

In the matter of the Police Act, R.S.A. 2000, c. P-17 and  
in the matter of the Police Service Regulation, Alta. Reg. 356/1990

And in the matter of Complaints and Disciplinary Proceedings against  
Regimental Number [REDACTED] Constable [REDACTED], and  
Regimental Number [REDACTED] Constable [REDACTED]  
of the Calgary Police Service

## DECISION

### NOTE:

This matter was ordered to be held as a “Public” Disciplinary Hearing by the Chief of Police. Upon application by the Government of Canada, Department of Justice, and upon the hearing of evidence in relation to the application, the Hearing was ordered “Closed.” This application was supported by both the Presenting Officer and Counsel for the Cited Officers. Subsequent discussions with the Department of Justice have resulted in an agreement that this decision will be a public document.

The names of the complainant in the matter and two co-workers of the complainant called as witnesses have been anonymized in this decision and the transcripts of the Hearing.

### Legend

SO - Complainant  
CL - Co-worker #1  
CD - Co-worker #2

### Table of Contents

Procedural Background.....	Page 2
Incident Summary.....	Page 3
Exhibits .....	Page 4
Summary of Disciplinary Hearing Testimony .....	Page 5
Police Service Witnesses .....	Page 5
Testimony of SO .....	Page 5
Testimony of CL .....	Page 13
Testimony of Sergeant [REDACTED] .....	Page 15

Testimony of Acting Superintendent [REDACTED] .....	Page 16
Defence Witnesses .....	Page 19
Testimony of Constable [REDACTED] .....	Page 19
Testimony of Constable [REDACTED] .....	Page 34
Assessment of Credibility and Reliability .....	Page 44
Burden of Proof .....	Page 51
Standard of Proof .....	Page 51
Analysis and Findings .....	Page 51
The Disciplinary Charges .....	Page 51
General Findings of Fact .....	Page 54
Analysis Discussion .....	Page 56
Ruling .....	Page 94

## **Procedural Background**

On November 17, 2020, Constable [REDACTED] was charged with eleven counts of disciplinary misconduct. Constable [REDACTED] was charged with eight counts of disciplinary misconduct. The cited officers made their first appearance on January 20<sup>th</sup>, 2021. On that date, the Service made application to withdraw Counts #1 and #10 against Constable [REDACTED]. Those counts were subsequently withdrawn. The two cited officers entered “deny” pleas to all remaining counts. The matter was adjourned to March 29<sup>th</sup>, 2021 to commence the hearing of evidence.

On March 16<sup>th</sup>, 2021, the Government of Canada Department of Justice (DOJ) made application to have the Public Hearing ordered closed. The DOJ was given intervenor status for the purpose of the application. Mr. Arvo Litman, from the DOJ, appeared via video conference to make submissions on behalf of the Government citing “National Security Interests.” After hearing submissions, and with the consent of the Presenting Officer and Counsel for the Cited Officers, the hearing was ordered “Closed.” The DOJ was given further intervenor status to attend the hearing to ensure the National Security interests were maintained.

The hearing was adjourned to commence on March 29<sup>th</sup>, 2021. The hearing was held on March 29<sup>th</sup> to March 31<sup>st</sup> inclusive and then adjourned to May 11<sup>th</sup>, 2021 for closing

arguments. After hearing those arguments, the matter was adjourned to May 18, 2021, for decision.

## **Incident Summary**

On January 2, 2018, at approximately 23:53 hrs, a Calgary Police Service member in District 2, spotted a reported stolen vehicle, Alberta Licence plate [REDACTED]. He notified dispatch that he was following the vehicle from a distance. Resources were dedicated to the call including HAWC2. The vehicle was described as a Mitsubishi [REDACTED] by the car crew, and a Mitsubishi [REDACTED] by the dispatcher. Between 23:53 hrs and 02:53 hrs January 3, 2021, the stolen vehicle was followed with a number of unsuccessful traffic stops attempted. The incident was terminated when HAWC2 had to return to the hanger.

At approximately 04:45 hrs, Constable [REDACTED] operating an unmarked [REDACTED] patrol car, accompanied by Constable [REDACTED] was eastbound on Riverfront Avenue. Constable [REDACTED] observed a SUV type vehicle parked in the otherwise empty parking lot located in the 300 block of Riverfront Ave. SE. The vehicle was running and was similar in description to the stolen vehicle that had had been followed earlier in the evening.

The officers entered the parking lot with the stated intent of driving by the vehicle to confirm the licence plate number. After entering the parking lot, the police vehicle lost traction on the ice and slid into the back of the parked SUV.

At that time, a person was observed in the driver's seat of the vehicle. The officers exited their police vehicle, and with weapons drawn, ordered the occupant out of the vehicle. The occupant complied with all demands, was physically searched, handcuffed, and taken into custody. He was placed in the rear of the police vehicle.

The subject was asked if he had identification. He replied he had a badge on the top of his backpack on the front seat of his vehicle. The badge and identification were retrieved from the vehicle by Constable [REDACTED]. After confirming the identity of the subject, and confirming the vehicle was not the stolen vehicle from earlier in the evening, the subject was released from custody.

The collision that resulted from the police vehicle sliding into the SUV was not reported.

The subject, referred to in this decision as SO, complains that the officers committed misconduct in their actions. This alleged misconduct resulted in the disciplinary charges as articulated in the Notice and Record of Disciplinary Proceedings.

## Exhibits

Exhibit #1 Notice and Record of Disciplinary Proceedings

Exhibit #2a Presiding Officer Appointment Memo, Constable [REDACTED] Hearing

Exhibit #2b Presiding Officer Appointment Memo, Constable [REDACTED] Hearing

Exhibit #3a Presenting Officer Appointment Memo, Constable [REDACTED] Hearing

Exhibit #3b Presenting Officer Appointment Memo, Constable [REDACTED] Hearing

Exhibit #4 Affidavit

Exhibit #5 Joint Book of Documents Agreement

Exhibit #6 Stipulated Statement of [REDACTED]

Exhibit #7 Stipulated Statement of Superintendent [REDACTED]

Exhibit #8 Stipulated Statement of Det. [REDACTED]

Exhibit #9 Tab 36 Vehicle Comparison

Exhibit #10 Stolen Audio call

Exhibit #11 Tab 3 Google Satellite View

Exhibit #12 Tab 4 Google Street View

Exhibit #13 Tab 5 Scene Photos

Exhibit #14 Tab 16 pages CPS0049, 50 and 51

Exhibit #15 Tab 27 Emailed documentation

Exhibit #16 Tab 29 Statement of Claim

Exhibit #17 Negative Behavioral Event [REDACTED]

Exhibit #18 Negative Behavioral Event [REDACTED]

Exhibit #19 Tab 31 Exhibit #Electronic Audio Recording – [REDACTED]

Exhibit #20 Tab 32 Transcript of Mr. [REDACTED]

Exhibit #21 Tab 30 [REDACTED] Statement

Exhibit #22 Tab 22 Memo and Receipt for Jacket

Exhibit #23 Tab 1 Sunrise Data

Exhibit #24 Tab 2 Weather

Exhibit #25 Tab 6 Stolen Radio Recording (on USB)

Exhibit #26 Tab 7 Stolen Vehicle Event Chronology

Exhibit #27 Tab 8 Stolen Vehicle Event Information

Exhibit #28 Tab 13 Suspicious Vehicle Radio Recordings

Exhibit #29 Tab 14 Suspicious Vehicle Event Chronology

Exhibit #30 Tab 15 Suspicious Vehicle Event Information  
Exhibit #31 Tab 9 GPS Analysis  
Exhibit #32 Tab 10 Retention Period  
Exhibit #33 Tab 11 Airbags  
Exhibit #34 Tab 12 Vehicle Inspection  
Exhibit #35 Tab 37 Email re Crown Declination – [REDACTED]  
Exhibit #36 Tab 38 Email re Crown Declination – [REDACTED]  
Exhibit #37 Tab 39 Notice – [REDACTED]  
Exhibit #38 Tab 40 Notice – [REDACTED]  
Exhibit #39 Tab 43 Code 600  
Exhibit #40 Tab 44 Service Vehicle Driving  
Exhibit #41 Tab 45 Use of Force  
Exhibit #42 Tab 18 Pictures of unmarked police vehicle  
Exhibit #43 Arrest and Apprehension policy  
A1 Joint Book of Documents  
A2 Joint Book of Documents – USB Drive

## **Summary of Disciplinary Hearing Testimony**

### **Police Service Witnesses**

### **Testimony of SO (Complainant)**

#### **Direct Examination**

SO testified at approximately 4:30 a.m., on January 3, 2018, he parked his vehicle (SUV) in a parking lot off of Riverfront Ave. SE, close to the 4<sup>th</sup> Ave. bridge. He was waiting for two co-workers to arrive, these being CD and CL. He stated it was January, and cold. He described it as dark and the sun was not up. He was asked about lighting in the parking lot and stated there was lighting on the street, but not directly in the parking lot.

SO stated he was sitting in his vehicle when in his rearview mirror, he saw a vehicle enter the parking lot. This vehicle “sort of” sped up and hit his SUV. He could not make out the colour or make of the vehicle. When asked what he meant by sped up he replied, “*It just seemed to, like, pick up a little bit of speed from when it initially came in and to where it kind of -- kind of hit me.*”<sup>1</sup>

---

<sup>1</sup> Transcript. Pages 58-59. L. 26, L. 1-2

He described the parking lot and where he was parked in the parking lot in relation to the entrance. He stated the lot was graveled, with the entrance being off of Riverfront Ave. He was parked off slightly to the left of the entrance. He was asked if there was a slope into the parking lot from the entrance. He described it both as a slight slope, and a little bit of a slope.

He was leaning forward with his cell phone in front of him when the collision shot him back, then forward bumping his chest into the steering wheel. He saw the doors of the vehicle open and then thought he was going to be car-jacked. He thought they might steal his vehicle, hurt him, or kidnap him. He saw the two people get out of the car then he could see the barrel of a gun pointing at him from the driver's side of the vehicle. He was asked where the gun was pointed at. He replied: *"Basically in the vicinity of my face."* The person was standing by the driver's door, the other person was in a similar stance with also what he believed to be a gun pointing at him. At that point, he did not know who these people were, they did not say anything and he did not hear anything for a short while. He stated as the person on the driver's side came closer, he could see a dark shirt, then a police emblem and a uniform shirt. He stated: *"And then so when I realized it was a police officer, I kind of was, like, Okay. I'm not being carjacked, but now I'm going to get shot."*<sup>2</sup>

He stated he could see the person moving around a little bit still by his car and he was saying something that he could "kind of hear" but nothing clearly. Since it was a police officer, he thought he could be saying commands or something. His windows were closed and he could not hear clearly so he turned off the car and put up his hands so he would not be shot. He was asked if that was what was going through his head, that he thought he was going to get shot? He replied: *"Oh, yeah."*

He stated the police officer came closer and he could see his whole body with the gun still pointed at him. He heard him tell him something like get out of the car. He opened his car door, the officer was swearing at him, telling him to get on the ground. He got to his knees, then to his stomach. The other police officer had him on the ground. He was pushed and held to the ground. The police officer from the driver's side still had his gun pointed at him the whole time. He was asked if he asked the officer's why they were approaching him that way. He said he did not say anything to the police officers; *"these guys had guns pointed at my head...I didn't say anything to them. Not at this point, I didn't say anything to these guys."*<sup>3</sup>

The passenger side officer grabbed his hands, pulled them behind his back, handcuffed him while telling him "this is a stolen car, we've been chasing you all night with helicopters."

He was asked about the degree of strength was used when he was pushed to the ground. He stated: *"Well, it was a good shove. I mean, like, um, yeah. I don't know how*

---

<sup>2</sup> Transcript. Page 67. L. 7-9

<sup>3</sup> Transcript. Page 71. L. 6-7.

*to explain, basically, but other than -- yeah, he just forced me to the ground, basically, and he put his knee on my back, and so he had his knee on my back and, like, pulling my arms behind me.”*<sup>4</sup> The driver put his gun away, and joined the other officer searching him on the ground. He was not told why he was being handcuffed other than stating he stole the car.

He described how the police officer from the passenger side tried to lift him up, stating he tried to lift him up by the hood/neck area of his jacket which caused him to choke. He was pulled up again and at that time his jacket broke with the zipper popping. He did not recall the officers saying anything to him at that time. He was forcibly pushed against his car and patted down a second time. He was told again the car was stolen, asked who it belonged to and asking him for identification. He was asked if he responded to these questions and he replied *“no, at least he didn’t recall responding.”* He was asked again who the car belonged to, was he the registered owner, and if he had identification. He said he answered one question saying he did have ID; it was next to his badge in his bag. He told them the bag was in his car. The passenger officer exclaimed “what,” but SO stated he did not recall *“what else was after that.”*

He was told he was being put in the back of the police car, and after being seated, both officers went into his vehicle. He could see them searching, one on each side of the car. He stated the search lasted about thirty seconds. He could not recall if the back doors of his car were opened.

While he was in the back of the police car, he could see the laptop was open and he could see the description of the car they were looking for. He described it as a grey Mitsubishi [REDACTED] with a different plate than his. He stated he was driving a blue [REDACTED] Mitsubishi [REDACTED]. He stated he thought the officers did not even know what car they were looking for because they had three out of four indicators wrong.

SO stated at that time, he saw one of his co-workers had arrived in the parking lot. He saw CD pay for his parking, and then his co-worker CL also arrived with the two of them standing off and away. During this time, the officers were still searching SO’s vehicle.

He stated the passenger police officer let him out of the police car, removed the handcuffs and thanked him for being so compliant. He was not told why they were releasing him. He was asked if he was told why he was being detained to which he replied *“no.”*

He stated he was pretty upset, asking the officers why did they smash into his car. He was told by the passenger officer, those are the tactics used, “we come in in hot and fast.”

He was asked about the condition of his jacket prior to his encounter with the officers. He stated he had just gotten it and that it was fairly new.

---

<sup>4</sup> Transcript. Pages 71-72 L. 26, L. 1-4.

SO was asked if he told the officers where he was employed. He replied when he told them about his badge and he did tell them where he worked. The officers told him they thought he “was their guy” and they thought he going to get away so they used their car.

SO was asked if he showed the police officers his identification or his registration. He replied he did not show them anything. When he was patted down he did not answer their questions feeling he did not have the time.

Later, he did ask the officers for their names and badge numbers. He was shown a notepad with their names and the incident number. On the note pad, he saw something about “no impact/contact with his car” which the officer was covering up partially. He took a picture of the notepad which he later sent to the investigator.

He was asked if he saw any emergency lights when the vehicle entered the parking lot. He replied “no.”

He was asked how much time elapsed from when he saw the police car entering the parking lot until he was released. He replied, “*ten minutes maybe.*” When he arrived at work he was asked why he was late. He told his supervisor what had happened. He advised he had told the police officers where he worked, which required a reporting process. He later advised his Chief of the incident. His Chief told him about a meeting she was to have with ‘someone high up’ in the Calgary Police Service which had been previously planned. She asked if she could deal with his matter. Several days later she told him about her meeting and he could expect a call from someone at the Police Service.

After receiving a call, he met with Staff Sergeant [REDACTED]. He had stated it was his concern not to have his identification written down in a report. He was shown a report and stated he had concerns with what was in the report. He stated he felt the officers were not being honest. The report stated he was suspicious and he wanted to know why the term was used. He was told it was “lingo” and “jargon” but that was not elaborated on. Staff Sergeant [REDACTED] told him of the stolen vehicle and the individual they had been chasing around the city that evening. She stated the vehicle was being used as a weapon and had been hitting cars and could have been used as a weapon against police officers.

He told Staff Sergeant [REDACTED] some things were not true. It stated there was no contact with his car when there obviously was. He told her the officers were lying to him and when asked what they were lying about, he stated that not all of the information was provided and them saying they did not hit his car was a lie.

SO was asked if the officers would be able to see if he was inside the vehicle. He replied stating he was illuminated and they should have seen him.

He was asked if there was damage to his vehicle. He stated the impact zone on the bumper, the hitch and the side quarter panels were damaged. He was asked if he had



the vehicle repaired. He replied he did at a cost of about \$2,000.00 which was paid for by the City. The city also paid to replace his jacket at a cost of about \$400.00.

He was asked if he requested the attendance of a supervisor. He replied "no."

SO was then asked if he sustained any injuries. He replied "yes."

He stated he made his complaint through a lawyer. He has First Nation status and believes he was discriminated against. When asked why, he stated *"Well, I am First Nation. And, yeah, there's a known systemic issue publicized. Everyone knows about it. It's been there before. It's been there before the CPS even admitting to it. So it just felt like I was being targeted because of that."*<sup>5</sup> He was asked if the officers said anything to indicate that they were treating him differentially because of his status and he replied, *"no, it was nothing they said."* He was asked if it was his perception, and he replied no, it was because of his appearance he was treated that way. When asked, he stated he had no idea when the first time they saw him was. He stated one of the indicators of his indigenous background was an ornament on his rearview mirror. He described it as a drum.

SO was asked if he was ever told he was under arrest. He replied he did not recall them saying that.

He was then asked about his description of being dragged by his jacket. He was asked if he was lifted vertically and spoke of being pulled up and dragged up off of the ground. He stated he would use the word drag and was fine with using that word.

He was asked if there was a barrier in front of his vehicle where he parked in the parking lot. He replied yes there was a concrete barrier. He agreed there was no damage to the front of his vehicle.

### **Cross Examination**

SO agreed that the parking lot was on Riverfront Ave SE with the entrance in between the 4<sup>th</sup> Ave SE bridge, and 3<sup>rd</sup> Street SE. He was asked about the parking lot and was then asked to show in the photos at Tab 34, where he was parked. He stated he was parked where the SUV was beside the white Caravan in the photo. He was asked if he was sure he was not parked next to the building. He replied "no."

He was asked if the gravel lot was covered by snow and ice. He replied it did not stick out in his mind that the parking lot was icy. He did agree it was snowy. He was further

---

<sup>5</sup> Transcript. Page 105. L. 5-9

asked about his description of the slope at the entrance to the parking lot which he had previously described as "slight." It was put to him it was a steep slope. He replied, *"That's your definition, I guess."* He was asked if he agreed it was a steep slope and he replied no.

He agreed he was the only vehicle in the lot until the police arrived and that he had arrived about a half an hour early for his 5:00 a.m. work time start. He agreed the vehicle's engine was running and his cell phone was illuminating him. He also agreed that there was a First Nations ornament (drum) in the vehicle as shown in the fifth picture at Tab 27. He agreed the drum would indicate the vehicle belonged to a First Nations person.

SO agreed he saw a dark-coloured vehicle enter the lot in his rearview mirror. When asked if the vehicle was similar to CD's car, he stated *"I couldn't tell you because the headlights were shining in my eyes through the mirror."* He did say it was at the approximate time he was expecting him.

He was asked if the vehicle look and sounded like CD's car. He stated his windows were up and he could not hear. He was referred to his statement and asked if it refreshed his memory as to the look and sound. He replied it was speaking in general, not actual sound.

He was asked if the police vehicle and CD's vehicle were similar. He stated they were not similar at all. He agreed the parking lot was dark and he thought the car belonged to CD. It was put to him he saw and heard the vehicle speed up. He replied he could not say he heard it. It was put to him in his statement he stated he saw and heard the car speed up, then hit his car. He agreed. He was asked if this car hit him so hard that it actually it moved his car forward. He replied, *"I believe it did, yes."* He agreed it jolted and shot the vehicle forward a little bit. He further agreed he could see the tire tracks of being pushed and rocked. He was asked if he impacted the steering wheel to which he replied he did. He was asked if he suffered [REDACTED] He replied saying, *"I don't know. If that's what they call it."* SO was asked if he was suing the police officers for [REDACTED] He replied he was.

It was put to SO he thought there would be significant damage to the vehicle that hit him. He replied, *"Yeah, I guess."* He later stated, *"I don't know"* to the same question. SO was asked if he took photographs of both vehicles. He was asked if he inspected the police car for damage. He stated he did not and he did not recall if he took photographs of the police vehicle. It was put to him in his statement he told the investigator he did take a photo. He stated he took a photograph of the licence plate. He was asked if he saw visible damage to his vehicle and he replied yes. He was asked if the officers checked his vehicle. He replied, *"you would have to ask them."* He was asked if they indicated they could not see any damage. He stated he did not recall that. SO was then asked about the police officer showing him his notebook with their badge numbers and the notation there was no damage. He replied he did not recall seeing actual writing saying no damage. He described it had his badge number and maybe the

incident number. On the bottom of the pad there was a place where you could make a checkmark which had a checkmark that indicated there was no damage or no contact. It was put to him that was an indication that the officer was saying there was no damage to his vehicle. He replied, *"he wrote that, yeah"* which he later stated, *"I didn't know what that meant."*

It was put to him that part of his complaint was that the officers deliberately rammed him. He agreed. He was asked if it was an accident to which he replied, *"I just know they impacted mine."*

SO was then questioned about his thoughts at the time of the collision. He agreed he thought he was going to be car-jacked and part of that was because of the area and its reputation. He added there was more to it than that. It was put to him he thought he might be kidnapped or worse and he might have to defend himself and he was getting ready. He replied: *"yes."*

He was asked if he told the investigator he saw the individuals run to his vehicle. He replied yes and quickly. He saw two people get out of the vehicle *"really quickly, that's what he was referring to."* It was put to him in both his letter (Exhibit 21) and his complaint (Exhibit 23) he used the words *"run towards my vehicle."* He stated when they got out of the car, they ran to where they were standing which he described as next to their vehicle. He was asked if they were behind their doors. He replied it did not look like they were behind their doors. He agreed he saw guns aimed at his vehicle in his direction. He agreed he then saw they were uniformed police officers.

He was asked if then there was no fear of being kidnapped or carjacked but being shot by the police. He replied *"yes."* He was asked why to which he replied he was First Nations and he did not know their motives. He agreed he was very familiar with handguns and somewhat familiar with tactics. He agreed the officers were using a two-handed grip and were in a shooting stance. He was asked if they were running towards him in a shooting stance. He stated they were not. They were slowly moving towards his vehicle. He was asked if they came to his driver's door. He replied they did not and they were closer to their vehicle than his, more in between, at the front of their vehicle and the back of his. He was asked to look at his Complaint Form (Exhibit 23) at page 5 of 6 where it was written, *"Firearms out and point at him at the side of his vehicle."* It was put to him he was complaining that they were at the side of his vehicle. He replied it depends on how you read the sentence. He was asked if that would not be how he read it and he replied, *"Well, those 'his' aren't defined."*

He agreed both officers moved up towards his vehicle with guns pointed in his direction. He was asked if the gun was pointed at his face and head and if that was related to the [REDACTED] he described. He replied *"yes, it's part of 'em."* He was then asked if the officer from the passenger side was pointing his gun at his head. He replied he was not exactly sure, but it was pointed in his direction.

SO was asked if the officer came up to his vehicle and called him out. He stated he was called out from that position. He was asked if the officers were not back behind their own car doors when he was being called out. He replied "no." He was asked if he was told he was under arrest. He replied no. He was asked if he opened his door and got out. He stated he complied. He was asked if the gun was pointed at his face and he replied yes. He was asked if he went to his knees and then got on the ground and on his stomach. He replied yes to both questions. He was asked if he was told to put his arms out to the side. He stated he did not recall that.

It was pointed out to him in his written complaint (Exhibit 23) it stated both officers grabbed his wrists and twisted his arms behind his back while handcuffing him. He replied the first one did and the other one joined him. It was put to him in his testimony he stated he joined him after he was fully handcuffed and joined him to search him. He agreed he said that.

It was put to him he testified the police officers did not tell him he was under arrest. He agreed that was what it said but he stated he did not recall them saying he was under arrest. He was referred to his letter of complaint at Tab 23, page 5, bullet point #4 where it stated: "...He told he was under arrest for theft of a motor vehicle" and that was what he told his friends. He replied, *"When I used that term with my friends, it was just because the whole incident that they obviously handcuffed me and put in the back of the car."*

SO was asked about the discussion regarding where he worked and that his ID and badge could be found in his car. He stated he told them where it was in his bag and he agreed he told them the bag was in his vehicle and that it was on the front seat. He agreed at that point the officer told him he was going to place him in the back seat of the police car. He was asked if the officer then told him he would look for his ID and badge to which he replied, *"Yeah, something like that."* He agreed he wrote that in his prior statement.

He was then asked about his complaint that the officers dragged him by his jacket from the ground. He replied in the affirmative. It was put to him he did not allege being dragged in any of his previous statements which he accepted. He was directed to Exhibit 19, his handwritten witness statement where it stated, "They handcuffed me and then pulled me up by my jacket." It was suggested to SO he was referring to two police officers. He stated "they" as in he represents "they", CPS, meaning it was one officer, the passenger officer who "dragged" him up. He only recalled one doing it. He agreed the officer did not drag him along the ground towards his car.

He was then asked about the officers searching his car. He agreed they were still searching when his co-workers showed up. He agreed he had told the officer about his ID and badge and where they were located in the car. When asked if it was with the expectation the officer would go and check and confirm who he was and not a car thief, he replied *"I didn't know what to expect."* He was asked why he told him his ID and badge were in the car. He stated he thought it would be more of a saving grace for

himself. It was put to him it turned out to be a saving grace to which he replied, *"I'm still alive today."*

He was asked if there was anything disturbed in his vehicle or anything missing. He stated there was nothing missing but there was definitely stuff moved around. He thought the center console and glovebox were disturbed. He thought they had searched all over the front of the vehicle. He agreed that the officers did not take very long in searching.

