

*R. v. Canadian*, 2023 NWTTC 09

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**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**HIS MAJESTY THE KING**

**- and -**

**KELLY CANADIAN**

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**REASONS FOR DECISION**

**of the**

**HONOURABLE DEPUTY JUDGE CHRISTINE GAGNON**

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Heard at: Yellowknife, Northwest Territories

Date of Decision: August 29, 2023

Counsel for the Crown: Brian Bencze

Counsel for the Accused: Self-Represented

[Section 270 of the *Criminal Code*]

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**A. INTRODUCTION**

[1] On August 4<sup>th</sup>, 2023 in Yellowknife, Northwest Territories, I found Kelly Canadian not guilty of five counts of assaulting a peace officer engaged in the execution of his duty, in a decision communicated orally at the end of a four-day trial. Mr. Canadian was not represented by counsel during the trial. Crown counsel was Mr. Brian Bencze.

[2] This trial was scheduled to proceed in Fort Smith, Northwest Territories on August 1<sup>st</sup>, 2023. Mr. Canadian was in custody and was being detained at the North Slave Correctional Center in Yellowknife. On July 31<sup>st</sup>, 2023, he was to be transported by airplane from Yellowknife to Fort Smith. The plane in which he was travelling was not able to land in Fort Smith and returned to Yellowknife. The reason for this was that wildfires burning near the community of Fort Smith were producing thick smoke that reduced the visibility at the airport and made the approach and landing unsafe. On August 1<sup>st</sup>, 2023, this plane did not leave Yellowknife because of the continued presence of thick smoke around the community, so neither the court party nor the accused were able to travel to Fort Smith.

[3] With the consent of the accused, the court decided that the trial would be heard in Yellowknife, and that the witnesses who resided in Fort Smith would testify by video-conference, in accordance with section 714.1 of the Criminal

Code. Some of the considerations for this decision included the fact that the Accused was in custody; that certain witnesses were available in the community for a limited period of time; and that in view of the time and cost associated with finding alternatives to air travel, it was felt that proceeding remotely would be in the best interest of justice. The Accused appeared in court in person on the first day of his trial; he appeared by video-conference from the North Slave Correctional Center on August 2 and 3, 2023, and he appeared in person on August 4.

[4] Whenever necessary, documents were transmitted electronically from the Yellowknife courthouse to the Justice Center in Fort Smith with the collaboration and participation of the local court worker, Ms. Shari Olsen. Video-recordings were played simultaneously in the Yellowknife Courthouse, at the Justice Center in Fort Smith and at the North Slave Correctional Center, and all parties confirmed that they were able to view the document from their respective location.

[5] The video-conference link was maintained between the Yellowknife Courthouse and the Justice Center in Fort Smith and the public in both locations was able to observe the trial throughout the week, except for the decision, which was given in Yellowknife after 6:00 pm. The video-conference link had been interrupted at 5:00 pm for an hour-long recess and had not been re-established. I gave a succinct decision orally and undertook to provide written reasons within a reasonable time. Here are these reasons.

## **B. THE LEGAL FRAMEWORK**

### **(a) Assaulting a Peace Officer in the Execution of his Duty**

[6] Kelly Canadian was charged with five counts of assault against a peace officer engaged in the execution of his duty, contrary to section 270 of the Criminal Code. This offence incorporates the definition of an assault, which is found at section 265, and includes attempting or threatening to use force against a person without their consent.

### **(b) Peace Officer Engaged in the Execution of his Duty**

[7] A police officer is engaged in the execution of his duty if:

- (1) he acts within the general scope of any recognized police duty under statute law or common law and

(2) if, in the circumstances of this case, he uses the powers associated with the police duty in a justifiable and lawful manner<sup>1</sup>.

(c) Use of Force

[8] In the Criminal Code, use of force is codified at section 25, which provides that:

(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,

(c) in aid of 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.

[9] At common law, an interference with the arrested person's liberty, including the use of force, must be no more than is "reasonably necessary": *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 35; *R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 22.<sup>2</sup>

[10] In the case of *R. v. Waterfield*<sup>3</sup>, the court held that police interference with an individual's liberty or freedom was authorized at common law if:

(1) the police were acting in the course of their duty when they effected that interference; and

(2) the conduct of the police did not involve an unjustifiable use of powers in the circumstances.

[11] The Supreme Court of Canada wrote in *R. v. Assante-Mensah* that:

(J)ustification in the criminal law looks at a broader range of factors than simply the physical force required to restrain a person arrested: see, e.g., *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), in which it was explained *per Doherty J.A.*, at p. 499, that justifiability under s. 25 *Cr. C.* (and, by extension, s. 146 of the *Provincial Offences Act*) depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.<sup>4</sup>

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<sup>1</sup> *R. v. Sharma*, 1993 CanLII 165 (SCC), [1993] 1 SCR 650; *R. v. Knowlton*, 1973 CanLII 148 (SCC), [1974] SCR 443; *R. v. Noel* (1995), 1995 CanLII 1105 (BC CA), 101 CCC (3d) 183 (BCCA); see also: *R. v. MacDonald*, 2014 SCC 3 (CanLII), [2014] 1 SCR 37; *R. v. Clayton*, 2007 SCC 32 (CanLII), [2007] 2 SCR 725; *R. v. Dedman*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2)

<sup>2</sup> *R. v. Assante-Mensah*, [2003] 2 SCR 3, at par. 51

<sup>3</sup> [1963] 3 All E.R. 659 (C.A.)

<sup>4</sup> *R. v. Assante-Mensah*, *idem*, at par. 75

[12] Excessive force used by the police may result in a finding that they were not engaged in the execution of their duty in the context of a trial for offences contrary to s. 129 or 270 of the *Criminal Code*.

[13] Excessive force used by the police may result in a breach of section 7 of the *Canadian Charter of Rights and Freedoms*.

Excessive force may give rise to a breach of s. 7 if it substantially interferes with an accused's security of the person interest. The use of force that is not excessive – even force that gives rise to foreseeable injury – would not likely amount to a breach of s. 7. The police are entitled to use force to make an arrest as long as the force used is proportional, reasonable and necessary.<sup>5</sup>

[14] This issue was reviewed in the matter of *R. v. Da Costa*<sup>6</sup>, where the court had to decide whether a stay of proceedings was an appropriate remedy. In *R. v. Hannaford*, cited in this decision, the Ontario Superior Court of Justice wrote:

A critical contextual circumstance for many arrests is the dynamic and fluid nature of an apprehension with the need for rapid, on-the-spot decisions by a police constable:

A certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances<sup>7</sup>. (...)

[measures] reasonably necessary to eliminate threats to the safety of the public or the police ...will generally be conducted by the police as a reactionary measure... they will generally be unplanned, as they will be carried out in response to dangerous situations created by individuals, to which the police must react “on the sudden”<sup>8</sup>.

