Court of Queen's Bench of Alberta

Citation: R v Lindsay, 2021 ABQB 684

Date: 20210826
Docket: 170015663Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Trevor Ian James Lindsay

Accused

Reasons for Judgment

on Admissibility of Uncharged-Offence Evidence
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] This is partly a cautionary tale about a former Calgary police officer's sentencing for a 2015 assault being long delayed by an inquiry into a 2013 incident involving him and another Calgary citizen.

[2] On June 21, 2019, I convicted Trevor Lindsay, then a Calgary Police Service officer, of aggravated assault of Daniel Haworth in May 2015.

[3] A two-day sentencing hearing was tentatively set for October 2019. As discussed below, sentencing was adjourned a number of times, eventually to summer 2020. In late July 2020, Crown requested (per my notes) a "revised 3-4 day sentencing hearing … on the basis that Crown plans to call additional evidence at the sentencing hearing."

[4] The Crown's request for extra sentencing time was spurred by its wish to explore, at the sentencing hearing, an earlier (December 2013) incident involving then-Cst. Lindsay and another Calgary citizen (Godfred Addai-Nyamekye). Per the Crown, this earlier incident (alleged assault by Cst. Lindsay), if proved, would constitute an aggravating factor in the 2015-incident sentencing. Defence was agreeable to this request.

[5] On August 20, 2020, counsel jointly advised that they required six days for a contested hearing exploring the 2013 incident and that their earliest overlapping availability was April 26 to May 3, 2021 (six sitting days) i.e. approaching two years post-conviction. The hearing was booked for, and started, on those days.

[6] The exploration of the 2013 incident – effectively, a proof-of-aggravating-fact *voir dire* – began on April 26, 2021 and ran until May 4, 2021 (seven sitting days) and was incomplete then. In part, the problem was that Mr. Addai-Nyamekye advised, after direct examination by the Crown and about one hour of cross-examination by the defence, that he could not continue with cross-examination, due to post-traumatic stress.

[7] We adjourned the sentencing *voir dire* to enable a psychological assessment of Mr. Addai-Nyamekye. Between allowing time for that assessment and finding commonly available time, the sentencing *voir dire* was adjourned to June 28, 2021.

[8] It resumed then, albeit without the return of Mr. Addai-Nyamekye (despite the assessment's conclusion that he was able, but unwilling, to continue with cross), and continued until July 6, 2021 i.e. a further six sitting days. On three of those days, we sat late (once until 6 pm, and twice until 8 pm) i.e. we effectively sat the equivalent of at least another full day i.e. fourteen sitting days overall.

[9] At the conclusion of the sentencing *voir dire*, I reserved judgment.

[10] As explained below, I have concluded that the threshold test for admitting uncharged-offence evidence in ***R v Edwards***, (2001) 54 OR (3d) 737 (CA) applied here, that if the Crown (or both parties) had applied, in summer 2020, for permission to explore the 2013 incident as part of this sentencing, permission would have been denied, that the actual unfolding of the *voir dire* shows that the risks of launching this inquiry were real, and that completion of the hearing does not compel retroactive approval of this exceptionally long sentencing detour.

[11] However, I also find that, as between denying and granting such approval now, the interests of justice favour granting approval and, in turn, providing a decision on whether the Crown has proved an assault on Mr. Addai-Nyamekye beyond a reasonable doubt.

[12] For the reasons outlined below (starting at page 30 – "H. Analysis of 2013 incident"), I find that it has.

B. Proposed uses of uncharged-offence evidence on sentencing

[13] The Crown here argued that the alleged 2013 incident is relevant to sentencing for the 2015 incident on two bases: (1) a material uncharged offence per paragraph 725(1)(c) of the *Criminal Code* and (2) an event bearing on Mr. Lindsay's character, in both cases being an aggravating factor.

C. Law on uncharged-offence evidence on sentencing

Paragraph 725(1)(a) – uncharged offence

[14] I start with para 725(1)(c), which states:

> In determining the sentence, a court …
>
> > **(c)** may consider any facts **forming part of the circumstances of the offence** that could constitute the basis for a separate charge.

[15] There is no doubt that the allegations by the Crown against Mr. Lindsay could "constitute the basis for a separate charge." The Crown's theory is that Mr. Lindsay committed both assault and assault with a weapon (i.e. a taser) against Mr. Addai-Nyamekye in the 2013 incident (as discussed further below.)

[16] But did it "[form] part of the circumstances of the [2015] offence" i.e. the unrelated 2015 aggravated assault of Mr. Haworth?

[17] The Crown here cited ***R v Larche***, 2006 SCC 56:

> ... whether facts form part of the circumstances of the offence must ultimately be resolved on a **case-by-case basis**. Broadly speaking, however, there do appear to me to be **two general categories of cases where a sufficient connection may be said to exist.** These two categories, as we shall see, are not hermetic or mutually exclusive, and will often overlap.
>
> The first would be **connexity either in time or place, or both**. This flows from the ideal animating s. 725(1)(*c*): In principle, a single transaction should be subject to a single determination of guilt and a single sentence that takes into account all of the circumstances. In its application, this principle is subject, of course, to the constraints fixed by Parliament in the governing provisions of the *Criminal Code*, including, notably, s. 725.
>
> In *Edwards*, Rosenberg J.A. refers to the **concept of *res gestae*** as applied in R. v. *Gourgon* (1981), 1981 CanLII 328 (BC CA), 58 C.C.C. (2d) 193 (B.C.C.A.). The notion of *res gestae* — or "things done" (*Black's Law Dictionary* (8th ed. 2004), at p. 1335) — relates to a **close spatial and temporal connection**, and may therefore be helpful in this context.

> In *R. v. Paré*, 1987 CanLII 1 (SCC), [1987] 2 S.C.R. 618, this Court considered whether culpable homicide perpetrated "**while committing**" an indecent assault had to be "exactly coincidental" with the underlying assault, or merely form part of the same sequence of events or transaction. Wilson J., for a unanimous court, adopted the transactional definition (see pp. 632 and 634).
>
> **Both *res gestae* and the phrase "while committing" are narrower than the expression "facts forming part of the circumstances of the offence" employed in s. 725(1)(*c*).** The "circumstances" of an offence are more than the immediate transaction in the course of which it transpires. Thus, **in addition to encompassing the facts of a single transaction, s. 725(1)(*c*) also applies, in my view, to the broader category of related facts that inform the court about the "circumstances" of the offence more generally**.
>
> **"Facts" (or uncharged offences) of this sort that have occurred in various locations or at different times cannot properly be said to form part of the transaction covered by the charge for which the offender is to be sentenced**. Recourse to s. 725(1)(*c*) may nevertheless be had where the **facts in question bear so close a connection to the offence charged that they form part of the circumstances surrounding its commission. In determining whether they satisfy this requirement of connexity, the court should give appropriate weight to their proximity in time and to their probative worth as evidence of system or of an unbroken pattern of criminal conduct**. [paras 50-55] [emphasis added]

[18] The Crown submitted that the December 2013 (Addai-Nyamekye) incident, the May 2015 (Haworth) incident, and a third incident in January 2016 (then-Cst. Lindsay breaking a citizen's phone in a vexatious-use-of-9-1-1 context) constitute:

> … a pattern of criminal conduct; the timing, location and context all suggest that it is unbroken. Unbroken means simply that the behaviour indicates a pattern or *modus operandi* – similar behaviour in similar contexts (excessive use of force/actions against unruly detainees). There is no requirement to show daily, weekly or monthly offending. The pattern is not simply temporal, but is contextual.

[19] The Crown emphasized that these three incidents (alleged or proven) happened within just over two years.

[20] Defence tendered a call-out report from the Calgary Police Service reflecting then-Cst. Lindsay's involvement in approximately 7,250 calls for police service between 2012 and 2017, of which approximately 2,750 involved (collectively) "check on welfare", "disturbance", "suspicion person", and "unwanted guest."

[21] The Crown did not offer any "pattern" cases supporting its view that the three incidents in question (if all proved) would be sufficient, in the context of this call-out history, to form a sufficient pattern per ***Larche***.

[22] In my view, the 2013 incident might not form part of the "circumstances of the [2015] offence", at best forming part of the "circumstances of the **offender**" in the sense described by Charron J. for the SCC majority in ***R v Angellilo***, 2006 SCC 55 (para 31).

[23] I do not have to decide whether 725(1)(c) is actually a portal by which the 2013 allegations can enter into the 2015-incident sentencing, in light of my conclusion (outlined below) that the "character evidence" portal is potentially available.

[24] I turn next to the Crown's character-evidence argument and the ***Edwards*** factors.

"Character" dimension of uncharged-offence allegations

[25] In ***R v Edwards***, the Ontario Court of Appeal explored an alternative basis on which uncharged-offence allegations can bear on sentencing, namely, as illuminating the convicted person's character, where it is relevant to sentencing. Rosenberg JA explained:

> There are statutory provisions that do **permit the use of evidence about the offender, even though that evidence also discloses the commission of other crimes**. First, s. 718(c) and (d) of the *Criminal Code* set out as two of the objectives of sentencing:
>
> > (c) to separate offenders from society, where necessary;
> >
> > (d) to assist in rehabilitating offenders;
>
> **Neither of these objectives can be fairly achieved through sentencing without knowing something, and perhaps quite a bit, about the background and character of the offender**. The Crown, in this case, in effect put its case for admission of this evidence on the need to separate this respondent from society.
>
> Consistent with the statutory provisions that I have set out above dealing with the pre-sentence report [s. 721] and admission of evidence, the **courts have recognized that a sentencing judge has a broad discretion concerning the admission of evidence at a sentence hearing**. As Dickson J. said in R. v. Gardiner, 1982 CanLII 30 (SCC), [1982] 2 S.C.R. 368, 68 C.C.C. (2d) 477 at p. 414 S.C.R., pp. 513-14 C.C.C.:
>
> > One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable.
> >
> > . . . . .
> >
> > The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest

> possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime.

As is the case with evidence generally, **admissibility depends upon the purpose for which the evidence is adduced**. In this case, the Crown was **not entitled to lead the evidence of Ms. Powell and Ms. Firth for the purpose of increasing the punishment that would otherwise be appropriate for the offence of attempted murder**. To do so would offend the provisions of ss. 718.1 (proportionality) and 725 (taking other offences into account). The prosecution was also **not entitled to lead this evidence to attempt to extract some punishment for those untried and uncharged offences**. That would offend the presumption of innocence and s. 725. It is no answer to say that the Crown should be able to use the evidence for those purposes if it proves the conduct beyond a reasonable doubt. Such reasoning undermines the basic tenet of our system that, absent compliance with s. 725, an offender can only be sentenced for crimes that have been properly charged and proved at a trial of those offences.

In my view, **evidence that discloses the commission by the offender of other untried offences is admissible for the purpose of showing the offender's background and character** ***as that background and character may be relevant to the objectives of sentencing*****. That being said, the trial judge must have a discretion to refuse to admit the evidence where necessary to ensure that the accused has a fair hearing**. [paras 39, 40, 46, 62, and 63] [emphases added]

[26] Rosenberg JA then elaborated on the discretion to refuse to admit uncharged-offence evidence:

> I would suggest that **in deciding whether to exclude evidence that discloses untried offences, the trial judge, in addition to considering the proposed use of the evidence, might consider some of the following**:
>
> (i) the **nexus between the evidence and the offence for which the offender was convicted** -- the closer the connection the more likely the evidence will shed light on the circumstances of the charged offence;
>
> (ii) the **similarity between the evidence and the offence** for which the offender was convicted;
>
> (iii) the **difficulty the offender may encounter in properly defending against** the allegations in the proposed evidence;
>
> (iv) the danger that the sentence hearing will be **unduly prolonged**;
>
> (v) the danger that the **focus of the sentence hearing will appear to be diverted from the true purpose of imposing a fit sentence** for the charged offence that is proportionate to the gravity of the offence and the degree of responsibility of the offender in accordance with s. 718.1;
>
> (vi) whether, as in Lees, the **offender has adduced evidence of good character**; and
>
> (vii) the **cogency of the proposed evidence**.

> This is **not intended to be an exhaustive list and, as different cases present themselves involving different issues, no doubt other factors will have to be taken into account**. … [paras 64 and 65] [emphasis added]

[27] In ***R v Roberts***, 2006 ABCA 113 (SCC leave denied – 2007 CanLII 67851), the Alberta Court of Appeal endorsed this approach, first outlining the backdrop principles:

> An offender **cannot be punished for unproven acts:**
>
> ***Gardiner***, *supra*; ***Brown***, *supra*; ***R. v. Lees***, 1979 CanLII 43 (SCC), [1979] 2 S.C.R. 749. Doing so would violate the presumption of innocence, the principle of proportionality, and statutory rules governing the imposition of sentence for unproven acts: *Criminal Code*, s. 725. At the same time, it is **imperative that a sentencing court have as much information as possible about the offender's character and background**: ***R. v. Jones*** (1994), 1994 CanLII 85 (SCC), 89 C.C.C. (3d) 353 (S.C.C.), ***Gardiner***, *supra*; ***R. v. Donovan*** (2004), 272 N.B.R. (2d) 279, 2004 NBCA 55 at para. 40; ***R. v. Edwards*** (2001), 2001 CanLII 24105 (ON CA), 54 O.R. (3d) 737 (C.A.); ***R. v. Shoker*** (2004), 192 C.C.C. (3d) 176, 2004 BCCA 643 at para. 21.
>
> … evidence of untried acts is admissible during sentencing in some circumstances. The critical factor is the purpose for which the evidence is used: if the purpose is to punish the offender for acts that have not been tried, it cannot be admitted. **If, however, the purpose is to illuminate the offender's character and background, the evidence may be admissible, bearing in mind the sentencing court's discretion to exclude the evidence if necessary to ensure the offender gets a fair hearing.** [paragraphs 19 and 28] [emphasis added]

[28] The Court of Appeal then applied the ***Edwards*** framework:

> *i. nexus between the evidence and the offence for which appellant was convicted:*
>
> There **is no temporal nexus; nor were the same parties involved**. However, all three incidents occurred on the appellant's land.
>
> *ii. similarity between the evidence and the offence:*
>
> The appellant suggests that any similarities are so few and so weak as to be almost meaningless. I do not agree. **In both prior incidents, the appellant pointed a firearm at and verbally threatened persons on his property when frustrated by business dealings. The prior incidents demonstrate a tendency to deal with people who thwart the appellant in business on his own property by producing a firearm**.
>
> *iii. difficulty in defending against the allegations:*
>
> … The **allegations of prior acts were made under oath [during a trial *voir dire*] and subject to cross-examination**. The **appellant testified in response; so did his wife**. Moreover, defence counsel was **put on notice** by the sentencing judge that he intended to use the *voir dire* evidence in sentencing, and **could have asked to adduce further evidence** if necessary. Even though this appellant had full opportunity to respond, he failed to do so.