SO agreed the officer thanked him for being so compliant, he did not agree that the officer apologized.

SO was then asked about his meeting with Staff Sergeant [REDACTED] and what she told him about the stolen car the police had been following the evening of the incident. He was played a portion of the radio transmissions of the call. He was asked if hearing the radio transmissions changed his perspective about the incident at all. He replied, *"No...Actually it does, yes, sir. There's an overgeneralization about Native people. There's an overgeneralization about Native people and CPS...CPS Obviously overgeneralizes Native people."*

SO was then directed back to the police occurrence report to where it was written "observed a suspicious Mitsubishi SUV" and that it refers to the vehicle as suspicious. He was asked if he agreed that it just referred to an occupant and it did not refer to him being suspicious other than being in a suspicious vehicle. He stated he was still concerned they were referring to him as the occupant of the vehicle as being suspicious and that it bothered him. When asked how so, he replied asking why was his vehicle suspicious.

## **Testimony of CL**

### **Direct Examination**

CL is a Constable with the [REDACTED] currently assigned to the [REDACTED], Detachment. He has been a member for approximately two years.

He is an acquaintance of SO having been previously employed with the same employer beginning in 2012. They worked together from 2012 until 2018. He would consider themselves as friends.

He agreed that on January 3<sup>rd</sup>, 2018 he was present for part of the incident between SO and the Calgary Police. He arrived in the early morning, between 4:00 a.m. and 5:00 a.m. in the paid City parking lot across from the Drop In Centre.

When he arrived, he saw an unmarked police car had collided with the back of SO's SUV Mitsubishi. He saw two police officers in and around the vehicle as well as his associate, CD parked and standing at the corner. CD was a friend and colleague of his. He was asked how he knew it was an unmarked police car. He stated it was clearly an unmarked police car. It had two police officers outside of it, and he could see the unmarked lightbars inside of it. He added in the field that he does, it was clearly an unmarked police car.

CL was asked how dark it was when he arrived. He stated it was dark. There was no daylight and very little street lighting.

He was asked where SO was at the time he arrived. He stated he later came out of the back seat of the police car. He himself did not approach the police officers while SO was in custody. He did not hear the police officers engaging with SO but he did see them. When SO came out of the back seat, he could see SO interact with one of the police officers at the passenger side of the police car. He saw one of the police officers showing SO his notebook. He and CD had a brief conversation with the other officer with them being told SO would be free to go. They asked what was going on but did not get much information.

CL was asked about the weather conditions. He stated it was incredibly icy. He stated he parked in the lot every day and he struggled to get in and out of the lot. It has a very steep slope; it is not well maintained and quite icy. He was asked if he had trouble that day and he stated when he was leaving that day he had difficulty getting up the hill. He was asked where SO's vehicle was parked in relation to the entrance of the parking lot where it is sloped. He replied it was directly in front of it.

CL was asked about the demeanor of the police officers. He replied he noticed it was very serious, very tense. When asked why he thought that he replied, *"I think after everything had settled down and identities were known, and there's not many people, I guess, that are in that profession or even in the police line of work, and after there was an establishment of identification, that there wasn't any, I guess, apology or kind of easygoingness to kind of ease the situation. It just felt very tense. There wasn't a lot of conversation. I could see the stress on Mr. SO's face, his frustration, and didn't seem to be easing all throughout the interaction that I observed."*<sup>6</sup> He stated it would not have been how he would have expected or how he would have played it out.

He was asked about SO's demeanor. He stated SO is a very calm person, but he was very stressed and frustrated.

CL was asked when he learned more details about the incident. He replied it was when SO was released and they returned to work. He was asked about being told of any firearms being drawn. He replied, *"Yes. So once he realized the two doors had opened and he had noticed on his driver's side -- the first thing that he had observed, he told*

---

<sup>6</sup> Transcript. Page 195. L.13-23

*me, was a firearm, and he could see that from his peripherals when he was looking to see who was coming up.”<sup>77</sup> He was asked if SO said where it was pointed. He replied, “It would’ve been at the -- no, he didn’t, no. Just that he could see it in the -- in the hand.”<sup>78</sup>*

CL was then asked if he saw any damage to the police vehicle. He replied he did not and the only damage he saw was in the daylight after work; he could see damage to the rear of SO’s vehicle.

### **Cross Examination**

CL was asked if he would agree it was very very dark in the parking lot. CL replied that it was dark. He was referred to his statement where he stated it was very very dark and asked if he remembered saying that. He replied he did. He was then asked if he agreed that it was very very dark. He then stated, *“I believe it was very very dark.”*

CL agreed he did not see the police officers searching SO’s vehicle. They were standing outside when he arrived.

He was asked if he remembered talking with SO about the incident and him speaking to him about going for his own weapon. He replied he did.

He was asked about his testimony about the firearms and he stated he recalled SO telling him that he could see a firearm from the drivers’ side when he looked to see who was coming to his vehicle. He understood it to be that one of the officers went up to his driver’s side. He recalled SO saying he saw the gun at his driver’s side window. He agreed SO did not elaborate to where or whether the firearm was pointed at him.

### **Testimony of Sergeant [REDACTED]**

#### **Direct Examination**

Sergeant [REDACTED] is a member of the Calgary Police Service currently assigned to the [REDACTED]. In January 2018 he was an Acting Sergeant assigned to District [REDACTED]. Both Constable [REDACTED] and Constable [REDACTED] were assigned to his team and he was their supervisor.

On the morning of January 3<sup>rd</sup>, 2018, he heard the constable’s call in a [REDACTED] call (suspicious vehicle). He heard that everything was fine on the call and he left for the day. Later in the morning he received a BBM message from Constable [REDACTED] advising that they had been involved in a minor stop and had made minor contact with the subject’s vehicle, but no damage had occurred. He then received a telephone call from Staff Sergeant [REDACTED] asking what he knew about the incident. He was

---

<sup>77</sup> Transcript. Pages 197-198. L. 24-26. L. 1-2

<sup>78</sup> Transcript. Page 198. L. 4-5

advised there had been a complaint from within the Service but he was provided little detail about it.

He was asked about his further involvement in the matter. He stated he arranged for a collision report to be completed with SO and he made arrangements to get a receipt for reimbursement for the jacket SO stated had been damaged.

He was asked if he had a meeting with Staff Sergeant [REDACTED] He replied he did and the purpose was to ascertain what had happened and where would they go from there. They later met with Constable [REDACTED] who told them about the stop, and about the collision where they did not believe there was any damage. He agreed the officers did not report the collision to the Traffic Section, and that he instructed Constable [REDACTED] to complete a collision report.

He was asked if he met with Constable [REDACTED] He said he did approximately two weeks later after [REDACTED] returned from vacation.

He agreed the officers should have notified the District Sergeant about the collision. They also debriefed the tactics used when they interacted with SO.

Sergeant [REDACTED] was asked if there would be any sort of exigent circumstances or sense of urgency for the officers not to alert an individual by using their flashing lights and not taking the time to call in the District Sergeant or call in for backup in the event they are worried the vehicle would take off on them. He replied it is a viable tactic however not a safe tactic and not recommended for two lone officers. In his conversation with his District Inspector, he was told to give both officers a three-month written warning for the incident which he did. He referred to it as a Negative Behavioural Event.

Sergeant [REDACTED] agreed he would classify the takedown as a "high-risk" takedown. This was a person believed to be in a stolen car. There would be urgency to arrest him and here would be an increased risk. He then clarified saying "high-risk" is not fair. He would call it "increased risk." High-risk would-be people that are known to be carrying firearms or have actively committed a violent crime with those firearms.

### **Cross Examination**

None

### **Testimony of Acting Superintendent [REDACTED]**

#### **Direct Examination**

Acting Superintendent [REDACTED] is a member of the Calgary Police Service currently assigned to the [REDACTED]. Prior to



that she was a [REDACTED] and at the time of this incident she was assigned to [REDACTED] as the Administrative Staff Sergeant.

Regarding this matter, on January 3<sup>rd</sup>, 2018, she was notified by Inspector [REDACTED], the [REDACTED], there was a concern from an individual by the name of SO. This information came down through upper management to Inspector [REDACTED]. She was asked to look into the matter and to determine what had occurred.

She contacted Acting Sergeant [REDACTED]; the supervisor of the officers involved with SO to see if he had any information. Acting [REDACTED] had left early that morning, but he did hear Constable [REDACTED] and Constable [REDACTED] on the radio saying they had a suspicious vehicle and that was the extent of the information he had. He mentioned the officers did reach out to him explaining they had an incident with SO and vehicle contact had been made however there was no damage. She was aware this matter stemmed from an incident in District 2 with a stolen vehicle.

Acting Superintendent [REDACTED] was asked what she knew about the District 2 stolen vehicle. She replied: *"All I know is that it was a 2 District stolen vehicle that had been driving around most of the night, and the police in 2 District couldn't locate or deal with it. I don't have anything further."* She got that information from Occurrence Reports on the incident.

After that, she spoke again with Acting [REDACTED] advising him they were going to need more information. She, Acting Sergeant [REDACTED] and Inspector [REDACTED] met to determine a course of action. They met with both officers who she stated were up-front, honest, and informed them what had occurred which was they thought the vehicle was the same vehicle from District 2 that was parked down on Riverfront Avenue. They could see a partial licence plate; they went into the lot and slipped into the back of the vehicle on the ice. The vehicle had a trailer hitch, and they thought there was no damage. The vehicle was occupied and running, and they brought the person out in a "high-risk" vehicle stop. He was handcuffed, placed on the ground, where it was possible his jacket could have been ripped, and then place in the back of their vehicle. The officers mentioned that is where they realized he was not involved in the District 2 stolen car.

Acting Superintendent [REDACTED] was then asked to describe what was entailed in a "high-risk" vehicle stop. Amongst other aspects, she described how the driver of the primary police car would "call-out" the occupants of the vehicle, usually the driver first. The police officer calling out the subject would stand outside of their police vehicle between the door and the car.

She was asked about the use of firearms. She replied the officers would have their firearms drawn at the ready position. She described the ready position as having the firearm out, not directly pointed, but in a position that if there was a need to react you would be able to raise it on that person.

Acting Superintendent [REDACTED] was asked about handcuffing and if you are dealing with a person suspected of evading police in a stolen car, was handcuffing normal protocol. She replied *"Yes. I would say that if they -- if they believe the suspect is involved in the theft of the vehicle, and then for their safety and the safety of that individual as well to cuff them, to search them, to put them -- at that time, they're still trying to figure out who that individual is, at that time."*<sup>9</sup>

She was also asked about taking the individual to the ground. She explained it can depend on the level of cooperation and the threat level. If a person is suspected of having a firearm, they may be proned out, handcuffed on the ground and searched. She was asked if an officer does not know what they have or know if the person is armed or what is in the vehicle, would it be reasonable to take them to the ground. She replied: *"If there's -- if there's a suspicion that there could be a firearm in that car or if it's upon them, a lot of times I could see that taking them to the ground to cuff them and have control of them, just to make sure for their safety, as well as the safety -- we don't know who else is -- I mean, he was a lone occupant at this time, but just making sure for the safety of the members that they're conducting a proper search and making sure they're safe at the time... I think at this time they didn't know exactly what they were -- who they were dealing with. They saw this as the offender from this vehicle."*<sup>10</sup>

Acting Superintendent [REDACTED] was asked what would officers normally do during the time a subject would be on the ground to when they would be released from the police vehicle. She explained, *"So usually -- so cuffing -- well, again, making sure the cuffs aren't too tight. Searching 'cause we always have to search him before we put him in the back of the car, letting them know what they're under arrest for, giving them their Charter and caution rights, figuring out what's going on. And then, again, in this case, I understand that this wasn't -- Mr. SO wasn't involved in this 2 District, and this was his vehicle, basically releasing him at that time. You'd want to release at your earliest."*<sup>11</sup>

She was asked about the meetings with Constable [REDACTED] and Constable [REDACTED]. She stated they admitted to what happened and were apologetic. At that time, Inspector [REDACTED] made the decision they should receive a Negative Behavioural Event. This was tasked to Acting Sergeant [REDACTED]

Acting Superintendent [REDACTED] was then asked about her meetings with SO. She arranged for SO to complete his collision report with Constable [REDACTED]. At that time SO completed a written statement for the collision report. After that she met with SO. SO expressed concern about the Occurrence Report containing any form of disclosure regarding his workplace. She showed SO a copy of the report. He did question what was in the report and she explained about the stolen vehicle from earlier in the evening that was similar to his vehicle. SO was advised Acting Sergeant [REDACTED] would be in

---

<sup>9</sup> Transcript. Page 257. L. 17-22

<sup>10</sup> Transcript. Pages 258-259. L. 16-24. L. 5-8

<sup>11</sup> Transcript. Pages 259-260 L. 26. L. 1-9.

touch to put him in touch with City Claims regarding the damage to his vehicle as well as the need for a receipt for his jacket. That concluded their meeting.

### **Cross Examination**

Mr. Shymka asked the witness to go to Tab 22 of the Joint Book of Documents. She identified the document as the authorization to reimburse SO for his damaged jacket. Acting Superintendent [REDACTED] was asked if she was assigned to deal with the matter on the understanding that it could be result in a formal investigation. She replied "yes." She was asked if she attempted to resolve the matter informally before it became a formal investigation. She said she did because there was no discussion of a formal investigation. She said when she spoke with SO she knew he wanted his jacket dealt with but she knew they needed to speak with the officers as well. She agreed that it was her understanding that the matter could result in a formal investigation.

Acting Superintendent [REDACTED] was then asked about the occurrence report submitted by the officers on the incident. She agreed the report had not been done when she first became involved. She also agreed the officers made extensive remarks on the call, and that they did go back and complete an occurrence report. The officers also made notes and contacted their Sergeant via BBM.

She was then asked about her testimony regarding high-risk vehicle stops. She agreed her testimony spoke of "ideal" tactics for a "high-risk" vehicle stop. She agreed there are times when a police officer finds themselves in a situation where an emergency is thrust upon them and they have to improvise. She stated every situation is different. She agreed sometimes there is only one car and they have to deal with the situation without a backup vehicle. She added if there is an opportunity to get a backup, then they would always try.

### **Defence Witnesses**

#### **Constable [REDACTED]**

#### **Direct Examination**

Constable [REDACTED] is a [REDACTED] member of the Calgary Police Service, currently assigned to the [REDACTED]. Prior to that, he worked uniform patrol in [REDACTED].

On January 3<sup>rd</sup>, 2018, he was working nightshift in [REDACTED] with his shift commencing at 7:00 pm, the evening before. On his team, he was the team's Acting Sergeant as the need arose. He was partnered with Constable [REDACTED]. He had been partnered with Constable [REDACTED] for approximately six years. He stated having worked together for so long, they had built up an excellent reputation within the district. Oftentimes if the District Sergeant or the Staff Sergeant needed a unit to help out on an operation, direct

patrol, or assist a specialty unit, they would come to Constable [REDACTED] and Constable [REDACTED].

Constable [REDACTED] was asked to describe how the incident with SO came about. He stated at approximately 4:50 a.m., on January 3<sup>rd</sup>, he and Constable [REDACTED] were patrolling the downtown core, travelling eastbound on Riverfront Ave. SE. He was driving and Constable [REDACTED] was the passenger and they were operating an unmarked [REDACTED]. As they entered the Riverfront area, they were specifically looking for stolen cars.

As they approached the 400 block of Riverfront Ave. SE they noticed a lone SUV running in the parking lot behind the Bookers Restaurant. He could see the vehicle's daytime running lights were lit, but the vehicle was dark to the rear. He stated it was odd to see a vehicle parked in that parking lot at that time of the morning. It was usually vacant overnight and he believed it was too early for the normal rush-hour crowd on the core.

Constable [REDACTED] was asked about his statement they were in that particular area looking for stolen cars. He replied: *"Yes, that's correct. Riverfront Avenue -- with its proximity to the Drop-In Centre, Centre of Hope homeless shelter, we have access to the C-Train, river pathways. It's known to have a lot of moving or parked or dumped stolen vehicles. We have located stolen vehicles in the past in that specific parking lot. In addition, that general area is known for having a high crime rate, street local -- street-level drug dealing, homeless camps, homeless shelters, things of that nature, and so throughout the general course of a shift, we would respond to a number of calls for service in that specific area on a normal day-to-day."*<sup>12</sup>

He agreed that the area was known for drug trafficking as well as stolen vehicles and added specifically that particular parking lot because it is usually quite dark and empty overnight, and easy for people to hide in there.

When they saw the parked and running SUV, they stopped their patrol car on Riverfront Avenue; Constable [REDACTED] rolled down his window to get a better look. They were approximately fifty to sixty feet away from the SUV, trying to make out the licence plate. They were stopped facing eastbound, just west of the entrance to the lot.

Constable [REDACTED] was asked to look at Exhibit 12 which he identified as the parking lot he was speaking of in his testimony. He agreed the parking lot was gravel, which goes from the sidewalk entrance to some asphalt then into the gravel lot. He described a large lip at the entrance and an embankment, then a sudden drop off into the lot. He stated that in the wintertime, the lot is usually snow and ice covered, not ploughed, or maintained.

---

<sup>12</sup> Transcript. Page 301-302. L. 17-24, L. 1-2

He was asked to indicate on Exhibit 12 where the SUV was parked. He stated on the photo the SUV would have been where there was a silver SUV in line with the 'E' on the 'Google Map, (Exhibit 12)' facing south, nosed in towards the building. He agreed that the vehicle would have been directly in front of someone entering the parking lot.

Constable [REDACTED] was then asked to look at Exhibit 13. He identified the photo as one he took and provided to his Counsel. The photo was taken in January or February 2021. He agreed the photo was consistent with how the parking lot looked like the night in question.

He was asked what the surface condition of the lot was that night. He replied it was less snow covered and more ice. The lot was covered in a layer of ice.

Constable [REDACTED] was then asked to look at Exhibit 24. He agreed the air temperature was between minus 5 and minus 10 degrees Celsius with a windchill of around minus 10 degrees Celsius. He also agreed it was mostly cloudy. He was asked what the lighting conditions were. He replied it was dark, and within the lot there were no streetlights.

He continued his testimony stating they saw the lone SUV in the lot which he believed to be running. He could make out it was a Mitsubishi SUV but could not confirm the model. To him it appeared to be grey in colour and from their vantage point he could make out three of the seven digits on the Alberta licence plate. Those were a [REDACTED] and two [REDACTED]s. He could not make out any other letters. Seeing what they did, he stated it triggered to both him and his partner the vehicle was a match for a previously reported stolen vehicle that had been the subject of a lengthy "police-follow" earlier in the night. They had heard some of the radio broadcast throughout the night and they brought up the Broadcast Message (BMQ) on their CAD which had the details of the stolen vehicle. It described the make, colour and the digits on the stolen plate.

From the radio transmissions and the BMQ they knew the stolen vehicle was a Mitsubishi SUV and the licence plate was [REDACTED]. Multiple resources had been put onto the call due to the length of the follow; this included HAWCS (police helicopter). Several traffic stops had been attempted and on each of those attempts, the stolen vehicle fled.

He stated: *"Given the area, given the time frame, the location, and my prior experience working in that area. And more specific to the vehicle itself, it triggered a reaction in me because I know that criminals use stolen vehicles to move, to commit other crimes. So for me a stolen vehicle is a crime vehicle, and criminals use stolen vehicles as their platform to get around."*<sup>13</sup>

He again agreed he could only make out a partial licence plate and when asked if he could make out the colour of the vehicle, he replied he could confirm the vehicle was a

---

<sup>13</sup> Transcript. Page 314. L.12-19

Mitsubishi SUV. He was not certain of the specific model. From listening to the prior radio transmissions, he had heard it called as either an [REDACTED] or [REDACTED]. He stated at this point he did not know which model the stolen vehicle was. From his vantage point, he stated the vehicle looked grey in colour.

It was put to him the vehicle was actually blue and he was asked to explain that. He stated: *"I can explain that to me it looked grey due to the darkness of the lot, and the vehicle itself was dirty, so it had that kind of winter road grime, salt spray along the paint."*<sup>14</sup>

He was asked if the BMQ provided the model of the Mitsubishi. He stated he could not recall what the BMQ said. What he did remember was from listening to the radio and hearing it aired as either an [REDACTED] or [REDACTED]. He was asked if at the time he was familiar with the difference between the two models. He stated only that he knew one was more of a compact SUV and the other was a more fuller size. He did not know which was which.

Constable [REDACTED] was asked if he came to any conclusions. He replied: *"Yeah, that it was a possible match for this stolen Mitsubishi."*<sup>15</sup>

He was asked what they did next. He stated they decided to enter the parking lot with the goal to obtain the full licence plate on the parked and running Mitsubishi. When he was asked about the purpose for that he stated, the first step was to verify what they were looking at, whether or not it was the stolen vehicle. He agreed up to that point his belief was that it was a possible match. He stated if it had been one in the same, then they would take steps to deal with it after that. He was asked what those steps would be. He stated: *"So had we entered the lot and verified that it was the same stolen Mitsubishi, we would have exited the lot, radioed it into dispatch, let the district sergeant know that, Hey, we've just located the stolen vehicle that's been evading us all night. This is its location, and taken direction from there from the district sergeant."*<sup>16</sup>

He added, given their unmarked capabilities, he would have driven out of the lot and found a place out of view of the subject vehicle. Should it leave the lot, he would call it away.

He was asked about eliminating it as the stolen vehicle. He stated if it were eliminated, they could just leave, or given that it was still suspicious in nature due to where it was parked, the time and location, they could have conducted a normal traffic stop to verify the driver was authorized to have the vehicle.

Asked what they did next he stated from their stopped position, they slowly entered the parking lot accelerating to get over the snow, the lip, and the embankment. He coasted

---

<sup>14</sup> Transcript. Page 316. L. 1-4

<sup>15</sup> Transcript. Page 317. L. 24-25

<sup>16</sup> Transcript. Page 319. L. 11-17

for a couple of feet and applied the brakes. He stated at that point the brakes immediately locked up on the ice and he began to slide down the decline. He stated: *"This all happened very quickly. The distance itself from, I'd say, when I started sliding to the -- approaching a stopped subject vehicle was maybe 10 to 20 feet, so I'd estimate I slid on the -- on the ice 10 to 20 feet. It happened -- it caught me off guard, so basically I just hit the brake as hard as I could. I -- I didn't even think to try and steer out of it or, you know, allow the ABS to work, whatever. It just locked up, and it was all I could do to just try and stop it in time from hitting the -- from -- preventing and not hitting that subject vehicle."*<sup>17</sup>

He was not able to stop in time and made contact with the other vehicle. The front end of the patrol car hit squarely on the rear portion of the SUV.

Asked what happened next he stated, due to his assumption the vehicle was stolen and they had lost the opportunity to get the licence plate he transitioned feeling it was now an emergency. He did not know who was in the vehicle or what they were dealing with. His first thought was to get out of the patrol car and challenge thinking still, this was a stolen vehicle. He needed to deal with whatever threat could present itself and as well, the thought of officer safety for his partner and himself.

He was asked why a stolen vehicle pose a threat. He testified to his knowledge of how stolen vehicles are often used a crime-vehicles with Constable [REDACTED] providing detail (to be spoken to in analysis).

Constable [REDACTED] agreed when he was asked if this was a dangerous situation. When he was asked why, he said this was an emergency he replied, things had transitioned from obtaining a licence plate after they had the accidental contact. He needed to ensure the situation remained under control in terms of officer safety.

Constable [REDACTED] was asked if when they decided to go into the parking lot to get the plate, was he able to see if the vehicle was occupied. He replied he could not confirm if there were any occupants. He did not see anyone in the vehicle. He was asked what he was able to observe on his "slide approach in." He stated while his brakes were locked up he was not taking anything in. He was not able to look because he was focused on trying to stop his car. Upon making contact he stated it did not even register the SUV was blue. Once he came to a stop he could see through the rear hatch window that there was an occupant in the driver's seat. He could not tell if there were any other occupants.

He agreed once he hit the other vehicle he had decided to get out of his vehicle. He stated it was now an emergency and he was worried there could be a potential threat inside the vehicle. He was asked why he would not stay in his vehicle. He replied stating: *"To stay in the car, one, it's uncomfortable if you -- you feel you have a threat in front of you. If someone had indeed come out armed with a gun, a knife, come running*

---

<sup>17</sup> Transcript. Page 320-321. L. 24-26, L. 1-8.

*to our car, if I'm sitting inside, I would have no time to react. To me I would be more comfortable dealing with a problem or assailant from a standing position outside my car.*<sup>18</sup>

From there he stated he opened his door and positioned himself between the open door and the patrol car using the A-frame pillar as cover. He drew his service firearm to the ready and he began yelling out of the vehicle, "Police. Get out of the car. You're under arrest."

He was asked to describe what the "ready" position was. He stated the ready position is basically drawn from the holster and pointed to the ground. Not up on the target of any person but drawn to the ready so if the need be the gun could be raised and put on target. He described it as a two-handed grip with a 45-degree angle downwards.