...police officers put their lives and safety at risk in order to preserve and protect the lives and safety of others...[in] potentially dangerous situations...

[15] However, police officers cannot rely on s. 25(1) to justify the use of force if they had no legal authority — either under legislation or at common law — for their actions<sup>9</sup>.

[16] In *R. v. Nasogaluak*, the Supreme Court of Canada wrote that:

While police officers may have to resort to force in order to complete an arrest or to prevent an offender from escaping their custody, the allowable

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<sup>5</sup> *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206

<sup>6</sup> [2015] O.J. No. 1235, 2015 ONSC 1586

<sup>7</sup> *R. v. Assante-Mensah*, [2003] 2 S.C.R. 3, at para. 73

<sup>8</sup> *R. v. MacDonald*, 2014, 1 SCR 37, at para. 32

<sup>9</sup> *Fleming v. Ontario*, [2019] 3 SCR 519, at para. 117

degree of force is constrained by the principles of proportionality, necessity and reasonableness. Under s. 25(1) of the *Criminal Code*, the use of force to effect a lawful arrest is justified if the police officer believes on reasonable and probable grounds that it is necessary and if only as much force as necessary is used.

(d) *De Minimis Non Curat Lex*

[17] The actus reus of two of the counts before me involved spitting in the direction of peace officers. I raised with counsel the issue as to whether or not *de minimis curat lex* would apply when the spittle did not touch the person.

“Spitting on someone goes beyond violence, it shows a total lack of respect, contempt and hatred, besides being disgusting in the highest degree. Our Court of Appeal has already asserted that spitting on someone where there are no consequences is a shameful and contemptible behaviour” (*R v Jacko*, 2013 QCCQ 931).

[18] In *R. v. Burden*<sup>10</sup>, McFarlane J.A. found that an assault could be committed although no degree of strength or power was exerted by the accused when touching the victim by placing his hand upon her side.

[19] As a common law defense, “*de minimis*” is preserved by section 8(3) of the Criminal Code. In *R. v. Murphy*, the presiding judge quotes Doherty, J.A., in *R. v. Murdock*<sup>11</sup>:

... The “*de minimus*” (sic) defence at common law operated to prevent the conviction of those whose conduct, while falling within the four corners of the penal provision, were so trivial as to pose no risk to the public interest: Stuart, *supra*, at pp. 594-98.

[20] While no decision appears to have been handed by the Supreme Court of Canada to settle the question of whether the doctrine applies in Canadian criminal law, Justice L’Heureux-Dube in *R. v. Hinchey*<sup>12</sup> made the following comments in obiter, while declining to decide on the issue.

In my view, this interpretation removes the possibility that the section will trap trivial and unintended violations. Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex*, that “the law does not concern itself with trifles”. This type of solution to cases where an accused has “technically” violated a Code section has been proposed by the Canadian Bar Association, in *Principles of Criminal Liability* (1992), and others: see Professor

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<sup>10</sup> 1981 CanLII 355 (BC CA)

<sup>11</sup> 2003 CanLII 4306 (ON C.A.) p. 241

<sup>12</sup> 1996 CanLII 157; [1996] 3 SCR 1128, at par. 69

Stuart, *Canadian Criminal Law* (3rd ed.) at pp. 542-46. I am aware, however, that this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day.

[21] “*De minimis*” has been considered by many lower court judges across the country, some as a maxim, and by others as a principle, or a doctrine. Some judges saw it as a complete defense, while others viewed the principle as being applicable on sentence. In the matter of *R. v. Murphy*, Judge Walker<sup>13</sup> of the New Brunswick provincial court took the position that the principle of *de minimis non curat lex* was available at the trial stage, and that an acquittal was to be preferred over an absolute discharge because of the importance of the stigma of having a criminal record until the conviction is removed.

[22] Judge Faulkner of the Yukon Territorial Court, in *R. v. Elek*<sup>14</sup>, explained the rationale of the *de minimis* principle:

In my view, much of the difficulty in applying the *de minimis* test is the usual translation: “The law does not concern itself with trifles”. I think a much better way to approach the task is to ask whether or not the conduct of the accused is sufficiently serious that it should properly be stigmatized as criminal. I recognize that this is hardly more precise than speaking of the conduct as being trifling or trivial, but I think that the words trifling and trivial can convey a pejorative message to the complainant which may not be warranted. An accused may be acquitted on *de minimis* grounds even though what happened is not considered by the court to be a “trifle”, but is simply considered to be conduct that, while unacceptable and wrong, did not constitute criminal misconduct.

[23] *De minimis* was recognized as a defense in the province of Quebec in the matter of *R. v. Freedman*, [2006] QCCQ 1885. This decision was applied in a regulatory matter in *DPCP. v. St-Amour et Location Auto Imperial* (2015 QCC 4526), and more recently in the matter of *R. v. X*, LSJPA-2320.

[24] The maxim was applied in Ontario in the matters of *R. v. Juneja*, 2009 ONCJ 572; *R. v. Haynes*, 2022 ONCJ 30; *R. v. Arsenault*, 2018 ONCJ 224 and *R. v. Feliciano*, 2019 ONCJ 263. It’s been recognized in Alberta in the matters of *R. v. Smale*, 2016 ABPC 39, in *R. v. Kiemele*, 2011 ABPC 325, *R. v. McLeod*, 2006 ABPC 114, *R. v. Harrison*, 1992 CarswellAlta 961 (ABPC), as well as in Manitoba in the matter of *R. v. Hnatiuk*, 2000 ABQB 314; it was also applied in *R. v. L.(R.H.)* 2008 NSCA, *R. v. Lepage* [1989]S.J. No. 579 (Sask. QB), *R. v. Merasty* [2002]S.J.

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<sup>13</sup> Judge Walker also sits as a deputy judge of the NWT Territorial Court

<sup>14</sup> [1994] YJ No. 31

586 (Sask. P.C.) and in British Columbia in the matters of *R. v. Kolebaba*, 2011 BCPC 1, and *R. v. Dejong* 2005 BCPC 546.

### **C. REVIEW OF THE EVIDENCE**

[25] The Crown's evidence consisted of the testimonies of Cpl. Stephanie Leduc, Cst. Jesse Woodward, Cst. Shawn Gibson and Sgt. Cagri Yilmaz, Ms. Juniette Zuniga and Mr. Matthew Lodge. They also tendered video recordings from the surveillance cameras located in the Fort Smith detachment of the RCMP. They were identified as KC Part I (Exhibit 1), KC Part IV (Exhibit 2), KC Part I, view from Cell 3B (Exhibit 3). Other documentary evidence in the form of a medical record and photos of Mr. Canadian's injuries were tendered as Exhibit 6, and photos of injuries sustained by Sgt. Yilmaz were tendered as Exhibit 8. Exhibit 7 was a diagram showing the layout of the video-conference room at the Fort Smith detachment.