> *iv. the danger that the sentencing hearing will be unduly prolonged:*
>
> Any potential delay relates to the two potential witnesses to the first incident. **There was a two-month gap between the verdict and the sentencing decision, which occurred partly at the defence counsel's request, and partly with their full acquiescence. It is likely that the few remaining potential witnesses could have been marshalled within that time frame**. Moreover, the appellant stood convicted of second degree murder and faced a mandatory sentence of life imprisonment without possibility of parole for at least 10 years. Further delay to call these witnesses would have resulted in little or no unfairness to the appellant.
>
> *v. risk of diverting the focus of the sentencing hearing:*
>
> The second-degree murder conviction is much graver than the earlier allegations of pointing firearms; therefore, it is **unlikely that the latter would detract attention from the former**.
>
> *vi. good character evidence adduced by offender:*
>
> The appellant did **not introduce good character evidence, but the absence of good character evidence is not reason enough to exclude the evidence**: ***Donovan***, *supra*.
>
> *vii. cogency of the proposed evidence:*
>
> The *voir dire* evidence is **relevant because it reveals an aspect of the appellant's character that is not apparent from his excellent work history and clean record**.
>
> **Another factor considered by some courts is whether any objection was raised to the admission of the evidence during the sentencing hearing: *R. v. Laberge*** (1995), 1995 ABCA 196 (CanLII), 165 A.R. 375 (C.A.); ***Roud & Roud***, *supra*; *L. (J.C.)*, *supra*. In this case, the sentencing judge specifically invited defence counsel to address this issue, communicating his inclination to accept the evidence of the witnesses and to reject that of the appellant. **While defence counsel argued that the *voir dire* evidence should be given minimal weight, he made no objection to its admission.**
>
> In summary, these considerations favour admission of the *voir dire* evidence. I would dismiss this ground of appeal. [paras 32, 33, and 35-41] [emphasis added]

[29] In ***R v BM***, 2008 ONCA 645, after referring to both ***Edwards*** and ***Roberts***, the Ontario Court of Appeal identified acceptable uses for "background and character" evidence:

> … The background and character of the offender may be considered, for example, in order to assess the need for individual deterrence, rehabilitation, or the protection of the public. Such information is essential for crafting a sentence suitable for a particular offender. [para 11]

[30] Many other cases confirm this threshold admissibility-of-uncharged-offence-evidence requirement i.e. upstream and distinct (if the evidence is ruled admissible) from a proceeding to resolve any contest over the allegations, which is what the parties here moved to directly.

[31] In ***R v Flis***, 2003 ABQB 44, Greckol J. (as she then was) applied the ***Edwards*** factors to screen out proposed new-charges evidence:

> I conclude that the evidence of the untried alleged offences should be excluded. Such evidence may be **admissible for the purpose of showing the background and character** of Mr. Flis, as that information **may be relevant to the objectives of sentencing**, including those inherent in the inquiry of whether a conditional sentence would be fit and proper. Such evidence may be admissible to help assess the danger to the community posed by the offender while serving his sentence in the community in terms of the risk of his failing to comply with court orders or re-offending.
>
> However, it remains **necessary to consider the balance between prejudice and probative force**. There is **no nexus or similarity** between the alleged conduct while on judicial interim release and the offence before the court. There is potential prejudice to Mr. Flis in making a full answer to the new charges on an expedited basis without procedural preliminaries in the context of this sentence hearing, without which the fairness of the sentence hearing and the ultimate trial on the new charges may be prejudiced. The **admission of the proffered evidence may well require further delay with the new charges assuming prominence out of proportion to the charges for which Mr. Flis now stands before the Court**. Though proof of the new charges would show that Mr. Flis has breached the terms of his judicial interim release, the Crown has not argued the new charges involve conduct inherently dangerous to the community, for example, involving further trafficking in cocaine or acts of violence.
>
> **Balancing the potential prejudice in permitting the admission of the evidence on these particular facts, at this stage of the sentencing process, against the probative force or potential benefit to be achieved by adducing evidence of the new charges, the balance tips against the admission of the evidence**. Given the particular facts and circumstances of this case, I exercise my discretion to refuse to admit the evidence in order to preserve the right of Mr. Flis to a fair sentencing process and a fair trial on the new charges. [paras 36-38] [emphasis added]

[32] This procedure was also followed by Lynch J. in ***R v Heath***, 2019 NSSC 309 i.e. an application by the Crown to admit evidence bearing on certain other-offence allegations (leading to charges), an exploration of the ***Edwards*** factors, and an admissibility decision (there, to exclude the proposed evidence):

> (a) There is **little [if] any nexus** between the trafficking offence which is scheduled for sentencing relating to events in June 2016 and events in June 2019. The events are three years apart;
>
> (b) While I have not heard the evidence, the **offences of breach of recognizance and trafficking in Hydromorphone are not similar. The possession of Hydromorphone and cocaine charges are similar**;
>
> (c) Mr. Heath is scheduled for trial on the new charges and **should not have to defend the allegations twice and perhaps testify twice**;

> (d) The sentencing has been prolonged as the sentencing had to be adjourned **[apparently for four months]** to hear the application by the Crown to admit the evidence in relation to the new charges;
>
> (e) There is a **danger that the sentence hearing will appear to be diverted from imposing a fit sentence for trafficking** in Hydromorphone;
>
> (f) Mr. Heath has **not introduced evidence of good character**;
>
> (g) The **cogency of the evidence is not known**.
>
> Weighing the above factors, the evidence would **not be admissible**. I am also concerned that the prejudicial effect of the evidence would outweigh its probative value. [paras 30 and 31] [emphasis added]

[33] The same threshold analysis was also undertaken in ***Mapara v British Columbia (Attorney General)***, 2019 BCSC 895 (Gerow J.) (paras 8-16); ***R c Benjamin***, 2018 QCCS 5937 (Labrie J.) at paras 65-98; ***R v Golic***, 2017 BCSC 1679 (Humphries J.) (paras 15-25); ***R v Slater***, 2014 ONSC 4017 (Parfett J.) at paras 15-35; ***R v Burns***, 2010 SKPC 72 (Morgan J.); ***R v Khan and Chtirkova***, 2009 BCPC 114 (Gulbransen PCJ) at paras 9-22; and ***R v McKay***, 2004 MBQB 146 (Duval J.) at paras 10-15.

[34] That is what should have happened here i.e. a threshold application to determine whether the Haworth-incident sentencing should be diverted to explore the 2013 incident.

D. What happened instead

[35] As noted, in late July 2020, the Crown advised that it wished to convert the originally scheduled two-day sentencing hearing into a "3-4 day sentencing hearing … on the basis that Crown wishes to call additional evidence at the sentencing hearing." As it turned out, this was evidence of the 2013 incident.

[36] In mid-August 2020, Crown and defence agreed that six days should be booked for the proposed sentencing hearing and that their first overlapping availability was April 26 to May 3, 2021. Effectively both sides agreed to an inquiry, in the shape of a sentencing *voir dire*, into the 2013 incident.

[37] But the parties did not apply, formally or informally, for an ***Edwards*** (or equivalent) ruling on whether that inquiry should occur (i.e. that the Crown's 2013-incident evidence was admissible) i.e. as a precondition to conducting a contested hearing over whether that incident unfolded as alleged by the Crown.

[38] In a recent communication (made in response to my recent questions to both Crown and defence about ***Edwards*** and whether it applied here), defence made the following points (in part):

- [defence] has proceeded [i.e. to this point] **"without calling upon the Court to exercise a discretion to exclude the proposed character evidence in a hearing that also and necessarily had to first address the s. 725(1)(c) issue";**

- "… [the defence] did not request that the Court exercise its discretion to exclude the character evidence. On several occasions, the Court has inquired about the possibility of preliminary argument aimed at exclusion of the evidence (prior to addressing the merits and determining whether it has been proved beyond a reasonable doubt), and the **defence has indicated that it first needed to acquire and assess [2013-incident-related] disclosure and ultimately did not seek to invoke the Court's discretion to exclude**. The **defence incorrectly assumed that, when posing the question, the Court was referring to the discretion to exclude evidence if necessary to a fair hearing conferred by [*Roberts* and *Edwards*]";**
- [September 8, 2020 pre-trial conference] "the Court raised the question of whether there was an extricable or threshold issue [or issues] in order to streamline the case. Defence counsel noted that it "came back to the question of the evidential landscape", and Crown counsel observed that it would be "difficult to argue in the abstract with the information we have so far";
- [October 23, 2020 pre-trial conference] "The Court asked if there was potentially a move on the part of the defence to seek a ruling that the December 28, 2013 incident was not appropriately part of the sentencing. The defence indicated that it was probably premature to pre-argue either the s. 725 or … character issues 'without first looking at all of the disclosure.' The Crown was in agreement"; and
- [January 23, 2021 pre-trial conference] "The Court inquired as to whether the defence would open by arguing that the December 28, 2013 event was not properly part of the sentencing exercise. Defence counsel responded that **it was likely that everything would be argued at the end. The Crown agreed that it made sense to argue everything in an omnibus manner**. The Court later asked if the defence might be arguing that what happened in the earlier chapter was not really part of the matrix of sentencing. The defence noted that the Crown had posited two avenues under which the evidence might come in and that the [character] and s. 725 issues were "overlapped and intertwined." The Crown indicated that based on the assumption that the evidenced would be led as an aggravating factor of prior conduct or character **it made sense to argue the matter on the back end**. Although not referenced at the time, it maybe useful to note here that consideration of extrinsic evidence such as character evidence may be undertaken "if none of the paragraphs of s. 725 are applicable" [per ***Angelillo*** (SCC)]. [emphasis added]

[39] I accept this as an accurate capture of this dimension of our pre-trial discussions.

[40] I also acknowledge that I was not aware of the ***Edwards/Roberts*** line of cases and thus of the need for a threshold exploration of proposed uncharged-offence evidence. My questions to counsel were sparked only by a sense that we were possibly getting far afield of the 2015-incident sentencing.

[41] Here is the critical problem, as reflected in the pretrial-discussions synopsis: the ***Edwards/Roberts*** discretion – whether to approve or decline exploration of uncharged-offence evidence – is for the Court to exercise, not the parties themselves.

[42] It was not for the defence or Crown (or them jointly) to decide that the uncharged-offence inquiry should proceed i.e. for them to decide, by "not asking the Court to exercise its discretion to exclude uncharged-offence evidence", that the full-on merits inquiry should launch.

[43] That approach eclipsed the Court's necessary supervisory role here i.e. to weigh whether, on balance, exploration of the 2013 incident was an appropriate (necessary, justified, fair) detour from the 2015-incident sentencing.

[44] I also disagree that the "character pathway" to uncharged-offence evidence was contingent on para 725(1)(c) not applying and, implicitly, the Court needing to first rule on that point. The referenced excerpt from ***Angelillo*** discusses alternative pathways to admission i.e. does not set up a hierarchy of remedies or require any particular sequencing. If the evidence in question qualifies, or may qualify, for the "character evidence" pathway, it does not matter whether the 725(1)(c) pathway would or would not also have been available.

[45] As I see it, the parties had a duty to seek a ruling, in advance, on whether the 2013-incident inquiry should be allowed, laying out the ***Edwards*** factors, the information available on each factor, and explaining why, on balance and in each party's view, it was appropriate (or not) to conduct this hearing i.e. why the Crown should be permitted to introduce its other-offence evidence.

[46] As Daley RSJ put it in ***Blake v Blake***, 2019 ONSC 4062:

> ... Judges cannot be expected to know all of the applicable law in a case. ... The court cannot be expected to conduct its own independent research in every case. **When lawyers fail to bring forward relevant authorities, this can unduly increase the length of litigation when that authority is later discovered (or is raised on appeal), which in turns results in a hardship to the parties and the administration of justice**. [para 34]

[47] All to say: the parties bypassed the required threshold step of seeking a ruling on whether the Crown should be permitted to introduce evidence bearing on the 2013 incident at the 2015-incident sentencing i.e. before we all dove into what was effectively a "trial within a sentencing" of the 2013 allegations.

[48] What should happen now?

E. Application of the *Edwards* test (circa summer 2020)

[49] The first question is whether the Crown's uncharged-offence evidence would have been ruled admissible i.e. if sought in advance. If so, the absence of an application might be viewed as a technical oversight only.

[50] I accordingly apply the ***Edwards*** factors as though the Crown had sought an admissibility ruling on its uncharged-offence evidence in summer 2020.

Nexus between alleged uncharged offence and conviction offence

[51] No nexus here. Unlike many of the cases in this realm, the alleged uncharged-offence is not part of the "constellation" (or larger context) of the conviction event e.g. other misconduct occurring at or close to the time and place of the conviction event.

[52] Instead, we have events separated by approximately 1.5 years.

[53] Of course, there is the "common denominator" factor that Mr. Lindsay was involved in both incidents. But the cases do not suggest that this is a sufficient "nexus" factor on its own.

[54] If it were, Rosenberg JA would presumably not have identified a separate "nexus" factor i.e. as a separate factor that may or may not be present in a given case. If "offender (or alleged offender) overlap" were sufficient (i.e. Cst. Lindsay involved in both incidents), it would be present in every case i.e. with the Crown effectively always saying "same person, different offence."

Similarity between alleged (uncharged) and conviction offences

[55] The details of the 2015 incident are outlined in 2019 ABQB 462. In brief, following Mr. Haworth's arrest for theft and recognizance breach, transport to an arrest-processing centre and exit from a Calgary Police Service car, he and Cst. Lindsay were standing beside the car. Per Cst. Lindsay, Mr. Haworth was insufficiently compliant, justifying a punch to his face and (after perceiving continued non-compliance from now-bloodied Mr. Haworth, through to the latter apparently spitting blood at him) three further head punches and a throw-down. Mr. Haworth suffered a head trauma later revealed to have caused a brain injury. I found that none of the punches or the thrown-down were reasonable uses of force or legitimate self-defence.

[56] In the 2013 incident, the Crown alleges that then-Cst. Lindsay responded to a middle-of-a-cold-winter-night 9-1-1 call for assistance by Mr. Addai-Nyamekye, who had been driven to an isolated location in east downtown Calgary and dropped off for no good reason by two other CPS officers. Instead of assisting Mr. Addai-Nyamekye, Cst. Lindsay chastised him for wasting 9-1-1 resources, pushed him without provocation, and proceeded to administer an indefensible beating for several minutes, the last portion of which was captured by a CPS helicopter. Aerial footage seems to show Cst. Lindsay kneeing and punching a downed Mr. Addai-Nyamekye before other officers arrive and take over the subduing and arrest of Mr. Addai-Nyamekye for assaulting Cst. Lindsay. (Per Cst. Lindsay's account, Mr. Addai-Nyamekye was the aggressor and force advancer, with Cst. Lindsay defending himself throughout, and without excessive force. Mr. Addai-Nyamekye was charged with but acquitted of that assault.)

