

**IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367,
AS AMENDED**

AND

**IN THE MATTER OF THE PUBLIC HEARING INTO THE CONDUCT OF
CONSTABLE DIAZ AND FORMER CONSTABLE HUGHES**

ADJUDICATOR'S DECISION

Public Hearing Counsel:	Bradley Hickford
Commission Counsel:	Greg DelBigio, K.C.
Counsel For Cst. Diaz:	David Butcher, K.C.

Introduction & Overview

[1] This public hearing concerns an incident that occurred at the Rupert Street SkyTrain Station in Vancouver on August 10, 2011. The incident involved Mr. Charles Kenneth Riby-Williams and two police officers – Edgar Diaz and Michael Hughes – who at the time were serving in the South Coast BC Transportation Authority Police Service, commonly referred to as the Metro Vancouver Transit Police. Former Constable Hughes no longer works for the transit police. In these reasons I will generally refer to him as Cst. Hughes since that was his position at the relevant time.

[2] The history of these proceedings is unfortunately very lengthy. I will not comprehensively review that history here. A summary of the significant steps in the proceedings, and related judicial proceedings, can be found in the Court of Appeal's

decision in *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221. In that ruling, the Court of Appeal set aside an earlier decision by a Justice of the Supreme Court of British Columbia to quash the Police Complaint Commissioner's direction to arrange this public hearing.

[3] Despite finding that the delay in the proceedings did not meet the high standard of an abuse of process, and the PCC's decision to arrange the hearing was not unreasonable, the Court of Appeal did agree that the "history of these proceedings may aptly be described as 'tortured,' and that the process fell well short of the goal of the 2010 amendments to the police complaint process of 'timely decisions'": at para. 44, citation omitted. Without impugning the conduct of any party, I also agree with these comments and acknowledge the delay in this matter is regrettable and serves no one.

[4] The public hearing, which had begun in earnest in February 2018, resumed in September 2021 – after the Court of Appeal's ruling and following further delays caused by the coronavirus pandemic. The most recent in-person hearing was held on June 29, 2022.

[5] On that date, by consent and on the initiative of public hearing counsel, it was agreed that four out of the five allegations in this matter should be dismissed – namely the allegations in paragraphs 37 (i) and (ii) and paragraphs 38 (iii) and (v) of the Notice of Public Hearing in this matter dated June 15, 2017.

[6] Those allegations generally related to Cst. Diaz and Cst. Hughes' actions in recommending charges and issuing a violation ticket against Mr. Riby-Williams following the incident on August 10, 2011. Public hearing counsel took the position that these allegations were not proven in light of the evidence given by Inspector Andrew Perry of the New Westminster Police Department, who investigated the alleged misconduct in this matter. I agree, and I find that these allegations have not been proven. Because these allegations were ultimately not pursued, I will not say anything more about them in these reasons.

[7] With the dismissal of these four allegations, the conduct of Cst. Hughes is no longer at issue. I should note that Cst. Hughes did not participate in the public hearing after it resumed in September 2021.

[8] The remaining allegation is that on August 10, 2011, at or near the city of Vancouver, British Columbia, Cst. Diaz committed the disciplinary default of abuse of authority contrary to section 77(3)(a) of the *Police Act* by intentionally or recklessly using unnecessary force against Mr. Riby-Williams

[9] Following the appearance on June 29, 2022, I received written submissions from the parties, the last of which were filed on November 2, 2022. Cst. Diaz does not dispute that the remaining allegation has been proven, but counsel have raised certain issues to be determined before submissions are made as to the appropriate disciplinary or corrective measures to be taken in accordance with s. 126 of the *Act*.

[10] I agree that the remaining allegation of misconduct (abuse of authority by intentionally or recklessly using unnecessary force) has been proven.