[26] The Defense did not call any evidence.

[27] Certain facts are not in dispute. They include:

- 1) On January 6, 2023, Kelly Canadian was arrestable in Fort Smith, Northwest Territories, due to a bench warrant having been issued by a Deputy Territorial Judge for failing to appear in court. He was taken into custody by the police from the local detachment of the Royal Canadian Mounted Police.
- 2) He was brought before a justice of the peace on the same day, and he was remanded for a show cause hearing on January 10, 2023.
- 3) During that interval, he was kept at the Fort Smith detachment of the Royal Canadian Mounted Police, in cell number 3. He was being held under the authority of a Form 19 issued by a presiding justice of the peace.
- 4) He remained in custody at the Fort Smith detachment until he was transferred to Yellowknife on January 11, 2023.
- 5) There were numerous encounters with different peace officers between January 6 and 11. Most of the encounters have been captured by surveillance cameras that are installed in various locations within the detachment. Certain video recordings were played during the trial, and were marked as Exhibits 1, 2, 3 and 4.



- 6) The only room where there was no surveillance camera was the video-interview room, which is also used as the JP Court appearance room on January 10, 2023.
- 7) The police used force against Mr. Canadian on January 9 and on January 10, 2023.
- 8) Mr. Canadian suffered superficial injuries to his face and wrists, and he also complained of pain to his jaw. He was seen at the Fort Smith Health Center on January 10, 2023. A medical report was created and photos were taken. They were filed collectively as Exhibit 6. He was also seen at the Stanton Territorial Hospital on January 12, and X-Rays were taken of his spine, followed by a CT scan. Mr. Canadian was also diagnosed with an injury to his lower back vertebrae.
- 9) Mr. Canadian was taller and heavier than all the peace officers who dealt with him at the Fort Smith detachment.
- 10) Identity, place, jurisdiction and date of offence were not in dispute.
- 11) All four named victims, Cpl. Stephanie Leduc, Cst. Jesse Woodward, Cst. Shawn Gibson and Sgt. Cagri Yilmaz are peace officers within the meaning of section 2 of the Criminal Code.
- 12) Sgt. Yilmaz was injured to his hands during his interaction with Mr. Canadian on January 10, 2023.
- 13) The police tried to transfer Mr. Canadian to the Fort Smith Correctional Center, but the Correctional Center would not receive him.
- 14) The police would have liked to transfer him to the North Slave Correctional Center earlier, but they were not able to do it and the witnesses could not recall the reason for this.
- 15) The officers did not want to deal with Mr. Canadian, as they found him to be high maintenance, making many demands that they felt they were not able to accommodate due to limited resources.
- 16) The RCMP use the services of local citizens to guard their prisoners. At times when guards are unavailable, peace officers perform that duty.
- 17) A cell guard monitors the prisoners in cells, by making a visual inspection through a window cut out of the cell door, every fifteen

minutes. They also monitor the live feed of cameras installed in every cell. This feed runs continuously.

18) For the purpose of surveillance, the lights in the cells are never turned off, although they may be dimmed slightly at times.

19) Everything that could become a hazard is removed from the cells, which at times includes removing the mattress and blanket.

#### **D. THE DISPUTED EVIDENCE**

[28] At issue is whether or not Kelly Canadian assaulted the peace officers on any of the material dates, and whether or not these peace officers were engaged in the execution of their duties in relation to each alleged incident.

[29] For a peace officer to be engaged in the execution of his duty, he must be acting under the authority of a law or of the common law. On the material dates, the peace officers were on duty at the detachment, but this is different from being in the execution of their duties.

#### **E. THE EVIDENCE REGARDING COUNT #2, ASSAULT ON CST. SHAWN GIBSON, A PEACE OFFICER ENGAGED IN THE EXECUTION OF HIS DUTY ON JANUARY 7, 2023**

[30] Cst. Gibson and Cpl. Leduc testified regarding this count. Cpl. Leduc said that on January 7, 2023, she was on guarding duties, and that she noticed that Mr. Canadian had obstructed the video-cameras located in his cell. She said that she and Cst. Gibson approached Mr. Canadian in his cell and that they told him to remove the things he had put on the cameras. That would have been after Cst. Gibson had escorted Mr. Canadian to and from the video-conference room.

[31] Cst. Shawn Gibson testified that he brought Mr. Canadian to the video-conference room for a hearing with a justice of the peace at 11 o'clock in the morning. After the conclusion of the hearing, he brought the accused to his cell after allowing him to phone a lawyer, and to smoke a cigarette. He made no mention of the obstruction of the cameras as the reason for going to cell #3. Although the action of obstructing the camera lens is clearly visible from Exhibit 1, KC Part I, at 11:39 am, the testimonies of Cpl. Leduc and Cst. Gibson are contradictory as to whether or not Cst. Gibson told Mr. Canadian to remove the covers. I accept Cst. Gibson's version of the incident, over Cpl. Leduc's version.

[32] As the Accused was inside the cell and Cst. Gibson was outside, by the door, the Accused asked if he could go to the hospital because he felt he may have contracted COVID. The exchange continued with Mr. Canadian asking for an ambulance because of a heart condition. Cst. Gibson, and Cpl. Leduc who was now also by the door, started to ask about this condition. Mr. Canadian did not answer their questions and remained quiet. He said that Mr. Canadian then got angry at their questions and lunged toward the door and spat at him. Cst. Gibson swiftly shut the door and locked it.

[33] This interaction was captured on video. Exhibit 1, Cell 3B shows that at 11:42:34 am, the door to the cell opens, and Cst. Gibson is seen in the doorway. There is a brief exchange and at 11:43:00, Mr. Canadian makes a rapid move forward and Cst. Gibson takes a step back and shuts the door. The whole interaction lasted 26 seconds. Cst. Gibson said that he was not touched in the face. There is no evidence of where spittle landed, if any was emitted.

(a) Was Cst. Gibson a Peace Officer in the Execution of his Duty?

[34] When the justice of the peace issued the Form 19 remanding Mr. Canadian to return to court on January 10, 2023, they effectively ordered the RCMP to act as prison guards and to receive the prisoner into their custody:

“in the prison and keep each person safely until the day when that person’s remand expires and then to have that person before me or any other justice (*or if the signatory is not the justice*, before any justice) on (*date*), at (*hour*), at (*place*), there to answer to the charge and to be dealt with according to law, unless you are otherwise directed before that time.”<sup>15</sup>

[35] I am satisfied that Cst. Gibson was a peace officer in the execution of his duties at the time that Kelly Canadian spat in his direction on January 7, 2023.

(b) Did Kelly Canadian Assault Cst. Gibson?

[36] Spitting at a person, or in the person’s direction is considered an assault, which includes an attempt or a threat to commit the action. The fact that the spittle did not hit Cst. Gibson still makes it an assault.