He was asked what his partner was doing at this time. He replied his partner exited the passenger side door also drawing his firearm to the ready to cover off the passenger side of the SUV. He would have been looking for any threats coming out of the vehicle and watching for any activity inside the vehicle.

Asked what happened next, Constable [REDACTED] stated the driver door opened and a male subject began to exit. He gave this person verbal direction to keep his hands up and to get to the ground on his stomach. The male complied with the direction and got down to the ground to the side of his vehicle. Constable [REDACTED] maintained cover on the subject as well as kept watching the SUV as it had yet to be cleared.

Constable [REDACTED] was asked how the subject got to the ground and into what position. He replied he could not recall how he got down other than he thought he was holding a phone and some keys. He stated he basically got down and splayed his arms out. He was facing south, away from Constable [REDACTED]

Once the subject was prone on the ground, Constable [REDACTED] went up to the passenger side of the SUV to clear it. Constable [REDACTED] alerted Constable [REDACTED] the vehicle was clear, and he waited for Constable [REDACTED] to come around the back of the police car to join him all the while keeping his focus on the male. They decided he would maintain cover while Constable [REDACTED] would go up and handcuff the male. He added, as Constable [REDACTED] moved up on foot, he did so as well in the cover role.

He was asked how his partner took control of the subject. He stated Constable [REDACTED] took physical control by grabbing a wrist and arm, placing it behind the subject's back and applying the handcuffs. He was asked from what position did his partner handcuff the subject. He stated his partner would have been to the side of the subject so he could access the arms and hands and wrists, to apply the handcuffs. He said Constable [REDACTED] probably would have been kneeling on the ground with one knee in a crouched position to reach over on top of the subject. When asked why he said probably, he stated he did not remember exactly but the subject was compliant so their

---

<sup>18</sup> Transcript. Page 325. L. 14-20



method would be slow and deliberate and no rush to their actions at all. He stated it was done in the usual way without any resistance.

He was asked about any force used by his partner to handcuff the subject. He stated it would have been minimal, only to move the arms behind the subject's back and to maintain a grip to apply the handcuffs.

He was told he heard it described as the subject being jumped on and asked did that happen. He replied, "*no, it did not.*"

Constable [REDACTED] was asked about any thoughts he had at that time. He replied: "*My first thought was I was surprised by the level of cooperation, the compliance the subject showed. My experience, if it is actually a stolen vehicle, the occupants, offenders are not so willing to cooperate, whether it be following verbal direction, getting out of the vehicle, obeying commands. So this felt different in -- in terms of it was going very smoothly, and there was no resistance.*"<sup>19</sup>

He was asked what happened after the subject was handcuffed. He stated at this point the subject is in custody. He holstered his weapon and Constable [REDACTED] conducted a quick pat down search while the subject was still on the ground. He went to assist getting the subject up off the ground. He stated he recalled Constable [REDACTED] giving the subject direction to assist in getting up telling him what they were going to do. "*So, Okay. We're going to try and help pick you up. We'll sit you on your butt. We'll get you to bend the knee so that we can help you up, basically, as easily as possible. So to do that, I interlocked my arms kind of underneath the subject's one side, and Constable [REDACTED] would have done the same on the other side of the subject.*"<sup>20</sup> They then lifted the subject up from the ground.

He was asked about the allegation that what happened was his partner took it upon himself to grab him by the scruff or hood of his jacket and drag or pull him up and what he had to say about that. He replied: "*I say no. I say I know it did not happen, and it wouldn't make sense for us to try and lift someone that way because it would be a lot more difficult. The way we do it is the way we're trained, and it's easiest on our backs to -- to lift someone up the proper way versus trying to pull someone up just with their jacket.*"<sup>21</sup>

He added, downtown they pick up people all day and to use proper form and technique, hooking underneath someone's arms versus trying to drag them up from their coat, it does not work well. The combined effort makes it easier. He agreed that is what happened, a combined effort consistent with their training.

---

<sup>19</sup> Transcript. Page 335-336. L. 20-26. L. 1.

<sup>20</sup> Transcript. Page 336-337. L. 25-26. L. 1-9.

<sup>21</sup> Transcript. Page 337-338. L. 24-26. L. 1-4.

He was asked happened next, after the person was standing. He stated they walked him back to the police car where Constable [REDACTED] administered another quick pat down. Constable [REDACTED] stated while at the back of the police car he told the subject he was under arrest for possession of a stolen vehicle. He was then placed in the back of the patrol car.

From there he moved up to get the licence plate from the SUV which he wrote in his notebook. He went back to the patrol car where he ran the plate on CPIC. He stated, at that time his partner went up to the SUV to retrieve the subject's identification which he had stated was inside the front passenger seat.

Constable [REDACTED] was asked when did the subject indicate something about his identification. He replied that during his initial interaction when he first came out of the vehicle and as he was giving commands, he did yell out some kind of statement of a badge but he could not say who he worked for. He stated he believed this occurred while he was proning out the subject.

While in the back seat, he believed the subject mentioned to Constable [REDACTED], the specific location of his wallet, ID, and the badge. He stated, as he went and got the licence plate and sat back down in their patrol car, he observed Constable [REDACTED] go up to the subject vehicle and come back shortly thereafter with identification of the subject. He was asked he thought when he said he had a badge. He replied he was surprised. He thought he was in some kind of law enforcement, a fellow member of the Calgary Police Service or some other law enforcement. When his partner came back to their car, he had an Alberta drivers' licence and a badge.

Constable [REDACTED] stated: *"I had already run the licence plate of this Mitsubishi. The licence plate was [REDACTED] Alberta. Inquiries had come back that it was negative on our system. It was not stolen. We then ran the name on the Alberta driver's licence, which checked out and appeared to be related to the registered owner of this vehicle. At this time we were able to confirm that it was not the stolen vehicle we were looking for and it was not stolen at all. My very next step was to get out and get the subject out of our police car, out of handcuffs, and out of police custody."*<sup>22</sup>

He was asked if they then released the subject. He stated they did right away. They took him out of the police car and took the handcuffs off.

Constable [REDACTED] was asked to estimate the amount of time from when he started shouting to the subject, to the time he was released from handcuffs. He stated, "two to four minutes." He agreed that in the course of that, he told the subject he was under arrest.

He was asked if he read SO his *Charter* rights to counsel. He stated he did not. He was asked to explain why not. He replied: *"Yes. My priority was to verify his information."*

---

<sup>22</sup> Transcript. Page 343. L. 13-25

*Whether or not the vehicle that we had in front of us was indeed stolen or not, and once we had that information, it checked out right way, and so my next focus was to release him for our custody.”*<sup>23</sup>

He agreed he released him from custody rather than continue to detain him and read him his *Charter* rights. He stated once he determined the vehicle was not stolen and that his identification checked out, his investigation was over.

Constable [REDACTED] was asked what happened next. He stated after the subject (SO) was released from custody, he got back into the patrol car and reversed away from the other vehicle. He got back out and looked at both vehicles for any potential damage. Using his flashlight, he crouched down looking at the bumper, he noted a trailer hitch on SO's vehicle sticking out four to six inches. He stated: *“I use my hand, my glove to kind of wipe away some of, like, the dirt and the snow, salt that's on the paint to look for any scratches, paint transfer, dents. I did not see any. I did the same examination on the front of my patrol car. Now, this [REDACTED] we were driving, it was unmarked. It did not have a push bumper, so I examined the front bumper. There's a large -- there's two large portions of honeycomb grille, like, plastic honeycomb grille on those [REDACTED]. There was no cracks. There was no missing pieces of the grille. No damage that I could visibly see.”*<sup>24</sup> He believed his vehicle struck the bumper or the hitch itself.

He went on stating after examining the vehicle, SO made a comment that his jacket was broken. He indicated the zipper was pinched. He looked at the jacket and could not see any damage to the jacket. Constable [REDACTED] stated he was present when Constable [REDACTED] provided their details to SO. He provided their names, their regimentals, their call sign as well the occurrence number/incident number and a contact email address. Following that, SO walked away with two of his colleagues. He and Constable [REDACTED] returned to their car to write their notes, as well as a synopsis within the CAD call. They stayed in the lot for approximately 20 minutes.

Constable [REDACTED] was asked if he had any conversations with the people who had joined SO. He stated not to his recollection. He was asked about the testimony of CL who described his demeanor as “tense, unusually tense.” He was asked what he could say about his demeanor or treatment of SO. He stated: *“I can tell you that out treatment of SO was completely professional.”*

He was asked about SO's complaint that he did not apologize to him. He replied he was present when Constable [REDACTED] apologized to SO.

Constable [REDACTED] was asked if they called in the incident. He replied they did after they confirmed SO's identity and things slowed down a bit. They called in to get an incident number which was later given to SO.

---

<sup>23</sup> Transcript. Page 346. L. 19-23.

<sup>24</sup> Transcript. Pages 347-348. L.24-26. L. 1-10.

He was asked if they advised dispatch or their supervisor there had been contact. He replied not at that time. He stated at the completion of their shift, he notified his Team Sergeant, Sergeant [REDACTED] that they had been involved in an incident and that a vehicle contact had occurred.

He agreed he received counselling with respect to not notifying his sergeant at the time of the contact. He stated it would have been preferable to have notified the District Sergeant at the time or the Traffic Sergeant if available. He was asked if SO asked for a collision report to be done or did he complain about the damage at the time. Constable [REDACTED] replied SO never commented on the vehicle portion of the incident. He never asked for a supervisor to attend and he never asked for paperwork or a damage sticker or anything to do with the vehicle.

He was asked about the counselling he received for their tactics. He stated they had a debriefing after the fact where they discussed what other options were available prior to them entering the parking lot. This included notifying dispatch about the suspicious vehicle and that they were going to try and get the licence plate.

Constable [REDACTED] was then asked about the allegation that he pointed his gun at SO and did he. He replied he did not and he did not see his partner point a gun at him.

He was then asked if he searched SO's vehicle as he alleged. He replied he did not. He stated his partner very briefly entered the vehicle to retrieve SO's wallet, badge, as indicated by him. He did not see him searching the vehicle. He was asked what he thought of his partner doing that. He replied it was the normal course of duty. They needed to identify him and they needed a driver's licence. SO told them he had a badge and it was pertinent to them to find out who he was and who he claimed to be. He was then asked about SO's allegation they racially profiled him. He stated he disagreed and they absolutely did not. He was asked if he made any observations about anything in his vehicle or of him in terms of his racial background. He replied he did not, nothing. He was asked if he was aware of his race at any time. He stated he was not and he was never aware of his background from his brief interaction with him and he never told him what his background was.

Constable [REDACTED] was asked why he did not contact the Traffic Unit at the time. He replied he did not think about it. He was caught up with what had taken place. He knew there was no visible damage to either vehicle. He also knew that at the time, the Traffic Sergeant most likely would have been off. It would have been a call out situation.

### **Cross Examination**

Constable [REDACTED] agreed it was his evidence, when he and his partner stopped on Riverfront Avenue, they could only make out three of the number on the licence plate of the SUV. He agreed that was due to the darkness and the distance and that they were about 50-60 feet away. He was asked to look at Exhibit 16 and asked if the licence plate in the photo was [REDACTED]. He agreed it was. He was asked rather than seeing three

consecutive numbers in a row, how was it he saw the first number, the third last, and the last number, but not the ones in-between. He replied he could not really explain other than that is what he could pick out.

He was directed to Exhibit 9, and he agreed the licence plate on the stolen Mitsubishi was [REDACTED]. He was asked if when he recognized the [REDACTED] and two [REDACTED]'s, was that based on what he heard on the radio transmission throughout the night or was he looking at the CAD. He replied it was a combination of both. He was asked if he recalled the testimony of SO who stated he could see the computer screen and that in his words that he had the wrong car. He stated he recalled the statement but he did not know what if anything he could see. He stated it was their common practice if someone were in the backseat, they would try to not allow them to see the CAD because of the sensitive information. He said their general practice was to angle the screen so whoever was in the back would not be able to see it. If they both exited the vehicle, they would close the CAD.

Constable [REDACTED] was asked if after SO was placed in the backseat, did he immediately enter the front seat and sit down. He said he essentially did. His first thing was to get the licence plate while at his front door; he wrote it down then sat down.

He was asked about his familiarity with the parking lot and the very steep decline once you enter. He replied he was, but he was caught off guard with the iciness that morning. He was asked if the car sped up at any time between getting over the entrance lip and hitting his bumper. He replied *"potentially."*

Constable [REDACTED] was asked about his testimony that he started yelling "you're under arrest" after his car made contact and he opened his door. He replied "yes." He was asked if he was still inside his vehicle or had he stepped out. He stated he stepped out. He explained he was in a standing position with the door open but not away from the door. *"Still within the confines, I guess, of that open door and the police vehicle so that if need be I could use the -- that A-frame pillar as cover."* He was asked if that was part of his training to which he replied it was if challenging a vehicle.

He was asked about the commands he issued. He replied *"Police. Get out. You're under arrest."* He was asked if there was a response. He stated when he exited, other than the comments about his badge nothing else was said by SO. Constable [REDACTED] was asked where he was when SO exited the car. He replied he was in the same spot. He agreed he was still behind his car door and he had his gun at the ready.

He was asked how that worked. He replied: *"So I was probably, I guess, a little bit of distance from the door itself, but having that -- that portion where the window comes down and the frame, I could have my arms outstretched and my gun at the ready pointing to the ground, but that would have been, like, pointing, like, kind of parallel with my front tire."*<sup>25</sup>

---

<sup>25</sup> Transcript. Page 369. L. 18-23

He was asked if he had to shoot from that position, would he shoot through the window. He replied "*no.*" He stated raising his arms up it would be over the height of the door window. He stated preferably he would use the gap between the door and where the frame was. Every vehicle was different so with an SUV or a truck it might not work. On a [REDACTED] which is low he believed he would have enough height to reach over the window.

Constable [REDACTED] was asked about his firearms training and high risk stops. He was asked where he was trained to point his firearm. He replied: "*at the ready.*" He added "*whether it's a vehicle challenge or you're challenging just a person out on the street, you always have your firearm at the ready if it's out of the holster.*" He was asked if there was any other position he was trained to hold the gun in. He replied: "*No, not unless you're going up on target. I'd say there is no other position.*"

He was then asked about the training for going up on target. He stated that training would be the moment where you might have to fire your weapon. You would have to be up on target to use your sights, fully trained on whatever target you have acquired. He was asked if this would be where there is an imminent threat. He replied: "*Imminent threat, so, yes, you're about to be shot or stabbed or they've -- your subject has displayed a weapon against you. Yes.*"

He was asked where he was trained to point his firearm when it is on target. He replied, "*Ideally it is center of mass.*" He was asked if there is any training that teaches pointing at someone's head or face. He stated "*no*", only if that is the only option available to you.

Constable [REDACTED] was asked about the second time he told SO he was under arrest. He replied: "*The second time would have been -- I feel like I would have said it at least twice. So, if he was still in the vehicle, I would have issued that challenge. When he got out, I would have repeated it to ensure he heard me. And then when we finally had him in custody and handcuffs, prior to us placing him in the back seat of our patrol car, I did repeat, You're under arrest for possession of a stolen vehicle. Please be patient while we investigate further.*"<sup>26</sup>

Constable [REDACTED] agreed he assisted SO to stand up after he was handcuffed. He was asked how he was taken to the police car. He stated they escorted him back. They were both hold an arm; "*the kind of slippery surface.*"

He was asked if anyone with their hands tied behind their back could get enough momentum to stand up on their own. He replied saying unassisted it would be very difficult.

---

<sup>26</sup> Transcript. Page 372. L. 8-16

He was asked about SO's broken zipper and that in his testimony he stated he did not notice it. He agreed he did not. He was asked if it was possible his jacket broke at that time. He agreed it was possible but it was not their intention.

Constable [REDACTED] was then referred to the Calgary Police Service Arrest and Detention policy. He was advised that he can suspend reading someone their *Charter* and Caution if there are officer safety concerns. He was asked if he had any officer safety concerns when SO was in the back handcuffed. He replied, "*no.*" He agreed this was not a brief traffic stop, a Check Stop or a brief detention to enforce a municipal bylaw.

He was asked if he had time to look at CPIC, was there a reason why he did not *Charter* and Caution SO. He replied: "*Because I wanted to verify what I was dealing with. I wanted to know if, in fact, this was a stolen vehicle, and I wanted to have his identification. I thought that if I could release him sooner by confirming those two things, then that would be better than going through a Charter.*"<sup>27</sup>

He was asked if he was saying he was still in the investigative stage. He replied: "*100 percent, yes.*" He was asked if he felt at that point he had reasonable and probable grounds to arrest SO. He replied he did. He was asked what that was based on. He stated: "*That was based on going back to the time of night, the location that I -- we had located this vehicle, the -- my prior knowledge of what I was looking for in terms of this possible match to the 2 District stolen vehicle, the vicinity that it was parked in, and then combined knowing that it was a Mitsubishi, it looked grey, and the partial match of the plate gave me those grounds.*"<sup>28</sup> He agreed it would be fair to say he was hyper-focused on the SUV as a suspicious vehicle and that it gave him a little bit of tunnel vision.

Referring to when he slid in the SUV, he was asked how strong the impact was on a scale of 1 to 10. He replied it was a 3 to 4. There was noticeable contact. He was asked in the impact affected either him or Constable [REDACTED]. He replied "*No.*"

He was asked if when they stopped, could he not see the licence plate of SO's car. He replied he could have seen it but his attention was drawn away to deal with any potential threat and to keep his eyes up.

Constable [REDACTED] was then asked about SO's claim that Constable [REDACTED] had his knee on SO's back. He stated he recalled that statement and said "*I can tell you that Constable [REDACTED] did not have his knee or any body weight on Mr. SO.*"<sup>29</sup> He was asked if he was sure of that or did he just not see it. He stated, "*No. I would have observed it because I was watching -- as the cover officer, I was watching the handcuff procedure and --.*"<sup>30</sup>

---

<sup>27</sup> Transcript. Page. 377. L. 19-24

<sup>28</sup> Transcript. Page 378. L. 6-13

<sup>29</sup> Transcript. Page 379. L 22-24

<sup>30</sup> Transcript. Page 380. L. 1-3

He was asked if it was a control tactic to put a knee on a person's back for someone who has been taken down or proned out. He stated it is something that can be used if maybe you were handcuffing someone and they were uncooperative, resisting or fighting. It would be more like applying a body weight, not just a knee.

He was asked if he were saying that would only be applied when somebody was resisting. He replied saying "yes, *that would make sense.*" He agreed he testified that SO was completely compliant.

Cst [REDACTED] was asked about SO's testimony that both he and Constable [REDACTED] were actually inside his vehicle. He was asked if he ever went inside SO's vehicle. He stated he never went inside. He was getting the licence plate and running the check while Constable [REDACTED] went up and got SO's wallet and ID. He could not say which door Constable [REDACTED] entered, but he knew he was reaching in the front passenger seat. He was asked how long Constable [REDACTED] was in SO's vehicle and he replied "*seconds.*" He agreed Constable [REDACTED] came immediately back to the police car. He was asked if he brought anything with him. He replied he had SO's driver's licence and badge.

#### **Re-Direct**

Constable [REDACTED] was again directed to the Arrest and Detention policy. He was shown the 'court recognized exceptions' that he acknowledged did not apply. It was put to him he was saying his reason he did not *Charter* and Caution was he released him as a priority over *Chartering* and Cautioning. He replied: "*That's correct. My priority was to identify the vehicle, whether or not it was stolen; obtain his identification, going along with the fact that I was concerned that this might not be the right vehicle after he had voiced that he had had a badge.*" <sup>31</sup>

He agreed the idea was to release him if he could, ahead of continuing his detention for possession of a stolen vehicle. He agreed at the time he first arrested SO, he intended to continue his investigation. There was no further investigation he could do before the point of arrest.

Constable [REDACTED] was then asked about his vehicle speeding up and whether it was due to acceleration or due to the ice. He replied it was due to the ice and sliding. He did not deliberately speed up.

He was asked what the purpose of running the licence plate on SO's vehicle was. He replied it was to confirm whether or not it was stolen or if a plate swap had occurred. He was asked to explain a plate swap. He stated: "*So plate swap is where someone steals a vehicle, and they generally would find a similar vehicle and take that licence plate and put it on the one they've stolen so that should police unit run that plate, it would at first glance come back as the same vehicle and not stolen.*" <sup>32</sup>

---

<sup>31</sup> Transcript. Page 387. L. 4-8.

<sup>32</sup> Transcript. Page 390. L16-21



## Questions from the Presiding Officer

Constable [REDACTED] was asked if SO complained of any injury. He replied, "no." He was also asked about SO's testimony about being pushed against his car forcibly. He replied: *"Not true. Once we had escorted him or assisted him up to a standing position, we walked him back to our car. We never stopped or pushed him up against his vehicle. It was straight back to our police car. Constable [REDACTED] conducted that secondary pat down, and he was right into our back seat."*<sup>33</sup>

He agreed when they entered the parking lot it was their intention to gather more information from the vehicle and exit. It was not their intention to do a traffic stop. He was asked how he would characterize it if it was not a traffic stop. He stated: *"It ended up being a stop. It was -- it wasn't our goal. It wasn't preplanned. The Number 1 goal was to initially just get the licence plate and then act from that point. This turned into exigent circumstances that we felt we had to deal with because it could have been a stolen vehicle, and by dealing with it the way we did, we erred on the side of caution."*<sup>34</sup>

He was then asked about activating their emergency equipment. He replied: *"So had it been a normal traffic stop under normal circumstances, it would be very easy and common to flick on the lights and activate light, siren, emergency equipment; however, due to sliding into the rear of the subject vehicle, it didn't even register to reach over and flip the lights. I was caught in the moment, and my first thought was to get out."*<sup>35</sup>

He was asked if it would have been his intention to activate the equipment with the original intention of doing a drive through. He replied it would not have been. Their original intention was to use their unmarked capabilities to enter the lot, get the full licence plate and then retreat back to the roadway.

He was then asked if he ever approached SO's driver's door prior to him exiting and proning on the ground. He replied "no."

He was then asked if it was his normal practice to give *Charter* and *Caution* at the same time he would advise someone they are under arrest or being detained. He replied: *"It's dependent, Sir."* He was asked what his exceptions were. He replied: *"Exceptions would be -- to come to a point in the investigation where I was confident to Charter and caution someone. So I knew -- if I knew that an offence had been committed and I had the right person in custody and I knew their ID and it was safe to do so, then I would Charter and caution."*<sup>36</sup>

---

<sup>33</sup> Transcript. Page 393. L. 17-22

<sup>34</sup> Transcript. Page 394. L. 6-12

<sup>35</sup> Transcript. Page 394. L. 15-21

<sup>36</sup> Transcript. Page 395. L. 15-21

It was put to Constable [REDACTED] there is a difference between detention and arrest and he chose to arrest as opposed to detention for investigative purposes. He agreed.

He stated he felt he had reasonable and probable grounds to arrest with the information he had. He was asked if he would agree that arrest is the next step in the process past detention. He agreed. It was put to him that it was required by policy and law to *Charter* and Caution somebody upon detention. He stated he would agree with that.

### **Re-Direct**

Constable [REDACTED] was asked if SO was pushed at their vehicle. He replied SO was not pushed. He was walked over. He was not forced up against the vehicle. There was no application of any force to force him to do anything. It was a standing position, pat-down search.

He agreed it was not their intention to do a traffic stop when they entered the parking lot. He was asked if it was their intention to a high-risk or increased risk stop. He replied, “no, not at all.” He also agreed it was not their intention to do a ‘felony-stop.’

He agreed it was their intention to obtain the licence plate using their unmarked capabilities. He stated it would give them the element of surprise or not being detected. He agreed turning on the emergency lights would defeat that purpose.

### **Testimony of Constable [REDACTED]**

#### **Direct Examination**

Constable [REDACTED] is a nine-year member of the Calgary Police Service. He spent seven years working uniform patrol in [REDACTED], and for the past two years he has been a member of the [REDACTED].

He was partnered with Constable [REDACTED] for approximately six years. He was asked to describe the partnership. He stated it was a really good dynamic. Constable [REDACTED] was the strong silent type and he was the talker. He stated it worked really well. They knew what each other was doing.

On January 3<sup>rd</sup>, 2018, at approximately 4:50 a.m., he was working patrol driving eastbound on Riverfront Avenue SE, just past 3<sup>rd</sup> St. He described the area as a high-drug, high-crime area. Stolen autos come in and out of the area selling drugs to the homeless population community.

At the time, he was the passenger and Constable [REDACTED] was driving. He spotted a suspicious vehicle parked in the parking lot of the abandoned antique warehouse. The vehicle was running and darked out. It was the only vehicle in the lot. He stated he had never seen a vehicle parked in that lot that time of night. He then realized the vehicle matched the description of a stolen vehicle from earlier in the evening that was baiting

police and seen earlier driving down Riverfront Avenue. He said he noted the vehicle was a Mitsubishi SUV and it appeared grey in colour. The stolen vehicle was also a Mitsubishi SUV grey in colour. He could not see any occupants.