[11] After reviewing the parties' submissions, I would frame the issues left to be determined at this stage as follows:

- Did Cst. Diaz intentionally use unnecessary force on Mr. Riby-Williams, or did he recklessly do so?
- What specific actions by Cst. Diaz constitute misconduct in this matter, and more specifically:
 - i. Did he intentionally hit Mr. Riby-Williams in the head?
 - ii. Did he intentionally cause bodily harm to Mr. Riby-Williams?
 - iii. To what extent did Mr. Riby-Williams' own actions cause or contribute to the use of force against him?

Evidence

[12] In this section I will review the evidence that is relevant to the determination of the above issues.

[13] Much of the encounter between Mr. Riby-Williams and the officers was captured by video cameras located throughout the SkyTrain Station. The video recordings do not have any sound. Four recordings, depicting different but sometimes overlapping parts of the events from different angles, were entered as exhibits. I will discuss the contents of these recordings further below.

[14] Mr. Riby-Williams testified at the public hearing. He identifies as biracial and was 22 years old on August 10, 2011. In examination in chief, he said that in August 2011 he was a student at UBC, where he played on the varsity football team.

[15] On that date, before his interactions with the police, he was out with friends. He said he'd had a few beers, maybe three or four, and smoked some marijuana earlier in the day. He said he did not consider himself to be intoxicated when, around midnight, he went to the Rupert Street SkyTrain Station. He went to the SkyTrain Station to meet a male friend. He went up the stairs to the platform of the Station and was texting with the friend.

[16] He knew he was in a fare paid zone at that point but he had not bought a fare because he was just meeting his friend and did not intend to ride the SkyTrain. His friend told him via text that he was not there anymore, or would no longer be going there. Mr. Riby-Williams decided to leave and meet up with the friend at the friend's house.

[17] Mr. Riby-Williams said that he first saw the officers as he was going down the stairs to leave the SkyTrain Station. The officers were above him and one of them asked where he was going. Then midway down the stairs one of the officers (he believed it was Cst. Diaz, which the video confirms) caught up to him and grabbed the backpack he was wearing, and grabbed his wrist. Mr. Riby-Williams told Cst. Diaz he was going to his

friend's house. The other officer (Cst. Hughes) arrived around this time and suggested they move to the bottom of the stairs to continue talking, which they did.

[18] All of this is basically consistent with the depiction of each person's actions up to this point in the video evidence, although the video does not assist in determining what anyone was saying. From the video, it appears there was a brief exchange between Mr. Riby-Williams and Cst. Diaz midway down the stairs, and Cst. Diaz touched Mr. Riby-Williams' wrist and backpack when Mr. Riby-Williams went to continue walking down the stairs.

[19] Mr. Riby-Williams said that, at the bottom of the staircase, the officers questioned him about where he was going, where he had come from, and what he had been doing. He said he answered their questions and provided his name and address, and asked them why he was being arrested or stopped.

[20] He said he expected to be given a ticket for being in the fare paid zone without having paid, and asked if he could get a ticket and go home. He also asked why he was being held at the scene.

[21] He said he was eventually told he was going to be arrested, and when he asked why, the officers told him they did not believe his name and he was obstructing them, or obstructing justice. He testified that he had provided them with his date of birth and his full name: Charles Kenneth Riby-Williams. He said he did not recall which officer said they did not believe his name. He denied yelling or swearing at the officers, or otherwise acting aggressively towards them.

[22] He said that at a certain point, after he was told he was under arrest, both officers converged and they grabbed each of his wrists. He said he continued to question why he was being arrested. He said Cst. Diaz then went low and tried to lift or scoop out one of his legs, and he then lost his balance and back-stepped away. He said there was a "kerfuffle" after that, during which he was punched in the mouth (he was not sure by whom, but from the video evidence, which I will come to, he said he saw that it was Cst.

Diaz). He said at that point he concluded the officers were “not good police” and he began to panic, he did not feel safe, and decided to flee.