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<sup>15</sup> Criminal Code, Form 19

**F. THE EVIDENCE REGARDING COUNT #3, ASSAULT ON CST. SHAWN GIBSON, A PEACE OFFICER ENGAGED IN THE EXECUTION OF HIS DUTY ON JANUARY 9, 2023**

[37] On January 9, 2023, Cst. Gibson was on night shift, between 6:00 pm and 3:00 am. He said that he was informed by the cell guard that Mr. Canadian had again covered the camera lenses in cell number 3. He went to cell number 3 with Cst. Woodward. He said that he opened the door, telling Mr. Canadian to move away, and that they were coming in to clear the cameras. He said that Mr. Canadian threw a bowl of food and that he spat at them. He said that he deployed OC spray on Mr. Canadian. Cst. Gibson explained his decision to use OC spray because Mr. Canadian looked like he was going to spit again. He added that knowing who he is (Mr. Canadian), he was uncomfortable going into his cell. He felt he was going to be combative, that he was either going to come after him or to spit again.

[38] The Crown asked the witness to explain his understanding of Mr. Canadian's reputation. I did not permit the witness to answer, first because it was likely hearsay, and second because of the potential for character evidence being led. Because of the risk that this may also lead to propensity reasoning, I ruled that the potential prejudice to the accused of letting this evidence in outweighed its probative value.

[39] Cst. Gibson said that he used OC spray as a normal procedure for a veteran member like him. He explained that in order for OC spray to be effective, it must be deployed five to ten feet away from the target. He aimed at Mr. Canadian's forehead, knowing that the liquid would then trickle down into his eyes and produce a burning sensation.

[40] Exhibit 3 shows that at 6:27:43 pm, Kelly Canadian is sitting on the edge of a concrete bench that runs along three walls in his cell. He is facing the door. Between 6:27:43 and 6:27:45, the door opens, Cst. Gibson (who is recognizable because he is wearing blue gloves) is in the doorway, Mr. Canadian throws a container of salad in his direction, which lands on the floor. The bowl was not thrown with great force and it had a downward trajectory. Mr. Canadian is still sitting on the edge of the bench.

[41] Simultaneously, Cst. Gibson takes a step backward and actions the OC spray. Mr. Canadian is still sitting on the bench. At 6:27:54, Mr. Canadian is seen walking to a unit composed of a toilet seat and a sink and he appears to put water on his face. At 6:28:02 the police close the door and leave.

(a) Did Kelly Canadian Assault Cst. Gibson?

[42] Throwing the bowl of food constitutes an assault, whether the bowl or its contents touched Cst. Gibson or not. In his cross-examination of Cst. Gibson and Cst. Woodward, Mr. Canadian highlighted an encounter that had occurred between the same protagonists the day before, when the peace officers came to Mr. Canadian's cell and had a brief conversation. They acknowledged that Cst. Gibson performed a spark test on his taser gun, which he is qualified to operate. While Cst. Gibson denied doing this on his way to the cell where Mr. Canadian was being held, he acknowledged that Mr. Canadian may have heard the sound of the taser, and that he may have felt intimidated by it.

[43] I am not satisfied that Mr. Canadian had time to spit on Cst. Gibson before the OC spray was deployed and I find that it did not happen.

(b) Was Cst. Gibson Engaged in the Execution of his Duty when he was Assaulted?

[44] I find that Cst. Gibson was still acting under the authority of the Form 19 issued on January 7, 2023 when Mr. Canadian threw the container in his direction. I also find that he made a decision to use force against Mr. Canadian at 6:27:45 pm in response to what he perceived as a threat from Mr. Canadian.

[45] Proportionate use of force is seen as a continuum, in response to the level of danger that a person represents to a peace officer. Sgt. Yilmaz was asked to explain this during his testimony. Although he is not an expert on the continuum of force, I accepted his evidence based on his experience as a peace officer, and his rank within the detachment. He said many times that use of force depends on the individual, and on the totality of the circumstances. I understand this to mean that a peace officer makes a choice as to what degree of force he will use in a given set of circumstances.

[46] The graduation is summed up as follows: the first level of intervention is physical presence; the next level is termed "soft hand" technique, which may be used in the case of passive resistance; the following level is hard hand or strike in the case of active resistance; the next level is the use of tools such as the baton or OC spray in response to assaultive behaviour; the final level is the use of the firearm. He explained that a firearm is only drawn in the event of a life-threatening situation.

[47] While throwing a container of food may qualify as assaultive behaviour, Mr. Canadian was sitting in his cell. He did not get up. He was not trying to escape.

There is only so much that can be said about the height and weight of the accused, who is detained in a controlled environment and who is surrounded by peace officers carrying weapons. Mr. Canadian was not under the influence of alcohol or drugs.

[48] Objectively, based on what can be seen on Exhibit 3 at 6:27:45 pm, there was nothing more that Mr. Canadian could throw at the police, he did not rise from his seat, and he did not adopt a more aggressive stance. There was simply no time for that to have happened.

[49] The only duty that the officer could claim to be engaged in executing remains that of guarding Mr. Canadian and ensuring that he is safe, according to the Form 19. Clearing a camera may have been a natural consequence of this duty, but no testimony was offered as to whether the police returned to the cell to remove any cover on a camera after the OC spray had been deployed. I find that the use of force was not related to the execution of a police duty since the police retreated out of the cell without clearing the camera.

[50] I find that the use of the OC spray was disproportionate to any risk that Mr. Canadian may have posed to Cst. Gibson. It was an unreasonable use of force, and it was not warranted by the circumstances.

**G. THE EVIDENCE REGARDING COUNT #4, ASSAULT ON CST. JESSE WOODWARD, A PEACE OFFICER ENGAGED IN THE EXECUTION OF HIS DUTY ON JANUARY 9, 2023**

[51] Constable Woodward testified that he was on night shift with Cst. Gibson on January 9, 2023, and that he attended cell #3 because a camera was blocked. He said that he and Cst. Gibson entered the cell, and that Kelly Canadian threw a bowl of salad at him and that he spat at them. He said that Mr. Canadian got up and came toward him and that Cst. Gibson used the OC spray on Mr. Canadian. He said that as they exited, Mr. Canadian spat again and the spittle landed on the wall.

[52] His testimony is contradicted by the testimony of Cst. Gibson, which I reviewed above, and also by Exhibit 3. According to Exhibit 3, views from cell 3B, it is Cst. Gibson who comes in first and who is in front of Cst. Woodward at all times. I find that there was no assault committed against Cst. Woodward.

## **H. THE EVIDENCE REGARDING COUNT #5, ASSAULT ON CPL. STEPHANIE LEDUC, A PEACE OFFICER ENGAGED IN THE EXECUTION OF HIS DUTY ON JANUARY 10, 2023**

[53] On January 10, 2023, Cpl. Leduc on shift at the detachment. Around 2:00 pm, she was called by Sgt. Yilmaz to assist him. He was calling from the video-conference room, where he had brought Kelly Canadian for a hearing before a justice of the peace conducted remotely from Yellowknife. She said that when she entered the room, she saw Mr. Canadian half-standing against the wall. Cpl. Leduc said that Mr. Canadian's hands were moving toward Sgt. Yilmaz's head and upper body.