He told his partner the vehicle was a match to the stolen vehicle. Constable [REDACTED] stopped the police car on Riverfront Avenue in the middle of the road. Constable [REDACTED] rolled down his window, pulled up the BMQ on the stolen vehicle trying to confirm the licence plate. He stated he was able to match a few of the digits, but it was dark and he could not make out the entire plate. Using his notes, he advised the plate on the stolen car was [REDACTED]. Looking at the suspicious vehicle, he matched the ' [REDACTED]' and the two [REDACTED], and when he was looking at it he told his partner the ' [REDACTED]' and the [REDACTED], he wasn't able to tell the difference between the two.

He was asked to describe the lay of the land; what he was looking at. He stated the vehicle was parked nosed in. There is a parking spot right at the building approximately 20 meters from where they were. The lot looked snowy but at the time it was dark and he could not see all the way down. There was a slope down into the lot and there was no artificial lighting inside the parking lot.

He was asked what he was thinking and what he was now doing. He stated he told his partner that he had matched a few digits and it was a possible for the plate but he could not confirm because of how dark it was. He told his partner they should go in and try to confirm the plate. They entered the parking lot, and once they did he realized how steep the slope was and the lot was sheer ice. The car started sliding and he could hear the brakes grinding and locking up. They were sliding right to the back of the suspicious vehicle which they then contacted. When they contacted the vehicle, he could see the silhouette of the driver reaching down into the middle of the vehicle towards the console. He became worried the guy was grabbing a weapon. He stated at this point they had exigent circumstances; their element of surprise was gone as were their options. The exigent circumstance was bringing danger to his partner and himself. He quickly opened his car door, jumped out of the vehicle *"so he wasn't a sitting duck in this vehicle just sitting there"* and he drew his firearm to the ready. He stated: *"At this point, we were so close to the vehicle that if somebody jumped out of that vehicle with a gun shooting at us or running at me with a knife, I would have had very little time to react, and, for me, having my firearm out was a way I could protect myself and protect my partner."*<sup>37</sup>

He stated while he was standing behind his passenger door, his partner challenged the driver. His partner had jumped out at the same time and was outside the vehicle at the driver's side. As his partner challenged the driver, his focus was on the passenger side of the vehicle. He heard his partner direct the driver to the ground. He glanced over and saw the driver lying on his stomach with his arms out. Once he saw this, he left from behind his door and cautiously approached the suspicious vehicle. He cleared the vehicle and advised his partner. He holstered his firearm, walked around his car to

---

<sup>37</sup> Transcript. Page 415. L. 13-18

where his partner was standing at the driver's door. They approached the driver together and once he got to the driver, he told him he was going to put handcuffs on him and to put his hands behind his back.

He was asked why he holstered his firearm. He stated because he was going hands-on to handcuff the subject. He stated it is not proper training to walk up with one hand on his handcuffs and the other on his gun. It allowed him to have the ability to take the driver's hands and place handcuffs on him. At the same time, his partner was covering him. He was asked if he assumed he was covering him with a firearm. He replied he would assume yes. He was asked if he ever pointed his firearm at the person in the vehicle. He replied "*never.*" He was asked if he saw his partner point his firearm at SO. He replied he did see his partner with his firearm out. He agreed he assumed his partner was doing the same as he was.

He was asked about his training with respect to the ready position was. He stated: "*So ready position is you have your firearm out at a 45-degree angle pointed in a direction that if a negligent discharge should occur, there would be no harm, or you wouldn't hurt -- you wouldn't accidentally hit anybody, or your firearm wouldn't go off and hurt anybody. So for -- for me, my ready is the 45, pointed at the ground, and then if a threat occurs, you're able to raise it and put it on target.*" <sup>38</sup>

He was asked when he puts his firearm on target, what was his training with respect to where he would aim. He replied, "*Center Mass.*" He was asked if he would aim at the head. He replied stating center mass is where we would aim.

He was asked if he knew what the challenge his partner used. He stated he did not recall what the challenge was. He stated at this time his focus was on the side of the vehicle but he was aware his partner was challenging the driver. He did hear him directing him the ground.

He was asked in what circumstance is that type of challenged issued. He replied: "*So in a scenario when you're doing an increased-risk traffic stop, you have -- or a high-risk traffic stop. You're challenging somebody to get out of the vehicle. You stay at your vehicle for safety reasons, and you direct the driver or passengers back to you, so you're -- you're giving them a challenge, telling them that you're the police, identifying yourself, and telling them to get out of the vehicle; and at that point, you'll either, you know, tell them to turn around, talk them back to you, get them on the ground. That's generally the times you would direct them out of the vehicle like that.*" <sup>39</sup>

He was asked what happened after he approached the driver with his partner. He replied he told the driver he was going to put handcuffs on him. He told him to put his hands behind his back which he did. He stated he crouched overtop of SO with his handcuffs, took his hand in his hand and placed the cuffs on his wrists. At this point he

---

<sup>38</sup> Transcript. Page 420. L. 10-17.

<sup>39</sup> Transcript. Page 421-422. L. 24-26, L. 1-9

double locked the handcuffs and he did a search of his back waistband. With the help on Constable [REDACTED], they rolled him on his side and then onto his butt. SO was told to tuck a knee then he linked his arm under SO's armpit. Constable [REDACTED] did the same on the other side. They told SO to stand up, and they assisted him standing up from the seated position. Questioned about this he added: *"So we were trained to get somebody up from standing wearing handcuffs so it's the least amount of pressure on our backs and easiest for them to get up is we tell them to tuck a knee, and we tell them to stand up. So they take their knee, and they stand up, and we roll. We kind of shift their body and roll them to the side so they can stand up without having any sort of -- without having to lift, really. We're just kind of directing and helping him get up."*<sup>40</sup>

It was put to Constable [REDACTED] they were applying some degree of lifting force. He replied: *"A little bit, yes."* He was asked about SO's testimony that he put a knee on his back. He replied: *"he did not."* He was asked if there was a reason why, and if it is something that would be done. He replied he has done it in the past but it would be done if they had a resistive subject and he needed to get control. With a compliant subject he would not be putting a knee on his back.

He was also asked about SO testifying he grabbed him by the scruff or hood of his jacket, and he by himself dragged him, lifted him up. He replied that did not happen; he would never have grabbed somebody by the back and lift them up like that. He was asked why and replied, *"first of all, he could hurt himself."* It was slippery, it was icy. He advised if he had grabbed someone like that, he may have hurt himself or SO. He stated he would never have done that.

He was asked what he had to say about the jacket being ripped. He replied the jacket could very well have been damaged. He stated when SO laid down it could have damaged his jacket. When they lifted him up they were touching his jacket. He stated it could have happened. He added it was not his intention to damage his jacket.

Constable [REDACTED] was asked to describe how SO was dressed. He stated he had khakis on and he had a black jacket that was done up. He stated he was well dressed.

He was asked about SO being compliant and did he have any thoughts on that. He replied they got him into handcuffs and helped him up. He was very compliant. He was not saying much but he was doing everything they asked him to do. They started walking back to the police vehicle and he stated he was thinking 'there's something off here.' He stated he had a thought they might not have the right vehicle at this point.

He agreed he believed they had the stolen vehicle and was asked what he was anticipating from the occupants of what he suspected to be a stolen vehicle. He replied: *"So from my experience, the occupants of a stolen vehicle are not compliant, generally. Even if they are listening to your commands, they're swearing at you. They're calling*

---

<sup>40</sup> Transcript. Page 424. L. 16-24

*you names. They're not dressed -- they're not dressed well, again, in my experience, so, for me --"*<sup>41</sup>

He was asked about his experience with that to which he replied he had a lot of experience. He agreed in this case he was experiencing something different.

Asked to continue he stated, they were walking back to the police vehicle and he told SO they would figure this all out. They stopped at the vehicle where Constable [REDACTED] completed a secondary search for weapons. SO told him he had a knife in his right pant pocket, so he took the knife out of the pocket and placed it on the trunk. He finished the search and helped him into the back seat of the car.

He was asked if he slammed SO up against the police car or at the back of SO's car. Constable [REDACTED] replied no on both counts. He was asked if he heard SO testify to that. He replied he did.

Constable [REDACTED] stated he shut the car door, retrieved the knife, and walked around the car to the front passenger seat and got into the car. Before he could say a word to his partner, or tell SO what was going on, SO immediately said 'I have a badge. It's in my, the top of my backpack on the front seat.'

Constable [REDACTED] stated at this point he was "*kind of beside himself.*" He turned around and asked if SO was a police officer. SO replied no, but then told what agency he worked for. Constable [REDACTED] stated: "*So at this point, I immediately got out of the car, and I was, okay, we're going to confirm, check and confirm that this -- that he has a badge. So I walked to the passenger door, opened his passenger door. I unzipped the top of his backpack that was sitting on the passenger seat, and right on top was a badge sitting face up, and beside the badge was his driver's licence. I grabbed -- I took his driver's licence. I walked back to our vehicle. On the way back, I looked at his plate, the driver's plate, and..*"<sup>42</sup>

He confirmed the licence plate was not a match to the stolen vehicle. He got back into the police car, told his partner the plate was not a match and that there was a badge there. They ran his name on CPIC which came back clear and right away thought they needed to get this guy out of the vehicle. They took him out and removed the handcuffs thinking "*this is not good. We've made a mistake here.*"

Constable [REDACTED] was questioned more about being told about the badge. He agreed SO told him where the badge was in the vehicle. He also agreed he took it upon himself to go, check and confirm that. He agreed he still needed to confirm what he was being told. He stated: "*Working downtown for so long, people lie to us a lot. They tell us -- they tell us things about themselves. Like, they'll say that they're police officers or they're this or they're that, and, you know, for me, I had to confirm and check that even though I --*

---

<sup>41</sup> Transcript. Page 430. L. 1-6

<sup>42</sup> Transcript. Page 433. L. 10-20

*at the time he said that, I was, like, oh, shoot, like, this isn't a good situation, I still had to confirm and check that."*<sup>43</sup>

Constable [REDACTED] was asked about the allegation that he and Constable [REDACTED] searched SO's vehicle. He replied that did not happen. Constable [REDACTED] stated he checked the spot SO told him the badge was and that was it. He did not go through any other part of his vehicle. Constable [REDACTED] was not at the vehicle when he was there.

He was asked to speak to SO's complaint about his vehicle being searched. He stated when he was told about the badge and where it was in the vehicle, he believed SO was giving him consent. He stated he thought SO believed the badge was going to get him out of what was going on. Constable [REDACTED] stated for him it was like he wanted him to see the badge and he was thinking he needed to see it to confirm and get him out of custody.

He was asked what he thought SO was telling him in terms of entering the vehicle. He replied he thought SO was giving him consent to go into the vehicle and check that badge. He perceived it as SO telling him to go check the badge. He did not recall if he brought the badge back to the vehicle. He did bring the driver's licence back.

He was asked about letting SO out of custody. He stated they got him out of the car and out of the handcuffs. He said they knew they had made a mistake. He apologized to SO telling him they believed he was in a stolen vehicle. He gave SO their badge numbers and contact information and told him they would answer any questions he may have but SO did not seem interested in talking to them.

Constable [REDACTED] stated he disengaged at that time. He went to check for damage to the vehicles so he looked at the police vehicle bumper and did not see any damage. He looks at SO's bumper and did not see any damage. He took pictures for his own record and then walked back to the police vehicle. On his way back, SO stopped him and told him that he and his partner damaged his jacket. Constable [REDACTED] said he asked where the damage was and was told the zipper was pinched. He looked at the zipper and told SO he did not see any damage to the zipper. When he told SO that, SO got short with him. He stated he did not seem to want to talk to him, said he had to go, and left walking westbound with his colleagues.

Constable [REDACTED] said he got back in his car for about twenty minutes doing notes and entering comments on CAD.

Constable [REDACTED] was asked about SO's colleagues. He stated he did not have any contact with the colleagues. He saw them there standing behind the vehicle. It was put to him that SO was adamant that he was not apologized to. Constable [REDACTED] stated the was not true. He apologized to SO as soon as he was taken out of handcuffs. He told him they were sorry and they had made a mistake.

---

<sup>43</sup> Transcript. Page. 435. L. 10-17

He was asked about the information he gave SO. He agreed he let SO take a photo of his notebook page. He had written down the case number and their call sign which he showed him to take a picture. He also agreed he told SO he could email him and he would answer any questions. He stated he was hopeful he could engage SO in a conversation but he did not seem interested in talking to him.

Constable [REDACTED] was asked about the photos he took of the vehicles. He stated he emailed them to his Sergeant. He himself was going on vacation so his partner sent a BBM to their Sergeant with all the information.

Constable [REDACTED] was asked to look at Tab 16. He identified the photos as the ones he took of SO's vehicle on the date of the incident.

He was asked about when they were up on the road, looked down and saw the vehicle that he recognized as a Mitsubishi. He was asked if he recognized what kind of Mitsubishi it was. He stated he knew it was an SUV, but he was not familiar with the differences between the kinds of SUV's.

He was asked about when he described the vehicle as grey. It was put to him his pictures show a blue vehicle and he was asked to explain. He stated when they were trying to get the plate, the side of the vehicle had salt on it and it looked grey from the side profile. He did not see the back. When they were sliding into the vehicle he was not "processing" the colour.

Constable [REDACTED] was then asked to look at Exhibit 12, at Tab 4. He was asked if he recognized it which he said he did as being the parking lot they were in. He was asked where the Mitsubishi SUV was parked. He stated it would have been in the vicinity of between where the grey SUV and the silver sedan were parked.

He was asked what the weather was like that night. He stated it was a cold night, approximately minus 10 degrees; a January night.

He was asked about placing SO in the back of the police car and asked about his status. He agreed he was in custody. He agreed he closed the door, went around to the passenger side, and got into his front seat. He agreed before he could say anything, SO told him he had a badge. Constable [REDACTED] stated he then asked him if he was a police officer and SO told him who he worked for.

He was asked when he got back into his car, why he did not read him his *Charter* rights to counsel. He replied it became his goal to get SO out of custody as soon as possible. He would confirm the information and if it checked, he would get him out of the car.

He was asked did it occur to him at that point, once he said that, to *Charter* and caution him. He replied it did not occur to him at that point. He agreed it was his concern to get him out of custody or check and confirm and get him out of custody if it checked out.



Constable [REDACTED] was asked about the information he gave SO that he photographed. He was asked about SO testimony that eh seen it written down 'no damage.' He stated: *"I did not write that down. When I showed him the case number and our vehicle ID, there is the stamp on top. We have a daily stamp where we stamp when we look at our vehicle at the start of our shift and see if there's any damage, so I would have had a circle and an 'X' through our vehicle, but that's most likely what he saw."*<sup>44</sup>

He was then asked what their purpose was as they entered the parking lot. He stated they were going in to confirm the licence plate. If it was a stolen vehicle, they would leave the lot and call in the proper resources. They would keep an eye on the vehicle so if it left they could call the direction of travel. If it was not a stolen vehicle it was still a suspicious vehicle and in his mind they would conduct a traffic stop and find out what was going on.

Constable [REDACTED] was then asked about SO's concerns what was going on was racial profiling. He replied saying he did not agree with that. He was asked if from looking at him at the scene did he recognize him as First Nations. He replied he did not.

He was asked about when they contacted the vehicle and he had testified he saw the silhouette of the driver. He was asked if he saw he was looking at a First Nations man. He replied: *"No sir."* He did not recognize him as First Nations while he was in their back seat or at the scene.

He was asked about the testimony of the drum hanging from the rearview mirror and if he noticed that. He replied he did not.

Constable [REDACTED] was asked about any debrief they had on the incident. He replied when he returned from vacation, he met with his Sergeant, Staff Sergeant, and Inspector. After that, he and Constable [REDACTED] had a debrief with their team. They went through what they could have done differently and it was used as a training moment for their team.

He was asked what they could have done differently. He stated looking back it would have been more ideal to call it in as a suspicious vehicle and told dispatch to stand by for the licence plate. People would then know where they were if something did go wrong. He agreed they called it in after.

He was asked about notifying a supervisor. He replied saying after the dust settled it would have been ideal for them to notify the District Sergeant and let him know what was going on so he could contact the traffic Sergeant. At that time of night, there would not have been a Traffic Sergeant on, so the District Sergeant would have to notify somebody to look into that further.

---

<sup>44</sup> Transcript. Page. 456. L. 5-11

He was asked if he would acknowledge there may have been damage to SO's vehicle. He stated there may have well been. There was no visible damage but there could have been damage to the undercarriage.

### Cross Examination

Constable [REDACTED] agreed he had worked frontline in the downtown area for approximately [REDACTED] years at the time of the incident. He agreed he had testified that stolen vehicles are often in that area selling drugs to the homeless. He was asked how many times he encountered that. He replied saying he and his partner encountered many but he could not give an exact number. They have had many stolen vehicles in that area, dumped and mobile.

He was asked how often he observed that lot. He said it was daily. He and his partner did a lot of work in the East Village, in the area of the Drop In Centre.

He agreed SO was very compliant which triggered him to think they may not have the right person. He was asked what they would do with someone who was being non-compliant and physically resisting. He replied: *"In a moment, if someone's being non-compliant and physically resisting, my partner and I would have approached the same way, but I would have put pressure with my knee on his back and tried to get his arms out. If I was having problems, we'd call for backup to come help us to get this male or person into custody. But for me personally, I would start off with going up to the driver who's lying on his stomach. I would put my knee on the back, kind of, like, the center of his chest to keep him so he can't be -- he won't be jumping around, and then I would try to get his arms from underneath him and put them behind his back."*<sup>45</sup>

Constable [REDACTED] was asked about the pat-down search and whether it was standard procedure when a person is under arrest or detained. He replied, "yes, for weapons." He was then asked to described the pat-down search. He was asked if he put his hands into SO's pockets during the search. He stated he would have felt outside, and if he felt anything he would have put his hand in. In this case, there was nothing, other than the knife he had taken out previously.

He was asked if the first time he heard about the badge was once he was cuffed and in the backseat of the police car. He replied that was the first time he heard it. He was asked if he knew if Constable [REDACTED] had been told that. He stated he did not hear him say that.

He was asked if he asked SO where his badge was or if he told him. He replied that he told him. He was asked what was specifically said. He replied: *"So he said to me, as soon as I sat down, he said right away, I have a badge in the top of my backpack on the passenger seat, and that's when I was -- I was, kind of, taken aback, and that's when I asked him if he was a police officer."*

---

<sup>45</sup> Transcript. Page 464. L. 1-12.

He was asked what he saw when he went up to the car and opened the door. He stated he saw a large backpack sitting on the passenger seat. He was asked if he went through it. He said he opened the top where he said the badge was and that was it. He opened it and the badge was sitting face up. He didn't have to look; it was right there.

He was asked if he ever looked in the glove compartment. He said no. He was asked if he ever looked in the backseat or the console in the middle between the front seats. He replied no on both counts.

He was asked how long it was from the time SO was prone on the ground, to when Constable [REDACTED] returned to the police car after seeing the badge. He said it was three to five minutes.

He was asked if he was the primary person dealing with SO. He replied saying not until they got him into handcuffs. He was the primary person speaking with him. He was asked if he ever gave an explanation to SO about what type of vehicle they were looking for. He stated he did not, he told him they made a mistake. He was asked if he told SO because of the darkness they could not see that exact plate number. He again said no. He said he tried to engage in communication but he did not want to speak with him.

He was asked if he told SO they had accidentally slid into his vehicle. He stated he did not recall if they got into that much detail.

He was then asked about the debrief with his Sergeant, Staff Sergeant, and Inspector, specifically about his dealings with SO, having him proned on the ground, the use of firearms and the collision. He stated he did not recall but he would have told them the basics of what had happened. They slid into the vehicle, how they dealt with the situation. He was asked if he would have told them they drew their firearms. He replied "yes," and he replied "yes" when asked if he told them it was considered a high-risk stop.

He was asked about the negative noteworthy events and if there was any advice or reprimand for drawing their sidearm, for having him prone out, for handcuffing and placing him in the back. He replied, "no."

### **Re-direct**

Constable [REDACTED] was asked if when he stated he would not give SO information, he was referring to the stolen auto investigation. He replied "yes."

### **Questions from the Presiding Officer**

Constable [REDACTED] was asked if he or did he hear any police officer say to SO that they rammed his vehicle because that was the way you do things, or that you came in hot and fast. He replied, "No" on both counts.

He was asked who between he and Constable [REDACTED], would be considered the arresting officer. He replied his partner would have been the arresting officer. He was asked if he heard Constable [REDACTED] tell SO he was under arrest. He replied he did not hear him.

He was asked if SO ever asked to speak with a supervisor. He replied, "No." He was asked if he ever asked SO if he wanted to speak with a supervisor. He replied he did not.

### **Re-examination**

Mr. Shymka asked if it was a police tactic to come in hot and fast to ram a stolen vehicle or suspected stolen vehicle. He replied it was not. He was asked if there is a policy in respect to ramming. He replied at that point there was, but he had no vehicle intervention training... *"that would not have been a trained thing to do."*

### **Assessment of Credibility and Reliability**

To assist in making appropriate findings of fact, determining the credibility and the reliability of the witnesses is a key factor. Defined, reliability is the ability of the witness to perceive, remember, and accurately recall what they saw. Credibility is whether the witness is doing their best to tell the truth as they perceive it.

That the distinction between credibility and reliability is fundamental in arriving at a just decision was made clear in *R. v. Perrone*<sup>46</sup>, at paras 25-27:

*[25] Jurisprudence recognizes that there is a difference between credibility and reliability. In R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. wrote (at p. 526):*

*Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously, a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. In this case, both the credibility of the*

---

<sup>46</sup> *R. v. Perrone*, 2014 MBCA 74, affirmed 2015 SCC 8.

*complainants and the reliability of their evidence were attacked on cross-examination.*

*[26] In R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288, Watt J.A. described the difference between credibility and reliability (at para. 41):*

*Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately:*

- i. observe;*
- ii. recall; and*
- iii. recount events in issue.*

*Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: R. v. Morrissey (R.J.) (1995), 80 O.A.C. 161; 22 O.R. (3d) 514 (C.A.), at 526 [O.R.].*

*[27] In short, the fact that a witness may be found to be credible does not answer the question of whether the evidence provided is reliable (see R. v. Vickerson (W.) (2005), 200 O.A.C. 87).*

*[28] The distinction is an important one and must be recognized by a trial judge in order to reach a just verdict.*

In assessing credibility, amongst other things I must look at factors such as inconsistent statements, whether oral or written, motive to lie or exaggerate, is the testimony logical, or defies common sense.

I take instruction from the BCCA decision, *Faryna v. Chorny*.<sup>47</sup> At para 11 it states:

*"The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced, and confident witnesses, and of those shrewd persons adept in the half-lie and of long and*

---

<sup>47</sup> *Faryna v. Chorny* [1951] B.C.J. No. 152

*successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind."*

The first witness called was the complainant **SO**. I have examined SO's testimony comparing it to prior statements, interviews, and pleadings. Additionally, I have examined the testimony and statements of other witnesses for corroboration, along with various probabilities. In short, I have found that I need to be careful with the testimony of SO.

SO did not make any contemporaneous notes of the incident. The first written account came in the format of his collision statement, followed by another written statement made close to a month after the incident.

SO's testimony and interview statement reveals he has a distrust of the Calgary Police Service as it relates to dealings with First Nations people. I believe this distrust influenced his perception of what occurred on January 3, 2018. This in turn reflects on his reliability.

A similar observation was made of a complainant by retired Justice M.A. Binder in a police disciplinary decision dated March 31, 2020: *Edmonton Police Service and [REDACTED] and [REDACTED]* at paragraph 25:

*"I found FF intelligent but bitter and angry, very bitter and angry against the police, whom he believed had mistreated him. In my view such bitterness clouded his evidence to the extent that much of his testimony is what he imagined or wanted to have happened but didn't. I find much of his evidence unreliable."*

I have found SO's testimony often to be inconsistent with his prior statements. His terminology used to describe various aspects of the incident varied significantly. An example would be how the collision between the police vehicle and SO's vehicle was described. The word 'hit' was used in his Alberta Collision Report Witness Statement (Tab 19). He used the word 'rammed' in his written statement of January 30, 2018 (Tab 21). SO told CD, the police car slid into his car.<sup>48</sup> In his testimony under direct examination, he used the phrase 'kind of hit me' then under cross examination he used the word 'smashed.'

I found that SO's testimony regarding the condition of the parking lot was an attempt to diminish any impact the conditions had relating to the collision. SO was adamant the entrance into the lot was a slight slope. All other witnesses, including CL, described it as a very steep slope. SO was firm in his testimony that the parking lot surface was not slippery or icy. He stated it was snow covered. All other witnesses described the lot as

---

<sup>48</sup> Exhibit 20. Page 6. L. 20-21.

ice covered and very slippery. CL went as far as stating it was incredibly icy. He stated he parked in the lot every day and he struggled to get in and out of the lot. It has a very steep slope; it is not well maintained and quite icy. He was asked if he had trouble that day and he stated when he was leaving that day he had difficulty getting up the hill. I find SO used the words interchangeably to embellish or to diminish what he was trying to say at the time.