[57] Similarities exist here: both events featured interactions between Cst. Lindsay in his capacity as a police officer and unarmed civilians, perceived (by Cst. Lindsay) non-compliance by the civilians with his directions or instructions, perceived (by Cst. Lindsay) threats to his personal safety, the application of physical force to both individuals, and both individuals ending up on the ground under police control. Both events were captured, at least in part, on video.

[58] There are differences too: 2015 featured an arrested and handcuffed person, largely under police control; 2013 involved a person calling for police assistance with no (at least initial) basis

for arrest or any particular police control. 2015 involved punches and a throwdown; 2013, punches, kneeing, and tasering.

[59] For the purpose of this analysis, I will proceed on the basis of a material degree of similarity between the events.

Difficulty offender may have in properly defending against the allegations

[60] As I understand it, defence received access to extremely detailed disclosure of police investigations of the 2013 incident, with both Crown and defence also receiving extremely detailed information about that incident from the Alberta Serious Incident Response Team, which investigated it in response to a complaint by Mr. Addai-Nyamekye against Cst. Lindsay.

[61] During the 13-day hearing (and aside from the complainant's withdrawal from the proceeding, discussed later), defence did not argue that it was not able to respond properly to the allegations. From that, I infer that, if we were considering things from the perspective of summer 2020, when the Crown first proposed exploring the 2013 incident, defence would not have pointed to any particular defence difficulties.

Dangers the sentence hearing would be unduly prolonged and that attention would be unduly diverted from the Haworth-incident sentencing

[62] These are critical factors here.

[63] As far as I can tell, the Crown first raised exploration of the 2013 incident on July 29, 2020 (Crown seeking a "revised 3-4 day sentencing hearing … [where it] plans to call additional evidence at the sentencing hearing.") On August 13, 2020, Crown and defence then asked about "2-6 day availability" for the sentencing hearing. Per a court official on August 20, 2020, "Counsel are now advising that they require six days for a contested hearing … their first common available dates are April 26 to May 3, 2021."

[64] I infer that that long (eight-month) delay was effectively caused by the switch from two days to six days. If the sentencing had remained on its original two-day track, it most likely could have been scheduled in fall 2020, as early as September, based on summer 2020 emails between the Court and counsel.

[65] Plus, the pushback was effectively longer than the noted six-to-eight months: the parties approached the hearing as a stand-alone exploration of the 2013 incident, with implicit additional time required for (1) me to decide whether that incident occurred as the Crown alleged and (2) for the scheduling and hearing of the actual 2015-incident sentencing (itself requiring a minimum of two days).

[66] All in all, the late July request to change the nature of the sentencing hearing and (by mid-August 2020) to expand it to six days effectively required a pushback of at least six months and probably more like eight or nine.

[67] Most often long delays in sentencing are on account of appeals. But that is not a factor here. This long pushback was driven exclusively by the joint desire to explore the 2013 incident, via a full-blown contested hearing, before turning to the sentencing itself.

[68] On this aspect, I also factor in ss 720(1) ***CC*** and the cases considering it below:

> A court shall, **as soon as practicable after an offender has been found guilty**, conduct proceedings to determine the appropriate sentence to be imposed.

[69] In ***R v Andraecchi***, 2008 ONCJ 206, Filippis J. declined to adjourn a sentencing pending the expected release of a regulation, citing the unacceptability of a delay of as much as a year:

> ... **Generally speaking, delay in the criminal justice system should be avoided. Undue delay can be harmful to a defendant and compromise the public interest. Moreover, insofar as sentence is concerned, s. 720 of the *Code* directs that "A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed**". In appropriate cases other principles of sentencing may justify a departure from this direction. In these circumstances, for example, delay might be warranted if the provisions and future date of the Regulation were known. In such a situation, an adjournment request could be determined having regard to the applicable criteria set out in the regulatory scheme and an understanding of the length of delay.
>
> ... **to grant the motion could delay sentence for up to a year or more. In all the circumstances, I am of the opinion that there is no justification to depart from the legislative direction in s. 720 of the *Code***. [paras 7 and 8] [emphasis added]

[70] In ***R v Neil***, 2001 ABQB 859, Veit J. commented on the potential effects of a delay in sentencing:

> **Normally, a sentence is imposed as soon as practicable after conviction: this is mandated by the *Criminal Code*. The policy reflected in the Code obviously encompasses the interests of both the community and the accused in a sentencing and links as closely as possible the sanctioning to the criminal activity**. In this case, adjournments have already been granted relative to the June and August guilty verdicts delivered by two juries. **Granting a further, lengthy, adjournment might well have a substantive effect upon the sentencing itself: during the period of adjournment, Mr. Neil will continue to be bound by bail conditions which impose restrictions on his liberty for which he may well have to be given credit on any eventual sentencing. In these circumstances, an application for an adjournment is equivalent to a request for a stay.** [para 18] [emphasis added]

[71] In ***Bird v Nova Scotia (Attorney General)***, 2007 NSSC 45, Wright J. observed:

> In my view, Judge Murphy properly considered this uncertainty over the proper legal interpretation and effect of s.753(2), in the exercise of her discretion to dismiss the defence application. **Section 720 speaks in the imperative that the court shall, as soon as practicable, conduct a sentencing hearing but the words "as soon as practicable" likewise confer a discretion on the court as to when the sentencing ought to properly proceed. Here there was no ulterior**

> **purpose for delaying the determinate sentencing of Mr. Bird such as was found in other cases referred to by defence counsel.** Rather, it is apparent to me from reading the transcript of her decision that she did not want to run the risk of pre-empting the Crown from later bringing a Dangerous Offender application.

[72] In ***R v Small-Buffalo***, 2009 ABQB 353, Greckol J. (as she then was) surveyed the s. 720 case law before applying identified principles to the case before her:

> In addition to the ***Wells*** decision, I have also has considered s. 720 of the *Criminal Code*, which states: "A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed." The case law indicates that it is improper for the trial court to delay imposition of the sentence for a collateral purpose.
>
> In ***R. v. W.B.T.*** (1995), 1995 CanLII 4059 (SK CA), 104 C.C.C. (3d) 346, the Saskatchewan Court of Appeal addressed the scope of a judge's powers of adjournment on sentencing. Based on s. 570(1) of the *Criminal Code*, the court noted (at para. 9) that the first duty of the trial judge, to "endorse the information accordingly," is administrative in nature while the second duty, to "sentence the accused or otherwise deal with the accused in the manner authorized by law," is judicial. In the performance of this latter duty, the trial judge is "empowered to adjourn the sentencing proceedings for such length of time and for such purposes as fall within the contemplation of these and other provisions of the *Criminal Code*." **The trial judge may adjourn for reasonable periods of time to conduct a sentencing hearing of one kind or another, to obtain an assessment of the accused's mental condition, to get a pre-sentence report, to receive a victim impact statement or to reflect on a fit sentence.** However, the court in ***W.B.T.*** held that it was **improper for the trial judge to adjourn the sentencing for a year in order to implement the recommendations of a sentencing circle**. Such an adjournment was beyond anything contemplated by the law (at para. 15).
>
> Situations in which it is inappropriate to adjourn sentencing have been discussed in other appellate court decisions as well. In ***R. v. Fuller***, 1968 CanLII 792 (MB CA), [1969] 3 C.C.C. 348 (Man. C.A.), the Manitoba Court of Appeal held that it was **improper to adjourn sentencing proceedings for a period of six months following the receipt of a pre-sentence report in order to determine how the accused "would conduct himself during that intervening period."**
>
> In ***R. v. Urton***, 1974 CanLII 973 (SK CA), [1974] 5 W.W.R. 476 at para. 5, the Saskatchewan Court of Appeal expressed the view that the offender is to be sentenced for the offences which he committed and it would be improper to consider his subsequent conduct, particularly over a long span of time, as the trial judge would then be considering matters not in existence at the time the offence was committed.
>
> In ***R. v. A.P.N.*** (1976), 1976 CanLII 1349 (ON CA), 30 C.C.C (2d) 199 at para. 14 (Ont. C.A.), Jessup J.A., for the majority, was not prepared to cast doubt on those cases which hold that post-offence conduct of the offender may, in some

> circumstances, be a relevant consideration with respect to the appropriate disposition or sentence. However, he advised that while a trial judge has some discretion to postpone sentencing, it is an illegal purpose to do so in order to determine whether the accused makes restitution, co-operates with the police to recover goods, or aids in the investigation of others. He also commented that **postponing sentencing beyond a month or two may be regarded as *prima facie* evidence of the exercise of judicial discretion for an illegal purpose. Ultimately, he held that postponing the sentencing hearing for just under five months in that case was not an illegal exercise of discretion, having regard to the youth of the accused in that case (16-years-old) and the objectives sought to be achieved by the trial judge** (at para. 15).
>
> In ***R. v. Shea*** (1980), 1980 CanLII 2848 (NS CA), 55 C.C.C. (2d) 475 at para. 9, the Nova Scotia Court of Appeal held that it was **improper to delay sentencing for almost seven months in order to give the accused an opportunity to overcome or bring under control his drug habit or otherwise to "prove himself"** (see also ***R. v. Brisson*** (1989), 1989 CanLII 395 (QC CA), 47 C.C.C. (3d) 474 (Que. C.A.)).
>
> The Quebec Court of Appeal in ***R. v. Cardin*** (1990), 1990 CanLII 3797 (QC CA), 58 C.C.C.(3rd) 221 held that it was **not within the powers of a sentencing judge to postpone sentencing so that the accused, a drug addict convicted of robbery, could attend a treatment centre to overcome his addiction**.
>
> In light of the principles articulated in ***Wells***, this Court concluded that it was both **appropriate and practicable to order Mr. Small-Buffalo to attend the 90-day substance abuse treatment program** at the Poundmaker's Lodge. …
>
> Section 720 of the *Criminal Code* empowered this Court to adjourn the sentencing proceedings for a reasonable period of time for the purpose of conducting a proper sentencing hearing (***Taylor***). **The sentencing hearing commenced on January 22, 2009 and was scheduled to reconvene on May 12-13, 2009. This short delay was reasonable considering the circumstances** (***Nunner***). In the result, I ordered Mr. Small-Buffalo to attend Poundmaker's Lodge for assessment commencing January 23, 2009. [paras 26-33 and 35]

[73] I also note the Ontario Court Appeal's decision in ***R v Charley***, 2019 ONCA 726 (paras 86-94), where a presumptive five-month outer limit for sentencing delay was approved. (The backdrop there was s 11(b) of the ***Charter*** (right to be tried (and sentenced) in a reasonable time).

[74] In ***R v Harker***, 2020 ABQB 603, my colleague Kubik J. declined to recognize such a presumptive limit but still emphasized timeliness when sentencing:

> While it is true that the right to be sentenced within a reasonable period of time is protected by section 11(b) of the *Charter*, it is important to note that the protection afforded is fundamentally different than the right to be tried within a reasonable time, which contemplates not only the presumption of innocence, incarceration pending trial or strict release conditions, but the erosion of the ability to make full answer and defence with the passage of time. **Once**

> **convicted, these factors are not the primary issues for consideration. Instead, the right protects the broader interest of ensuring that the administration of justice is carried out in a reasonably expeditious fashion, such that the convicted person can move forward with their sentence and public confidence in the system is maintained.** [emphasis added]

[75] I do not assign blame to either party for the initial year delay, due (in part) to me having to clarify certain (aggravated-assault) details of my judgment, an issue relating to Mr. Haworth's medical records (possibly disclosing a separate injury-causing incident), limited common availability for the (then-needed) two-day sentencing, the onset of the Covid-19 pandemic, and less-than-timely responses by me (early in the Covid era) to counsel's requests for dates.

[76] But from the starting point of a sentence already delayed for thirteen months and (from the vantage point of summer 2020) a proposed further delay of six to eight months, I would have seen this as exceptionally long delay here, with a major risk of "attention diversion" within the meaning of ***Edwards***.

Whether the offender adduced evidence of good character

[77] The answer here is no, at least circa summer 2020, when the Crown was first proposing to change the focus and length of the sentencing hearing. I do not recall any such defence evidence then or even any signal that any would be forthcoming.

[78] It is now apparent, from recent (post-hearing) communication from both Crown and defence, that Mr. Lindsay's character will be a live issue in his 2015-incident sentencing.

[79] The Crown now proposes these uses of the 2013 incident (if proved):

- to show that Mr. Lindsay "is of bad character and a risk to others; prone to reacting excessively on little to no provocation";
- "as an aggravating factor for the Haworth [2015] offence (mindful that the limitations of an uncharged offence are that an offender cannot be sentenced for what that sentence would have been worth, if convicted of it as charged); and
- "to rebut the trial claim that Haworth 'slipped' out of [Mr. Lindsay's] hands pursuant to a controlled takedown .... As the Court has not yet ruled on this issue, the Court (... and should) [find an intentional takedown]."

[80] Addressing the last point first, in fact (per my October 17, 2019 communication to counsel), I have already clarified my trial finding of an intentional throw-down.

[81] As for "bad character and risk to others", Mr. Lindsay has (effective September 2020) resigned from the Calgary Police Service. The Crown did not assert any particular "out of police service" risk posed by Mr. Lindsay.

[82] As for "aggravating factor", the Crown emphasized that "the offender **can** claim the Haworth incident was a one-time exception in an otherwise unremarkable (or perhaps even good) career ... This is a relevant and material point, given that the defence has alluded to

'remarkable rehabilitation' on the part of Mr. Lindsay, by which the Crown assumes character will be addressed in a positive light."

[83] I do not follow the Crown's logic here: any such "rehabilitation" would necessarily refer to post-2015-incident-conviction developments i.e. be distinct from any "good character as of 2013 or 2015" arguments.

[84] In any case, the defence has confirmed, also via recent correspondence, that:

> Since [the 2015-incident] conviction, [Mr. Lindsay] has throughout intended, and continues to intend, to introduce substantial and strongly affirmative evidence of good character and ongoing post-conviction rehabilitation at his sentencing hearing. He intends to seek a [particular sentencing outcome] which by operation of law necessarily further engages consideration of his character. Moreover, that intention was implicitly clear in the sentencing authorities by the accused in the initial post-conviction period and has been assumed by and/or known by the Crown.

[85] As well, after the hearing and as noted above, the defence forwarded (with Crown consent) Calgary Police Service "service call" data reflecting the nature and frequency of then-Cst. Lindsay's interactions with members of the public during his time as a police officer, presumably intended to show the benign (if not positive) nature of the vast majority of his interactions with members of the public.

[86] I will assume, for the purpose of the "from summer 2020" analysis, that these "character emphases" of both parties would have been both disclosed and noted i.e. if we had been conducting an ***Edwards*** scan back then.