[54] She said that she saw Sgt. Yilmaz strike Mr. Canadian once in the head and only once. She said that Cst. Woodward also came in and that the three of them were trying to gain control of Mr. Canadian, as she repeatedly told him to stop resisting. They eventually handcuffed Mr. Canadian's hands behind his back and put a spit hood on his head. She and Cst. Woodward escorted Mr. Canadian back to his cell.

[55] Once in cell number 3, Cpl. Leduc said that Mr. Canadian "flocked down" on the bench and that he kicked her on the leg. She described that she felt she was dragged down, and that Mr. Canadian was trying to grab at her duty belt. Cst. Woodward grabbed Mr. Canadian's arms and Sgt. Yilmaz came in too and they carried Mr. Canadian to the ground. She says that through this intervention, Mr. Canadian was not listening to verbal commands to stop resisting.

(a) Did Kelly Canadian assault Cpl. Leduc?

[56] Cst. Woodward testified that he did not see Mr. Canadian kick Cpl. Leduc. Exhibit 2 (KC Part IV) at 2:20:42 shows Cpl. Leduc, Cst. Woodward and Kelly Canadian entering the cell. Mr. Canadian's hands are handcuffed behind his back, he has a spit hood on his head, and he is being guided by Cpl. Leduc. At 2:21:56, Mr. Canadian is seen falling sideways onto the cement bench. Mr. Canadian's legs are flailing as he is falling, and it looks like the movements are consistent with trying to regain balance. I saw no movement of the legs directed at Cpl. Leduc.

[57] Cpl. Leduc immediately jumped on Mr. Canadian and she used her arms and legs to turn his body to be face down on the bench and she is seen straddling on his back. Although Cst. Woodward said that he heard Cpl. Leduc say that Mr. Canadian was grabbing at her duty belt, he acknowledged that did not observe this. Even if Mr. Canadian did that, I fail to see how that can constitute an assault, given

how Cpl. Leduc was the one on top of Mr. Canadian and applying force onto him, and how Mr. Canadian's hands were restrained. If any, his actions were consistent with reacting to the force being applied to him.

[58] The totality of this evidence raises a doubt as to whether or not Mr. Canadian assaulted Cpl. Leduc.

**I. THE EVIDENCE REGARDING COUNT #6, ASSAULT ON SGT. CAGRI YILMAZ, A PEACE OFFICER ENGAGED IN THE EXECUTION OF HIS DUTY ON JANUARY 10, 2023**

[59] On this count, I heard evidence from Cpl. Leduc, Cst. Woodward, Sgt. Yilmaz, Ms. Juniette Zuniga, and Mr. Matthew Lodge. All five witnesses have a different perspective and a different recollection of what happened in the video-recording room at the Fort Smith detachment.

[60] Ms. Zuniga and Mr. Lodge were independent witnesses who observed part of the interaction between Mr. Canadian and Sgt. Yilmaz during the bail hearing of January 10, 2023. They were in the courtroom in Yellowknife, while Mr. Canadian and Sgt. Yilmaz were at the Fort Smith detachment. Cpl. Leduc, Cst. Woodward and Sgt. Yilmaz were involved in the interaction with Mr. Canadian, and their perception of the sequence of events may have been affected by their own perspective, as well as their emotions, and this may have also affected their ability to record and recall the events. In addition, at the time of these allegations, Sgt. Yilmaz was under investigation for complaints of excessive force.

[61] Some of the interactions were captured by Exhibits 1 and 2, and where there are discrepancies between what the witnesses remembered and the video-recordings, I find that the video-recordings are more reliable.

[62] Sgt. Yilmaz testified that he was with Kelly Canadian in the video-recording room at the Fort Smith detachment, for a bail hearing with Justice of the Peace Barnet. At the conclusion of the hearing, a question was asked to the justice of the peace as to which detention facility Mr. Canadian could be remanded to. The justice of the peace adjourned the hearing briefly to consider the issue. Upon resuming the hearing, Justice of the Peace Barnet gave her decision and concluded the hearing.

[63] While the hearing was concluded, the video-connection was not interrupted immediately, and Mr. Canadian and Sgt. Yilmaz were still visible on screen to those in attendance at the Yellowknife Courthouse.



[64] Ms. Zuniga was the Crown prosecutor handling the bail hearing, and Matthew Lodge was the Deputy Sheriff enforcing the security in what is commonly referred to as “JP Court”.

(a) The Verbal Exchange

[65] Sgt. Yilmaz said that he told Mr. Canadian that he needed to return to his cell now that the hearing was over. He said that Mr. Canadian asked to phone his lawyer. Sgt. Yilmaz said that he told Mr. Canadian that his lawyer may not be available right away and that he would let him know to call later. He said that Mr. Canadian did not want that and that he would not go anywhere. Sgt. Yilmaz said “I tell him I’ll handcuff him and bring him to his cell.” Mr. Canadian’s words would have been “I don’t give a fuck, I’m not going anywhere”.

[66] Matthew Lodge was watching the screen from the back of the courtroom in Yellowknife. He said that he could see Sgt. Yilmaz and Mr. Canadian. He testified that Sgt. Yilmaz asked Mr. Canadian to go back to cell (“Ok, it’s time to go back”) and that Mr. Canadian replied “Fuck you, I’m not going back”. He says that the sergeant next said “I can either put you in handcuffs & walk you back, or you can walk back on your own”.

[67] Juniette Zuniga said that at some point her attention was drawn back to the screen, and that she saw Mr. Canadian and Sgt. Yilmaz. She said that “it looked like there was an exchange between Mr. Canadian and the officer. It looked like the officer was going to grab the arm of Mr. Canadian. Because she had not been paying attention to the screen, she can’t recall any of the conversation.

[68] The only consistent fact between these three witnesses is that there was a verbal exchange between Sgt. Yilmaz and Mr. Canadian, and that they were not in agreement. I accept as a fact that Mr. Canadian did not want to return to his cell. I also find that Mr. Lodge is the more credible witness as to what Sgt. Yilmaz actually said to Mr. Canadian, as he was not involved in the exchange, and I believe that Sgt. Yilmaz had adopted a stronger position towards Mr. Canadian than he was prepared to acknowledge in his testimony.

(b) The Confrontation

[69] Sgt. Yilmaz said that he took out a pair of handcuffs from his duty belt, he took a step toward Mr. Canadian, who was sitting on a chair. He said that Mr.

Canadian spat in his face, and that it hit his mouth, nose, and eyes. He said that Mr. Canadian raised his hands to hit him. He said:

“I tried to handcuff him. They went towards me as if he was going to hit me. It was obvious he wanted to fight me.