In SO's letter of complaint (Tab 23) he described how the officers exited their vehicle and 'ran' towards his vehicle. This was repeated in his written statement (Tab 19) and the Statement of Claim (Tab 29). In CL's transcribed interview he stated SO told him he first noticed the firearm at his driver's window.<sup>49</sup> This was in direct conflict with the testimony of both Cited Officers who clearly testified they exited the police vehicle and used their car doors for cover until such time as SO was out of his vehicle and prone on the ground. These actions would be consistent with their training, and the practice of police officers in such situations. When SO testified to this point under direct examination, he did not state the officers ran towards his vehicle; they were standing by their doors where they drew their guns. He was defensive in his attempts to clarify what he meant by using the term 'ran.' He re-asserted this version of evidence under cross examination.

SO testified the officers aimed their pistols at his face. This conflicts with some of his prior statements. He stated in his Alberta Collision Report Witness Statement (Tab 19), 'males got out with guns aimed towards car, points guns @ me.' In his written statement (Tab 21), he writes 'A few moments later I saw a gun pointed in my direction' which he repeated in his Written Complaint (Tab 23). In his Statement of Claim, it states 'and pointed guns at him' which is an elaboration from the prior statements. The first mention of guns being pointed at his face was in his interview with Detective [REDACTED] transcribed at (Tab 25). When asked 'so the officer that approached you from the driver's side had his gun out and pointed directly at you,' he answered, 'At my face, yes.' In this statement he repeats the gun was pointed at his face when he exited his vehicle and the whole time he was on the ground. He also referred to the guns pointing towards his head.

I have concerns with this aspect of SO's testimony. His testimony on this point is highly improbable. It conflicts with his prior written statements, what he related to CL regarding the firearm and the fact he never told CL the officers pointed the firearms at his face or head is concerning. This will be expanded upon in the analysis of the charges.

During cross examination, it was put to the Complainant he complained he was put to the ground, that he was thrown to the ground and jumped on. He replied: *"Yeah, so pushed me to the ground. And when I say the word "jump", I don't mean as in, like, he physically jumped. When someone jumps on you, like, they're grabbing you, so that's what I mean."* This is another example of SO using words to exaggerate something that did not occur as the word would normally be used.

---

<sup>49</sup> Tab 34. Page 6. L. 10-11.

SO testified that it was the passenger officer who pushed him to the ground, 'jumping on him' as he went to his knees.

Constable [REDACTED] testified he did not move from his position at the passenger side of the police car until SO was fully prone on the ground. He then 'cleared' SO's vehicle, walked around the back of the police car, then he and Constable [REDACTED] both approached SO. This scenario is what makes sense. It is consistent with training and officer safety. It is the more likely scenario and directly contradicts SO's testimony on this point and adversely affects both his credibility and reliability.

It was further put to SO, in his testimony he stated the officer held him on the ground when he was on the ground. He replied he put his knee on his back.

It was put to him he did not alleged any of that in his previous statements. He was referred to his prior statements (Tab 19, page 1 para 3) where it was written: *"I complied and dropped to my knees and then my chest with my keys in my right hand and my phone in my left hand. When I dropped to my knees, I dropped both the phone and keys on the ground and was told not to move and keep my hands in view and away from my pockets which I complied."* This was repeated verbatim in his prior statement at Tab 21, paragraph 3. In his Written Complaint, Tab 23, paragraph 3, he is quoted as saying *"SO got down on his knees and then onto his chest with a phone and keys in his hands, putting them ground when he was on his ground.(sic)"* Lastly, in the Statement of Claim at Tab 29, paragraph 12, it is written: *"Constable Doe #1 and Constable Doe #2 yelled at the Plaintiff to exit his vehicle, get down on the ground and keep his hands visible. He complied."*

SO agreed it was not written in his Statement of Claim (Exhibit 29) but pointed out it does state, 'The plaintiff was aggressively and arbitrarily physically detained' which he described as "that's part of it." He agreed it was not particularized.

SO was being compliant, following the commands of Constable [REDACTED] to the letter. He also was not saying anything. This is far from the scenario where a police officer would have to escalate a level of force to deal with a non-compliant, resistive, or assaultive individual.

Another aspect that raises concerns about SO's testimony is that he denied having a knife on his person when he was taken into custody. Constable [REDACTED] testified he retrieved a knife from SO's pocket after SO told him it was there. He placed the knife on the police vehicle as he completed his pat down search. The knife is referenced in Constable [REDACTED] notes. CL was asked if he remembered talking with SO about the incident and him speaking to him about going for his own weapon. He replied he did.

SO testified he did not have a knife. SO's denial of having a knife does not play into any findings of fact relating to the allegations but it does raise questions on his credibility and or reliability.



During cross-examination, I found SO's responses to some questioning and challenges as dismissive. An example would be when he was put to him the entrance to the parking lot was a steep slope. His reply was 'That's your definition, I guess.' I found his explanation of some of the terms he used as defensive. The discussion about the term 'dragged', 'jumped' and "ran" are examples.

SO testified this matter has resulted in him seeking on-going [REDACTED] [REDACTED] He has re-lived the incident in his mind repeatedly. I am concerned this [REDACTED] [REDACTED] may have influenced his recollection of the events as they transpired.

SO's testimony on many of the facts at the heart of his allegations has evolved since his original statements and written complaint. This incident occurred over three years ago.

The first statement he provided was his Collision Report Witness Statement provided in early 2018. The Written Statement (Tab23) was provided on January 30, 2018. These two statements are the ones provided closest to the incident date. The written complaint followed in June 2018. SO then had almost a full year before he was interviewed by Detective [REDACTED] on May 30, 2019. It was during this interview, the spoke of the guns being pointed at his face, being jumped on, and being pushed against his vehicle. These allegations were repeated almost verbatim in his testimony.

While I am reasonably confident SO believes what he has testified to be true and accurate, I am concerned about the reliability of his testimony. Much of what he testified to is in direct conflict with other testimony, statements and evidence. Portions of his testimony are improbable and are in conflict with what would make sense under the circumstances. Accordingly, unless SO's evidence is reasonably corroborated through other means, I will be careful as I assess its reliability. I must treat the testimony of SO with caution as I apply it to my analysis of the allegations against the Cited Officers.

The next witness called by the Police Service was **CL**. This witness arrived at the scene of the incident while SO was still in custody and in the back seat of the police car. CL had a reasonable recollection of his involvement in the event. His testimony was consistent with his interview statement. His testimony is also consistent with the known facts as well as SO's initial prior written statements. I find CL to be both a credible and reliable witness.

**Sergeant [REDACTED]** was the next witness called by the Police Service. Sergeant [REDACTED] testimony was focused on matters that occurred after the incident both with the cited officers and the complainant. Sergeant [REDACTED] was a good witness who gave his testimony in an open and succinct manner. He had distinct recall of his involvement in the matter. I have no concerns with the testimony of this witness.

The Police Service then called **Acting Superintendent [REDACTED]**. As was the case with the previous witness, this witnesses' testimony dealt with the cited officers and the complainant. Acting Superintendent [REDACTED] communicated her evidence in a clear and

concise manner. It was straightforward and open. I find this witness to be both credible and reliable.

The first defence witness in this matter was **Constable [REDACTED]**. Constable [REDACTED] is a competent witness who has benefitted greatly from his experience in giving testimony in court. He was clear in his testimony and responsive in his answers both on direct and on cross-examination. Constable [REDACTED] testimony was supported by notes made at the scene as well as comments entered into the event chronology of the incident. It was also aided by the Occurrence Report he completed several days following the incident.

Constable [REDACTED] was very forthright in his testimony. He was certain on facts, and when questions were put to him, he answered factually and without attempts to justify. He provided reasons. Constable [REDACTED] had excellent recall of the incident and his involvement in it. He was candid in his testimony and I found his testimony to be coherent and detailed.

One discrepancy exists between Constable [REDACTED] notes on the matter and his testimony. In his notes on page CPS0059 he wrote, 'Drive into lot to engage vehicle occupants.' In his testimony he was quite clear that it was their intention to drive into the lot covertly to obtain the full licence plate number of the Mitsubishi, then exit the lot. He did testify that if the plate did not match the stolen auto, they would do a traffic stop to investigate the suspicious circumstances of the vehicle being there at that time of the night. Constable [REDACTED] notes on this aspect of the incident stated, 'Partner drove in to get a closer look.' Taking the evidence of both officers into consideration, and their respective notes, I do not believe much turns on this discrepancy. I do not believe it has an adverse effect on the credibility of this witness. It does not affect the analysis of the evidence as it relates to the allegations against the cited officers. Overall, I am confident with the credibility and reliability of this witness.

The last witness to testify was **Constable [REDACTED]**. Constable [REDACTED] is a very competent witness who also has benefitted from his experience in giving testimony in court.

Throughout his testimony he clearly articulated his version of the events as he recalled them. I am confident that Constable [REDACTED] has very good independent recollection of this incident. Constable [REDACTED] also testified with the benefit of notes he made at the scene of the incident. I found Constable [REDACTED] to be reasonable in his responses to questions under cross-examination. He was not defensive or argumentative. He simply answered the questions put to him. For example, despite not believing SO's jacket was damaged when he was picked up from the ground, he readily agreed it was possible.

He was quite open in discussing how they made a mistake. He did not attempt to justify it with excuses. He simply provided the facts as he knew them to be.

For the reasons given, I find Constable [REDACTED] to be a truthful witness. I also conclude that his evidence about what happened on the date of the incident is reliable.

## **Burden of Proof**

The burden of proof (onus) lies with the Police Service to prove the allegations on the civil standard of proof, being a balance of probabilities.

## **Standard of Proof**

In Alberta, the *Police Act* does not address the issue of the standard of proof.

I hold a “balance of probabilities” based on credible and reliable evidence to be the standard of proof to be met in these matters.

This standard of proof has been affirmed in the case, *F.H. v. McDougall*<sup>50</sup> where in the summary it was written:

*“There is only one standard of proof in a civil case and that is proof on a balance of probabilities. Although there has been some suggestion in the case law that the criminal burden applies or that there is a shifting standard of proof, where, as here, criminal or morally blameworthy conduct is alleged, in Canada, there are no degrees of probability within that civil standard.”*

Further at para 46, it is written:

*“Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency.”*

## **Analysis and Findings**

### **The Disciplinary Charges**

Constable's [REDACTED] and [REDACTED] are jointly charged with eight counts of disciplinary misconduct. Constable [REDACTED] is charged with one additional count. Counts 1, and 10 were withdrawn at the commencement of the proceedings. The remaining counts are stipulated in the Notice and Record of Disciplinary Proceedings, and are listed as follows:

*\*The complainants' name has been anonymized with initials in the replicated counts listed.*

---

<sup>50</sup> *F.H. v. McDougall*, 2008 SCC 53 (CanLII)

## Count #2

Improper Use of Firearms contrary to section 5(1)(f) of the *Police Service Regulation*, as further defined by section 5(2)(f)(iii) of the *Police Service Regulation* by failing to exercise sound judgment and restraint in respect of the use and care of a firearm.

### Details of the Allegation

On or about the 3<sup>rd</sup> day of January, 2018, at or near the City of Calgary, in the Province of Alberta, you, **Constable [REDACTED]** and **Constable [REDACTED]** drew your Calgary Police Service issue firearms and pointed them at, or around, SO during a traffic stop when it was not necessary to do so.

## Count #3

Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the *Police Service Regulation*, as further defined by section 5(2)(i)(i) of the *Police Service Regulation* as exercising his authority as a police officer when it is unlawful or unnecessary to do so.

### Details of the Allegation

On or about the 3<sup>rd</sup> day of January, 2018, at or near the City of Calgary, in the Province of Alberta, you **Constable [REDACTED]** and **Constable [REDACTED]** conducted a search of SO's vehicle without lawful authority or consent.

## Count #4

Neglect of Duty, contrary to section 5(1)(h) of the *Police Service Regulation*, as further defined by section 5(2)(h)(i) of the *Police Service Regulation* as neglecting, without lawful excuse, to promptly and diligently perform his duties as a police officer.

### Details of the Allegation

On or about the 3<sup>rd</sup> day of January, 2018, at or near the City of Calgary, in the Province of Alberta, you, **Constable [REDACTED]** and **Constable [REDACTED]** arrested and detained SO and did not charter or caution him as required by law.

## Count #5

Discreditable Conduct, contrary to section 5(1)(e) of the *Police Service Regulation*, as further defined by section 5(2)(e)(viii) of the *Police Service Regulation* by doing anything prejudicial to discipline or likely to bring discredit on the reputation of the police service.

### Details of the Allegation

On or about the 3<sup>rd</sup> day of January, 2018, at or near the City of Calgary, in the Province of Alberta, you, **Constable** [REDACTED] while operating an unmarked police vehicle, unnecessarily caused a collision with a vehicle SO was parked in.

### Count #6

Discreditable Conduct, contrary to section 5(1)(e) of the *Police Service Regulation*, as further defined by section 5(2)(e)(vii) the *Police Service Regulation* by differentially applying the law or exercising authority on the basis of race, colour, religion, sex, physical disability, mental disability, marital status, age, ancestry, or place of origin.

### Details of the Allegation

On or about the 3<sup>rd</sup> day of January, 2018, at or near the City of Calgary, in the Province of Alberta, you, **Constable** [REDACTED] and **Constable** [REDACTED] arrested and detained SO based on his race or ancestry.

### Count #7

Discreditable Conduct, contrary to section 5(1)(e) of the *Police Service Regulation*, as further defined by section 5(2)(e)(viii) of the *Police Service Regulation* by doing anything prejudicial to discipline or likely to bring discredit on the reputation of the police service.

### Details of the Allegation

On or about the 3<sup>rd</sup> day of January, 2018, at or near the City of Calgary, in the Province of Alberta, you, **Constable** [REDACTED] and **Constable** [REDACTED] used excessive force against SO during his arrest when they lifted him from the ground or dragged him by the jacket, thereby causing damage to the jacket.

### Count #8

Unlawful or Unnecessary Exercise of Authority contrary to section 5(1)(i) of the *Police Service Regulation*, as further defined by section 5(2)(i)(ii) of the *Police Service Regulation* as by applying inappropriate force in circumstances in which force is used.

### Details of the Allegation

On or about the 3<sup>rd</sup> day of January, 2018, at or near the City of Calgary, in the Province of Alberta, you, **Constable** [REDACTED] and **Constable** [REDACTED] used excessive and unnecessary force against SO during his arrest and detention.

## Count #9

Neglect of Duty, contrary to section 5(1)(h) of the *Police Service Regulation*, as further defined by section 5(2)(h)(i) of the *Police Service Regulation* as neglecting, without lawful excuse, to promptly and diligently perform his duties as a police officer.

### Details of the Allegation

On or about the 3<sup>rd</sup> day of January, 2018, at or near the City of Calgary, in the Province of Alberta, you, **Constable** [REDACTED] and **Constable** [REDACTED] did not take reasonable steps to confirm the vehicle SO was sitting in was not stolen before arresting him.

## Count #11

Discreditable Conduct, contrary to section 5(1)(e) of the *Police Service Regulation*, as further defined by section 5(2)(e)(viii) of the *Police Service Regulation* by doing anything prejudicial to discipline or likely to bring discredit on the reputation of the police service.

### Details of the Allegation

On or about the 3<sup>rd</sup> day of January, 2018, at or near the City of Calgary, in the Province of Alberta, you, **Constable** [REDACTED] and **Constable** [REDACTED] did not apologize to Mr. SO after they mistakenly arrested and handcuffed him for being in a stolen vehicle. Additionally, they did not provide him the opportunity to speak with a supervisor or have a CPS Traffic Unit officer clear everyone from the scene, as there had been a collision between the police vehicle and SO's vehicle.

### General Findings of Fact

Prior to making any determination of whether or not the allegations have been proven, I will make certain findings of fact based on the evidence before me as well as my knowledge and experience obtained during my tenure as a senior police officer in the City of Calgary. This evidence includes the testimony of the witnesses, stipulated facts, and the items/documents entered as exhibits. A partial list of these findings is as follows:

- The incident occurred on January 3, 2018 at approximately 0445 hrs;
- On that date, between the hours of 0400 to 0500, the temperature ranged between -9.5 and -6.8 Celsius with a windchill factor between -13 and -10 Celsius. Sunrise on January 3, 2018 was at 0839 hrs. The sky was cloudy and overcast;
- The incident occurred in the City of Calgary parking lot located on the south side of the 400 block of Riverfront Ave. SE;

- The parking lot is not equipped with artificial lighting. The nearest lighting is a streetlight on the southside of Riverfront Ave SE, approximately 35 meters from the parking lot entrance;
- The parking lot was extremely dark at the time of the incident;
- The parking lot surface is loose gravel. At the time of the incident, the lot was covered in snow and ice. Traction was slippery;
- The parking lot is below grade of street level. The entrance to the parking lot is raised with a steep incline into the lot from street level;
- The parking lot in the 400 block of Riverfront Ave. SE is in an area that is known as a “high crime” area. This includes illicit drug use and trafficking, prostitution, and crimes committed against the homeless population. Stolen vehicles are known to be operated and abandoned in the area;
- The vehicle operated by SO, was parked with the engine running, nosed into a parking spot directly in front of the abandoned Riverfront Antiques store;
- The vehicle was not parked in the lot in the location stated by SO in his testimony;
- The vehicle was the lone vehicle parked in the parking lot;
- A lone vehicle parked and running, in this location at this time of night is suspicious and would warrant further investigation by patrolling police officers;
- The vehicle operated by SO is described as a Blue, [REDACTED] Mitsubishi [REDACTED], bearing [REDACTED];
- At the time of the incident, SO’s vehicle was covered in road grime and salt as depicted in photos contained in exhibit 27. This grime and salt obscured the true colour of the vehicle, giving it a dirty grey appearance;
- The stolen vehicle is described as a Grey, Mitsubishi [REDACTED], bearing [REDACTED];
- The [REDACTED] and the [REDACTED] are similar in size and body style. Both vehicles are small/midsize SUV’s with the [REDACTED] being the larger of the two vehicles;
- From a distance, while both distinguishable as Mitsubishi SUV’s, an [REDACTED] can be mistaken as an [REDACTED] and vice versa. This mistakenness can be greater in the dark of night in an unlit location. It can also be dependent on an individual’s personal knowledge of Mitsubishi SUV models;
- The partial licence plate letters and digits observed by the cited officers on the suspicious Mitsubishi SUV had similarities to the previously reported stolen Mitsubishi SUV whose description had been circulated previously;
- It is not uncommon for vehicle thieves to steal licence plates from similar type vehicles and place them on the stolen vehicle;
- Stolen vehicles are often used by people to commit other crimes. These people are often armed. These people often use the vehicle itself as a weapon or a tool to commit crimes;
- When the unmarked police vehicle operated by Constable [REDACTED] entered the parking lot, it accelerated to drive over the elevated entrance. After the

vehicle crested and proceeded down the incline, the vehicle lost traction on the icy, snow covered surface. The vehicle brakes locked, the ABS engaged however the momentum of the vehicle carried it forward striking the backend of the vehicle occupied by SO;

- The collision between the two vehicles was unintentional;
- The front airbags of the [REDACTED] police vehicle did not deploy;
- The force of the collision was minor. The force of the collision did not knock the snow off the bumper of SO's vehicle. (Exhibit 16) There was no damage to the police vehicle. The damage to SO's vehicle was minor and not readily visible without a close inspection;
- It was not the intention of the cited officers to conduct a "traffic stop" on the suspicious vehicle. The use of emergency equipment (lights) in this instance was not warranted;
- Emergency lights and other emergency equipment when affecting a traffic stop is to signal the subject vehicle to pull over and stop;
- The vehicle occupied by SO was already in a stationary position;
- The use of emergency lights can precipitate an aggressive response from the drivers of suspicious and/or stolen vehicles;
- The cited officers were aware that the stolen Mitsubishi [REDACTED] had failed to stop, and evaded police for several hours previously during their shift;
- Based on the totality of the circumstances, the officers had a reasonable suspicion based on reasonable grounds that the Mitsubishi SUV, parked and running in the parking lot, may have been the stolen Mitsubishi SUV that had successfully evaded the police earlier in the evening;
- With that reasonable suspicion, any occupant of the Mitsubishi SUV could be lawfully detained for investigative purposes;
- Any information contained in SO's CPS Complaint form, or Statement of Claim, relating to the circumstances of the incident and allegations, if not authored by SO, would be sourced from information provided by SO.

Additional findings of fact will be made during the analysis of the specific allegations.

## **Analysis Discussion**

The Presenting Officer's closing argument referenced a quote from *Terrio v. Elliott*<sup>51</sup> :

*"The law is clear that a police officer will not be insulated from charges of abuse of authority merely because he or she acted out of good faith and proper motives. However, where an officer has exercised his or her best judgement in potentially dangerous circumstances, the behavior must be viewed in context, and should not be subjected either to microscopic scrutiny, or to a requirement of absolute*

---

<sup>51</sup> Terrio v. Elliott and Niagara Regional Police Service, 1995, Board of Inquiry



*perfection. Such scrutiny imposes too high of a standard, and will ultimately have the effect of frustrating law enforcement in the public interest.”*

As I go through this analysis discussion, it is appropriate for all to keep the above quote in mind.

### **Count #1 – Withdrawn**

**Analysis on Count #2 - Improper Use of Firearms contrary to section 5(1)(f) of the PSR.**

To prove this count, the Service must show on a balance of probabilities that Constable [REDACTED] and or Constable [REDACTED] failed to exercise sound judgment and restraint in respect of the use and care of a firearm.

The evidence in the form of witness testimony allows me to make a finding of fact, that both officers drew their pistols from their holsters upon exiting their police vehicle. One of the questions to ask, was this reasonable under the circumstances.

It was the testimony of both officers they believed the presence of SO's vehicle in the parking lot was suspicious. They based this belief on their experience and knowledge of the general area which they described as a high-crime area, known for drug trafficking and stolen vehicles being operated or abandoned. They further testified to their knowledge of the stolen Mitsubishi SUV, which they heard had been described as both an [REDACTED] and a [REDACTED] that had evaded police over an extended period of time earlier in the evening/morning and had been seen on Riverfront Avenue. They described how they viewed the suspicious vehicle in the parking lot and how they both believed it bore a strong resemblance to the stolen Mitsubishi. From their observations, their knowledge of the earlier events and based on their experience, they formed a reasonable suspicion that the vehicle in the parking lot was the stolen vehicle from earlier.

Notwithstanding whether or not the officers employed the most appropriate tactics prior to entering the parking lot, when the police vehicle collided with SO's vehicle and the officers realized SO's vehicle was occupied, it changed the dynamics of the situation. It escalated from an intelligence gathering drive-by to confronting the occupant of a possible stolen auto, one that had successfully and on numerous occasions evaded police earlier in the evening. They described the situation as 'exigent' and considered the situation as a 'high-risk' stop. They described the potential threat from inside the vehicle.

Sergeant [REDACTED] testified regarding the 'urgency' of arresting a person believed to be in a stolen car and the increased risk associated with such an arrest. Acting Superintendent [REDACTED] testified what was entailed in a 'high-risk' stop and how the occupant would be called out. She also testified the officers would have their firearms drawn and at the 'ready' position. Under cross-examination she agreed her testimony

on direct spoke of ideal tactics but there are situations where an emergency is thrust upon members and they have to improvise.

Both officers testified to the dangers presented by stolen cars and or their occupants. When asked why, Constable [REDACTED] replied: *"A number of reasons. As I mentioned before, stolen vehicles are used by criminals to get around; they're used to commit other crimes. Specifically being it was late in the morning, I know that criminals use stolen vehicles to commit late-night B&Es, move drugs, move weapons, things of that nature. As well stolen vehicles generally -- who's ever operating them or when you come in contact situationally with a stolen vehicle, you don't know what their demeanor is going to be; you don't know how they're going to respond to police presence, whether they run, whether they come out with a weapon, try and fight or try and drive away or drive themselves out of the situation. So it's always very dangerous."*<sup>52</sup>

The assessment of any given situation is a subjective process based on the totality of the circumstances. It is my finding, Constable [REDACTED] and Constable [REDACTED] exiting their police vehicle with firearms drawn and held at the ready position was reasonable under these circumstances. This is supported by the testimony of Acting Superintendent [REDACTED]

The specific allegation to be discussed is that the cited officer pointed their firearms at or around SO during the traffic stop when it was not necessary to do so.

SO testified the officers pointed their firearms at his face and head. SO stated this occurred upon the officers exiting their vehicle, as he exited his vehicle and when he was prone on the ground during handcuffing. Both Constable [REDACTED] and Constable [REDACTED] testified they had their firearm drawn and held at the ready at all times. They did not bring their firearm up on target; they did not point their firearm at SO's face or head, or at him at all. Constable [REDACTED] testified, during the handcuffing process his pistol was holstered.

SO's testimony that the officers aimed their pistols at his face conflicts with some of his prior statements. He stated in his Alberta Collision Report Witness Statement (Tab 19), 'males got out with guns aimed towards car, points guns @ me.' In his written statement (Tab 21), he writes 'A few moments later I saw a gun pointed in my direction' which he repeats in his Written Complaint (Tab 23). In his Statement of Claim, it states 'and pointed guns at him' which is an elaboration from the prior statements. The first mention of guns being pointed at his face was in his interview with Detective [REDACTED] transcribed at (Tab 25). When asked 'so the officer that approached you from the driver's side had his gun out and pointed directly at you,' he answered, 'At my face, yes.' In this statement he repeats the gun was pointed at his face when he exited his vehicle and the whole time he was on the ground. He also referred to the guns pointing towards his head.