[87] As for the legal backdrop here, the ***Criminal Code*** expressly refers to "character" in various contexts e.g. report by probation officer on absolute or conditional discharge (s. 721); making of probation order (s. 731); intermittent sentences (s. 732); delaying parole (s. 743.6); parole ineligibility (ss 745.4, 745.5, 745.51, and 745.63), dangerous or long-term offender proceedings (s 757).

[88] As I understand it now, the defence will or may be seeking an intermittent sentence here.

[89] In ***R v Lees*** [1979] 2 SCR 749, the Supreme Court of Canada approved the use of untried or potential offences to **rebut the convicted person's assertions of good character**. (See also ***R v Woodcock***, 2010 ONSC 3752 (Pardu J.) at para 35.)

[90] In ***R v Roopchand***, 2016 MBCA 105, the Manitoba Court of Appeal approved the use of character evidence to **rule out a conditional sentence** "as a viable sentencing option. [The trial judge] did not use the existence of the untried charge to punish the accused" (paras 10 and 11). On this same purpose, see also ***R v Flis*** (cited above) at para 23 and ***R v Joseph*** (cited above at para 39.

[91] In ***R v Khan and Chtirkova***, 2009 BCPC 114, Gulbransen PCJ endorsed the use of uncharged-offence evidence as character evidence "particularly relevant to the question of **whether** it would be contrary to the public interest **to grant a discharge**" (para 20).

[92] In ***R v BM*** (cited earlier), the Ontario Court of Appeal stated:

> **A sentencing judge should not rely on prior uncharged acts as "aggravating factors" as the sentencing process should not impose punishment for untried and uncharged offences.** However, prior abusive conduct may nonetheless be relevant at the sentencing stage to show the character and background of the offender **as it relates to the principles of sentencing**: see *R. v. Edwards* (2001), 2001 CanLII 24105 (ON CA), 155 C.C.C. (3d) 473 (Ont. C.A.) at para. 63; *R. v. Roberts* (2006), 2006 ABCA 113 (CanLII), 208 C.C.C. (3d) 454 (Alta. C.A.) at para. 28. The **background and character of the offender may be considered, for example, in order to assess the need for individual deterrence, rehabilitation, or the protection of the public**. Such information is essential for crafting a sentence suitable for a particular offender. [para 11] [emphasis added]

[93] In ***R v Suppiah***, 2021 ONSC 3871, MacDonnell J. held:

> …Mr. Suppiah's **prior abuse of his wife is not an aggravating factor in relation to the offence, but it sheds light on his background and his character** and thus it is relevant to an assessment of the need for specific deterrence and rehabilitation: *R. v. B.M.*, 2008 ONCA 645, at paragraph 11; *R. v. Edwards* (2001), 2001 CanLII 24105 (ON CA), 155 C.C.C. (3d) 473, at paragraph 63 (Ont. C.A.). **The prior history in this case reveals a longstanding predilection to spousal abuse, which highlights the need to clearly and firmly impress upon Mr. Suppiah the necessity of changing his behaviour.** [para 32] [emphasis added]

[94] In ***R v Moore***, 2014 ONSC 1788, MacDonnell J. stated:

> Accordingly [after considering ***Edwards*** and ***BM*** on acceptable uses of uncharged-offence evidence going to character] I accept that Mr. Moore's conduct in shooting Mr. Khan can be taken into account in assessing his character. **It is relevant to a consideration of whether the shot that he fired at Mr. Darakjian in the Arax robbery was an aberration, as something inconsistent with his character, and in that way it is relevant to his prospects for rehabilitation. Beyond that, however, it has no relevance to the sentencing calculus.** [emphasis added]

[95] In ***R v Wertman***, 2009 BCSC 1177, Sigurdson J. wrote:

> The sentencing judge was alive to the fact that **she could not sentence the accused for prior uncharged conduct. There is no indication in the reasons for sentence that the judge took the prior noise complaints into account as an aggravating circumstance or that she purported to impose additional punishment in her sentence for uncharged conduct.**

> However, the fact of there being prior complaints was not challenged, only their relevance. I think that the **fact of prior complaints is admissible for a limited purpose and that it is relevant to the nature of the particular offence for which the accused were charged**. That is particularly so given the terms of the Noise By-law which prohibits the "sound of radio…or any other music or voice amplification equipment … which can easily be heard by an individual or member of the public who is not on the same premises." (emphasis added) [paras 19-20] [bold emphasis added]

[96] In ***R v Golic***, 2017 BCSC 1679, Humphries J. issued an important caveat about the use of uncharged-offence evidence:

> … I agree with the Crown that the [uncharged-offence] evidence is generally relevant and could go to the issue of **character and lack of remorse**. It may be relevant to the issue of **rehabilitation**.
>
> The Crown may also submit that it is **useful if there is evidence of good character or expressions of remorse to come**.
>
> I agree that the evidence is potentially relevant and should be admitted. ***It is important to emphasize that the evidence cannot be used to increase sentence. Mr. Golic is not on trial for threatening. The use of the evidence must be closely circumscribed.*** The weight to be attached to it, if any, and the importance it will ultimately assume is still to be seen. [paras 21, 22, and 24] [emphasis added]

[97] In ***R v McKay***, 2004 MBQB 146, Duval J. held:

> The hearsay **information respecting incidents of violence within the correctional facility which the Crown seeks to tender** through the report of Mr. Huzack **cannot be used for the purpose of increasing the punishment which would be appropriate in respect of the offences before the court, although relevant for the purpose of establishing the offender's character, behaviour, and attitude since the commission of the offences before the court**. [para 14]

[98] In ***R v McDonald***, 2015 ABPC 282, Norheim PCJ stated:

> I am satisfied that the evidence of Mr. McDonald's subsequently incurred impaired driving charges, if proven by the Crown beyond a reasonable doubt, **would be a relevant consideration in the sentencing process. It would tend to support the position that the defendant has a drinking problem, and may weigh in favor of a sentence crafted to deal with this problem**. … [para 21]

[99] In ***R v Clements***, 2013 MBPC 69, Krahn J. held:

> … as noted in *Angelillo*, I must be **very careful not to punish the accused on this sentence for the untried offences** or even for his other convictions. In this case, the **background of the offender is important in order to assess his moral culpability and the degree of deliberate risk taking**. The untried offence and the subsequent conviction also provide **relevant information to the court to independently evaluate the risk assessment set out in the PSR, that is, that he**

> **is a low risk to re-offend**. The subsequent conviction impacts the weight and credibility that can be placed on the accused's assertions that he has stopped drinking and has learned his lesson. [para 27] [emphasis added]

[100] In ***R v Deiaco***, 2019 ONCA 12, the Ontario Court of Appeal emphasized the limited use of character illumination derived from uncharged-offence evidence:

> Nor did the sentencing judge err in admitting or relying on the voluntary, videotaped interviews Mr. Deiaco gave about his work in the sex trade business. She considered and applied properly the factors identified by Rosenberg J.A. in *R. v. Edwards* (2001), 2001 CanLII 24105 (ON CA), 54 O.R. (3d) 737 (C.A.), at para. 64, for admitting and using uncharged offences when sentencing offenders. **The sentencing judge cautioned herself not to punish Mr. Deiaco for the uncharged conduct, properly confining her use of Mr. Deiaco's voluntary admissions to proof of his background and character as information relevant to the objectives of sentencing**. Specifically, she used Mr. Deiaco's uncontested boastful admissions as demonstrating that he has **no insight into his behaviour or its impact, a consideration that may reduce the impetus for imposing a rehabilitative sentence**. We would not interfere with the sentencing judge's discretionary decision to admit this evidence and to use it as she did. [para 5] [emphasis added].

[101] Finally, in ***R v MSG***, 2021 BCPC 157, Boblin PCJ said:

> Another factor that affects M.'s sentence is the fact that the offences he committed were in the context of the ongoing physical, psychological and emotional abuse of his spouse over decades. **Although I must not sentence M. for uncharged conduct, and uncharged conduct is not an aggravating factor, the history of his relationship with T. is relevant to his character and his prospects for rehabilitation**. [para 170]

[102] From these cases, I conclude that:

1. uncharged offences, if established, can illuminate the convicted person's character;
2. character can be relevant by way of an express ("character"-referencing) statutory provision (e.g. suitability for absolute or conditional discharge, parole eligibility, and dangerous-offender designation);
3. character can also be relevant to general sentencing considerations e.g. rehabilitation prospects, risk of re-offending, protection of the public, and genuineness of remorse;
4. it can also be relevant in a rebuttal sense where the convicted person puts forward good-character evidence on sentencing; and
5. it is not relevant as an "aggravating factor" *per se*, in the sense that proof of the uncharged offence translates directly, or necessarily, into a more severe sentence, in the way that proof of a prior conviction can (as explained thoroughly by the Manitoba Court of Appeal in ***R v Wright***, 2010 MBCA 80 at paras 7-18).

[103] In the present case, as noted and assumed above, Mr. Lindsay's character will indeed be a factor at the eventual sentence hearing.

[104] On the ***Edwards*** test, this factor would have weighed in favour of exploring the 2013 incident.

Cogency of the proposed evidence

[105] In ***R v Roberts*** (cited above), the Court of Appeal gauged "cogency" as "relevance", assessing it compactly:

> The *voir dire* evidence is relevant because it reveals an aspect of the appellant's character that is not apparent from his excellent work history and clean record. [para 39]

[106] As I recall, as of summer 2020, the Crown had not provided any particular synopsis of its proposed uncharged-offence evidence. I did understand that the complainant in the 2013 incident would be testifying and that (among other possible evidence) the Crown would be introducing police-radio and police-helicopter-video evidence of the incident.

[107] In my view, the "cogency" factor is a kind of *prima facie* screen, aimed to sifting out weak or next-to-no evidence cases.

[108] At an ***Edwards*** (threshold) application, and at least in a case where the uncharged-offence evidence does not already form part of the trial or sentence proceedings (as here), the Court is not in a position to perform a deep x-ray of the prospective evidence.

[109] I will proceed on the basis that, from the perspective of summer 2020, the only-briefly-described Crown evidence was "cogent", in the sense of at least potentially related to sentencing issues and more-than-minimally probative i.e. this was not a case of weak or next-to-no evidence.

Defence objection (or other position)

[110] In ***Roberts***, the Alberta Court of Appeal noted another factor:

> … some courts [also consider] **whether any objection was raised to the admission of the evidence during the sentencing hearing**: ***R. v. Laberge*** (1995), 1995 ABCA 196 (CanLII), 165 A.R. 375 (C.A.); ***Roud & Roud***, *supra*; *L. (J.C.), supra*. In this case, the sentencing judge specifically invited defence counsel to address this issue, communicating his inclination to accept the evidence of the witnesses and to reject that of the appellant. **While defence counsel argued that the *voir dire* evidence should be given minimal weight, he made no objection to its admission.** [paragraph 40] [emphasis added]

[111] In this case, the defence endorsed the Crown's request to expand the initial sentencing hearing to "4-6 days" to dig into the 2013 incident and the accompanying initial delay of approximately six to eight months.

[112] And, while stated to be "grudging" or "with reluctance", the defence also acquiesced to the additional two-month delay to assess the complainant's fitness to continue with cross-examination and, overall, the expansion of the earlier-incident hearing to effectively 14 days.

[113] I do not place much weight on this factor. As discussed already, with Crown and defence both keen to dig into the 2013 incident, they both had an obligation to raise the ***Edwards*** test, to identify the relevant factors, and to explain why, per ***Edwards***, we should make the earlier-incident detour.

Efforts required to explore uncharged-offence allegations

[114] While it may be implicitly addressed under one or more of the other ***Edwards*** factors, I raise an additional factor to be considered at the threshold stage i.e. the "state of the evidence", as in the source(s) of the uncharged-offence evidence, whether such evidence is already on the record (versus needing to be introduced at the sentencing hearing), whether it is straightforward (and thus likely to require little time and effort to obtain or review) or incomplete, complex or otherwise likely to require extensive time and effort to obtain and weigh.

[115] In ***R c Benjamin*** (cited above), for instance, the uncharged-offence evidence had been offered, and cross-examined on, in a **pre-trial motion** (para 31).

[116] In ***R v Bajwa***, 2020 ONSC 185 (Leibovich J.), the evidence came from an **Agreed Statement of Facts**.

[117] In ***R v Joseph***, 2006 CanLII 4903 (ONSC), Molloy J. emphasized the **"straightforward and brief"** nature of the uncharged-offence evidence and the **absence of "complicated issues of fact or law**."

> Factors (d) and (e) relate to the **danger that the examination of the other offence will unduly prolong this sentencing or divert its focus. That does not arise here. The evidence with respect to the weapon possession was straightforward and brief and did not result in any meaningful delay of the sentencing**. Further, because of the limited purpose of this evidence, there has not been any diversion of the focus of the hearing with respect to the appropriate sentence for this crime and this offender. The sole issue to which the new evidence is directed is whether the danger to the community makes a conditional sentence inappropriate.
>
> My analysis of factors (c) (difficulty in defending the proposed evidence) and (f) (cogency of the proposed evidence) are related. I recognize that Mr. Joseph may not have had a full opportunity to see all of the Crown disclosure on the weapons offence charge, nor to interview all of the civilian witnesses who were present in the store at the time of his arrest. He also did not have the advantage of a preliminary hearing on the charge before being called to answer to it. However, **the evidence against him is brief and straightforward. Officer McKenzie apprehended him within seconds of entering the store and the gun, fully loaded, was actually on his person. There are no complicated issues of fact or**

> **law and no inferences to be drawn from circumstantial evidence. The evidence is direct, cogent and compelling.** [paras 41 and 43] [emphasis added]

[118] Another way of viewing this factor is whether the uncharged-offence inquiry is likely to require a "trial within a trial" (or, more accurately, a "trial within a sentencing").