The Crown prosecutor asked:

“Does he make contact?”

Answer:

“I don’t recall feeling a strike at the time. He gets up; he tries to overpower me by getting up... he pushed me and in one motion he then struck me two times.”

[70] Ms. Zuniga’s account of this was as Sgt. Yilmaz was going to grab Mr. Canadian’s arm, Mr. Canadian punched Sgt. Yilmaz. All she could see was Mr. Canadian’s upper body. She said that Sgt. Yilmaz was facing Mr. Canadian, but to his left side. She could not explain how Mr. Canadian punched Sgt. Yilmaz, nor where the punch landed. What she was able to describe was that Mr. Canadian shifted his body and looked like he turned around to face Sgt. Yilmaz. She said that the screen went black after that.

[71] Mr. Lodge said that after Sgt. Yilmaz gave Mr. Canadian the option as to how he could go back to his cell, Mr. Canadian spat twice on Sgt. Yilmaz. He said that he did not see saliva being projected, but rather, he just heard the sound of someone spitting. He said that the screen went black after that.

[72] I don’t know who to believe regarding this exchange. The body positions described by Ms. Zuniga and Mr. Lodge are at odds with each other’s, and at odds with how Sgt. Yilmaz remembers it. They each speak to different movements made by Mr. Canadian. As Ms. Zuniga and Mr. Lodge were together in the same room, it is difficult to reconcile the different perspectives that they had, and the different movements which they observed.

(c) The Escalation

[73] Sgt. Yilmaz said that after the physical contact by Mr. Canadian, he tried to place him in handcuffs, but was not able to do so. He said:

“I go for his right hand first. I pushed him hard. I punched him three or four times to the side of his face; hard enough for him to stop assaulting me.”

[74] He explained this use of force by the fact that he was alone with Mr. Canadian in the room, and that Mr. Canadian was taller and larger than him. As this

is happening, he called on to Cpl. Leduc. She came in a few moments later, followed by Cst. Woodward.

[75] Sgt. Yilmaz said that Kelly Canadian was not assaulting any of them, but that he was not complying with their orders. They wanted him to put his hands behind his back. He recalls that Cpl. Leduc kept saying: “Stop resisting”. The three of them brought Mr. Canadian to the ground, and they were trying to handcuff him.

[76] Sgt. Yilmaz said that Mr. Canadian tucked his hands under his body. Because he was failing to comply with their orders, Sgt. Yilmaz punched Mr. Canadian again, this time three or four times in the stomach area. He called that “distraction strikes”.

[77] Sgt. Yilmaz said that he placed Mr. Canadian in handcuffs, with his hands behind his back. He then asked for a spit hood, which was placed on his head while he was still being held to the ground.

[78] Cpl. Leduc testified that she heard her name being called by Sgt. Yilmaz and that she rushed to the video-conference room. She entered and she saw Mr. Canadian and Sgt. Yilmaz fighting. She said that Mr. Canadian was leaning against the back wall, partially standing, and impeded by a chair. Sgt. Yilmaz was up against him. Mr. Canadian’s hand was around Sgt. Yilmaz’s head. She said that Sgt. Yilmaz struck Mr. Canadian once in the head.

[79] She said that she tried to gain control of Mr. Canadian’s arm, but that he was pulling away from her. She said that they were trying to gain control of him, and that they put a spit hood over his head. They put him on the ground to “secure” him and put him in handcuffs. She said that she then brought him back to his cell with Cst. Woodward.

[80] Cst. Woodward testified that he heard Sgt. Yilmaz yell “Steph”, and that he and Cpl. Leduc “shot” to the room. What he saw coming into the video-recording room was Sgt. Yilmaz and Kelly Canadian on the ground, struggling to get control of one another. He described that Sgt. Yilmaz was on top of Mr. Canadian, that they were fighting on the ground, but that Mr. Canadian was also slumped on a chair. Sgt. Yilmaz was trying to get Mr. Canadian’s hands, and Mr. Canadian was trying to get away.

[81] Cpl. Leduc was yelling “Stop resisting”, and “Put your hands behind your back”. He said that they had to force the handcuffs on him. They got a spit hood and put in on Mr. Canadian’s head.

[82] The three witnesses have a different memory of how Sgt. Yilmaz and Mr. Canadian were engaged. Cst. Woodward saw them on the ground, Cpl. saw them half-standing and Sgt. Yilmaz said they were standing straight. I am not sure who to believe about this, but I find as a fact that at the outset, Mr. Canadian was handcuffed behind his back and had a spit hood over his head.

[83] If I correlate this incident with the time shown at Exhibit 1 at which Mr. Canadian was brought to his cell, the hearing concluded at about 2:15 pm, and Mr. Canadian was in his cell with the peace officers beginning at 2:21:53. The whole confrontation in the video-conference room took 6 minutes.

(d) The Injuries

[84] Cpl. Leduc said that she observed one cut above Mr. Canadian's left eye; Cst. Woodward said that he saw no injuries on Mr. Canadian.

[85] Sgt. Yilmaz did not testify about any injury to Mr. Canadian, but he acknowledged Exhibit 6, and the results of an X-Ray and scan of Mr. Canadian's spine, showing an injury.

[86] Exhibit 6 also includes a number of pictures of Mr. Canadian's face, showing abrasions and cuts to his cheek, upper left lid, bridge of nose, inside of ear; and also of his wrist, showing bruising. Exhibit 6 contradicts the evidence of the three police officers.

(e) Use of Force in Cell Number 3

[87] Exhibits 1 and 2 show Mr. Canadian being brought to his cell by Cpl. Leduc and Cst. Woodward. Mr. Canadian is seen falling awkwardly onto the cement bench while Cpl. Leduc is still holding onto his right arm. She swiftly jumps on him and turns his body so that he is facing down on the bench. She is sitting on his lower back and leaning forward, trying to hold his head down.

[88] Cst. Woodward grabs Mr. Canadian's handcuffed hands and pulls them upward. Sgt. Yilmaz is seen walking into the cell and he goes toward them. He grabs Mr. Canadian's legs, crosses them, and bends them backward (toward Mr. Canadian's back). He is visibly applying pressure.

[89] The three officers then lift Mr. Canadian and place him on the ground. They continue to apply pressure on his body. Sgt. Yilmaz is seen walking around Mr. Canadian and positioning himself close to his head. He is seen talking to Mr. Canadian, saying something in his ear, while poking his back with his finger.

[90] Sgt. Yilmaz pulled the spit hood off Mr. Canadian's head, and as he is doing this, he pushed Mr. Canadian's face onto the cement floor a few times.

[91] They then remove the handcuffs, but as they do this, Sgt. Yilmaz appears to be applying pressure to Mr. Canadian's head or neck.