---

<sup>52</sup> Transcript. Page 322. L. 8-21

I have concerns with this aspect of SO's testimony. First of all, it evolved from having guns pointed in his direction, to being pointed at him, to being pointed directly at his face and head. The version of the guns being pointed at his face first came to light in his interview with Detective [REDACTED] in May 2019. It is not mentioned in the Statement of Claim in December 2019 but is repeated in his testimony. The Cited Officer's testified they drew their firearms and held then at the 'ready' position. This is consistent with their training. It is a significant safety issue that it drilled into police officers in their training to avoid injury as the result of an unintentional discharge. SO was being compliant and was not presenting a threat let alone an imminent threat. There was no reason to bring the firearms up on target. This is also consistent with training.

Additionally, a target to a police officer is 'center mass,' not the head. SO was seated in his vehicle and the police officers were at the doors of their police car. It is not possible to point a firearm directly at a person's face when they are facing away from you. My understanding of SO's testimony was he was watching the officers by way of his rearview and side mirrors. He was not facing the officers. His windows were not open so he did not put his head outside of the vehicle. SO told CL he saw the guns from his peripheral vision. CL was asked if SO told him where the guns were pointed. He replied *"It would've been at the -- no, he didn't, no. Just that he could see it in the -- in the hand."*<sup>53</sup> I am confident if SO had guns pointed at his face/head, he would have told CL.

SO spoke of the officer on the passenger side of the vehicle with a gun pointed at him and the other officer in a similar stance with what he believed to be a gun pointed at him. He stated, *'these guys had guns pointed at my head.'* He was asked under cross examination if the officer from the passenger side was pointing his gun at his head. He replied he was not exactly sure, but it was pointed in his direction.

Constable [REDACTED] was the officer on the passenger side. He testified he exited the police car, drew his firearm which he held at the ready. As his partner challenged the driver (SO), it was his responsibility to cover the vehicle. After SO was prone on the ground, he approached the passenger side of SO's vehicle and cleared the vehicle. He then holstered his firearm.

Constable [REDACTED] task at the time did not involve SO. It was to maintain cover on the suspicious vehicle and to deal with any threat potential. He would not be focused on SO as Constable [REDACTED] would be. His firearm would not be pointed at or in the direction of SO.

SO claimed the guns were pointed at his face while he was pruned on the ground until he was handcuffed. The officer with the gun at this time would be Constable [REDACTED] who stated he was holding his firearm at the ready position. Constable [REDACTED] firearm had been holstered and he was handcuffing SO from the left. While Constable [REDACTED] was handcuffing, I find it implausible that Constable [REDACTED] would be pointing his firearm at SO let alone at his face or head. This would also put Constable [REDACTED] in the

---

<sup>53</sup> Ibid 8

line of fire. It would not be safe. It is also not consistent with training. When Constable [REDACTED] completed the handcuffing of SO, Constable [REDACTED] holstered his firearm.

SO's testimony on these allegations is highly improbable. His testimony is inconsistent with his prior statements and has evolved over time. The testimony of the cited officers makes sense. Their version of the events is consistent with each other's testimony. Constable [REDACTED] made notes at the time regarding exiting the police vehicle with his gun out of his holster and at the ready. Their testimony on how they reacted is consistent with their training. Their training in such situations is to remain at their vehicle, outside, using their car doors as cover, firearms at the ready, issuing commands to the vehicle occupants. The vehicle occupants are not approached until such time as it is safe, and cover is provided by your partner or other officers. Weapons are held at the ready unless an imminent threat presents itself then the weapon is brought up on target which other than in exceptional circumstances is center mass. Repetitive training ensures repetitive actions. I accept the testimony of Constable [REDACTED] and Constable [REDACTED] as more credible and reliable.

I also note, when police officers have their pistols held down at the ready, they most often are facing towards the subject. SO's perception of this was most likely the pistols were pointed at him. This is not the case but it is an understandable perception.

It is my finding, the Service has not proven on a balance of probabilities, Constable [REDACTED] and or Constable [REDACTED] failed to exercise sound judgment and restraint in respect of the use and care of a firearm. One count #2, Constable [REDACTED] and Constable [REDACTED] are found not guilty.

**Analysis on Count #3** - Unlawful or Unnecessary Exercise of Authority as define by section 5(1)(i)(i) of the *PSR*.

It is alleged, both Constable [REDACTED] and Constable [REDACTED] searched SO's vehicle without lawful authority or consent.

SO testified both officers entered his vehicle and searched it. He could see them searching, one on each side and that the search lasted about thirty seconds. He stated he thought both the glovebox and the center console were searched. His vehicle was being searched when his co-workers arrived. CL testified he did not see the police officers searching SO's vehicle.

Constable [REDACTED] testified he did not search SO's vehicle. He stated Constable [REDACTED] entered the vehicle briefly to retrieve SO's wallet and badge as indicated by him. He did not see Constable [REDACTED] searching the vehicle.

Constable [REDACTED] testified that neither he nor Constable [REDACTED] searched SO's vehicle. He stated he checked the spot where SO told him his badge was and that was it. He did not go through any other part of the vehicle and Constable [REDACTED] was not at the vehicle when he was there.

On direct examination, Constable [REDACTED] was asked to speak to SO's complaint about his vehicle being searched. He stated: *"I can. So when he told me that he had a badge, it was -- to me, like, his voice, it was, like, I have a badge. Like, to me, that was -- he was giving me implied consent. Like, you need to see this badge. This badge is going to get him out of whatever he's in, and in my mind, I think he knew, us being police officers, as soon as you say, I've got a badge, we're going to be, like, okay, okay. We need to get this done and get this out -- get him out of the car, out of custody, we need to deal with this situation. So, for me, when he was saying he had the badge, he wanted me to see that badge, and that -- that was where I was -- where I was thinking, in my mind, and that I needed to see that badge to confirm and check this badge so I can get him out of custody right away."*<sup>54</sup>

Constable [REDACTED] testified he believed SO had given him consent to go into the vehicle and check the badge.

SO was asked under cross examination: *"Okay. You wanted the officer to go -- told the officer about your ID and badge, and you wanted the officer to go and get your ID and badge so that they could clear you, correct?"* He replied, *"Yeah."*<sup>55</sup>

SO was handcuffed and seated in the rear of the police car. He brought up the fact he had a badge. His purpose in telling the officers he had a badge is obvious; he wanted the officers to know who he was and to prove he was not in possession of a stolen car.

This was a reasonable course of action for SO and was a continuation of his cooperation with the police officers. He also would know the officers would not just take his word that he had a badge, they would have to see it. He told Constable [REDACTED] specifically where the badge was. SO knew he was being detained and would know he would not be permitted to leave the police car to retrieve his ID. I believe it to be a reasonable assumption on Constable [REDACTED] part that SO was giving him consent to enter the vehicle to retrieve the identification.

I make the finding of fact, SO's consent for Constable [REDACTED] to check his vehicle for his badge was implied.

This consent did not extend to giving the officers permission to search the vehicle and it must be determined if the Service has proven on a balance of probabilities that the vehicle was searched, and if so by who.

SO described seeing the officers searching all over the front of his vehicle.

Constable [REDACTED] stated he did not enter SO's vehicle. It was his testimony, when Constable [REDACTED] was retrieving SO's identification, he got the licence plate number of

---

<sup>54</sup> Transcript. Page 437-438. L. 21-26. L. 1-9.

<sup>55</sup> Transcript. Page 148. L. 4-7

SO's vehicle and then sat back down in the police car. Constable [REDACTED] was clear in his testimony, Constable [REDACTED] did not enter SO's vehicle.

When police officers have a person in custody in their police car, and a vehicle search is required, it is not practice for both officers to search the vehicle. One officer would remain with the person in custody. Another consideration is two people searching a vehicle is impractical and can lead to areas being left unsearched.

On this point, I believe SO is mistaken in his recollection. I do not believe Constable [REDACTED] entered his vehicle. There would be no purpose. There is insufficient evidence to prove that Constable [REDACTED] entered SO's vehicle and I conclude the only police officer to enter SO's vehicle was Constable [REDACTED].

SO stated the search lasted about thirty seconds. This in itself is a strong indicator a search was not conducted. Even a search incidental to arrest takes far longer than thirty seconds. SO was not sure if the back of the vehicle was entered or searched. He only testified the front car doors were opened. If a search was conducted, then the back seat area would have been searched as well. SO stated 'he believed' the glovebox and center console were searched. He did not expound on why he believed this other than he thought it may have been disturbed.

Constable [REDACTED] testified when SO told him about the badge, doubt started to enter his mind about SO being involved in criminal activity and that he was actually a police officer. His reason to go to the vehicle was to confirm SO's claim he had a badge. At this point, there would be no logical reason or evidentiary purpose to conduct a search of the vehicle. His stated purpose in entering the vehicle was satisfied when he located the badge exactly where SO stated it would be.

The evidence in the form of testimony, combined with the circumstances as they presented themselves at the time do not support the allegation that SO's vehicle was searched by the police officers. The vehicle was entered by Constable [REDACTED] with the sole intent of locating the badge/identification of SO and done so with the reasonable understanding of the implied consent of SO.

This count has not been proven on a balance of probabilities. Constable [REDACTED] and Constable [REDACTED] are found not guilty on count #3.

#### **Analysis on Count #4 - Neglect of Duty, as defined by section 5(2)(h)(i) of the PSR.**

In count #4, it is alleged Constable [REDACTED] and Constable [REDACTED] arrested and detained SO and did not *Charter* or caution him as required by law.

I will first state, there is no requirement in law for a police officer to provide a "caution" to an arrested or detained person. Section 10 of the *Charter* does not address a "caution." Calgary Police Service policy on Arrest, Release, Detention does not mandate a requirement to provide a caution. A caution is required as an investigative step when a

police officer is seeking a legally admissible statement or admission from a suspect or an accused person.

To prove this allegation, the Service must first show on a balance of probabilities that neither of the cited officers provided SO with his *Charter* rights. It must next be proven the cited officers were acting negligently and without lawful excuse, to promptly and diligently perform their duty as a police officer, by not providing SO with his *Charter* rights.

In this matter both officers confirmed during their testimony, they did not provide SO with his s. 10(b) *Charter* rights. I make this a finding of fact.

A person rights upon arrest or detention are conferred under section 10 of the *Charter*. It reads:

*10. Everyone has the right on arrest or detention*

- (a) to be informed promptly of the reasons therefor;*
- (b) to retain and instruct counsel without delay and to be informed of that right; and*
- (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.*

I am satisfied based on the evidence and testimony presented, SO was informed he was under arrest and why. He was told this as he was ordered out of the vehicle, and upon being placed into the police car. I accept the testimony of Constable [REDACTED] on this point. The written letter of complaint states SO was told he was under arrest. I also accept the evidence of Constable [REDACTED] that he told SO they were investigating a stolen vehicle. This was confirmed by SO in his testimony when he spoke of the officers having the wrong vehicle and that the description of the stolen vehicle did not match his vehicle.

The CPS Arrest/Release/ Detention Policy at section 10 addresses the responsibilities of a CPS member as it relates to Section 10 of the *Charter*. The relevant sub-sections are as follows:

- 1. Section 10 Charter Rights apply whenever you arrest or detain a person.*
- 2. This includes but is not limited to:*
  - d. short-term “arrest and release” (with or without charge);*
- 3. Promptly inform the person:*
  - a. of the reasons for their arrest or detention per s. 10(a) Charter Rights;*  
*and*

*b. of their right to speak to a lawyer per s. 10(b) Charter Rights*

- 4. Read the person their 10(b) Charter Rights verbatim from the most current issue Charter Card.*

The cited officers were not charged with failing to abide by the Arrest/Release/Detention policy, however it is one of the guiding documents for the officers to follow.

Aside from being told he was under arrest when he was being ordered out of his vehicle, SO was told he was under arrest and what for prior to him being placed into the police car. While this could have been an opportune time to advise SO of his *Charter* rights, CPS policy dictates *Charter Rights* are to be read verbatim from the most current issue *Charter Card*. Given the circumstances, I find it was appropriate not to read the *Charter Rights* outside of the police vehicle, and to wait until SO was in the vehicle and the officer was inside the car as well. Most officers retain the card inside their notebook. The cold weather outside, and the ability to converse inside the police vehicle made this the appropriate place.

The evidence tells me that almost immediately after being placed inside the police car, SO advised the officers' he had a badge. There was some evidence stating he made mention of this as he exited his vehicle or was being escorted to the police car. Constable [REDACTED] testified the first he heard of a badge was when SO was in the back seat of the police vehicle. I find it is more definitive that this was clearly articulated by SO when he was inside the police car, and clearly understood by Constable [REDACTED] when he was inside the police vehicle.

This understandably changed the focus of the officers relating to their investigation. The focus changed from proceeding with their possession of stolen property investigation and providing SO with his *Charter* rights, to confirming the assertion of SO that he had a badge, inferring he was a law enforcement officer and therefore not in possession of stolen property.

Constable [REDACTED] upon hearing this from SO and learning where the badge was, immediately exited his police vehicle to confirm this information which he did. As he walked back to the police car, Constable [REDACTED] checked the licence plate of SO's vehicle confirming it was not the plate on the stolen vehicle. Constable [REDACTED] advised Constable [REDACTED] there was a badge, and the licence plate did not match the stolen vehicle. During this time, Constable [REDACTED] stated he believed they had made a mistake in arresting SO, however he still needed to confirm that. They quickly ran SO's name on CPIC to confirm and it came back clear. Constable [REDACTED] then said it became their priority to release SO from custody.

He stated: *"At this point, as soon as I sat down, and he gave me that information, it -- it was my goal to get him out of custody as soon as possible. If I -- like, again, I was thinking back to if I was in the situation, as a police officer, I would want to be out of*



*custody. I would want to be free to go, and my thought process was to confirm, check, get him out of the car. That was it.”*<sup>56</sup>

Additional relevant sections of the *Charter of Rights and Freedoms* speaks to “life, liberty, and security of the person” and to the detention and or imprisonment of people.

Section 7 states:

*7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

Section 9 states:

*9. Everyone has the right not to be arbitrarily detained or imprisoned*

I also quote from the Government of Canada, Department of Justice website:

*The section 10(b) right to retain and instruct counsel is triggered at the outset of an investigative detention, and the police have the obligation to inform the detainee of his or her right to counsel “without delay”. **The Supreme Court has stated that “[t]he immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under section 1 of the Charter”** (Suberu, supra at paragraph 2. See also Rowson (ABCA), supra at paragraph 27).*<sup>57</sup>

*Bolding and underlining added*

In Mr. Shymka’s written submission dated April 12, 2021, he speaks of competing *Charter* interests. This is a laudable argument and one that I believe plays significantly into this matter.

One of the purposes behind s. 10 of the *Charter* is to ensure a person has been informed of the reason for their arrest, and to obtain legal advice all in order to facilitate their release so as to satisfy s. 9. Accordingly, one could say s. 9 takes precedence over s. 10 in its degree of importance.

This is supported by Mr. Shymka’s argument where he quotes *R. v. Prosper*<sup>58</sup> at p 273:

*[O]ne of the purposes of the right to counsel under s. 10(b) is to safeguard the liberty interests of detainees, which are constitutionally protected under s. 7 of the Charter, and to assist detainees in regaining their freedom.*

---

<sup>56</sup> Transcript. Page. 453-454. L. 22-26. L. 1-3.

<sup>57</sup> <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art9.html> s. 3(ii) Investigative Detention

<sup>58</sup> *R. v. Prosper*, 1994 CanLII 65 (SCC), [1994] 3 SCR 236

Again from Mr. Shymka's argument, "Police should not disregard information given by a suspect who is cooperative and denying any involvement in a crime: *R. v. Long*,"<sup>59</sup>

*I have no hesitation in saying that when a police officer is proceeding to arrest without a warrant, he ought to listen to any statement the prisoner may seek to give in a reasonable manner about the charge upon which he is being arrested. ... The statement of the prisoner may show clearly that a mistake has been made by someone.*

SO provided exculpatory information to Constable [REDACTED] which he acted upon that led to SO being released forthwith. They officers had made a mistake and upon confirming the mistake, immediately released SO.

Again, quoting from Mr. Shymka:

*"SO had a right to be advised by the arresting officers of his right to counsel without delay. At the same time, he also had a right to speak to the arresting officers in answer to his arrest in order to regain his liberty without delay."*

*"Constables [REDACTED] and [REDACTED] were faced with a situation where they had to resolve their competing duties to SO in terms of affording him his competing Charter rights."*

Supporting the argument regarding competing *Charter* interests, I apply the case provided by Mr. Shymka, *R. v. Crawford*.<sup>60</sup>

*"I have gone to some length to stress that Charter rights are not absolute in the sense that they cannot be applied to their full extent regardless of the context. Application of Charter values must take into account other interests and in particular other Charter values which may conflict with their unrestricted and literal enforcement."*

I agree with the assertion that Constable [REDACTED] and Constable [REDACTED] prioritized SO's right to liberty without delay, over his right to counsel without delay. If they did not act on this information expeditiously, it could be argued the officers were neglectful, by not being prompt and diligent in their duties to release SO.

Mr. Shymka also provided two additional case citations that are on point:

*R. v. Mann*<sup>61</sup> at para. 22:

---

<sup>59</sup> *R. v. Long*, 1969 CanLII 989 (BC CA), [1970] 1 CCC 313 at p. 317

<sup>60</sup> *R. v. Crawford*, 1995 CanLII 138 (SCC), [1995] 1 SCR 858 at para 34

<sup>61</sup> *R. v. Mann*, 2004 SCC 52 (CanLII) at para. 22

Section 10(b) of the Charter raises more difficult issues. It enshrines the right of detainees “to retain and instruct counsel without delay and to be informed of that right”. Like every other provision of the Charter, s. 10(b) must be purposively interpreted. **Mandatory compliance with its requirements cannot be transformed into an excuse for prolonging, unduly and artificially, a detention that, as I later mention, must be of brief duration.**

*Bolding and underline added*

and *Allen v. Alberta (Law Enforcement Review Board)*<sup>62</sup> at para 33:

**It cannot be the case that a Charter breach is ipso facto a disciplinary offence, because it would mean that mere errors in judgment or carelessness would inevitably rise to the level of discreditable conduct.**

*While police discipline may not require a full level of mens rea, and negligence may in some instances amount to a disciplinary offence, there must be some meaningful level of moral culpability in order to warrant disciplinary penalties. As noted in *Rampersaud v Ford*, January 26, 1994 (Board of Inquiry under the Ontario Police Act) police work would become impossible if police officers were, regardless of the circumstances, subjected to disciplinary proceedings every time a judge found a Charter breach.*

*Bolding and underline added*

Constable [REDACTED] and Constable [REDACTED] breached the *Charter* by not providing SO with his *Charter* rights. It is my finding, that this breach was not as the result of negligence, or without lawful excuse. They prioritized which *Charter* right to uphold first and I believe they chose correctly. To further detain SO under the circumstances would be far more serious. Such a type of breach is what our *Court of Appeal* were discussing in *Allen* when they stated: “there must be some meaningful level of moral culpability in order to warrant disciplinary penalties.”

The Service has failed to prove on a balance of probabilities, either Constable [REDACTED] or Constable [REDACTED] negligently, without lawful excuse, failed to promptly, and diligently, perform their duties.

I find Constable [REDACTED] and Constable [REDACTED] not guilty on count #4.

**Analysis on Count #5 - Discreditable Conduct**, as defined by section 5(2)(e)(viii) of the *PSR*.

The allegation of Discreditable Conduct relates to the collision between the police vehicle operated by Constable [REDACTED] and SO’s vehicle, describing the collision as ‘unnecessary.’

---

<sup>62</sup> *Allen v Alberta (Law Enforcement Review Board)*, 2013 ABCA 187 (CanLII) at para. 33

I will first state, on an annual basis, there are dozens of collisions involving police vehicles where it has been determined through an investigation and review, that the police officer operating the vehicle bore primary responsibility. Such collisions have involved extremely excessive speed, failing to stop at traffic signals, disobeying traffic control devices, distracted driving, and a myriad of other causes. Outside of collisions involved in pursuits, I have never seen an allegation of Discreditable Conduct arise as a result.

The onus is on the police service to prove on a balance of probabilities, that the actions of Constable [REDACTED] in the operation of a police vehicle unnecessarily caused the collision, then to prove that these actions rise would be prejudicial to discipline, or likely to bring discredit upon the reputation of the police service. And that it is serious enough to be heard at a disciplinary hearing.

It is undisputed, Constable [REDACTED] was operating the police vehicle on the date and time of the collision.

Findings of fact have been previously made regarding the condition of the parking lot. This includes the steep grade down into the lot from the entrance, as well and the extremely icy conditions that reduced traction. Those findings are applied to this analysis.

Constable [REDACTED] testified they entered the parking lot to obtain the licence plate of the suspicious vehicle. He stated: *"So from there -- from our stopped position, I accelerated away on the roadway; slowly entered the parking lot via that kind of sidewalk -- rise in the sidewalk; had to accelerate to get over the snow and that lip, get over the embankment. I then coasted for a couple feet, applied the brakes. And at that point my brakes immediately locked up on the ice, and I began to slide down that decline... This all happened very quickly. The distance itself from, I'd say, when I started sliding to the - - approaching a stopped subject vehicle was maybe 10 to 20 feet, so I'd estimate I slid on the -- on the ice 10 to 20 feet. It happened -- it caught me off guard, so basically I just hit the brake as hard as I could. I -- I didn't even think to try and steer out of it or, you know, allow the ABS to work, whatever. It just locked up, and it was all I could do to just try and stop it in time from hitting the -- from -- preventing and not hitting that subject vehicle."*<sup>63</sup>

The evidence supports a finding that this was a low-speed impact. The police vehicle sustained no damage, the airbags did not deploy. The damage to SO's vehicle was minor. The fact that the damage cost was \$1,959.31 is not an accurate indicator of the force of the collision or the speed the police vehicle was travelling leading up to or at the time of impact. A minor scratch or dent on a vehicle can cost in excess of \$1,000.00 to repair.

---

<sup>63</sup> Transcript. Pages. 320-321. L. 15-26. L. 1-8

Constable [REDACTED] was clear in his testimony the collision was not intentional. The claim by SO that Constable [REDACTED] rammed his vehicle is refuted by his own testimony and prior statements.

It is my further finding a significant factor in the collision was the steepness of the decline into the parking lot from the entrance, combined with the ice-covered surface that greatly reduced traction. I refer back to the testimony of CL on this point who described the lot as extremely slippery.

Constable [REDACTED], upon cresting the sidewalk and coasting several feet, applied his brakes. The wheels locked and the vehicle slid down the incline. Constable [REDACTED] kept his foot on the brake and the ABS had no effect. He did not release the brake in an attempt to steer out of the slide. In fact, an attempt to steer out of the slide on such road conditions could have caused the police car to turn sideways in the slide and strike SO's vehicle broadside with the police car. Striking the vehicle front end first was the lesser of two bad outcomes.

The collision between the two vehicles was unfortunate but it was the result of a combination of a multitude of factors. It was not limited to the singular actions of Constable [REDACTED]. And certainly not something that does not occur on a regular basis in the public, and within the police service.

A dictionary definition of 'unnecessarily' is *"in a way that is avoidable; needlessly."* Was the collision avoidable? The officers did not need to enter the parking lot; an alternative tactic was to stay on Riverfront Avenue and notify dispatch. That is hindsight. While that would have avoided this particular collision they chose another tactic and entered the lot to get a closer look at the licence plate. This was their choice and based on the circumstances of the situation. Once they entered the lot and gravity and slippery conditions took over, the collision became far less avoidable and the collision resulted. It has not been proven and I do not see how the term "unnecessarily" applies to this collision.

An aspect of the misconduct that the service must prove is how the actions of Constable [REDACTED] prejudiced discipline or brought the reputation of the police service into disrepute. They have not presented any evidence that would prove this on a balance of probabilities, or to any level of satisfaction.

In matters of Discreditable Conduct, the prevailing case that provides assistance in this type of misconduct is *Girard v. Delaney*.<sup>64</sup> This case deals with a test to be applied when determining whether particular conduct on the part of a police officer is likely to bring discredit to the reputation of a police service.

Page 339 of that decision states:

---

<sup>64</sup> *Girard v. Delaney* (1995), 2 P.L.R. 337 (Ont. Bd. Inq.)

- A. *The test is primarily an objective one.*
- B. *The board must measure the conduct of the officer by the reasonable expectations of the community.*
- C. *In determining the reasonable expectations of the community, the Board may use its own judgment, in the absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully appraised of the circumstances of the case.*
- D. *In applying this standard, the Board should consider not only the immediate facts surrounding the case but also any applicable rules and regulations in force at the time.*
- E. *Because of the objective nature of the test, the subjective element of good faith (referred to in the Shockness case) is an appropriate consideration where the officer is required by the circumstances to exercise discretion.*

The above points allow me, in absence of specific evidence, to use my judgment as to what the community expectations are relative to the harm that Constable [REDACTED] actions may have caused to the reputation of the Calgary Police Service.

It is my finding the collision was not intentional. It was as described by Mr. Shymka an accidental collision. I agree with his assertion, there has to be some degree of moral blameworthiness, and I certainly do not see it here.