[119] On this aspect, the Supreme Court of Canada cautioned in ***R v Larche***:

> **Care must also be taken**, in applying s. 725 [i.e. in the analogous context of uncharged offences occurring within the circumstances of the conviction offence] over the accused's objection, **to ensure that the sentencing hearing is not transformed into a "trial within a trial". This is relevant to a court's exercise of discretion**, once the threshold requirements of s. 725(1)(*c*) have been met, especially given the need for the accused to anticipate the extent of their jeopardy and the right to jury trial for certain offences. But the **need to avoid a series of "spin-off" trials at the sentencing stage** is, at best, of marginal value in determining whether an uncharged offence forms part of the circumstances of the offence for which the accused must be sentenced. [para 49] [emphasis added]

[120] In ***Edwards***, the trial judge highlighted the risk of a "trial within a sentencing." Per Rosenberg JA:

> The trial judge initially ruled only on the admissibility of the evidence concerning Ms. Powell. He held that if evidence is adduced "at the trial" of a pattern of violent or dangerous conduct, it may be taken into account on sentencing. However, **the Crown cannot "manufacture" a criminal record at sentencing by leading evidence of untried and contested crimes. The trial judge held that this would deprive the accused of all the procedural safeguards of a trial**, "especially where the collateral crime is committed in a foreign country, an accused would be at a substantial disadvantage of finding or calling evidence to defend himself". **The trial judge also said that the danger exists of deflecting the court's attention from the sentencing issues and creating the undesirable situation of embarking on a trial within a trial.** Finally, the trial judge asked, "Is not the accused entitled to a jury's verdict before it can later be said of him, in aggravation of sentence, that he has earlier committed a serious indictable offence or a serious indictable offence that formed part of a pattern extending back 18 years? Is this court to deprive an accused of a defence he may have in the foreign country?" [para 15] [emphasis added]

[121] In ***R v Hunter***, 2013 ONSC 5570, Sproat J. emphasized the same factor:

> … s. 725(1)(c) gives me a discretion whether to consider evidence concerning additional victims. If, contrary to my conclusion, s. 725(1)(c) is available I would not exercise that discretion. **In *Larche*, at para.49, Fish J. cautioned that care must be taken to ensure that the sentencing hearing is not transformed into a "trial within a trial". In my view that is what would result if the Crown application is granted. Given the time spent at trial hearing from approximately 20 complainants, hearing from 20 more is likely to take a**

> **week or more. That was certainly not contemplated in the original trial scheduling which is also a factor to consider.** [para 16] [emphasis added]

[122] In a different context (***Charter*** application for sentence mitigation on account of excessive-force arrest), Topolniski J. recognized the risks posed by having to conduct "mini-trials" during sentencing (***R v Jones***, 2008 ABQB 559):

> There have been no findings by a court of competent jurisdiction that any of the six arrests that the five witnesses will testify to involved excessive force by Constable Drynan. Consequently, **six 'mini-trials' within this sentence hearing would be required to determine if such was the case. One need not stretch their imagination too far to envision these 'mini-trials' entailing the accused calling medical evidence to support the allegations of police brutality and the Crown calling significant evidence to address Constable Drynan's character and the circumstances of the six arrests.**
>
> Whether I consider the intended evidence by applying the classic collateral fact rule or by weighing its probative value against prejudicial effects, I reach the same conclusion. The **intended evidence** is irrelevant to the real issue on this sentencing hearing. Its probative value is, at best, tenuous. **Its admission would severely impair the flow of the trial because of the need for multiple 'mini-trials' to determine the merits of intended witnesses' allegations. The possibility of opening the door to examinations of the many arrests that Constable Drynan had been involved in at the date of the arrest and the significant rebuttal evidence that could be called would further hinder the process, unduly consuming time and eroding trial economy**. In the result, the intended evidence is inadmissible. [paras 26(b) and 28] [emphasis added]

[123] In a similar-fact-evidence scenario (***R v JK***, 2016 ONSC 7163), Morgan J. noted the "serious distraction" risk of exploring uncharged offences:

> Where the similar fact evidence is strong it does not tend to distract the trier of fact by focusing on controversial circumstances for which the accused is not currently on trial: *R v CPK*, [2002] O.J. No. 4929, at para 33 (Ont CA). Here, by contrast, **the still untried evidence of the Ottawa Complainant threatens to be a serious distraction to the present trial, potentially turning it into a trial within a trial in order to determine the veracity of the Ottawa facts before any inference can be drawn from them**. [para 32] [emphasis added]

[124] In this case, it was clear that the defence would be vigorously opposing the uncharged-offence allegations and that the evidence would be both extensive and highly contested.

[125] In early September 2020, both counsel referred to needing to review approximately 2,000 pages of information gathered by the ASIRT in its 2017 inquiry into the 2013 incident (which did not lead to charges against Mr. Lindsay)

[126] In mid-December 2020, the parties reported that "some 3,500 pages of [disclosure] material" had been produced by ASIRT.

[127] From the start, these uncharged-offence allegations raised the spectre of a complicated "trial within a sentencing."

Pre-existing delay

[128] I add one more factor: whether the sentencing has already been delayed.

[129] In this case, as noted, we had extensive pre-existing delay (thirteen months i.e. June 2019 to July 2020). With a summer 2020 forecast of six to eight more months' delay, we were already looking at a total delay of upwards of 1.75 years.

Conclusion on Edwards factors from perspective of summer 2020

[130] Favouring admission of the Crown's uncharged-offence evidence were the general similarity of the conviction and uncharged offences, the apparent ability of the defence to respond to the allegations, and the assumed centrality and cogency of the character evidence.

[131] On the other hand:

- no nexus existed between the conviction and uncharged offences (being discrete and time-separated events);
- exploring the uncharged offence appeared to push back the sentencing between six and eight months;
- the sentencing had already been delayed for thirteen months;
- s. 720 requires sentencing to be completed "as soon as practicable" after conviction;
- a material risk existed of time and attention being diverted from the core objective i.e. completing the 2015-incident sentencing;
- the uncharged-offence inquiry had clear "trial within a sentencing" potential, and a complex one at that, from when it was first conceived;
- neither party presented precedents, at any stage, for a sentencing hearing being turned into a full-fledged trial of uncharged offences, let alone one anticipated (from the standpoint of summer 2020) to require as much or even more time than the trial itself; and
- the Crown had had over 6.5 years (December 2013 to August 2020) to charge Mr. Lindsay in respect of the 2013 incident (and had not done so).

[132] As the trial judge stated in ***Edwards***, "the Crown cannot 'manufacture' a criminal record at sentencing by leading evidence of untried and contested crimes."

[133] It may often be the case, in sentencing, that allegations surface (or resurface) of other offences, which may indeed (if proved) illuminate the sentencing.

[134] But the questions are whether the that illumination is worth the incremental delay, effort, and expense and, more fundamentally, whether a sentencing should be adjourned to allow what is effectively a separate trial to be started, conducted, and completed, so that its outcome can illuminate the sentencing.

[135] In some cases, as here, a proposed subsidiary (aggravating-factor) proceeding risks overwhelming the primary (sentencing) one, to such a degree that it should have been exposed for what it actually was: a stand-alone matter, normally requiring its own proceeding, its own resources, its own witnesses, and its own timetable, leaving the sentencing proceeding to be pursued "as soon as practicable" and not obscured and delayed by the other proceeding.

[136] Even if some sentencing illumination is otherwise lost.

[137] From the perspective of summer 2020, with the sentencing for the 2015 incident already delayed over a year, I believe that the ***Edwards*** factors, on balance, signalled clearly that the proposed inquiry carried massive risks of unduly delaying, complicating, and in fact completely overwhelming the sentencing.

[138] If the Crown had brought the application it should have a year ago, I would have declined to admit the proposed evidence and directed that we proceed to sentencing without any examination of the 2013 incident.

F. Perspective from summer 2021

[139] The above analysis attempted to re-create how the analysis would have unfolded if the Crown had sought permission to open up the 2013 front when it should have (summer 2020) i.e. when first proposing to change the nature and length of the original sentencing hearing.

[140] From that perspective, some of the ***Edwards*** factors were "risk management", namely, is it likely there will be prolonged delay, and will time, energy, and resources be unfairly redirected from the main sentencing hearing?

[141] From the perspective of the present, it is plain that those risks came to pass, and worse that expected:

- the predicted six-day hearing turned into effectively **fourteen** days; and
- we required an **additional adjournment**, in part to allow for psychological examination of Mr. Addai-Nyamekye, **of almost two months**, from May 4, 2021, when the first segment of the 2013-incident hearing ended, until June 28, 2021, when we resumed for a further (effective) eight days, albeit without Mr. Addai-Nyamekye participating.

[142] At the conclusion of the second segment (on July 6, 2021), an additional year had passed (since the Crown first proposed this detour) and we had **passed the second anniversary of the conviction judgment** (June 21, 2019 - June 21, 2021).

[143] I do not say that these outcomes were predictable. But they confirm that the circa-2020 signals of likely long delay and major complexity were reading the winds accurately.

G. Denial of retroactive approval for 2013-incident inquiry would be justifiable

[144] At this stage, is it better to simply decide the contested issues i.e. whether the Crown has proved the commission of assault and assault-with-weapon offences in 2013?

[145] A sentencing detour that should never have launched in the first place does not necessarily become more legitimate for having been completed.

[146] What happened here is a prime – perhaps the ultimate -- example of what the ***Edwards*** test was designed to avoid i.e. a side proceeding overwhelming the sentencing, resource expenditures far out of proportion to the "aggravating factor" context, unacceptably long delay (pushing us more than two years out from conviction), and an obvious loss of focus on the main (2015-incident) event.

[147] The Crown sought "aggravating factor" illumination. The defence sought vindication on the 2013 incident (through a "not proved beyond reasonable doubt" decision) or, at worst (if a 2013 assault by Mr. Lindsay were proved), minimization of his exposure for such an assault to incremental sentencing on the 2015 incident. (Per ss 725(2), Mr. Lindsay would not be chargeable for the 2013 incident on either outcome.)

[148] But they effectively built a side road to those destinations without advance approval, and approval would not have been granted if sought. Those outcomes would not have been available if the ***Edwards/Roberts*** test had been applied at the outset. They should not necessarily become available through the parties' joint bypassing of that test.

[149] The reported cases do not appear to feature anything remotely akin to a five-day criminal trial being followed by an almost three-week "aggravating factor" hearing proposed a year after conviction and not completed until another year had passed. Even in pandemic times.

[150] As I see it, the policy considerations underlying s 720 (sentence to follow as soon as possible after conviction) were abandoned here.

[151] Defence mentioned several times over the course of the fourteen-day hearing, albeit without referencing the ***Edwards*** test, that the overarching decision whether the 2013-incident evidence should come into play in the sentencing rested with me.

[152] As I have explained, per ***Edwards***, that discretion ought to have been brought into play by an admissibility application in advance i.e. before conducting a full-blown "trial within a sentencing" about the 2013 incident.

[153] For all the reasons outlined above, I believe I have the discretion, even at this stage, and on the basis of the ***Edwards*** factors already outlined (from the perspective of summer 2020) and exacerbated by the actual outcome of this proceeding i.e. longer and more delayed than projected, to find that this detour proceeding should not be approved retroactively and that we should proceed directly to sentencing for the Haworth assault without any consideration of the 2013 incident.

[154] However, having completed the inquiry into the 2013 incident, after fourteen days of sittings, I find that the better course is to decide whether the Crown has proved the alleged assault of Mr. Addai-Nyamekye.

H. Analysis of the 2013 incident

The three segments

[155] The 2013 incident has three segments:

- the **lead-up**, involving Mr. Addai-Nyamekye being called to serve as designated driver for some of his friends late in the evening on Friday, December 28, 2013, him travelling from his home to his friends' location, him driving a car owned by one of those friends (with the friends onboard) into a snowbank, efforts to push the car out of the snow, two Calgary police officers passing by and then stopping, an altercation between one or both of those officers and Mr. Addai-Nyamekye ending in the latter being handcuffed, put into the back of a police van, and dropped off at approximately 4 a.m., in the middle of an under-construction section of Calgary's eastern downtown, on a very cold (approximately -17C, plus windchill factor making it more likely -mid-20s) night, with him severely underdressed (t-shirt, track suit, shoes), and him then calling 9-1-1- for help in getting home, shortly afterwards then-Cst. Lindsay arriving on scene (having received dispatch information about an apparently "vexatious 9-1-1 caller"), and some initial dialogue or at least attempted communication between Cst. Lindsay and Mr. Addai-Nyamekye (captured in part on a 9-1-1-system recording and a police-radio recording);
- the **main-altercation** i.e. the approximately four minutes after the end of those recordings and before a Calgary police helicopter video captures the tail-end of an altercation between the two men, about which they offered starkly different accounts; and
- the **tail-end**: about forty seconds captured by the helicopter video, showing the conclusion of the altercation.

Lead-up

[156] Concerning the events up to when Mr. Addai-Nyamekye first called 9-1-1, I generally accept, and adopt, Mr. Addai-Nyamekye's version of the principal events i.e. being called to drive his friends, connecting with his friends, driving away with them, getting stuck in the snowbank, and having an encounter with two CPS officers (Csts Ben Donockley and Kyle Kwasnica).

[157] It is not necessary, or possible, for me to determine exactly what happened between him and those officers i.e. in their encounter at that scene.

[158] But whatever happened in that encounter did not justify the decisions of one of those officers (or both of them, if that is what happened) to drive Mr. Addai-Nyamekye away from that scene and also further away from his residence -- and they, or one of them, knew his address, from his driver's licence -- to a largely unpopulated and under-construction section of downtown east Calgary, at 4 in the morning, on a bitterly cold winter night and to leave him there, unprepared (clothing-wise and otherwise) to be outside for any length of time.

Transition from the lead-up to the middle segment

[159] The first segment ends with Mr. Addai-Nyamekye on the phone with a 9-1-1 operator from his dropped-off-at location, yelling (effectively) that he was mistreated by the first two officers, that he is cold, and that he needs a ride home. As noted above, I have accepted that he was so mistreated and that he was cold, and I find that he was indeed calling (in part) about wanting a ride home.

[160] As Cst. Lindsay arrives, he hears Mr. Addai-Nyamekye yelling something to the effect that "if you don't fucking get me home …", and he perceives that this is directed either at him or at both him and the 9-1-1 operator.

[161] From his police car, he called out to Mr. Addai-Nyamekye: "are you on the phone with us [i.e. with the police]"?

[162] Mr. Addai-Nyamekye continued talking to the 9-1-1 operator. Cst. Lindsay got out of his vehicle and radioed in: "I'm out with this male. It looks like he is yelling at one of our call takers. So, we can disconnect with him."

[163] In response to Mr. Addai-Nyamekye apparently still talking with 9-1-1, Cst. Lindsay called out "Hey! Hang up. Right now." At that point, Cst. Lindsay was standing just outside a pedestrian-protection awning over a sidewalk (or future sidewalk) where Mr. Addai-Nyamekye was standing. (For ease of reading, from here I will use initials (L and AN) for the two men).

[164] AN continued on the phone: "If you don't fucking get me to the fucking … don't get me to the house … they [i.e. the first officers] took my ID, everything."

[165] L then called out "Hey! Hey!" and then "don't you fucking …", which he testified was designed to get AN's attention. In light of the "vexatious 9-1-1 caller" report he had received, his message to AN at that point was, effectively, "don't call 9-1-1 if you don't have an actual emergency."

[166] The above-quoted were the last communications captured by the 9-1-1- recording and, aside from the short messages noted below, by the police radio system, before the middle segment.