[92] They leave the cell. The confrontation in the cell lasted until 2:25:08 pm. This part took 4 minutes.

(f) Did Kelly Canadian Assault Sgt. Yilmaz?

[93] There are three different very versions of the confrontation. They are so different that they are difficult to reconcile. All three witnesses have credibility or reliability issues. Ms. Zuniga's testimony was unreliable because she was taken by surprise by what she saw, and she could not recall any details about the incident.

[94] Mr. Lodge was cross-examined about the fact that he had made a complaint about Mr. Canadian while he worked as a correctional officer at the North Slave Correctional Centre. On January 10, 2023, the matter was still pending before the courts. While it may have had no bearing on his ability to observe and to recall the incident, it is an interest that cannot be overlooked, as potentially affecting the reliability of this witness.

[95] Sgt. Yilmaz's conduct towards Mr. Canadian throughout their interactions on January 10 involved the use of force, which Sgt. Yilmaz felt was reasonable and justified. While it is common sense to infer that something must have happened to trigger Sgt. Yilmaz's response, the question is what did really happen? The only consistent fact between the witnesses Zuniga, Lodge and Yilmaz is that Mr. Canadian refused to return to his cell after the bail hearing.

[96] When I gave my brief reasons orally, I expressed the fact that Mr. Yilmaz's conduct towards Mr. Canadian affected his credibility. When I considered his testimony globally, I felt that he was very insistent on the fact that he was justified to use force against Mr. Canadian. Because he was involved personally in the physical confrontation with Mr. Canadian, his perspective would not be objective. There was a certain amount of emotion, and he acknowledged that his adrenaline was flowing, but I also find that there would be an interest for him to claim that he was assaulted in order to justify, after the fact, the force that he used against Mr. Canadian.

[97] I don't know how much of Sgt. Yilmaz testimony I believe, and if I can trust what he says. The part that made me doubt the reliability of Sgt. Yilmaz's

testimony is his version of the take-down in the cell, which is different from what Exhibits 1 and 2 show. In particular, Sgt. Yilmaz was insistent on the fact that Mr. Canadian was resisting his direction to turn his head to the opposite side of him before he removed the spit hood. He testified that because of that, he turned Mr. Canadian's head for him.

[98] But the video recording shows that Sgt. Yilmaz did not turn Mr. Canadian's head. Rather, he banged his head twice on the floor. The gesture was deliberate. Sgt. Yilmaz was insistent that Mr. Canadian was resisting them but Exhibits 1 and 2 show that Mr. Canadian was not moving because of how he was held by the three peace officers. I don't accept Sgt. Yilmaz's testimony on that point, and I find that this affects how I view his testimony.

[99] In addition, Cpl. Leduc and Cst. Woodward offered different and watered-down versions of what happened after that confrontation, which are inconsistent with what Sgt. Yilmaz testified to. Furthermore, Mr. Canadian had obvious and observable injuries to his face and wrist, which Cpl. Leduc and Cst. Woodward were not prepared to acknowledge. Cst. Gibson was the only witness who admitted seeing the injuries to Mr. Canadian's face. This lack of forthrightness on the part of Cpl. Leduc and Cst. Woodward also gives me cause for concern about the reliability of the evidence given by these witnesses, and I find no corroborative value in their testimonies.

[100] So the answer to the question as to whether Mr. Canadian assaulted Sgt. Yilmaz is that while I am prepared to accept that something happened, I cannot determine with certainty what it was beyond Mr. Canadian refusing to return to his cell, and Sgt. Yilmaz adopting a firm stance in forcing Mr. Canadian to comply with his order.

(g) Was Sgt. Yilmaz a Peace Officer Engaged in the Execution of his Duty?

[101] Until the confrontation happened, Sgt. Yilmaz was engaged in the duty of bringing Mr. Canadian before a justice of the peace, and after the hearing, his duty was to bring Mr. Canadian to his cell and to keep him safe until the date of the next court appearance.

## **J. ANALYSIS**

[102] The police used force against Mr. Canadian on January 9 and 10, for different reasons and in different circumstances. This case highlights the difficult adaptation and adjustments that must take place now that technology allows for remote hearings to take place. Mr. Canadian spent six days in the custody of the

RCMP in their detachment. The police had a duty to guard the prisoner and to keep him safe.

[103] For reasons of safety, the police witnesses insisted that it was necessary that they be able to monitor the prisoner at all times, and they considered the blocking of the cell cameras as a “super high risk”, without defining what creates a risk other than to say that they need to observe the prisoners for their safety.

[104] Mr. Canadian was behaving badly. He was demanding. He was time consuming. He was unreasonable at times in his demands. Over the course of the six days that he was in police custody, this had an impact on the degree of tolerance of the peace officers, who, in addition to keeping him safe, had other duties to attend to.

[105] While no evidence was called about this, it is common sense to conclude that a holding cell is a temporary place of detention, and that there are different rules in a police detachment and in a prison, and prison guards and police officers receive different trainings. The conditions of detention in a police detachment are different than those prevailing in a prison.

[106] Incidents occurring in the confines of a police detachment, which is a controlled environment, are different from incidents occurring on the streets, where the police are exposed to various environmental risks, and where they deal with suspects whom they do not know. When a peace officer approaches a suspect on the street, he does not know if the person is carrying a weapon, if he is under the influence of alcohol or drugs, or how many persons he might encounter. There is a certain amount of unpredictability. Decisions must often be made in a split second.

[107] In a prison environment, the prisoners are under constant surveillance, any object that may pose a safety risk are removed from a prisoner’s possession and cell, and they are known to the police. While there may always be circumstances beyond the control of the police, they are in an environment with which they are familiar, and which they control. The police would have more time to decide how they will address issues that present themselves.

[108] It became clear that the issue was more about gaining compliance from Mr. Canadian than to ensure his safety. The peace officers’ decisions in how to deal with Mr. Canadian were often predicated on protecting themselves from a perceived threat, rather than to deal with an issue in a matter-of-fact manner. The police chose to use force as a default position. The nature of the threat posed by the

prisoner to the peace officers is to be evaluated in light of the specific circumstances of this case.

[109] The Crown argued that the accused is big and tall. He is. But the police were armed, and they outnumbered the accused at all times. The accused was in cells most of the time, in conditions that were not far from solitary confinement. The prisoners' actions were documented by surveillance cameras, that were aimed at him at all times, and the lights in his cell were on twenty-four hours per day. At no time did the accused try to escape. While he was in custody, Mr. Canadian was not under the influence of illegal drugs or alcohol. Mr. Canadian was not armed.

[110] After the hearing was concluded on January 10, Sgt. Yilmaz was to bring Mr. Canadian to his cell, and to keep him safe until the next court date. What ensued next was that Mr. Canadian refused to return to his cell, and this is what prompted the use of force. Given the conclusion that I reached with regard to count number 6, I do not need to further address the use of force.

