity to give verbal instructions to a subject who is being escorted. He agreed that according to standard training, the takedown process in the cell would be accompanied by verbal commands from the officer throughout the process, but they should be contemporaneous with the officer's actions. Pausing for the subject to comply risks relinquishing control of the situation by informing them of the officer's next intended move.
- [171] As to the officers' departure, Mr. Johnston explained that the risks connected with this type of physical interaction would remain until they had all left the cell. His observation was that the officers involved in this incident appeared to perceive that Mr. Petrus needed to be restrained until all of them had left. As the last officer left, S/Sgt. Volk was in the most vulnerable position, having to let go and leave the cell quickly, with this being Mr. Petrus's last opportunity to assault anyone. He agreed with the suggestion that Mr. Petrus appeared to be limp at the point that the other officers left the cell.
- [172] With respect to the alleged kick to Mr. Petrus's head, Mr. Johnston described S/Sgt. Volk's body "slightly over-rotat[ing]" (that is, turning more than 180 degrees) as he stood up to disengage from Mr. Petrus in order to leave the cell. He explained that in turning the body, as when S/Sgt. Volk got up and turned quickly, can cause "rotational torque". He theorized that this may have caused S/Sgt. Volk's foot to rotate "and/or possibly slip" outward, making contact with Mr. Petrus's head and causing it to move slightly. He later elaborated that as a result of the rotational torque the ankles can build up a bit of tension, and that pushing off (with the foot, I took it) can cause the foot to slide. He noted no overt motion of the foot towards Mr. Petrus, or even a lifting of the foot.
- [173] He responded to the suggestion that this was an unusual movement by S/Sgt. Volk by saying "maybe", but stressed that it may have been the only means of disengaging quickly and exiting the cell safely. Backing up was not a safe option, because of the possibility of backing into walls or objects, although he agreed that "up to a certain point" it would make more sense to back up while keeping an eye on Mr. Petrus.
- [174] Crucially, cell floors are made of a hard smooth material, often polished concrete, and he found it likely that the cell surface would have become slippery due to some combination of sweat, saliva, nasal fluid or blood being exuded during the physical struggle, especially at Mr. Petrus's head. Thus, the contact between S/Sgt. Volk's boot and the head may have been incident to moving on a slippery surface.
- [175] Almost needless to say, Mr. Johnston confirmed that a deliberate kick to a prisoner's head in these circumstances would not fall within any accepted use of force, and would constitute an assault.

- [176] He described the officers' actions as "a very low level of force in the grand scheme of things", other than the contact by S/Sgt. Volk's foot. It would not have required the completion of the standard use of force report, which is known as a Subject Behaviour Officer Response report.
- [177] Looking at the overall sequence of events as shown in the video, he identified some contradictions with the descriptions that Cst. Dee had provided in his statement to the investigators about how Mr. Petrus had been treated at the detachment. These included the fact that Mr. Petrus was not taken from the vehicle by S/Sgt. Volk and Sgt. Martin, that he was not "dragged" to the cell, that he was not "thrown to the ground" of the cells, and that S/Sgt. Volk was not utilizing a pain compliance technique when initially seeking to control his body on the floor. (Although I note these contradictions for what relevance they may ultimately have, they are not as helpful as other aspects of Mr. Johnston's opinion, both because Cst. Dee did not use the same terminology in his testimony as he had in his statement, and because critiquing the version of events provided by a witness in light of other evidence is not a task with which a trier of fact requires expert assistance.)
- [178] Mr. Johnston was challenged by Crown counsel on his conclusion that the various actions taken by S/Sgt. Volk and the other officers (taking Mr. Petrus directly to the cell, Cst. Dee and Cst. Verstuk restraining him in the cell, and S/Sgt. Volk pulling his head by the hair) were necessary in light of Mr. Petrus's behaviour, simply by virtue of the fact that those actions had been taken. In other words, the officers acting in that manner was being used to corroborate the reports that Mr. Petrus was being violent. He stood by those conclusions, which were based on the "conglomeration of information" that had been provided to him. Nonetheless, he reiterated that at the end of the day the reasonableness of the use of force depended on the court's finding about Mr. Petrus's degree of resistance.

Positions

S/Sgt. Volk

- [179] In the defence submission, Cst. Dee inappropriately minimized the level of threat that Mr. Petrus posed, considering the circumstances leading to his arrest, his degree of intoxication and his behaviour in the police vehicle while being transported.
- [180] While there are some concerns about Mr. Petrus's reliability, I am asked to find that he is telling the truth about having been assaulted by Cst. Dee at the scene, and that he continued to protest the wrongfulness of his arrest up to the time that S/Sgt. Volk decided to carry out a cell search. A key factor in the believability of his claim of that assault is its persistence in the more than four years since the arrest. In contrast, Cst. Dee failed to carry out the duty to report that would have been imposed on him if S/Sgt. Volk has actually committed an offence.