Middle (main altercation) segment

[167] The next question is what happened in the middle segment, captured neither by audio or video recordings (aside from three short radio messages sent by Cst. Lindsay during the main altercation ("Code 200" (i.e. officer in distress); "Code 200 … taser deployed"; and "Code 15 (things okay now) … one [person] in custody").

[168] As noted, the two men offered starkly different accounts of that segment.

[169] But only one of them (Mr. Lindsay) was subjected to cross-examination on his account.

Complainant's voluntary absence mid-cross-examination

[170] The problem was Mr. Addai-Nyamekye's decision, partway through cross-examination, to absent himself from the balance of the proceeding. The defence had only cross-examined him for about an hour, and only about pre-main-altercation events, before we ended our court day.

[171] The next day, Mr. Addai-Nyamekye advised that he could not continue with the cross-examination due to post-traumatic-stress-disorder symptoms triggered, he said, by having to revisit the altercation as part of the cross.

[172] As noted earlier, we adjourned the 2013-incident inquiry, for approximately two months, to allow for a psychological assessment of Mr. Addai-Nyamekye. The assessor, Dr. Patrick Baillie, concluded, after extensive testing and analysis, that "[w]hile Mr. Addai-Nyamekye would *prefer* not to continue to testify, he is *capable* of doing so."

[173] He elaborated:

> While testifying in this matter is distressing for Mr. Addai-Nyamekye, **that distress does not appear to be disproportionate to what might be anticipated for many complainants in criminal matters**, such as when testifying about an alleged sexual assault, robbery, fraud, home invasion, etc. He is unable to articulate (and did not accept) suggestions for modifications to trial proceedings (e.g., having a support person or dog on hand, testifying remotely) that might lower his distress. In light of his chronic back pain and distress, the only proposed modifications I would respectfully suggest would be that Mr. Addai-Nyamekye be permitted to sit *or* stand, at his preference, when testifying, and that frequent breaks in his testimony be offered to facilitate movement. [emphasis added]

[174] In his report letter dated June 25, 2021, Dr. Baillie provided extremely comprehensive, and compelling, reasons for his conclusions.

[175] When we reconvened to complete the proceeding in late June 2021, Mr. Addai-Nyamekye declined to participate on any basis i.e. regardless of the possible accommodations.

[176] On this subject, I also note the defence's submissions about Mr. Addai-Nyamekye having apparently revisited the 2013 incident at various times and in various contexts (e.g. his own trial, for assaulting Cst. Lindsay, at which he was acquitted; various media interviews about the incident; his participation in a documentary about it; other questioning about it) without experiencing or at least raising triggering-PTSD concerns.

[177] I also note here Mr. Addai-Nyamekye's apparent ability, as I gauged it, to endure (i.e. without obvious signs of distress or any requests for breaks or other assistance) the complete direction examination by the Crown and the opening hour of cross-examination.

[178] For the reasons provided by Dr. Baillie, and in light of the "other occasions" submissions by the defence and my own observations of him during direct examination and the opening phase of cross, I find that Mr. Addai-Nyamekye was in fact able to continue with the cross-examination (and any redirect that would have followed) i.e. that he absented himself from the balance of our proceeding, including the rest of cross-examination, without a reasonable excuse.

Complainant's absence precluding any altercation-focused cross

[179] I conclude that, with Mr. Addai-Nyamekye's no-reasonable-excuse absence preventing any cross-examination about the altercation, the appropriate consequence is to disregard his direct examination about it: ***R v Lovie***, (1995) 24 OR (3d) 836 (CA) at the paragraphs beginning "The failure of a witness …" and "The experience in the United States …" and ***R v Hart***, 1999 NSCA 45 (leave denied [2000] SCCA No. 109) (paragraphs beginning "The approach appears …" with Wigmore-approach synopsis and "This case stands …", in particular "… the limitation should not result from the fault of the witness or Crown").

Middle (main altercation) segment – Mr. Lindsay's evidence

[180] I turn then to Mr. Lindsay's evidence of the main altercation, which, aside from the short radio messages noted above and some Taser-deployment-timing evidence, is effectively the only remaining window into what happened in the middle segment i.e. largely unrecorded by either audio or video.

[181] Here is a synopsis of Mr. Lindsay's evidence about the middle segment:

- after AN completed his "… took my ID, everything" statement, he turned to face Mr. Lindsay and (per the latter) "at one point, pointed at me … he was angry, swearing, and pointing at me";
- "at that point, he [started] coming toward me … I stayed stationary … he came towards me … that is when I stepped back and warned him not to come closer … he was coming at me … I said 'don't you fucking come any closer' … my perception was, from his aggression on the phone [with 9-1-1] and then his aggression [towards] me, with him starting to [move towards] me, he was trying to close the distance for some nefarious purpose";
- "these [actions] made me feel like an attack could be imminent … [however], I did not want to jump to that conclusion";
- "I said 'don't you come any closer' … I took a step [back] … I did not assume an attack was coming … I tried to create space and time [for him] to change his course … that is when I said [again] 'don't come any closer' … I stepped back maybe a half or full step i.e. back towards my car";
- "he kept coming towards me … he did not listen to what I said … he got to the point where we were almost chest-to-chest … then I pushed him back, forcefully, and told him, like, 'back off' or 'stay back'";
- "this push caused him to move and stumble backwards, but not so hard that he lost his balance … he stayed on his feet … my purpose here was to make clear that he needs to stay back from me i.e. if he wants to engage i.e. if he wants to [talk with me]";
- "then he sort of puffed out his chest and put his arms out, [which are] pretty common [actions] for someone trying to entice you into a fight or into saying something … kind of a masculine-like posture [translated as] 'what are you going to do about this?' … I have seen this many times … it is obviously an aggressive posture intended to show me that a fight was imminent or that he was not afraid of me";
- "[at this point] he was almost chest-to-chest with me … I pushed him back, maybe four feet or so";
- "his facial expression was still 'aggravated' … he was still swearing … this was not a 'sorry' or 'excuse me' gesture … in one hand, he still held his phone, the other hand was [open-fingered] i.e. not a fist … he puffed up his chest, and he started to move to me again … walking toward me … he started to bring his hands to the front of his body … my perception was that he was trying [again] to close the distance to attack me … I felt threatened … about to be attacked … as he got closer, I pushed him, harder this time … [this] caused him to stumble and fall backwards, landing on his back";

- "as his hand hit the ground, his phone bounced out of his hand, skittering away";
- "[the purpose of that push] was to prevent an attack";
- "he ended up full out on his back side, about four or five feet away from me … I shouted at him to stay on the ground … I tried to give him an opportunity to say what was going on … [he responded by] rapidly trying to stand up and lunge towards me again … he sort of quickly scrunched forward … rising and lunging at the same time, with his hands reaching out in front of him … I perceived that this was clearly an attack [against me] at this point … I felt threatened … I then essentially engaged a football or hockey-style tackle or body-check, causing him to start to stumble and my momentum to carry me on top of him";
- "at this point [in our encounter], I [gauged his behaviour] as assaultive in nature, which entitled me [per the Calgary Police Service use-of-force policy] to use "communication, physical control, and intermediate weapons" as (authorized) responses … 'physical control' is a broad category, including pushing, strikes and stuns, full-on tackles, and all resulting efforts to put someone into custody physically and manually from there";
- "[after the tackle], we landed on the ground [together] … he was on his side somewhere … I was somewhat on [top of] his side … I started shouting 'you're under arrest' and ordering him to roll from his side onto his stomach … I then grabbed his left wrist with my left hand, … trying to use my right hand to push him onto his stomach and gain control of his wrist behind his back … I accomplished this briefly … I was able to grab his wrist and start moving it behind him and [got] most of my weight onto [his] shoulder blades, to try to pin him down to gain control … because I had a brief moment of control, I used my radio to advise the district [I had] a 'code 200' [i.e. officer in distress] situation" … at that point I was at about 'half a tank' of energy";
- "I was [then] trying to get him face-down, prone on the ground and to get one wrist behind his back to apply a handcuff. I was trying to arrest him … behind-the-back is the safest way to handcuff a combative, assaultive subject";
- "people who are handcuffed to the back [still] have other ways to effect an assault e.g. spitting, biting, head-butting, kicking, stomping … even rear-kicking like a horse … and such people [still have the use of their] hands … can still grab items from [an officer's] duty belt … handcuffing to the front [on the other hand] has [or creates] other [i.e. additional] risks e.g. the suspect can see what you're doing [versus handcuffing from behind] … they can see when you're distracted by doing the cuffing … plus they can see your duty belt in front of them … some may try to grab something … plus, if only one cuff is on, they can use the [free] cuff as a weapon, including using the handcuff chain to choke you";
- [back to describing the encounter and how AN responded to the initial handcuffing attempt] "despite me having most of my weight on the small of his back and me shouting 'you're under arrest' and him having one hand behind his back, he was till able to use his other hand and his body to twist and turn and buck … I could feel the tension [in his arm as I tried to cuff him] … **he was able to buck me off to an extent and turn to face me … [that] exposed me to … threats of spitting, primarily spitting and biting, to one of my arms";**

- "we then [entered a protracted phase of the struggle], not just one bucking but a long time of us wrestling, with me trying to [get him] on his back to pin him down and saying 'you're under arrest', because I was starting to get tired … I told him at least five or six times [that he was under arrest] … this was a very dynamic situation … I do not recall [all of] the specifics … I told him repeatedly to put his hands being his back … every time he tried to buck me off, he twisted … **a few times he twisted up towards me and, one time at least, I thought he would try to spit at me** … at that point, I delivered a right-hand stun with my free hand, with my left hand still trying to control his wrist the whole time";
- "my [purpose here was to] simply redirect his face away from me … so that he would turn his head back to the ground, which would shift his body face down, also protecting me";
- "[around this time] it was becoming clear to me that [our struggle] was kind of locked-in … no one was getting the upper hand at this point … I was [still] trying to get his hands behind his back … [I was] not succeeding … he bucked me off successfully but I could [still] regain some control … it seemed like a never-ending back-and-forth tug-of-war … this made me feel worried … I thought we might be locked at the same level of [back-and-forth struggle] while my energy [was starting to really] fade … it is not an easy task to control an assaultive person like that … eventually you run out of ability … you can end up in a dangerous position [where] you may not be able to defend yourself … they can harm you [by] grabbing something from your duty belt … as I was [losing energy], it was [becoming a] more and more dire situation … my perception [around this point] was that I was not going to be able to prevail";
- [going back to the first face strike, and **again asked what it was that concerned him and made him fear possible spitting] "[it was] the way he twisted around to me … not like trying to turn … very [much] seemed to me [that he was] intentionally trying to face me**";
- [returning to the encounter] "I was still trying to get his left arm behind his back, with my right arm on his shoulder, **[trying to] get him twisted down to face down, stomach down** … this is the preferred position of control … [the preference is to] keep the face away, and to keep the feet away … once [you] get [their] arms behind them, it is hard [for them] to buck or maneuver or position themselves up i.e. without [the use of their] arms";
- "I still had his left wrist in my left hand, and my right hand on his shoulder, with my weight on the middle of his back, near his shoulder blades, or below … I was trying to roll him … he bucked me off … I fell off him but kept my grips … he put his right hand on the ground and pushed himself up … he got his feet underneath him and started to rise … I tried to rise with him and [to] pull him to the ground or to prone [position], but he was quicker than me … he was up with me behind and below him … it was not going well … this made me worried that he could free himself from my limited grip and attack me, or attempt to flee the scene, or injure someone else … my control was fading rapidly … **I saw his right hand trying to make a fist** … I lost my grip on his right shoulder … he twisted around … he was twisting around to strike me … [that] was my perception … physical control was not working … I quickly accessed my taser [from] my belt,

drew it, powered it on, and just fired [a shot] from the hip … I did not fully raise or sight it … just based on close proximity … I followed [my] instincts and fired it toward his back … at this point I [still] had my hand on his wrist … was still in tight control … his shoulder was almost against my own shoulder … [he was maybe a] foot away as [I fired it] … right at this point, I was afraid that not only would he assault me, [but also] that my energy levels were getting so low, I [would not be able to] defend myself if it continued [much] longer … **I felt that he was going to strike me with the fist he was forming** … **[I thought that] I might be exposed to a serious assault with no defence**, and I now [had] a conductive-energy weapon he might get access to … I also had concerns about my tool belt … lots of [our tools] are designed for quick access [e.g. oleoresin [pepper] spray, baton, even our radio] … if you cannot protect yourself or if you are unconscious, people may get to the tools … ";

- [re the point of using the taser] "physical control was not working .. it was clear [I needed to] effect some kind of control [via] intermediate weapons … one option was oleoresin, but it is generally only effective if it gets into the eyes or nose of the subject … he was facing away from me … could be a challenge [to use it] … plus there some danger of using it too close to a person's eyes … it can embed particles of oleoresin into their corneas, **[causing] lifelong troubles** … another option was [my] baton, but …it is not just 'ready to use' … you need to draw it from [its] sheath and to take time to swing it or telescope it out … the quickest and most effective [intermediate weapon] was [my] taser"
- "I was concerned that, if [AN] won the struggle, I could be seriously assaulted, with injury to me and [if he got access to my tools] and [with me not] sure of his motivation at this point, [I was worried] he might use them against a member of the public";
- [questioned about appropriateness of use of taser] "[one criterion] is 'when the subject can be lawfully detained' … I thought [AN] could be lawfully arrested for … the whole sequence … assaultive behaviour towards me multiple times … [he was] arrestable for assaulting a peace officer … also, I believed there was a real likelihood of injury to myself, and I [had discerned that] other control options were [likely to be] ineffective or inappropriate";
- "I used the 'shooting mode' of the taser … it seemed highly effective [on impact] … seemed to be a full lock-up … he lost the ability to stand … lost his balance … his lower legs and back were [affected by] the taser … my perception was that I had [made contact] somewhere in his lower back or buttocks … he was clenched and seizing … [the taser hit] caused him to fall … he fell, somewhat backwards, landing on his rear quarter and onto his back … I used that moment to radio in 'still code 200, and taser deployed'";
- [concerning the taser sequence] **"around this time, he was yelling and swearing, and I was telling him to lie on his stomach and put his hands behind his back, and (repeatedly) that he was under arrest … essentially both of us were shouting different things … no actual communication or conversation"**;
- "the taser cycle then ended, and I shouted at him to stay on the ground and keep his hands behind his back … but once the [taser] electricity stops flowing, it [was]

like it [had] never happened … his lock-up ended … he started to sit up and reach up towards me … he began reaching up as if standing again … I was standing at his feet giving commands … he was facing [away from me]";