[111] In my view, it is relevant at this stage to consider the incidence of the *de minimis* principle, and I propose to apply the analysis put forward by Justice Vauclair in *R. v. Freedman*<sup>16</sup>.

[112] In that matter, Justice Vauclair was of the view that because the offence of assault is broadly defined,

the *de minimis non curat lex* principle could act as a filter to less serious breach of the law in appropriate circumstances 67. Undoubtedly, it can be said to be a safeguard against unjustified prosecution; a role that would serve to protect everyone's interests but also, it would serve to maintain confidence in the administration of justice. Indeed, in the long run, legitimacy of the criminal process may well be affected if convictions are entered for insignificant matters the same way they are for serious breach of the law. The incapacity to discriminate is no sign of a well-balanced system.

[113] He added that the courts were in a position to assess the full ambit of the conduct at the conclusion of a trial and that they must retain the ability to determine which case deserves a criminal conviction.

[114] At paragraph 60 of the *Freedman* decision, Vauclair J. proposes a grid of analysis based on factors such as:

- 1) the defendant's character,

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<sup>16</sup> Supra, at par. 60



- 2) the nature of the proven offence,
- 3) the circumstances surrounding the proven offence, including, if any, the accused's motive,
- 4) the circumstances surrounding the laying of the charge, including if any, the plaintiff's motive,
- 5) the actual harm caused by the offence,
- 6) the specific objective, if any, intended to be achieved by the legislature when it enacted the provision and
- 7) the public interest.

[115] *The defendant's character* was described by the witnesses as being difficult, but also they said that he had "a reputation". This court takes judicial notice of the fact that Mr. Canadian made a human rights complaint against the North Slave Correctional Center in 2017 regarding his treatment while incarcerated.<sup>17</sup> Cst. Gibson candidly acknowledged that he did not want to go inside Mr. Canadian's cell, and that he'd rather not be dealing with him at all.

[116] *The nature of the proven offences* is one of assault on a peace officer engaged in the execution of his duty, which includes the lesser conducts of threatening or attempting to use force.

[117] *The circumstances surrounding the proven offences* include the fact that the duty in question was to keep Mr. Canadian safe until his next court appearance; that Mr. Canadian was in police custody, that he was monitored twenty-four hours a day in his perpetually lit cell, where he was kept alone and often without a mattress or blanket. On one occasion, the accused spat in the direction of a police officer, and on the other, he threw a food container in the direction of a peace officer. The police made decisions about how they approached Mr. Canadian, and how they dealt with the petty behaviour that he was displaying, such as covering the cameras in his cell with toilet paper. There is no direct evidence of a motive by the accused for acting the way he did, (regarding the throwing of the food container) except that through his cross-examination of Cst. Gibson, he established that he may have felt intimidated by the police's own conduct towards him.

[118] There is no evidence of *the circumstances surrounding the laying of the charge*, except to say that the conduct of the police was likely to be the subject of scrutiny given their use of force which was captured on video. The sergeant in charge of the detachment was also an alleged victim. He was neither independent

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<sup>17</sup> CBC article: "Gay man claims mistreatment, discrimination, while in jail.", Jamie Malbeuf CBC News · Posted: Mar 09, 2018.

or impartial in his conduct of the investigation. Furthermore, it was clear from his testimony that he approached the defendant with the intention of obtaining compliance from him, and the laying of the charges is in keeping with this intention of maintaining the authority of the police over the defendant.

[119] No harm was done. The police were not touched by any projectile. There was no proof of material damage to the RCMP property.

[120] Regarding *the legislative objective* of the disposition, clearly Parliament intended to protect the police when they are engaged in the execution of their duties. They are often involved in dangerous situations, and they face violence on a daily basis. However, this disposition should not be used to justify after the fact the use of force by the police.

[121] The last factor in the analysis is the *public interest*. During this trial, I heard about a young man who was detained at the RCMP detachment for six days, in apparent isolation, and under constant surveillance, and against whom the police used force on many occasions while carrying out the duty of keeping him safe until his next court appearance. I heard about peace officers insisting on making a young man comply with their orders, for the sake of compliance. At no time did the accused try to escape, or to provoke a serious confrontation with the peace officers. I heard of peace officers saying that they feared for their safety while they were in a familiar environment, carrying weapons, and outnumbering the prisoner most of the times.

[122] Despite having this advantage on the prisoner, the peace officers chose to escalate situations when they perceived that he was not compliant, by qualifying his behaviour as one creating a risk for them.

[123] I heard about the prejudice fostered by what the peace officers said they knew about the accused. This prejudice caused the peace officers to assume the worst intentions from their prisoner, and to adopt a strong stance against him for what in retrospect amounted to a nuisance rather than a true threat to peace officer safety. When I consider these circumstances, and the degree of violence that was applied to the accused, I find that the entering a conviction against the accused for spitting in the direction of peace officers would stigmatize this person in a disproportionate and unfair manner. I find that the conduct of the accused, while objectively constituting an assault on a peace officer engaged in the exercise of his duty, was insignificant in light of how he was ultimately treated.

## K. CONCLUSIONS

[124] Regarding count 2, the Crown has proved that Mr. Canadian committed an assault on a peace officer engaged in the execution of his duty contrary to section 270 of the Criminal Code. However, for the reasons expressed above, I apply the principle of *de minimis non curat lex* and I enter an acquittal on this count.

[125] Regarding count 3, the Crown has proved that Mr. Canadian committed an assault against a peace officer engaged in the execution of his duty, but for the reasons expressed above, I apply the principle of *de minimis non curat lex*, and I enter an acquittal on this count.

[126] When I gave my oral reasons, I said that If I am wrong on the issue of *de minimis*, I am of the view that if a conviction must be entered, the time already served in custody should be applied, and the accused should not be made to serve any further jail.

[127] Regarding count 4, I found that no assault was committed on Cst. Woodward, and I enter an acquittal on this count.

[128] Regarding count 5, the totality of the circumstances raise a doubt as to whether Cpl. Leduc was assaulted, and I enter an acquittal on this count.

[129] Regarding count 6, the totality of the circumstances raise a doubt as to whether Sgt. Yilmaz was assaulted, and I enter an acquittal on this count.

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Christine Gagnon  
D/Judge of the Territorial Court

Dated at \_\_\_\_\_, Ontario  
this \_\_\_\_\_ day of September, 2023.

*R. v. Canadian*, 2023 NWTTC 09

*Date: 2023 11 03*

*File: T-1-CR-2023-000129*

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**IN THE TERRITORIAL COURT OF THE  
NORTHWEST TERRITORIES**

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**BETWEEN:**

**HIS MAJESTY THE KING**

**-and-**

**KELLY CANADIAN**

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**REASONS FOR DECISION  
of the  
HONOURABLE DEPUTY JUDGE  
CHRISTINE GAGNON**

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[Section 270 of the *Criminal Code*]