- [181] It is argued that Cst. Dee also misunderstood S/Sgt. Volk's actions at the detachment, and characterized as unnecessary and excessive actions that both S/Sgt. Volk and the expert witness explained as perfectly legitimate and relatively low-level physical control techniques. Importantly, the other officers who participated in the arrest saw nothing excessive about it, and applied force themselves to the required degree, which they are unlikely to have done in the absence of any resistance.
- [182] His counsel submit that S/Sgt. Volk's actions were amply justified by the numerous background factors that increased Mr. Petrus's threat level, and provided the essential context within which he made his own observations of him ramping up into assaultive behaviour. As illuminated by Mr. Johnston's cogent explanations of what measures are appropriate to carry out when controlling a potentially violent subject, the videos show that Mr. Petrus was guided into the cell to prevent him from walking past it, the control measures executed during the search itself were skilful and low-level in their intensity, and the contact between S/Sgt. Volk's boot and Mr. Petrus's head was an accident that likely resulted from the urgent need to depart the cell on a surface that had been rendered slippery by the struggle.

The Crown

- [183] The primary Crown theory is that S/Sgt. Volk acted out of anger towards Mr. Petrus, and that he never formed the necessary grounds to justify escalating the situation into a search in cells. Cst. Dee and Cst. Verstuk had Mr. Petrus under complete control and were preparing to book him at the counter. The escalation of the situation was instead solely the product of S/Sgt. Volk's actions. More importantly, actual animus towards Mr. Petrus was revealed by S/Sgt. Volk's taunting comment about his statements to the dispatcher, and what was unquestionably a kick as he lay limp on the ground.
- [184] If a doubt is raised as to the existence of subjective grounds, it is still clear that any such grounds were not objectively reasonable, the Crown argues. Cst. Dee and Cst. Verstuk were in the best position to assess any resistance by Mr. Petrus, having their hands on him at the time. Notably, neither of those officers reacted to his supposedly escalating behaviour, nor did the cell guard, who was supposedly the object of a verbal outburst. S/Sgt. Volk could not reasonably have concluded that the cell search was necessary in the circumstances facing him, since that ran completely contrary to the actual nature of the situation.
- [185] Finally with respect to the cell search, if there is at least a doubt that S/Sgt. Volk's grounds were objectively reasonable, the degree of force that he then applied was disproportionate in light of the control exerted by the officers at the booking desk, and the risk inherent in the controlled takedown of a handcuffed subject.

[186] As a stand-alone assault, the contact between the boot and Mr. Petrus's head is said to have been obviously deliberate, in furtherance of the punishment that had previously been inflicted. Factors supporting this conclusion are said to include S/Sgt. Volk's unusual gait when walking forward, the unusual height of his foot when contact was made, and the inconsistency of his casual departure from the cell with the supposed urgency of making it to safety.

Discussion

[187] The applicable legal principles in this case are not in issue. Section 25(1) of the Criminal Code provides that a peace officer who is required or authorized by law to do anything in the administration or enforcement of the law is, if they act on reasonable grounds, justified in doing what they are required or authorized to do and in using as much force as is necessary for that purpose.

[188] A helpful summary of these elements in practice was provided in *Crampton v. Walton*, 2005 ABCA 81:

15 The first element is relatively straightforward. It requires the court to review the type of action undertaken by the police officer (rather than the manner in which the action was carried out) to determine whether it was something the police officer was required or authorized by law to perform in the administration or enforcement of the law. Essentially, the court decides whether the type of action was within the scope of the police officer's law enforcement duties.

19 The second element of the s. 25(1) defence requires the court, having determined that the type of action falls within the scope of the police officer's law enforcement duties, to examine the basis for the action and manner in which the action was carried out. The police officer must act on "reasonable grounds"

20 The phrase "reasonable grounds" also appears in s. 32(1) of the Criminal Code, which justifies the use of force to suppress a riot. In evaluating the conduct of a police officer, the court is to place itself in the shoes of the officer and assess whether reasonable grounds existed for the actions taken: *Berntt v. Vancouver (City)*, 1999 BCCA 345 at paras. 35-37. See also *R. v. Storrey*, [1990] 1 S.C.R. 241.