It is also my finding, that the reputation of the Police Service would not be adversely affected by the actions of Constable [REDACTED] that caused this collision. The public would see it for what it was; a minor collision; one that a great many of them have experienced themselves. As well, I do not see any prejudicial affect to discipline within the police service. On the contrary, a finding of proven for such a minor act would have a significant adverse effect on discipline and morale within the Service.

It is my finding the Police Service has failed to prove the allegation on a balance of probabilities. I find Constable [REDACTED] not guilty on count #5.

On this count, I note Mr. Shymka has argued the Police Service has no jurisdiction to be pursuing SO's complaint over the collision (Counts #5 and #11) as this complaint was informally resolved under s. 43.1(0.1) of the *Police Act*. This argument has merit and should be discussed.

SO participated in the informal resolution process as laid out in s. 43.1(0.1) of the *Police Act*. He met personally with Acting Superintendent [REDACTED], as well as communicated with Sergeant [REDACTED]. Sergeant [REDACTED] facilitated a collision report being completed, and as well arranged for the compensation payment for SO's damaged jacket. Ultimately SO

was compensated for the damages to his vehicle as well. This was all prior to the Service receiving his formal complaint against the cited officers in July 2018. Acting Superintendent [REDACTED] testified SO willingly participated in the process. It is apparent that through this process and absent of a PSS investigation of a formal complaint from SO, he achieved certain resolutions.

The cited officers also willingly participated in the informal resolution process. They met with their District Commander, Staff Sergeant and Sergeant. Ultimately they each received documentation in the form of “negative behavioral event.”

The intent of the informal resolution process is to facilitate a “speedy” resolution to a complaint or a concern raised by a complainant. This can be done in advance of or during an investigation. Upon meeting with Acting Superintendent [REDACTED] and communicating with Sergeant [REDACTED], SO’s concerns regarding the damage to his jacket and his vehicle were resolved. He accepted the compensation. The Statement of Claim filed by SO in December 2019 does not claim damages for the jacket or the vehicle. This indicates a resolution to this aspect of his complaint.

Count 5 was found to be not proven. If this had not been the case, serious consideration would have been given to dismissing the count due to a lack of jurisdiction as this aspect of the complaint could have been considered resolved under s. 43(1)(0.1) of the *Police Act*.

**Analysis on Count #6 - Discreditable Conduct**, as defined by section 5(2)(e)(vii) the *PSR*.

This count alleges Constable [REDACTED] and Constable [REDACTED] arrested and detained SO based on his race or ancestry. The wording of the charge under the *Regulation* states to differentially applying the law or exercising authority on the basis of race, colour, religion, sex, physical disability, mental disability, marital status, age, ancestry, or place of origin.

SO claims he was targeted by the police officers because of his First Nations status. This is an extremely serious accusation and one that can be extremely damaging to a person’s reputation. The first mention of his status came in his Written Complaint where at bullet point 7, it stated ‘This is an abuse of authority and police power towards an innocent Indigenous citizen of Calgary.’ Even here it did not state he was ‘targeted’ or profiled. The allegation also was not included as part of the ‘facts’ or ‘breaches of duty’ alleged in the Statement of Claim (Tab 29). The first accusation of him being targeted due to his First Nations status came during his interview with Detective [REDACTED]. The accusation is based on SO’s perception of the incident. In answer to the question did he believe this was racially motivated, he stated “*Sometimes, yes.*” Asked to expand on that he replied, “*Me being a First Nations person...I’m very sensitive to that.*”

The following questions and answers to SO on direct examination are specific to this allegation:<sup>65</sup>

Q     *You made a -- in that complaint, you also alleged that the officers perhaps discriminated you or were against you because of your First Nation status?*

A     (NO VERBAL RESPONSE)

Q     *Can you elaborate on that? How was what they said or did that gave you that impression?*

A     *Well, I am First Nation. And, yeah, there's a known systemic issue publicized. Everyone knows about it. It's been there before. It's been there before the CPS even admitting to it. So it just felt like I was being targeted because of that.*

Q     *Did they say anything to indicate that they were treating you differentially because of your status?*

A     *No, nothing that they said.*

Q     *So are you saying that it's because of your -- it was your perception that you were being treated that way because you're First Nation?*

A     *I think it was because of my appearance is why I'm saying I was treated that way.*

Q     *Well, let's talk about when they actually saw you, physically. So they'd already bumped into your car; they already had their sidearms out; they were already beside your car before they actually saw you, correct?*

A     *No, I don't know.*

Q     *Before you stepped out of the car.*

A     *I don't know if that's the first time they saw me. I have no idea the first time they saw me. There were indicators that I was an Indigenous person.*

Q     *What were those?*

A     *My car -- my car had an obvious Indigenous-style ornament --*

Q     *Where is that?*

---

<sup>65</sup> Transcript. Pages 104-106. L. 25-26. L. 1-26, L. 1-12



A -- that they could've seen. That's on the rearview mirror. So they would have seen that.

Q But you can't say for sure when they --

A No, no. I'm just saying it's obvious right there. So it's not like something that's hidden. It's right there.

Under cross-examination SO also spoke of the ornament. He testified the officers would have known of his First Nation status because he had an Indigenous symbol hanging from his rearview mirror. This symbol was described as a drum with a 'sort of' dreamcatcher on the back of it. This item can be seen in Exhibit 15 (Tab 27) photographs 5 and 9.

Also under cross-examination, SO was questioned about the radio transmissions relating to the stolen vehicle. He was asked is hearing them changed his perspective at all about this incident. The following question and answer took place: <sup>66</sup>

A Actually it does, yes, sir. There's an overgeneralization about Native people.

Q Sorry?

A There's an overgeneralization about Native people and CPS.

Q From the excerpts I played for you?

A Yeah. You asked me if it changed my mind on the incident.

Q Okay. Does what you heard change your perspective about this incident?

A Yeah.

Q How so?

A CPS obviously overgeneralizes Native people.

Constable [REDACTED] testified he disagreed with SO's allegation that race played a part in this incident. He stated, "*they absolutely did not.*" He did not make any observations about anything in SO's vehicle in terms of his racial background. He also stated he was not aware of his race from his brief interaction with him and SO never spoke of it.

Constable [REDACTED] was asked about SO's concerns what was going on was racial profiling. He replied saying he did not agree with that. He stated he did not know SO

---

<sup>66</sup> Transcript. Page 178-179. L. 16-26. L. 1-2.

was Native. He was asked if from looking at him at the scene did he recognize him as First Nations. He replied he did not.

He was asked about when they contacted the vehicle and he had testified he saw the silhouette of the driver. He was asked if he saw the silhouette was an Indigenous man. He replied: *"No sir."* He also did not recognize him as First Nations while he was in their back seat or at the scene.

He was asked about the testimony of the drum hanging from the rearview mirror and if he noticed that. He replied he did not.

When Constable [REDACTED] and Constable [REDACTED] decided to investigate the suspicious vehicle, they were on Riverfront Avenue. While they could see the vehicle was running, they could not determine if it were occupied. The first indication it was occupied was when they collided with the vehicle and they saw movement in the driver's seat.

When Constable [REDACTED] issued commands for the driver to exit the vehicle, the police vehicle was behind SO's vehicle whose windows were up. Neither Constable [REDACTED] or Constable [REDACTED] had or would have been able to see who the driver was. The commands were issued to a driver of a suspected stolen auto. SO's First Nations background did not play into the decision making. There is absolutely no evidence to support the allegation that SO was ordered out of the vehicle because he was First Nations.

The contention that the officers should have known they were dealing with a First Nations person because there was an Indigenous ornament hanging from the rearview mirror is nonsensical. If the officers were paying attention to or even noticed what was hanging on a rearview mirror instead of the potential threat they faced, I would be quite surprised. Their attentions were rightfully focused on other more pressing matters. To suggest otherwise is ridiculous. The ornament hanging from SO's rearview mirror did not play into the officer's decision-making process in any way.

SO's belief that the officers were racially motivated was described in his interview with Detective [REDACTED]. He stated he has dealt with situations very similar where a police officer was racially motivated. He stated: *"Uh, it's not like these guys like threw me down on the ground and said hey you dirty Indian... it wasn't anything like that."*

He questioned why did they pick him out of a crowd? He questioned why they thought his vehicle was suspicious vehicle. He did not know who they were actually looking for and that was one thing he wanted to know. He stated: *"if they were looking for another native man or anyone like that then that would be like sort of a generalization."*

In his interview he said, every person he talked to about the incident asked him if it happened because he was native.

I do not question SO believes the officers targeted him due to his race. SO stated himself in his interview with Detective [REDACTED] *"him being a first nations person, he is very sensitive to that."*

It is his perception he was targeted, but a perception is not evidence. In this case, all that exists is a perception. There is no evidence whatsoever to support the allegation. SO was not targeted, and his First Nations status did not play into his interactions with Constable [REDACTED] or Constable [REDACTED] in any fashion.

I had previously mentioned this is an extremely serious accusation. Even the accusation can be extremely damaging to a person's reputation. When such an accusation is found to be without merit, or an iota of truth, the accusation must be strongly denounced. I make that denunciation in this decision.

It is my finding, the allegation that Constable [REDACTED] and or Constable [REDACTED] differentially applied the law or exercised authority on the basis of race, colour, religion, sex, physical disability, mental disability, marital status, age, ancestry, or place of origin is totally without foundation. The Service has failed to prove the allegation on a balance of probabilities. I find Constable [REDACTED] and Constable [REDACTED] not guilty on count #6.

#### **Analysis Count #7, Count #8**

As it appears the allegation in count #7 is premised on the use of force alleged during the arrest as particularized in Count #8, it is appropriate both counts be discussed in a single analysis.

**Count #7 - Discreditable Conduct**, as defined by section 5(2)(e)(viii) of the *PSR*.

**Count #8 - Unlawful or Unnecessary Exercise of Authority** as defined by section 5(2)(i)(ii) of the *PSR* as by applying inappropriate force in circumstances in which force is used.

The count of Discreditable Conduct alleges Constable [REDACTED] and Constable [REDACTED] used excessive force against SO during his arrest when they lifted him from the ground or dragged him by the jacket, thereby causing damage to the jacket.

The count of Unlawful or Unnecessary Exercise of Authority, using excessive and unnecessary force, alleges Constable [REDACTED] and Constable [REDACTED], during the arrest or detention of SO:

- a) They grabbed his wrists and twisted his arms behind his back;
- b) They applied handcuffs to him;
- c) They lifted him from the ground or dragged him by the jacket to their police vehicle.

Count #7, appears to duplicate Count #8, with the only difference being the allegation that the use of force caused SO's jacket to be damaged and as such it is prejudicial to discipline or like to bring discredit upon the reputation of the police service.

I will commence this analysis with a finding of fact, that SO was placed in handcuffs during his arrest and detention. This is not disputed and is supported by testimony from all persons present. The fact that SO was placed in handcuffs does not prove the allegation of unlawful or unnecessary use of force.

It has not been alleged in the charges, that the arrest/detention of SO was unlawful. The officers have not been charged under s. 5(2)(i)(i) *PSR* for "exercising his authority as a police officer when it is unlawful or unnecessary to do so." In count #9, they are facing a count of Neglect of Duty alleging they failed to take reasonable steps to determine whether or not the vehicle was in was stolen, however again it does not allege the detention/arrest was unlawful.

At the outset of the analysis section, I made a finding of fact that 'Based on the totality of the circumstances, the officers had a reasonable suspicion that the Mitsubishi SUV, parked and running in the parking lot, may have been the stolen Mitsubishi SUV that had successfully evaded the police earlier in the evening' and 'With that reasonable suspicion, any occupant of the Mitsubishi SUV could be lawfully detained for investigative purposes.'

This reasonable suspicion was premised on a number of factors, most of which were articulated in the 'Findings of Fact' which led to the officer's reasonable grounds.

I apply those findings to the analysis on counts 7 and 8.

The officers testified SO was told he was under arrest. Constable [REDACTED] testified this was announced in the commands to SO to get out of the vehicle. He testified it was repeated to SO when he was being placed in the rear of the police car. Constable [REDACTED] testified he believed he had reasonable and probable grounds to arrest SO based in the circumstances.

Whether Constable [REDACTED] and Constable [REDACTED] had 'reasonable and probable grounds' to arrest is not material to the matter. They did have 'reasonable suspicion' based on reasonable grounds to detain SO. The confusion caused by the use of the word arrest over detained was aptly addressed in *R. v. Dupuis*<sup>67</sup> provided by the defence:

*"We turn, then to the circumstances of the arrest of this accused. It would appear that this accused was in fact arrested by the officers in the sense that they told him he was under arrest."*

---

<sup>67</sup> *R. v. Dupuis*, 1994 ABCA 401 (CanLII) at paras. 8-9

*At the time, of course, they had no reasonable grounds to believe that he was guilty any crime.*

*It is a sufficient disposition for us to say that, even if there was no power of arrest, the officers did have the power to detain him. “*

One of the allegations in count 8 is that SO was handcuffed. I have made the finding that SO was lawfully detained.

I refer to the testimony of Acting Superintendent [REDACTED] who was asked when officers are dealing with a person they suspect to have been evading police in a stolen vehicle, would handcuffing be normal protocol or procedure. She replied: *“yes I would say that if they -- if they believe the suspect is involved in the theft of the vehicle, and then for their safety and the safety of that individual as well to cuff them, to search them, to put them – at that time, they’re still trying to figure out who that individual is, at that time.”*<sup>68</sup>

The Calgary Police Service ‘Use of Force’ Policy at s.7, Physical Control Techniques, states the following:

1. Handcuffing

a. Handcuffing may be employed during the arrest of the following persons:

- i) one who has demonstrated an intention to become violent, to escape or to cause harm to themselves or others;
- ii) one who is suspected of a violent crime;
- iii) one who has a known history of violence; or
- iv) when you have a reasonable belief that handcuffing is necessary.

Having been lawfully detained, SO was subject to being handcuffed and a pat down search for officer safety purposes. The use of handcuffs to restrain a detained or arrested person is a standard practice employed by members of the Calgary Police Service. Such a practice is supported in case law with an example being *R. v. Mehari*<sup>69</sup> at paragraph 10:

*Regarding Constable Elsom’s search of the accused, **she concluded that while the power to detain for investigative purposes does not automatically give police the right to search an individual, officer safety made it lawful to handcuff the accused and perform a pat-down search.** Further, she accepted his evidence about “the effort by the accused and to reach toward his pant’s pocket in the course of the investigative detention”: Mehari at para 10. She found Constable Elsom had both subjective and objective reasonable grounds to arrest*

<sup>68</sup> Transcript. Page 257. Line 17-22

<sup>69</sup> *R. v. Mehari* , 2011 ABCA 67

*the accused for the possession of a controlled substance and subsequently search his pocket in relation to the crime for which he was arrested:*

(Bolding and underline added)

The cited officers detained SO believing he was operating a stolen vehicle. Their suspicions needed further investigation. The vehicle they believed he was operating had been involved in a lengthy police 'follow' earlier in the evening. The stolen vehicle fled from several attempted traffic stops and successfully evaded police. The fact they suspected SO was in possession of this vehicle, satisfies s.7.1.a.i of the CPS policy, 'one who has demonstrated an intention to become violent, to escape.' It is also keeping with s. 7.1.a.iv of the policy 'When you have a reasonable belief that handcuffing is necessary.' This is a subjective belief that the Service has not been proven on a balance of probabilities to have been unreasonable.

They also testified as to their personal experience of dealing with persons operating stolen vehicles, as well as their knowledge of the potential for weapons or violence.

It is my finding, the application of handcuffs to SO was reasonable and did not constitute the use of excessive and unnecessary force. The Service has not proven otherwise.

The next aspect of the allegation is that the cited officers 'grabbed his wrists and twisted his arms behind his back.

From the testimony of the complainant, Constable [REDACTED] and Constable [REDACTED], it is clear the Constable [REDACTED] was the officer who handcuffed SO. Constable [REDACTED] maintained a cover position until such time as SO was in handcuffs. Constable [REDACTED] was not involved in the handcuffing of SO.

As such, the analysis will focus on the actions of Constable [REDACTED] in handcuffing SO.

It is the testimony of SO that: *"And then he -- he was -- then he started grabbing my hands and then pulling my arms behind the back as I lay on the snow, and he started just handcuffing me. He's pulling one arm, and then he pulled the other..."*<sup>70</sup>

The only reference in his testimony to his arms being twisted was in response to a question under cross examination. It was put to him: 'And you assert in your written complaint -- so back to Tab 23 -- that both officers grabbed your wrists and twisted your arms behind your back while handcuffing you.' He replied: *"The one did at first and the other one joined him."*<sup>71</sup>

---

<sup>70</sup> Transcript. Page 71. L. 10-13.

<sup>71</sup> Transcript. Page. 161. L. 15-19

In SO's Collision Report Witness Statement, (Tab 19) he stated, *"they handcuffed myself and then pulled me up by my jacket..."* In his written statement of January 20, 2018 (Tab 21) he wrote: *"The other police officer grabbed my other wrist and I was told I was being handcuffed which I said ok and complied."* In his Written Complaint (Tab 23) he wrote: *"The two officers then grabbed his wrists and twisted his arms behind his back while handcuffing him."*

In SO's interview with Detective [REDACTED] he stated: *"And uhm as he was doing that he has uh he was gripping one of my arms back behind my back and he's kneeling on my my back as well too, so he kinda pushed me to the ground with his knees and then started yanking my arms behind me and then I so uh prior to that I put my phone and my keys on the ground in the snow uhm and I just left those there and uhm so the the one guy with the gun still pointing it at me, he's like don't move, don't move, um and the other that was uh jumped on me um was trying to pin my arms behind me and try to handcuff me, so I didn't resist in any way whatsoever and I just did it..."*<sup>72</sup> In SO's Statement of Claim, (Tab 29), it is written: *"The Plaintiff was handcuffed."* It does not allege his wrists were grabbed and his arms twisted behind his back.

Constable [REDACTED] was asked how his partner took control of SO. He replied: *"Physical control of grabbing a wrist and arm, placing it behind the subject's back, and applying those handcuffs."*<sup>73</sup>

Constable [REDACTED] testified his partner would have been to the side of the subject so that he could access the subject's arms and hands and wrists to apply those handcuffs. He added the subject was compliant so their method would have been slow and deliberate and no rush to their actions at all. He stated there was no resistance from the subject. He was asked to describe the degree of force used. He replied: *"Would have been minimal only to move the arms behind the subject's back and maintain a grip to apply the handcuffs."*<sup>74</sup>

Constable [REDACTED] testified after SO had proned out on the ground, he went around his vehicle to where Constable [REDACTED] was, then the two of them approached SO. He told SO he was going to handcuff him and told him to put his hands behind his back. He testified: *"So at this point, we get to where the driver is lying. I tell the driver I'm going to put handcuffs on him. I tell him to put his hands behind his back. He put his hands behind his back. He complies. I crouch overtop of him with my handcuffs, and I take his hand in my hand, and I place handcuffs on his wrists. At this point, I double lock the handcuffs, and I do a search of his back waistband for weapons."*<sup>75</sup>

The only mention of SO's arms being twisted came in his Written Complaint. He did not describe as such in his interview with Detective [REDACTED]. In the interview he stated the

---

<sup>72</sup> Joint Book of Documents. Tab 25, Page. 5. L. 1-10.

<sup>73</sup> Transcript. Page 334. L. 7-9.

<sup>74</sup> Transcript. Page 335. L. 11-13

<sup>75</sup> Transcript. Page 423. L. 12-19

officer was gripping one of his arms back behind his back..."*then started yanking my arms behind me.*"

He described the handcuffing differently in his direct examination. In his direct examination, he testified the officer pulled his arms behind his back.

For anyone to be handcuffed, the police officer applying the handcuffs would need to grab the individual's wrists. In the case where a person does not put their arms to the back on request, the officer would take the arms of the person and put them behind their back. This often involves some maneuvering and contorting of the arms. It is not a natural movement. No matter what, it is not a comfortable position to be in and with a person the physical size of SO, that discomfort is compounded.

SO was fully compliant with the commands of the police officer. I do not see why this compliance would not continue with SO putting his arms behind his back as he was instructed. This is what Constable [REDACTED] testified SO did with this testimony being corroborated by Constable [REDACTED].

Even with SO's compliance, Constable [REDACTED] would need to take hold of his wrists and attached a handcuff, then bring the other wrist together and handcuff it. This could easily cause strain on SO's arms. This is not indicative of an excessive or unnecessary use of force. It is a standard and trained way to apply handcuffs under the circumstances presented and with a compliant subject.

The Service has not established how SO's arms were handled by Constable [REDACTED] during the application of the handcuffs. SO's testimony does not support his arms were twisted as alleged. His version was different each time he either provided a statement, was interviewed, or testified. SO's use of the word "twisted" in his written complaint is not evidence Constable [REDACTED] twisted SO's arms. With how SO has interchangeably used different words to describe certain actions in attempts to embellish those actions, his use of the word "twisted," could be another example.

It is my finding this aspect of the allegation has not been proven on a balance of probabilities.

The last allegation in the count is that "they lifted him from the ground or dragged him by the jacket to their police car.

There was significant discussion with SO in his testimony and cross examination as to what he meant by the term 'dragged.' An appropriate definition of the word is *"pull (someone or something) along forcefully, roughly, or with difficulty."* It is in this context I believe the allegation is made. This is not SO's definition of the word.

He was asked about the allegation that the officer dragged him by his jacket. He replied: *"Well, yeah, when he was trying to pull me up, he was dragging me up off the ground."*



The Presenting Officer explained when she thought of dragging, she thinks of somebody being pulled across horizontally. He was asked if this was a vertical. *"He replied: "Yeah, sort of. So I'm laying on my stomach, and the officer grabbed me by the back of my jacket like that and basically just tried to drag me up." 76*

Under cross examination it was put to SO, the officer did not drag him across the ground towards his vehicle or he did not drag him along with his feet dragging behind him. SO agreed saying, "No."

Both officers clearly stated they did not drag SO by his jacket.

It is my finding, neither Constable [REDACTED] nor Constable [REDACTED] 'dragged' SO by his jacket to their police car. This allegation has not been proven on a balance of probabilities.

From the wording of the 'details of allegation' on this portion of the count #8, I can only assume what remains is an allegation that the officers "lifted" SO from the ground by his jacket. Then looking at the 'details of allegation' on count #7, this resulted in the jacket sustaining damage.

SO testified only one police officer was involved in lifting him up. This was the passenger officer who would be Constable [REDACTED] On this point I believe SO is mistaken.

I accept the testimony of Constable [REDACTED] and Constable [REDACTED] that they both were involved in bringing SO to his feet from the prone position. After SO had been handcuffed, Constable [REDACTED] holstered his firearm. SO was prone on the ground. The ground was snow covered and icy. Two people assisting a person to their feet is much easier than one person and it makes sense that both officers were involved in lifting SO to his feet. SO's recollection could mean that Constable [REDACTED] first took hold of SO, then he was joined by Constable [REDACTED]

SO testified the officer tried to lift him up by his jacket, and indicated it was grabbed where the hood connected to the neck (collar). He stated: *"So as he was pulling me up, my jacket was, like, kind of choking me because it was done up. It was, like, in my neck, so it was choking me. So I'm like this, and I'm on my stomach, and he's trying to lift me up by the scruff of my -- or the hood of my jacket. And as he's lifting me up, it's kind of pushing against my throat. And then -- so I knew by the way that that wasn't working that that's not -- that wasn't going to lift me up properly. So then he tried again, and as he pulled me up again the second time, my jacket broke." 77* He described how the zipper on the jacket broke.

---

<sup>76</sup> Transcript. Page 109. L. 9-11.

<sup>77</sup> Transcript. Page 73-74. L. 23-26. L. 1-6.

When asked if he tried to get to stand up on his own. He replied: *"Towards the end, yeah. Like, I'm trying to get up on my knees, but once I got to the knees, that was a little easier to actually get up."*<sup>78</sup>

This aspect of SO's allegation is consistent throughout, from his statements, interviews, written complaints. He consistently alleges the officers lifted him by his jacket which resulted in damage to the zipper.

During his testimony, Constable [REDACTED] was asked about the allegation that his partner grabbed SO by the scruff or hood of his jacket and dragged or pulled him up. He replied: *"I say no. I say I know it did not happen, and it wouldn't make sense for us to try and lift someone that way because it would be a lot more difficult. The way we do it is the way we're trained, and it's easiest on our backs to -- to lift someone up the proper way versus trying to pull someone up just with their jacket."*<sup>79</sup>

He added, downtown they pick up people all day and to use proper form and technique, hooking underneath someone's arms versus trying to drag them up from their coat which does not work well. The combined effort makes it easier. He agreed that is what happened; a combined effort consistent with their training.

Constable [REDACTED] was asked about SO testifying he grabbed him by the scruff or hood of his jacket, and he by himself dragged him, lifted him up. He replied that did not happen; he would never have grabbed somebody by the back and lift them up like that. He was asked why and replied, first of all, he could hurt himself. It was slippery, it was icy. He stated: *"At this point, if I would have grabbed somebody like that, I basically would have been doing a dumbbell row, and that would have been -- that would have hurt me, could have hurt him. It just doesn't make sense. I never would have done that."*<sup>80</sup>

He did agree the jacket could have been damaged as they lifted him from the ground. He added it was not his intention to damage the jacket.