- [asked to elaborate on the second "code 200" message] "at that stage, I felt I still needed back-up even though I [had] used the taser and it [had been] effective … **I [still had] no handcuffs [on him]** … no physical control … was still trying to get control … I [still] felt I needed back-up and help";
- "as he started to rise back up towards me, I reactivated the taser so I could pull the trigger again … [that] reactivates the cycle … I held the trigger this time … I then had the opportunity to put my knee on his chest to pin him to the ground, to manipulate his hands, to be more effective … I 'drove stun' [the taser] into his midsection, to get a [better] cycle of electricity … he was now facing me … I [tasered him] in the low-stomach area … this seemed to have a greater effect, as he fell backwards … I [perceived that] the [taser] probes were embedded [in him] … I placed my knee into his lower chest area … sternum … I grabbed one of his arms, trying to flip him onto his stomach, to get him into prone control, and to try to put the handcuffs on [from behind] … when I grabbed his wrist, I [felt some of the taser energy] on my left arm, up to my forearm … I lost almost total control … I released him … I could not grab his wrist to cuff him … I released the trigger after about five to seven seconds … then I tried to put the taser away while regaining [control of] that wrist … I accessed a pair of handcuffs and got one cuff on that wrist … I was still facing him, [but] he was able to somewhat twist away from me … we [continued to] struggle … I was able to get the second cuff on his other wrist, but in front of him … both [of his] arms were up in the air … handcuffing him in the front was not a preferred option for me … was more of a sign of desperation at that point";
- "with the cuffs in front, [I had] some leverage … I grabbed the chain between [the cuffs] and tried to roll him over away from me … **I felt him tensing under my grip and trying to force himself and the cuffs up toward me** … I essentially pinned the cuffs down to the road to hold him to the road … his arms were at 90 degrees [to his body] … I [continued to] grab the handcuff chain to control him … I leaned into [the cuffs], rolling him … I could [still] feel his resistance … [he was] still able to push … **he [then] turned his head and neck to look up towards me … I [feared] he could attack by spitting or biting, [so] I delivered a strike to the left side of his face … I got his face away from me** … I tried to grab him [by] his arm to roll him over [but] **I could feel him flexing [his] bicep … I could feel the muscles moving under his skin … tensing up [for] counter-action** … **I started delivering knee strikes to his rib cage and back shoulder blades, in an effort to keep him faced away"** [this segment corresponds with part of the interaction between the two men captured in the helicopter video];
- [at around this point] "I radioed 'code 15', which means 'I am okay for now', as well as 'one in custody', meaning 'one person now in custody' … my energy levels by this stage were extremely low … I was essentially empty";
- [about his use of strikes or punches generally] **"they were efforts to readjust [AN's] positioning … [my] intent was to get him to reposition more into a face-down position"**;

- [about a late-stage portion of the video] "I was trying to position him so I could stand him up and move him to my vehicle … I was attempting to try to lift him up to his feet or stand him up so he can walk to the vehicle, [off] the road and out of the cold … [I] had one hand on the handcuffs to try for control [and I was] trying to help him stand up [by putting my] hand under his right armpit, [but] he was not cooperative in wanting to stand and go to vehicle … [on viewing the video of this segment] both of us possibly slipped [at one point], though [seeing it now] it looks like he tried to kick out one or both of my feet … after that, I then slip and start to fall on him … [I thought then that] we had both slipped … **I was still not in a position of control** … **my objective [still] was to protect myself from any attack from him and to place him into a position of control**, to finalize the arrest … **"position of control", [for me], meant 'as prone on his stomach as possible', to the point where I could safely speak with him** about moving into my vehicle and avoid further aggressive activity like this";
- [at this point] we fell to the ground … he [was] facing me with his hands reaching, in the middle of the fall, reaching towards me, with me trying to gain control of the cuffs with sturdy control where I can reposition him, **but with him facing me, I am delivering one stun strike to [his] face to prevent that**"
- [concerning AN's described reaching-out] "I was afraid of him hitting me or grabbing at my face … [describing the closing stages of the video, just before other officers are seen rushing in] "**he was still facing me … not complying by rolling over … I could feel the tension in his arms, like [he was] trying to reach me and twist towards me … [I] thought some kind of attack or spitting was imminent** … this made me feel afraid";
- "I was [then] trying to use [the] handcuffs to rotate him around and pin his arms to the road … **he was able to turn around to face me, [which] was completely non-compliant with anything I had told him to do … [I] took this as a potential attack and delivered another strike";**
- **[from the point of the tasering, forward] "[my main message was] 'face away from me, face away from me … on your stomach … face away from me'";**
- [re the final kneeing sequence] **"my primary recollection was more his upper-body activity … I could feel the tension in his arms and resistance [i.e. him trying] to roll back around to face me … actively trying to roll back to me … my perception was … that he was trying to roll to face me to attempt another attack, via [the] handcuffs or spitting or something of that nature** … this made me feel threatened and afraid … I used [the] knee strikes to try to roll him over … I remember it took a few knee strikes … more than three or four … he [did] start to roll over … I remember pinning him down … I was ultimately able to pin him down with both hands … [asked to characterize AN's conduct in the closing phase of the video] "[I could feel the] tension of his body … with his attempts to roll over, I saw him as assaultive or highly actively resistant";
- [asked about his perceptions in the closing moment when other officers arrive and whether he still had concerns about AN's conduct] **"he had been assaultive throughout … the way I had his legs pinned, he could lay on [his] side or face me, and he did face me"**; and

- **[asked about one last punch seen in the video i.e. before the other officers arrive] "my recollection [of seeing that punch] is that [it was] intended to stun and get his face away from me** … this was a closed-fist stun, of low force **… not to punish, not to hurt, [but] to get his face away from mine** … [asked how he perceived AN at that moment] **he was [still] turning to face me after everything, [so I still regarded him as] assaultive**." [emphasis added]

[182] At this point in the video, two officers are seen rushing in to assist L, and the helicopter officer announces that the altercation is over.

[183] In cross, the following exchange occurred:

> L: Given thousands of calls [for police assistance] in a year, the [number] of "assault peace officer" [charges] is quite low compared to other offences.
>
> Crown: This is interesting … [I suggest] that much of your evidence in this sentencing hearing [was about] threats an officer could face e.g. spitting, biting, kicking, use of handcuffs as a choking weapon [and more].
>
> L: Yes.
>
> Crown: If police assaults are so rare, why [were you or are you] so focused on those possible contingencies here?
>
> L: **Because it only takes one of them to kill you … you need to be on guard for that one time … [assuming for the] sake of argument that [assaults on peace officers] are rare, it is something you always have to be mindful of … [it] can take just one blow or spit, [and] your life or [the life of] a member of the public could be jeopardized.** [emphasis added]

[184] And the following exchange:

> Crown: … I am suggesting to you that [AN] was largely, if not entirely, passive [towards] you while this [altercation] was happening i.e. that he was non-violent towards you.
>
> L: You can suggest [that] all you want; that was not the case.
>
> Crown: He never swings at you, never punches you, never spits or head-butts you …
>
> L: I prevented it. I was able to prevent it.

[185] And this one:

> Crown [addressing the closing sequence, when the two other CPS officers arrive] … one of your concerns [was about] spitting … you mentioned it many times.
>
> L: Yes, it was one major concern.
>
> Crown: I am suggesting to you, if you watch [the video] a bit further, there is no spit mask … your version is that you punch him because, [if he] faced you, you were worried about a [spitting risk].
>
> L: [That was] one of my concerns.

Crown: You are bent over [him], with your face down, and with his face here [i.e. close to yours], within arm's reach or literally spitting distance.

L: I can't speak to which way he was facing.

Crown: [The other officers] have total control of him [by this point in the video]. Why lean forward and down like that if spitting is such a concern?

L: Because [I was] so exhausted … I needed to catch my breach, and he was under control.

[and later]

Crown: The video shows that you lean over and down towards his head, within spitting distance, at least four times … then walk by [AN with the other officers], [but] there is no spit mask or hobbles [to prevent kicking] … you do not stay to help your colleagues.

L: I was too exhausted.

[186] And this close-to-closing exchange:

Crown: [I will] summarize the uses of force here. [AN] walks [towards] you, and lunges twice or three times, then attempts to form a fist a few times, or clenched a fist, but no [actual] swing [at you] …

L: [He had] no chance [to swing at me].

Crown: … no kicks, no head-butts, no spitting, no verbal threats to you …

L: I do not recall the exact verbal [i.e. words used by AN].

Crown: … and [now] the force used [by you] against him: … you pushed him three times …

L: Yes.

Crown: … [plus] the initial punches … multiple punches …

L: I believe so.

Crown: … [plus you] tasered him two times, with the drive-stun making it three times …

L: Three actual taser deployments … the drive-stun was part of the second one.

Crown: … then, after tasering him, you punched him several times to handcuff him …

L: To protect myself as part of the handcuff sequence.

Crown: … then we see one punch during the handcuff [sequence] … one punch, but several punches in the [helicopter-video] sequence …

L: Yes.

Crown: … [then you] struck him with your knees – you say three to four times …

L: With [my] thigh [i.e. not knee].

> Crown: … [okay], three to four knee strikes, or thigh strikes … the video [actually] shows five times, with your knee or thigh … [plus] the last punch [just before the other officers arrive] … all of this, even on your version, is a disproportionate use of force.
>
> L: I disagree.

[187] As explained above, I will proceed on the basis that Mr. Lindsay's direct-examination account of the middle segment (i.e. the encounter between the two men starting with when the 9-1-1- call ended through to when the helicopter video captures the closing moments of their altercation) is an accurate account.

[188] As for the tail-end segment (captured by the helicopter video), I find that the video, even though taken from between 1,000 and 1,500 feet above the altercation, accurately captured what happened between the two men, or at least their principal movements.

[189] For finer details (such as whether Mr. Addai-Nyamekye was facing Mr. Lindsay at a certain point), I will proceed on the basis that Mr. Lindsay's account is accurate.

[190] I next turn to the applicable legal principles here, first the statutory provisions and then some cases explaining how to interpret and apply them.

I. Statutory framework

[191] Here are the key ***Criminal Code*** provisions:

> **Assault**
>
> **265** (1) A person commits an assault when
>
> > **(a)** without the consent of another person, he applies force intentionally to that other person, directly or indirectly; …
>
> ...
>
> **Aggravated with a weapon or causing bodily harm**
>
> **267** Every one is guilty of an indictable offence … who, in committing an assault,
>
> > **(a)** … uses … a weapon …, [or]
> >
> > **(b)** causes bodily harm to the complainant ….
>
> **Protection of Persons Administering and Enforcing the Law**
>
> **25 (1)** Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> …
>
> **(b)** as a peace officer or public officer,
>
> …
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
>
> …

Defence of Person

34 (1) A person is not guilty of an offence if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person's role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person's response to the use or threat of force; and

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful. [para 15]

J. Key use-of-force and self-defence cases

[192] This section largely reproduces the equivalent section in the conviction judgment in this proceeding (***R v Lindsay***, 2019 ABQB 462), with excerpts from some bedrock cases (with footnotes omitted).

Section 25

[193] In ***R v Nasogaluak***, 2010 SCC 6, the Supreme Court of Canada outlined the proper interpretation of s 25:

> Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. …
>
> 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. ... [paras 34 and 35]

[194] In ***Crampton v Walton,*** 2005 ABCA 81, the Court of Appeal held:

> The second element [i.e. after the "lawful context" element] ... requires the court ... to examine the *basis for the action and manner in which the action was carried out*. The police officer must act on "reasonable grounds". ...
>
> … In evaluating the conduct of a police officer, the court is to place itself in the shoes of the officer and assess *whether reasonable grounds existed for the actions taken*: [authorities omitted].
>
> … In order to satisfy the second element of s 25(1), namely that the police officer acted on reasonable grounds, the court must determine whether there was *an objectively reasonable basis, given the circumstances faced by the police officer, for the actions undertaken by the officer*.
>
> Essentially, s 25(1) is a safe harbour from liability for those who are required to enforce the law. The police are often placed in situations in which they must make difficult decisions quickly, and are to be afforded some latitude for the choices they make. [authority omitted] Courts recognize that law enforcement is dangerous; no one wants police officers to compromise their safety. On the other hand, s 25(1) is not an absolute waiver of liability, permitting officers to act in any manner they see fit [authority omitted]. *The police are entitled to be wrong, but they must act reasonably*.
>
> …
>
> The final element ... requires the court to determine whether unnecessary force was used. In making this assessment, the court is to determine whether the use of force was objectively reasonable in light of the circumstances faced by the police officer: [authority omitted].
>
> Because both the second and third branches ... use the modified objective standard to review police conduct, the demarcation between the two elements is sometimes blurred. *To clarify, the second branch requires the court to determine whether the police acted on reasonable grounds in carrying out the action.* The police could, for example, establish reasonable grounds for using force. *The third branch focusses exclusively on the amount of force used.* Even if the police acted on reasonable grounds in executing the warrant in an aggressive manner, they will be denied the protection of s 25(1) if they used excessive force.
>
> Police officers act in dangerous and unpredictable circumstances. No doubt a trained police officer will have instructions and a game plan to follow when entering premises to execute a search warrant. But the officer will have to react to

> the circumstances that present themselves. Accordingly, *police officers will be exempt from liability "if they use no more force than is necessary having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves":* [authority omitted].
>
> Police officers are not expected to measure the precise amount of force the situation requires: [authority omitted]. Nor will they be denied the protection of s. 25(1) if they fail to use the least amount of force that would achieve the desired result. Allowance must be made for an officer, in the exigency of the moment, misjudging the degree of necessary force: [authorities omitted]. Accordingly, the immediate decisions a police officer makes in the course of duty are not assessed through the "lens of hindsight": [authorities omitted]. [paras 19-22 and 42-45] [emphasis added]

Section 34

[195] Section 34's reference to "reasonable grounds [to believe] that force is being used against [a person]" means that self-defence (or defence of others) has both subjective and objective elements. This was explored by Gates J. in ***R v Poucette***, 2019 ABQB 432. Among other cases cited by him on the subjective/objective aspect was ***R v Cormier***, 2017 NBCA 10, where the New Brunswick Court of Appeal held:

> Section 34(1) enumerates three criteria, all of which must be present for the defence to be available. In other words, self-defence is not applicable if the prosecution proves beyond a reasonable doubt that one of these criteria has not been met. They [include]:
>
> 1) Reasonable belief: *the accused must reasonably believe that force or threat of force is being used against him or someone else (the subjective perception is objectively verified).* [para 98 from ***Poucette***] [emphasis added]

[196] See also Jerke J.'s judgment in ***R v Dyck***, 2018 ABQB 106:

> *... self-defence has both subjective and objective factors, including a determination under s34(1)(a) of whether [the person claiming to have acted in self-defence] believed on reasonable grounds that force was being used against him*. [His] statement [as to being kicked] is direct evidence that force was being used against him. If true, it also supports the objective determination that he had reasonable grounds for believing that there was force being applied against him, but *an objective determination requires consideration of all the circumstances*. [para 23] [emphasis added]

[197] Concerning excessive force, the Saskatchewan Court of Appeal held as follows in ***R v Power***, 2016 SKCA 29:

> In summary, for both ss 25(1) and 34(1), the force used by a police officer or a person acting in self-defence must be no more than necessary to enable him or her to defend themselves or effect an arrest. That force need not be measured with exactitude or "to a nicety" when considering the question of proportionality. The law provides for a flexible or tolerant approach to the objective measure of whether force is proportionate (*Piapot* at para 46). [para 32]

K. Burden of proof

[198] The Crown carries the onus of proof, and it is proof beyond a reasonable doubt. As Gates J. stated in ***R v Poucette*** (cited above):

> It is a fundamental principle of our criminal law that everyone is presumed innocent until proven guilty. This principle is enshrined in s 11(d) of the *Canadian Charter of Rights and Freedoms*. In a criminal prosecution, the onus is on the Crown throughout to prove the guilt of an accused beyond a reasonable doubt. While there have been many judicial decisions on the concept of proof beyond a reasonable doubt, I will mention only two. In ***R v Lifchus***, ... 1997 CanLII 319 (SCC), [1997] 3 SCR 320, the Supreme Court held that a reasonable doubt is a doubt based on reason and common sense and not one based on sympathy or prejudice. While more is required than proof that an accused is probably guilty, it is not proof to an absolute certainty, nor is reasonable doubt an imaginary or frivolous doubt. Similarly, in ***R v Starr*** ... 2000 SCC 40 (CanLII), [2000] 2 SCR 144, the Court held that proof beyond a reasonable doubt falls closer to absolute certainty than to proof on a balance of probabilities. [para 103]

[199] That extends to s. 25 (use of force). As Gates J. held in ***R v Angstadt***, 2015 ABQB 547:

> There is no question that force was applied to Halcro by all three accused [police officers] without his consent. The issue is whether the Crown has proven beyond a reasonable doubt that they were not acting within the protection afforded by s. 25(1). As in all criminal trials, the onus is on the Crown to prove guilt beyond a reasonable doubt. This burden of proof never shifts. [para 77]

[200] The same goes for self-defence. As Renke J. held in ***R v Johnson***, 2016 ABQB 633:

> In applying the reasonable doubt standard I must apply the same level of scrutiny to Crown and Defence evidence (keeping in mind that *the Crown bears the burden of proof and, to secure an acquittal, Mr. Johnson need only a raise a reasonable doubt respecting the availability of the defence of self-defence or respecting an element of the charged offence*). [para 29] [emphasis added]

[201] Gates J. expanded on the onus on self-defence in ***R v Poucette***:

> The Accused is not required to prove that she acted in self-defence. The Crown must prove beyond a reasonable doubt that she did not: ***R v Lieberman***, 1970 CanLII 393 (ON CA), [1970] 3 OR 407 (CA); ***R v Nadeau***, 1984 CanLII 28 (SCC), [1984] 2 SCR 570. An accused person need only raise a reasonable doubt as to whether the defence of self-defence is available on the evidence to secure an acquittal. At the same time, the Crown is not required to prove beyond a reasonable doubt each of the three elements of the defence of self-defence, as set out in s 34 of the *Criminal Code*. Rather, the defence fails if the Crown can prove beyond a reasonable doubt any one of the three requirements has not been established in any given situation. [paras 19-27] [footnotes omitted]

L. Application of principles here

[202] I see two distinct phases of the altercation:

- the initial phase, during which, even if mistaken, Mr. Lindsay had reasonable grounds for believing that, at various points, Mr. Addai-Nyamekye was about to assault him; and
- the closing phase, when Mr. Addai-Nyamekye was handcuffed and largely under the dominion of Mr. Lindsay, when the risk of an assault had effectively been extinguished.

[203] During the initial phase, I conclude that Mr. Addai-Nyamekye, justifiably indignant at being mistreated by one or both of the "snowbank scene" officers, appeared menacing and even threatening to Mr. Lindsay, as manifested by:

- swearing at him, or at the last of the 9-1-1 operators involved, or at both of them;
- walking up close to Mr. Lindsay;
- not heeding his "stay back" commands and walking up close to him again;
- displaying an apparent what-are-you-gonna-do-about-it? stance (which may have been more of an I-can't-believe-what-just-happened-to-me-with-those-other-officers-and-with-your-unfriendly-opening-approach stance);
- walking back towards Mr. Lindsay despite the initial pushes; and
- getting back up after being pushed to the ground and appearing to move back towards Mr. Lindsay ("rising and lunging at the same time").

[204] While these initials actions by Mr. Addai-Nyamekye may have contained no actual seeds of an assault against Mr. Lindsay, I find that Mr. Lindsay could reasonably have read them as threatening and that, accordingly, he was justified in reacting with his verbal commands, pushes, and tackle.

[205] As for the protracted struggle sequence, it is difficult to tell whether Mr. Addai-Nyamekye was resisting (e.g. twisting and bucking) so he could launch (or resume) an assault on Mr. Lindsay, or was trying to get away from, or neutralize, or minimize, an assault on him by Mr. Lindsay.

[206] But I have at least a reasonable doubt about Mr. Lindsay having no reasonable grounds for his actions during much of this struggle sequence. One reasonable reading of that sequence is that Mr. Lindsay reasonably perceived an ongoing threat from Mr. Addai-Nyamekye, largely emanating from the latter's apparent resistance to arrest attempts and non-compliance with stand-down directions, combined with at least the potential for full-freedom-of-movement actions (e.g. punches, congruent with "attempting to make a fist") by the latter (if he got free of Mr. Lindsay), and that Mr. Lindsay reasonably responded with his continued efforts to subdue Mr. Addai-Nyamekye throughout this sequence, up to and including his use of his taser.

[207] To this point, the threatening actions from Mr. Addai-Nyamekye, or at least reasonably-perceived-as-threatening actions, were "coming up close to him" at various points, assuming the above-described stance, and (as Mr. Lindsay described it) "attempting to make a fist."

[208] However, later in the struggle, Mr. Lindsay was able to get handcuffs on Mr. Addai-Nyamekye. And he was largely able to get control over the latter's overall movements.

[209] The struggle then took on a materially different complexion.

[210] In any case, the struggle took on a materially different complexion shortly later i.e. by the tail-end phase, when the helicopter video catches the closing moments of the altercation.

[211] Here is where things become much clearer i.e. after the cuffing and, in any case, during the (post-cuffing) video sequence.

[212] I note the following about the struggle at this (caught-on-video) stage:

- the opening phase here is Mr. Lindsay standing above, and behind, Mr. Addai-Nyamekye, who is lying on the ground, handcuffed and immobile;
- Mr. Lindsay has complete dominion over the latter at this point. Mr. Lindsay had prevailed in the struggle, and Mr. Addai-Nyamekye's perceived-to-be-threatening body movements had ceased;
- Mr. Lindsay then began dragging Mr. Addai-Nyamekye, by the handcuffs, with the latter apparently in "dead-weight mode" i.e. whether due to an inability, at that point, to move or simply not cooperating;
- by this point, Mr. Lindsay had made two "code 200" (officer in distress) calls. He obviously knew, or should have known, that reinforcements were close at hand. (During the proceeding, he explained the all-hands-on-deck "absolutely priority" of such calls for assistance). If Mr. Lindsay was unsure at this point about the status of other police responders, he could easily have radioed in for a real-time update;
- Mr. Lindsay offered no meaningful explanation for dragging Mr. Addai-Nyamekye by the cuffs. It may indeed have been more comfortable for the two of them to be inside Mr. Lindsay's police car on that very cold night, but no evidence showed any kind of life-and-death, or other kind, of urgency to getting Mr. Addai-Nyamekye up off the ground immediately after the struggle was over;
- at this stage, with Mr. Addai-Nyamekye subdued (handcuffed, immobile, lying on the ground), Mr. Lindsay should have stepped back and said (effectively): "Okay, we're done … you're now under arrest and under my control … will you stand up and walk to the car?", particularly with reinforcements due to arrive any moment, and especially with both men presumably exhausted by their long struggle;
- Mr. Lindsay gave no evidence of performing any kind of arrested-person status check at this point e.g. asking Mr. Addai-Nyamekye whether he could stand on his own, whether he would stand on his own, whether he needed assistance to get up, whether he was now willing to cooperate, or whether he could even hear and understand him. Absent such simple and reasonable steps, the cuff-dragging was even less justifiable;
- I conclude that no operational-necessity or other grounds existed for the cuff-dragging;
- the cuff-dragging, combined with Mr. Addai-Nyamekye's inability or unwillingness to move, led to the tripping or, in any case, falling sequence. Mr. Lindsay's assessment at the time, as reflected in his notes made shortly after the altercation, was that "we slipped and fell." On viewing the video at our proceeding, he noticed Mr. Addai-Nyamekye's right foot sweeping along the ground as Mr. Lindsay continued to drag him along, which sweep appeared to cause Mr. Lindsay to lose his footing and fall on top of him. It is hard to tell from the video whether this was a deliberate trip or simply an unintentional movement caused by the dragging. In any case, it is Mr. Lindsay's at-the-time read that matters i.e. this was a "slip and fall";

- the slip-and-fall triggered what I find to be an indefensible response by Mr. Lindsay. As soon as he landed on Mr. Addai-Nyamekye, he launched a series of punches and knee (or thigh) strikes on the downed man. As noted above, here is how (in part) Mr. Lindsay tried to justify those force applications:
    - [after explaining how he pinned Mr. Addai-Nyamekye's cuffed hands to the road after the fall] "I would [still] fell his resistance … [he was] still able to push … he [then] turned his head and neck to look up towards me … I [feared] he could attack by spitting or biting, [so] I delivered a strike to the left side of his face … I got his face away from me …";
    - [later in the closing sequence] "he was still facing me … not complying by rolling over … I could feel the tension in his arms, like [he was] trying to reach me and twist towards me … [I] thought some kind of attack or spitting was imminent … this made me afraid";
    - [about the final kneeing sequence] "… my perception was … that he was trying to roll to face me to attempt another attack, via [the] handcuffs or spitting or something or that nature … this made me feel threatened and afraid …"; and
    - [about the final punch] "he was [still] turning to face me after everything, [so I still regarded him as] assaultive."
- this focus on spitting or biting echoes Mr. Lindsay's evidence about earlier stages of their altercation e.g.
    - "… he was able to buck me off to an extent and turn to face me … [that] exposed me to those threats of spitting, primarily spitting and biting, to one of my arms";
    - "… a few times he twisted up towards me and, one time at least, I thought he would try to spit at me …"; and
    - "[what made me fear possible spitting] … was the way he twisted around to me …."
- I reject, as completely unfounded, Mr. Lindsay's concern about spitting, both before and after the cuffing, with no evidence confirming, pointing to or even suggesting that:
    - Mr. Addai-Nyamekye actually spit at, towards or near Mr. Lindsay, let alone spit at all;
    - he gave any physical sign of intending to spit at him, or anyone, or anywhere, at any point;
    - he said anything about spitting, directly or indirectly;
    - he had any known-by-Mr.-Lindsay or other history of assaultive (or other) spitting; or
    - he had any kind of actual or perceived medical or physiological need or possible need to spit at any point;
- same with biting and any other perceived-by-Mr.-Lindsay-at-this-last-stage mode of counter-attack by Mr. Addai-Nyamekye; and

- I also reject, as completely baseless, Mr. Lindsay's attempt to justify his closing-phase punches and knee (or thigh) strikes on the basis of "continued resistance" as manifested by "[Mr. Addai-Nyamekye] tensing under my grip" and Mr. Lindsay "[feeling] [Mr. Addai-Nyamekye's] muscles moving under his skin … tensing up [for] counter-action", "[feeling] the tension in his arms, like [he was] trying to reach me and twist towards me …" and "[feeling] the tension in his arms …" or as manifested by Mr. Addai-Nyamekye "[turning] his head and neck to look up towards me, him "[turning] around to face me", "[him trying] to roll back around to face me" and "[him] intentionally trying to face me."

[213] Any reasonable viewer of the video would conclude that, during the entire videoed punching-and-kneeing sequence, Mr. Addai-Nyamekye – hand-cuffed, lying on the ground, and largely immobile – was not capable of materially resisting Mr. Lindsay, let alone mounting any kind of "counter-action."

[214] What the video reveals, fundamentally, is an effectively defenceless man (unarmed, lying on the ground, in prone position, handcuffed and largely movement-restricted), who is already under the dominion of a fully-equipped police officer (with reinforcements obviously close to arriving), being punched and kneed for phantom reasons i.e. perceived risks (spitting, biting, and so on) having no rational foundation or basis.

[215] Mr. Addai-Nyamekye's principal "offence" in the closing stages and in the eyes of Mr. Lindsay was trying to look at the latter.

[216] Mr. Lindsay was so bent, and for no good reason, on getting Mr. Addai-Nyamekye lying facedown on the road, that he left the zone of reasonable use of force and reasonable self-defence far behind.

[217] Nothing that Mr. Addai-Nyamekye did or said, in any of the segments here (lead-up, middle, and tail-end) provides any justification for the seen-in-video cuff-dragging, punches or kneeing by Mr. Lindsay.

M. Conclusion

[218] I am satisfied, beyond a reasonable doubt, that:

- the final-stage cuff-dragging, punching, and kneeing amounted to the application of non-consensual and intentional force by Mr. Lindsay against Mr. Addai-Nyamekye within the meaning of s. 265 of the ***Criminal Code***;
- Mr. Lindsay did not have reasonable grounds within the meaning of s. 25 of the ***Criminal Code*** for applying any of that force against him;
- Mr. Lindsay did not have reasonable grounds within the meaning of s. 34 of the ***Criminal Code*** to believe, during those force applications, that Mr. Addai-Nyamekye was using or threatening to use force against him; and
- those force applications were not reasonable in the circumstances here.

[219] Accordingly, I find the evidence relating to the closing-stage events (and these associated conclusions) to be admissible in the Haworth sentencing.

[220] In the end, there was no mystery here. The video both appears to, and does, show a series of unjustified assaults, even accepting Mr. Lindsay's account of the middle-stage events.

[221] As the defence ably argued, video evidence is not infallible.

[222] But here it provided a reliable account, pulling back the curtain on an unlawful assault of a defenceless man posing no material risk to Mr. Lindsay.

N. Next steps

[223] I direct that the parties continue their efforts, with my assistant, to arrange for the hearing of the Haworth-incident sentencing at the earliest commonly available dates.

Heard in person in Calgary, Alberta on April 26, 27, 28, 29 and 30, May 3 and 4, June 28, 29 and 30, and July 2, 5 and 6, 2021.

Dated at the City of Calgary, Alberta this 26th day of August, 2021.

M. J. Lema
J.C.Q.B.A.

Appearances:

John Baharustani
for the Crown

D.W. MacLeod, Q.C., O'Brien Devlin MacLeod
for the Accused