21 The modified objective test used in relation to s. 32(1) is equally applicable in determining reasonable grounds under s. 25(1). See, for example, *Chartier [v. Greaves]*, [2001] O.J. No. 634, at para. 59. In order to satisfy the second element of s. 25(1), namely that the police officer acted on reasonable grounds, the court must determine whether there was an objectively reasonable basis, given the circumstances faced by the police officer, for the actions undertaken by the officer.

22 Essentially, s. 25(1) is a safe harbour from liability for those who are required to enforce the law. The police are often placed in situations in which they must make difficult decisions quickly, and are to be afforded some latitude for the choices they make. See *R. v. Asante-Mensah*, [2003] 2

S.C.R. 3 at para. 73. Courts recognize that law enforcement is dangerous; no one wants police officers to compromise their safety. On the other hand, s. 25(1) is not an absolute waiver of liability, permitting officers to act in any manner they see fit: Chartier at para. 64. The police are entitled to be wrong, but they must act reasonably.

42 The final element of the s. 25(1) defence requires the court to determine whether unnecessary force was used. In making this assessment, the court is to determine whether the use of force was objectively reasonable in light of the circumstances faced by the police officer: Bolianatz at para. 36; Vlad v. Edmonton Chief of Police (2002), 319 A.R.1, 2002 ABQB 518 at para. 133.

43 Because both the second and third branches of the s. 25(1) defence use the modified objective standard to review police conduct, the demarcation between the two elements is sometimes blurred. To clarify, the second branch requires the court to determine whether the police acted on reasonable grounds in carrying out the action. The police could, for example, establish reasonable grounds for using force. The third branch focusses exclusively on the amount of force used. Even if the police acted on reasonable grounds in executing the [their duties] in an aggressive manner, they will be denied the protection of s. 25(1) if they used excessive force.

45 Police officers are not expected to measure the precise amount of force the situation requires: Bolianatz at para. 36 citing R. v. Bottrell (1981), 60 C.C.C. (2d) 211 at 218 (B.C.C.A.). See also Asante-Mensah (S.C.R.), supra, at para. 73. Nor will they be denied the protection of s. 25(1) if they fail to use the least amount of force that would achieve the desired result. Allowance must be made for an officer, in the exigency of the moment, misjudging the degree of necessary force: Klyne v. Rae (2002), 218 Sask. R. 141, 2002 SKQB 139; Anderson v. Port Moody (City) Police Department, 2000 BCSC 1194; Breen v. Saunders and Fredericton (1986), 71 N.B.R. (2d) 404 (Q.B.). Accordingly, the immediate decisions a police officer makes in the course of duty are not assessed through the "lens of hindsight": Robinow v. Vancouver (City) (2003), 37 M.P.L.R. (3d) 265, 2003 BCSC 661 at para. 71; Parrett v. Vanderford, 2001 BCSC 23 at para. 88; Besse v. Thom (1979), 96 D.L.R. (3d) 657 at 667 (B.C.Co. Ct.), rev'd on other grounds (1979), 107 D.L.R. (3d) 694 (B.C.C.A.).

[189] As is the case for all defences, once there is an air of reality to the s. 25(1) defence, in the sense that there is evidence that could lead to an acquittal if it were believed, the onus is on the Crown to disprove at least one element of it beyond a reasonable doubt. Such an air of reality, with the corresponding onus on the Crown, is present here.

[190] Although the conduct by S/Sgt. Volk in this case is obviously all related, the analysis conveniently breaks down into two forms of alleged assault - the decision to search Mr. Petrus in a cell and the contact between S/Sgt. Volk's foot and Mr. Petrus's head as S/Sgt. Volk was leaving the cell.

[191] In my opinion, whatever else may be said about his conduct, I am satisfied beyond a reasonable doubt that S/Sgt. Volk did not slip when he left the cell, but deliberately struck Mr. Petrus in the head with the heel of his boot. Even allowing for the inherent limitations of video evidence, it is obvious that he made a distinct quick backwards striking movement with his foot, which was not associated to any visible loss of traction, and made sharp

contact with Mr. Petrus's head. There was no over-rotation, as Mr. Johnston described it. S/Sgt. Volk simply got up from the ground, turned to face the door, and struck out with his foot.