Constable [REDACTED] described how SO was brought to his feet. With the help on Constable [REDACTED], they rolled him on his side and then onto his butt. SO was told to tuck a knee then he linked his arm under SO's armpit. Constable [REDACTED] did the same on the other side. They told SO to stand up, and they assisted him standing up from the seated position. Questioned about this he added: *"So we were trained to get somebody up from standing wearing handcuffs so it's the least amount of pressure on our backs and easiest for them to get up is we tell them to tuck a knee, and we tell them to stand up. So they take their knee, and they stand up, and we roll. We kind of shift their body and roll them to the side so they can stand up without having any sort of -- without having to lift, really. We're just kind of directing and helping him get up."*<sup>81</sup>

---

<sup>78</sup> Transcript. Page 74. L. 15-17

<sup>79</sup> Transcript. Page 337-338. L. 24-26. L. 1-4.

<sup>80</sup> Transcript. Page 426. L. 2-6

<sup>81</sup> Transcript. Page 424. L. 16-24

He stated they brushed the snow off of his jacket, and walked him to the car, with each of them holding an arm.

It is reasonable to believe and I make it a finding of fact, the zipper of SO's jacket was damaged when he was brought to his feet by the officers. This is supported by the testimony of CL who observed the damaged zipper. While I have found that SO's jacket zipper was damaged as he was brought to his feet by the officers, the damage was incidental to being lifted from both sides and the strain it would put on the zipper. The damage to the jacket was not intentional.

This is also another aspect of SO's complaint that was dealt with through "informal resolution" pursuant to s. 43(1)(0.1) of the *Police Act*. SO was fully compensated for his damaged jacket well prior to his submitting a formal complaint against the cited officers.

The cited officers were dealing with a compliant person. There would be no reason to use any amount of force on this person. The goal was to get SO to his feet with the least amount of effort, to conduct a pat down search, then to place him in the police car. Grabbing a person solely by the jacket to lift them to their feet would not be a successful means to accomplish the task. A police officer dealing with a compliant person wants to keep that person compliant. An act such as alleged by SO, would be counter to that goal.

Throughout this investigation, two factors have been in the forefront with SO. The damage to SO's vehicle, and the damage to his jacket. His terminology in describing how his vehicle was struck varied significantly. His description of how his jacket was similar. He used phrases such as "broke," "popped open" or "blew open." He stated the jacket was choking him and used the term "dragged" by the jacket. It is my belief SO has embellished his language in describing what happened to his jacket and how it happened.

On this aspect of the allegation, I accept the testimony of both Constable [REDACTED] and Constable [REDACTED] as being more credible and reliable. I find that the officer's provided instruction to SO on how to get up, then assisted him to his feet, with an officer on each side hooking under his arm to raise him to his feet.

After an analysis of the evidence and the submissions, it is my finding, the Service has failed to prove the allegations in both count 7 and count 8 on a balance of probabilities. I find Constable [REDACTED] and Constable [REDACTED] not guilty on count 7 and count 8.

**Analysis on Count 9** - Neglect of Duty, as defined by section 5(2)(h)(i) of the *PSR*.

In count 9, it is alleged Constable [REDACTED] and Constable [REDACTED] did not take reasonable steps to confirm the vehicle SO was sitting in was not stolen before arresting him.

As mentioned previously, it has not been alleged and the officers have not been charged with “unlawful of unnecessary exercise of authority for unlawfully or unnecessarily detaining SO or making an unlawful or unnecessary arrest.

I have also made findings that the officers, acting on a reasonable suspicion based on reasonable grounds, had the lawful authority to detain SO, to continue their investigation.

For the benefit of the analysis on the allegation in count #9, a review of the information the officers based their suspicion on it warranted. As well, a review of the relevant law relating to “Investigative Detention.”

I will first discuss the law. In *Mann*<sup>82</sup>, the SCC stated at paragraph 34:

*The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the Waterfield test, along with the Simpson articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer’s suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer’s reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer’s duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test.*

The Court in *Mann* provides clear guidance on what is required for a lawful investigative detention.

In *R. v. Yeh*<sup>83</sup>, the Saskatchewan Court of Appeal provided guidance on some of the limitations relating to investigative detention.

*It is, of course, well established that the police do not enjoy a general power to detain individuals for the purpose of ferreting out possible criminal activity. More particularly, they may not conduct an investigative detention to determine whether an individual is, in some broad way, “up to no good.” In order to justify an investigative detention, the police suspicion must be particularized, i.e., it must relate to specific criminal wrongdoing. Just how specific it must be is not an issue in this appeal.*

---

<sup>82</sup> R v Mann, 2004 SCC 52 (CanLII), at para 34

<sup>83</sup> R. v. Yeh, 2009 SKCA 112 (CanLII),

What defines “reasonable suspicion” has been discussed in the SCC case of *Kang-Brown*<sup>84</sup> at paragraph 75.

*The “reasonable suspicion” standard is not a new juridical standard called into existence for the purposes of this case. “Suspicion” is an expectation that the targeted individual is possibly engaged in some criminal activity. A “reasonable” suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. As observed by P. Sankoff and S. Perrault, “Suspicious Searches: What’s so Reasonable About Them?” (1999), 24 C.R. (5th) 123:*

*[T]he fundamental distinction between mere suspicion and reasonable suspicion lies in the fact that in the latter case, a sincerely held subjective belief is insufficient. Instead, to justify such a search, the suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment.*

*What distinguishes “reasonable suspicion” from the higher standard of “reasonable and probable grounds” is merely the degree of probability demonstrating that a person is involved in criminal activity, not the existence of objectively ascertainable facts which, in both cases, must exist to support the search. [pp. 125-26]*

*Writing about “reasonable suspicion” in the context of the entrapment defence, Lamer J. in R. v. Mack, 1988 CanLII 24 (SCC), [1988] 2 S.C.R. 903, thought it unwise to elaborate “in the abstract” (p. 965). See also R. v. Cahill (1992), 1992 CanLII 2129 (BC CA), 13 C.R. (4th) 327 (B.C.C.A.), at p. 339. However, in Alabama v. White, 496 U.S. 325 (1990), the U.S. Supreme Court contrasted “reasonable suspicion” with reasonable grounds of belief (or, what the U.S. lawyers call “probable cause”):*

*Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. [p. 330]*

In the matter with Constable [REDACTED] and Constable [REDACTED] the required nexus as discussed in *Mann* was the officer’s investigation of the stolen Mitsubishi SUV, and their belief SO was in possession of that vehicle. I find the nexus was established at the time as defined in *Yeh*, and *Kang-Brown*, sufficient to warrant investigative detention to further their investigation.

---

<sup>84</sup> R v Kang-Brown, 2008 SCC

With the above citations in mind, we now examine the information Constable [REDACTED] and Constable [REDACTED] based their reasonable suspicion on.

Much of this information has already been discussed in other parts of this decision however a recap is beneficial. This recap may be non-exhaustive.

The cited officers had been monitoring the radio transmissions from District [REDACTED] regarding a stolen vehicle. In the transmissions, the vehicle was described as a Mitsubishi SUV, [REDACTED] or [REDACTED] r, Grey in colour with [REDACTED]. The vehicle had been seen in the downtown area, including on Riverfront Ave. SE. The officers knew that the vehicle had fled some several attempted traffic stops, had successfully evaded police and was still at large.

The cited officers had knowledge of the area of the 400 block of Riverfront Ave. SE. They knew it to be a high-crime area, frequented by drug traffickers. They also knew the area was frequented by people operating stolen vehicles. Their experience as police officers also allowed them knowledge that stolen vehicles are often used to commit other crimes. These crimes range from property crimes to crimes of violence involving the possession and or use of weapons.

The officers had personal knowledge of the City of Calgary parking lot located in the 400 block of Riverfront Ave. SE. They knew the lots to be frequented by people actively involved in criminal offences. They knew the lot to be a 'dumping' spot for stolen vehicles and they knew the lot to be normally empty in the early morning hours.

The vehicle operated by SO was a [REDACTED] Mitsubishi [REDACTED] SUV, blue in colour bearing [REDACTED]. The vehicle was parked nose into a parking stall in front of the building, in the parking lot in the 400 block of Riverfront Ave. SE. The parking lot was dark without artificial lighting. The vehicle was running with its daytime running lights illuminated, and the interior dash lighting on. The vehicle was dirty with road salt and winter grime. This gave the sides of the vehicle a grey appearance.

The cited officers, travelling eastbound on Riverfront Ave. SE. spotted SO's SUV parked in the lot. A running vehicle parked in that lot at that time of the night was suspicious to them. The vehicle was parked approximately 30 meters from the roadway where the cited officer stopped their patrol car. From their vantage point, they could make out the vehicle was a Mitsubishi SUV. The vehicle looked grey in colour. Both officers realized the vehicle was strikingly similar to the previously reported stolen Mitsubishi SUV, so they accessed the Broadcast message (BMQ). They retrieved the licence plate and compared it to what they could see. They could see a letter and two digits which were also on the licence plate of the stolen Mitsubishi. As well, they could make out a [REDACTED] or an [REDACTED] with the [REDACTED] also being on the stolen vehicles plate.

Both officers also had personal knowledge of a common practice amongst car-thieves, to switch licence plates from vehicles of the same make to the stolen vehicle.

Based on all of the above information, the officers had a reasonable suspicion that the vehicle parked in the parking lot, was the reported stolen Mitsubishi SUV warranting further investigation.

The premise of this allegation is that the cited officers did not take reasonable steps to determine the vehicle was stolen, prior to arresting SO and not to do so constituted "Neglect of Duty."

Two paragraphs from *R. v. Yuan Nguyen*<sup>85</sup> are appropriate to address the allegation.

*[27] Since the "reasonable suspicion" standard is lower than the "reasonable and probable grounds" standard, it logically follows that the degree of reliability and the amount of information to establish that lower threshold is lower. This was recognized by our Court of Appeal in R. v. Savage, 2011 SKCA 65, 371 Sask. R. 283, where, at paragraph 18, Smith J.A. said:*

*[18] Reasonable suspicion is a lower standard and can be established by less evidence, with less probative value, than reasonable and probable cause.*

*[30] Further, in reviewing the question of whether the police had an objective basis upon which to act, the Court must take into account that the police at the scene are often required to make quick decisions based on available information, some of which may not be complete or exact, in situations that are rapidly changing and potentially volatile. Judicial reflection is not a luxury the police enjoy, and their decisions should not be viewed in the same way as an unhurried decision made after full debate and careful deliberation. See R. v. Nolet, 2009 SKCA 8, [2009] 4 W.W.R. 604.*

The wording of the charge particularizes the officers did not take reasonable steps to "confirm" the vehicle was not stolen before arresting SO. It does not state "all" reasonable steps or what any of those steps might be.

I surmise the first of those steps would be to obtain the licence plate number from the suspicious vehicle.

The officers both testified it was their intention to enter the lot, utilizing their unmarked car to covertly obtain the licence plate of the parked and running Mitsubishi SUV. If the plate matched, they stated they would have exited the lot to maintain a visual of the vehicle, notify dispatch and take instruction from the District Sergeant.

---

<sup>85</sup> R v Xuan Nguyen, 2013 SKQB 36 (CanLII)

It must also be repeated, it is not uncommon for criminals to do a licence plate switch from a similar make vehicle to the stolen vehicle. A vehicle stop would be warranted under these circumstances.

The officers testified if the plate did not match, they would do a traffic stop on the vehicle to further investigate the suspicious circumstances of why the vehicle was parked and running at that location at that time of the morning.

These steps as articulated by the officers are “reasonable steps.”

The officer’s investigative plan was impeded by the unfortunate collision with the suspicious vehicle; the circumstances of which have been previously discussed.

This new and unexpected circumstance presented a new dynamic to the situation. It was at this time the officer first confirmed the suspicious vehicle was occupied. The priority would shift from investigations to determine if the vehicle were in fact stolen, to anticipating, and effectively dealing with any potential threat the person in the suspected stolen vehicle may present.

The officers did this effectively and without incident. As soon as they had SO in custody, they continued to determine if the vehicle was stolen, while at the same time ascertaining SO identity. Both were satisfied in short order with SO being released from custody within minutes.

The SCC in *Nasogaluak*<sup>86</sup> at paragraph 35 stated:

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

The above statement was with regards to a “use of force” matter, however the words are equally applicable to any form of police action.

It may be speculated that the officers should have contacted dispatch or the District Sergeant as soon as they spotted the suspicious vehicle. This is true, but depending on the District Sergeant, the recommended approach could widely vary, and include exactly what the officers did. They may have been advised to wait for an additional unit if one was available. Then they likely would have been told to make efforts to obtain the plate, would entail them entering the parking lot as they did.

Whatever the case, it would end with the vehicle being physically checked and the occupant questioned.

---

<sup>86</sup> R. v. Nasogaluak, 2010 SCC 6, [2010] 1 S.C.R.



It is my finding the Police Service has not proven the charge on a balance of probabilities. It is my finding the cited officers planned and took reasonable steps to make the determination whether or not the suspicious vehicle was in fact stolen. The unfortunate and unplanned circumstances resulting from the collision changed the dynamics of the situation from making that immediate determination, to successfully and safely detaining the suspicious vehicle's occupant.

I find Constable [REDACTED] and Constable [REDACTED] not guilty on count #9.

### **Count #10 – Withdrawn**

**Count #11 - Discreditable Conduct**, as defined by section 5(2)(e)(viii) of the *PSR*.

At the conclusion of my analysis on count 5, I made comment about the informal resolution process SO and the cited officers participated in pursuant to s. 43(1)(0.1) of the *Police Act*. I apply those comments to this count as it relates to the vehicle collision.

I will however provide an analysis and make findings based on the evidence presented.

Count 11 alleges Constable [REDACTED] and Constable [REDACTED] did not apologize to SO after mistakenly arresting and handcuffing him. They did not provide SO the opportunity to speak with a supervisor and lastly, they did not have a CPS Traffic Unit officer clear everyone from the scene as there had been a collision between the police vehicle and SO's vehicle.

To satisfy this count, the Service must prove on a balance of probabilities, that the facts occurred as alleged, that if they occurred what were the obligations of the cited officers, and if the actions of the officers did occur as alleged, did they prejudice discipline, or likely bring discredit on the reputation of the Police Service.

I will first speak to the allegation that the officers did not apologize to SO.

SO stated he was not offered an apology. He was asked if the officer thanked him for being so compliant to which he replied, "yes." He was then asked if the officer apologized and he replied, "*did not apologize*." In his testimony, CL stated there was no apology. CL would not have been in voice range of any conversation between SO and either of the officers. It is likely CL's knowledge of this came from conversation with SO after the fact.

While an apology for their actions would be warranted, and I would expect one to be made, there is no requirement in law or in policy for a police officer to apologize.

That being said, I will address the evidence on the matter.

When Constable [REDACTED] was asked about SO's complaint there was no apology, he testified: "*Well, yes. So in addition to Constable [REDACTED] providing all of our information*

*and the details of the incident, I was present when Constable [REDACTED] made an apology to Mr. SO. I can't recall the specifics of the apology, but I was standing beside him when he made that comment, and I understood that he was saying it on behalf of both of us, and I agreed with that.”*<sup>87</sup>

Constable [REDACTED] made contemporaneous notes while still at the scene of the incident. On page 77 of the notebook there is a notation: *“I apologized to the male & I explained to him his vehicle was mistaken to be a stolen vehicle.”* These notes were made at the time, and long before the allegation that SO was not apologized to.

Constable [REDACTED] testified: *“So we immediately get him out of the car, get him out of handcuffs. At this point, I knew that we had -- we had made a mistake. I told him, I apologize. I said, We made a mistake here. We thought your vehicle was a stolen vehicle. I gave him my badge number, my partner's badge number, the case number, our vehicle call sign, and I told him that he could email me, and I would answer any questions to him that he may have. I'll try to answer his questions at any time. He didn't seem interested in talking to me at that time.”*<sup>88</sup>

In response to SO's testimony he was not given an apology, Constable [REDACTED] testified: *“That's not true. I apologized. As soon as I got him out of handcuffs, out of the car and out of handcuffs, I apologized, and I said -- I told him, We're sorry. We made a mistake. We thought your vehicle was a stolen vehicle. I mean, to me, I was -- that's what I would have wanted. As a law enforcement officer, if somebody [sic] happened, I would have liked an apology, and, to me, my mentality was, you know what, we made a mistake here. We need to own up and tell him what happened, and that's what we did.”*<sup>89</sup>

When later asked about if he told SO they slid into his vehicle accidentally, he stated: *“The apology, like, I said, We're sorry, we made a mistake, we thought your vehicle was a stolen vehicle, and I gave him all the information. My intention was to engage in conversation about it. That's why -- he didn't seem to want to talk to me. That's why I told him, You can email me, and I'll answer any questions you may have. I was just trying to give him, sort of, that -- that, sort of, you know -- that, sort of, out to -- to ask me questions, but he didn't seem interested in talking to me.”*<sup>90</sup>

After SO was removed from the police vehicle and taken out of handcuffs, the evidence is he was angry and frustrated. This is understandable. Constable [REDACTED] stated SO did not seem to want to talk to him. He said he had to go and left walking with his colleagues.

SO testified after they took the handcuffs off he was pretty upset.<sup>91</sup> CL was asked what SO's demeanor was. He stated: *“Mr. SO's a very calm -- probably one of the most calm*

---

<sup>87</sup> Transcript. Page 351-352. L. 25-26. L. 1-5.

<sup>88</sup> Transcript. Page 439. L. 7-18

<sup>89</sup> Transcript. Page 441-442. L. 26, L. 1-10.

<sup>90</sup> Transcript. Page 470. L. 1-10

<sup>91</sup> Transcript. Page 85. L. 19-20.

*individuals I know to work with. So it was abundantly clear to me -- that's why I said the tenseness of the situation -- he was very stressed, you could see, frustrated and without having any details of what had happened at the time, something was off... With the situation to cause Mr. SO to be in that state and to show those signs of stress and upset."*<sup>92</sup>

On this portion of the allegation, I accept the testimony of Constable [REDACTED] over that of SO as the more credible and reliable of the evidence.

I am satisfied that Constable [REDACTED] apologized to SO. This is corroborated by Constable [REDACTED]. The conclusion is harmonious with the information Constable [REDACTED] was providing SO, this being the incident number, their names, regimental numbers etc. It also makes sense. The cited officers knew they had made a mistake. They admitted their mistake and explained the circumstances to SO. They knew they were dealing with a fellow law enforcement officer. It was the right thing to do and I believe they did it. Constable [REDACTED] testimony is also supported by his notes.

I do not find the testimony of SO on this point as reliable. SO was upset and was not interested in talking to the officers, and likely not interested in listening to them. He attributed a number of statements to the officers that I do not believe they made. He had testified he did not recall if he had been told he was under arrest when it is clear he had. His complaint stated such and the evidence supports he was told. His recall on this point is likely as faulty. It could also be the case that SO did not accept the apology as genuine and therefore in his mind dismissed that it was offered or was not good enough.

On this aspect of the allegation, the Police Service has not proven its case on a balance of probabilities.

The next allegation in the count is that SO was not provided an opportunity to speak with a supervisor. I have to again ask the question, where is it in the statute or in policy that it is required to "offer" a person the opportunity to speak with a supervisor. I could see it if the request were made by SO, but it was not.

SO was asked if he requested to speak with a supervisor. He was clear he did not. Constable [REDACTED] testified SO never asked for a supervisor to attend. Constable [REDACTED] testified SO never asked for a supervisor to attend, and he agreed he never asked SO if he wanted a supervisor to attend.

This aspect of the allegation has not been proven on a balance of probabilities.

The above findings also apply to a request for a supervisor to attend with regards to the collision.

---

<sup>92</sup> Transcript. Page. 196. L. 10-18

The last allegation is specific to the collision and alleges the officers failed to have a CPS Traffic Unit officer clear everyone from the scene as there had been a police vehicle collision.

On this allegation, I make the following finding of facts:

- A collision occurred between a police vehicle and another vehicle;
- The operator of the police vehicle was Constable [REDACTED];
- The operator of the second vehicle was SO;
- The collision resulted in no damage to the police vehicle and minor damage to SO's vehicle;
- No injuries were reported at the scene by any parties;
- A police officer involved in a collision, is required to notify their District Sergeant, regardless of the amount of damage;
- The District Sergeant was not notified of the collision;
- A CPS Traffic Officer did not clear the parties from the scene.
- At 4:45 a.m., the CPS Traffic Section is not on shift. Call-out would be required.

A CPS member's responsibilities relating to police vehicle collisions are stated in CPS Policy, Service Vehicle Driving, s. 8. It reads as follows:

#### **8. Service Vehicle Collisions**

##### **1. CPS Members**

- a. If you are involved in a collision while driving a Service vehicle, immediately notify the Dispatcher and the District Sergeant regardless of the amount of damage.*
- b. If the collision results in major damage, injuries, or death:*
  - i) tend to any injured (if you are able and not injured yourself);*
  - ii) ask the Dispatcher to call EMS;*
  - iii) await instructions from the Traffic Sergeant;*
  - iv) remain on scene and await Traffic Response Unit members instructions;*
  - v) complete a driver's statement; and*
  - vi) complete a Police Service Vehicle Collision / Damage Report (PD380).*

c. *If the collision involves minor damage and no injuries:*

i) *consult the District Sergeant who will determine if the investigation will be done at the collision location and if the Traffic Section or District member will investigate; and*

ii) *complete a Police Service Vehicle Collision / Damage Report (PD380).*

The above responsibilities are those of the operator of the police vehicle. This was Constable [REDACTED] It was not the responsibility of Constable [REDACTED]

This was also a situation where at the scene SO did not request a collision report to be completed. He did not request a damage sticker or any insurance particulars from the officers or offer his. He did not request a supervisor to attend. He also did not wish to converse with the officer or remain at the scene. This does not detract from Constable [REDACTED] responsibilities to notify the District Sergeant, but it certainly come into play as to how the District Sergeant would decide how to proceed.

The circumstances of this matter were such that if notified, the Traffic Section would likely have not been called out, or even notified. In my personal experience as a Duty Inspector, if I were notified of a collision such as this, at this time of day, I would not call-out a Traffic Section member. The matter would be left with the District to investigate and to report on.

I also note neither officers attempted to conceal the fact there was a collision. They made note of the collision in the CAD Event Chronology. At the end of their shift Constable [REDACTED] notified Sergeant [REDACTED] of the collision. Constable [REDACTED] also took photographs of SO's vehicle which were forwarded to Sergeant [REDACTED].

It is my opinion, any allegation with regards to the reporting of the collision and any subsequent responsibilities, should be done by way of an allegation of insubordination as was particularized in count 10. The Service has chosen to withdraw count #10 which is their prerogative. Nowhere in the policy with regards to a collision with minor damage and without injuries does it state a requirement to have a CPS Traffic Unit officer clear everyone from the scene. The way this portion of the allegation is written in count 11, appears to be an attempt to obfuscate the facts.

That being said, with the fact the scene was not cleared by a CPS Traffic officer, does this allegation amount to Discreditable Conduct as defined in the *Regulation*? The Service has not offered any evidence to prove on a balance of probabilities that it does.

When I apply the test in *Girard v. Delaney*<sup>93</sup>, I have to look at the reasonable expectations of the community. In the absence of evidence on this point, while I believe the community would expect a police officer to abide by the rules and policies in place, I

---

<sup>93</sup> Ibid 56

also believe, taking the circumstances into consideration, the public would not think this to be discreditable to the reputation of the Service. This is especially the case when the allegation is not part of the CPS Service Vehicle Collision policy. As well, as the fact, there would most likely not have been a CPS Traffic officer in attendance at the scene.

On this allegation as particularized in count #11, I find the Service has not proven the matter on a balance of probabilities.

With regards to all allegations particularized in count #11, I find Constable [REDACTED] and Constable [REDACTED] not guilty.

### **Ruling**

Counts 1 and 10 are withdrawn. On counts 2, 3, 4, 5, 6, 7, 8, 9, 11, it is my finding, the Service has failed to prove the allegations on a balance of probabilities. I find Constable [REDACTED] and Constable [REDACTED] not guilty on all counts.

### **Annotation**

I am taking this unusual step as I believe it is appropriate in this instance.

The vast majority of hearings I have conducted where an unlawful or unnecessary use of force has been alleged, have stemmed from when the complainant has failed to follow the instructions of a police officer. Often times the complainant has resisted arrest and sometimes violently so. Use of force then results, sometimes with terrible results.

In this instance, SO fully complied with the instructions of the officers. He did so to such an extent, the officers were surprised by his compliance. In the past, I have advised complainants the best course of action was to “comply, then complain.” This is exactly what SO did and I wish to recognize and compliment him for it.

I do not doubt that the outcome of this hearing is not what SO wished for. I do hope it provides some context for him as to what occurred on January 3<sup>rd</sup>, 2018. I wish him well as he moves forward.

*Original Signed*

---

Superintendent Paul Manuel (Ret'd)  
Presiding Officer

Presenting Officer: Ms. Valerie Campbell  
Counsel for the Cited Officer: Mr. James Shymka

Issued at the City of Calgary, May 18, 2021