- [192] In the course of reaching that conclusion I would also say that whatever else I may make of S/Sgt. Volk's credibility, I disbelieve his testimony about having slipped. In addition to it being inconsistent with what I find is clear video evidence of a deliberate blow, I find it implausible that after having had his memory refreshed about the incident, which was otherwise a matter of routine according to him, a specific memory of having slipped, wondering if he had struck Mr. Petrus but then concluding he had not, would somehow have been recovered. Nor is it plausible that in a situation of immediately turning his back on Mr. Petrus he would still somehow be watching him out of the corner of his eye. I also find that his manner of leaving the cell after inflicting the blow, which Crown counsel has accurately characterized as casual, to be inconsistent with the dangerous situation that he sought to portray in connection with his departure.
- [193] The question of an assault arising from taking Mr. Petrus to the cell and searching him there is not as straightforward, and requires consideration of Mr. Petrus's actions throughout his dealings with the police and the level of threat that he actually posed at any point.
- [194] The significance of Cst. Dee's evidence is in his description of Mr. Petrus's behaviour during their interactions, and his observations of the extent of any risk that Mr. Petrus posed. His observations of S/Sgt. Volk's actions during the search are of some value, having the advantage of his close physical proximity, but his characterization of them is less critical to the Crown's case, because the video shows them very clearly.
- [195] I am not sure that a medical emergency due to Mr. Petrus's intoxication was as likely as him simply getting into more mischief of the kind that had led to the 911 call, but I accept that in general Cst. Dee's decision to arrest him for being drunk in a public place was for Mr. Petrus's own benefit, and was reasonable in the circumstances. I also found the idiosyncratic details that Cst. Dee related of Mr. Petrus's reaction to being arrested, the level of maturity that he presented, and the manner in which he attempted to gain leverage by striking his head on the silent patrolman and threatening to allege an assault, to be quite striking, and unlikely to be put forward if the goal was to present Mr. Petrus in as benign a light as possible. Rather than inappropriately minimizing the risk that Mr. Petrus created, or portraying him as a blameless victim, it appeared to me that Cst. Dee was simply situating him on the spectrum of intoxicated arrestees that an officer might deal with, towards the less aggressive end.
- [196] Similarly, I found his evidence of what occurred when he arrived at the detachment to be convincing. His descriptions of the lecture in the sally port on charging practice from S/Sgt. Volk and Sgt. Martin (which was renewed at the end of the incident), Mr. Petrus's vocalizations in the area of the booking desk as "just drunk talk" and S/Sgt. Volk's actions

taking the situation "from zero to sixty" (the last of those being quite a reasonable interpretation of what is shown on the video) were low-key and lacking in hyperbole, and seemed like idiosyncratic recollections of actual events, rather than a goal-driven reconstruction.

- [197] Further, while there is a difference of opinion on the legitimacy of S/Sgt. Volk's physical control techniques, Cst. Dee's description of his actions with respect to Mr. Petrus's shoulder was not hyperbolic in light of what the video shows, and his description of the hair pulling was factually accurate. I take the point however, that his description of S/Sgt. Volk kneeling on Mr. Petrus's neck appears to have been generated by watching the video, and that in relation to it he is not in any better position than any viewer of it.
- [198] He was tripped up on his initial testimony that his recitation of S/Sgt. Volk's comment to Mr. Petrus about the dispatcher was verbatim, since he then restated it in a slightly different way. Obviously that needs to be weighed in the assessment of his credibility, but it is not as though he had initially put forward a substantially more incriminating version, only to retreat from it. His mistake was in initially stipulating to the exact wording, which does not necessarily undermine the substance of his recollection.
- [199] I am also not troubled by the manner in which his complaint surfaced, or by his failure to comply with the duty to report wrongdoing by a fellow RCMP member. His position that he did not feel he could stop S/Sgt. Volk's actions or report them makes sense in human terms, as does his unwillingness to offer a statement about them until an internal investigation led to him being contacted. One need not take judicial notice of police culture having any particular attributes to understand how difficult the situation of a junior officer who believes that his commanding officer has overreacted would be, and what strong disincentives there would be to raising a fuss about it.
- [200] As a result, on the whole I found Cst. Dee to be a credible witness. I accept his essential narrative of events, including his denial of having assaulted Mr. Petrus.
- [201] The most significant barrier to Mr. Petrus's reliability is his significant intoxication. I would not attribute any weight to his claim to have been assaulted by Cst. Dee, or his adherence to that memory in preference to any allegations about his treatment in cells, which he seemed to become aware of only after watching the video. To do so would be to presume that the alleged assault at the scene was ever reliably recorded in his memory in the first place. Whether it was justified by s. 25 or not, I am satisfied that the thorough thrashing that he underwent in cells would inevitably have endured in his mind if he had been in a fit state to record any such memories, and it does not make sense that he would omit reference to it in his statement in preference to an earlier less serious and protracted application of force by a police officer.

- [202] His supposed lack of concern about the search was also contradicted by his testimony about his actual concerns following it, including his unwillingness to complain to the cell guard or the officer who released him, for fear that they were allied with the officers who had searched him. Capping off concerns about the level of his intoxication was his bizarre behaviour in the ensuing hours after he recovered from the search.
- [203] As a result, I think that all that can reliably be drawn from his evidence was that he was not happy to have been arrested.
- [204] In my estimation, the videos confirm the important parts of Cst. Dee's evidence. Even without sound, and even with the limitations inherent in the available camera angles and distances, they show quite convincingly that Mr. Petrus was rushed out of the booking area while appearing to doing nothing other than verbalizing in some way, that he complied with the process of fast-walking him to the cell, that he was effectively thrown into it by S/Sgt. Volk and taken quickly to the ground, and that while the search by the other officers seemed to comply with the description of the required areas to be examined, S/Sgt. Volk manipulated his upper limbs in the course of controlling him with what can only be described as extreme vigour. Lastly, they show him lying essentially inert for an extended period, which may be informative of both the intensity of those control techniques on him and the effects of his alcohol consumption.
- [205] The question of course is whether this body of evidence disproves the application of the defence beyond a reasonable doubt. When considering the evidence called on S/Sgt. Volk's behalf to show the objective reasonableness of his actions it is important to keep in mind that even though several factors relating to Mr. Petrus's attributes and his behaviour before and after his arrest were relied on as increasing the risk that he presented, and those factors could have provided the context within which S/Sgt. Volk assessed his behaviour, the specific basis of his decision to conduct the search in cells were variations on the theme that Mr. Petrus had "crossed the line" into assaultive behaviour, or was "assaultive" or "pre-assaultive". He did this by directing his anger at the cell guard (and, S/Sgt. Volk added, the officers).
- [206] Of equal importance, while Mr. Johnston was supportive in many ways of S/Sgt. Volk's approach, his threshold for the justification of the measures used in the search, which I accept, was active resistance by Mr. Petrus, not the anticipation by S/Sgt. Volk that he had, or was about to, become assaultive. In other words, he did not endorse the use of those force techniques on a pre-emptive basis, without the required element of active resistance. I think his opinion accurately tracks the objective element of both reasonable grounds for applying force and the reasonableness of that force.
- [207] The problem is that other than S/Sgt. Volk's assertion that Mr. Petrus was resisting up to a certain point in the search, there is no other evidence of such resistance. In fact, as I have said, the video suggests strongly otherwise, including while Mr. Petrus was being manhandled in the cell.

- [208] I agree with the Crown's position that finding that the force was reasonable because the other officers joined in in applying it, as Mr. Johnston suggested, is a form of circular reasoning. Nevertheless, it is legitimate to ask why they would participate in an application of force that they did not consider to be justified. I think the answer is found in the defence evidence. As S/Sgt. Volk testified, they are expected to follow his lead when dealing with a prisoner and, as both he and Mr. Johnston testified, in the absence of an advance plan the collective training kicks in and the officers act in accordance with it. More fundamentally, other than Cst. Dee, who was in the unique position of having dealt with Mr. Petrus for a much longer period, the other officers would not really be in a position to question S/Sgt. Volk's determination that these actions were necessary.
- [209] In this regard, I do not think that Sgt. Martin's testimony adds anything useful to the analysis. In the absence of any memory of the incident, even as refreshed by the videos, he could do no more than comment on what was probable by reference to his general experience, with no access to the dynamics of the actual situation.
- [210] In my opinion however, the evidence goes further than just demonstrating that there was no active resistance by Mr. Petrus, and that S/Sgt. Volk acted precipitously. He did not seize control of Mr. Petrus immediately upon arrival, so there is no basis to find that the cell search was a complete pretext for payback for how he had spoken to the dispatchers. But the reality is that his comment to Mr. Petrus about it during the search, which despite the variation in the exact wording quoted by Cst. Dee I am satisfied, owing to the quite striking nature, must have been made, and the very vigorous application of control techniques revealed by the video, shows at least an element of hostility underlying the level of force that he applied. I think that such hostility was likely in addition to that generated by Mr. Petrus's verbalizations at the booking desk.
- [211] In short, the evidence satisfies me beyond a reasonable doubt that while S/Sgt. Volk may well have had grounds in his own mind for the cell search, in the form of what he considered to be imminent assaultiveness, they were certainly not objectively reasonable, in that Mr. Petrus was not then and did not become at any later point, actively resistant. I am also satisfied beyond a reasonable doubt that the force used was not objectively reasonable in light of the circumstances that faced S/Sgt. Volk, which were a complete lack of resistance to being flung around and subjected to various pain techniques, on a fairly indiscriminate basis.
- [212] Accordingly, I find S/Sgt. Volk guilty of assault both in relation to his foot coming into contact with Mr. Petrus's head, and the force that he applied during the search itself.

"Schultes J."

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