[23] He said he was tackled as he was backing up, and he was then hit and punched in the head. He remembered being on his hands and knees, having his shirt ripped, and being hit with batons. He said the blows became more intense as the incident went on, and the officers were hitting him in his head and back. He slipped his backpack off over his shoulders and head, and his shirt came off with it. He saw blood and did not know how long the blows would continue. He thought he was going to get “brutally beaten,” “just like Rodney King.”

[24] At some point he got up and ran a number of steps before collapsing and rolling down a few stairs, then he got up again and ran towards Rupert Street.

[25] The video recordings capture the interaction between Mr. Riby-Williams and the officers up to this point in the narrative, but not after. The footage is more or less consistent with Mr. Riby-Williams’ account up to this point, with a few discrepancies that are mostly unremarkable. The live issues essentially come down to the subjective perceptions, interpretations, and motivations of the people involved.

[26] On my review of the video footage, it appears that Cst. Diaz initially runs after Mr. Riby-Williams to catch up to him as he is walking down the stairs from the platform level in the SkyTrain Station. Mr. Riby-Williams stops on a landing in the middle of the staircase and Cst. Diaz talks to him there. Mr. Riby-Williams moves to continue down the stairs and Cst. Diaz touches his arm and backpack in an apparent attempt to prevent him moving in that direction. Cst. Hughes is then seen going down the stairs towards them.

[27] The three of them proceed to the bottom of the staircase and Mr. Riby-Williams stands against a wall with the officers standing close to him. He engages in a discussion with the officer for about four-and-a-half minutes. At times he appears animated and gesticulates with his arms. After about two minutes, a group of passengers goes down

from the platform level and walk past them. At a certain point, Cst. Hughes appears to hold a flip-open paper booklet in front of him.

[28] After four-and-a-half minutes, Cst. Diaz and Cst. Hughes simultaneously move toward Mr. Riby-Williams, and each of them takes hold of one of his arms. Immediately before this happens Mr. Riby-Williams is standing still with his hands gently touching in front of his body. I would not characterize his body language as threatening or tense in that moment. After the officers move in and grab him, Mr. Riby-Williams does appear to become tense and he holds his arms in front of his stomach. He and the officers then pull or struggle against each other and it appears Mr. Riby-Williams is still talking to the officers.

[29] Shortly after this, Cst. Diaz, who is on Mr. Riby-Williams' left side, bends down and appears to try to manipulate Mr. Riby-Williams' left leg. Mr. Riby-Williams pulls and steps away forcefully and Cst. Diaz stands back up straight. It is difficult to tell, but it appears that Cst. Diaz may move his arm in the direction of Mr. Riby-Williams' upper body around this point. It appeared that Mr. Riby-Williams identified this as the moment he was first punched by Cst. Diaz in the video.

[30] At the same time, in the video, Cst. Hughes is trying to maintain control over Mr. Riby-Williams by holding on to his backpack, and Mr. Riby-Williams is continuing to move away from the officers, towards the SkyTrain Station entrance.

[31] As he moves backward towards the entrance, Mr. Riby-Williams bends forward at the hips and slips his shoulders and arms out of the backpack as Cst. Hughes is holding on to it, such that the backpack comes off over his head. Cst. Diaz grabs Mr. Riby-Williams by the waist and tries to tackle him to the ground as this is happening. As he is being tackled, Mr. Riby-Williams grasps his backpack in his hands, pulling it away from Cst. Hughes.

[32] Mr. Riby-Williams is briefly taken down so that his hands are on the ground, but he gets back up and moves a few steps in an apparent attempt to get away from Cst. Diaz. Cst. Hughes draws his baton and follows him.

[33] Cst. Diaz continues to hold on to Mr. Riby-Williams by the leg and drags him to the ground a second time, landing on one of his legs and then trying to move on top of him. Cst. Hughes moves in with his baton held in a ready position near Mr. Riby-Williams' upper body.

[34] Cst. Diaz then appears to strike Mr. Riby-Williams in the upper body twice with his left hand and a number of times with his right hand. He appears to throw as many as nine strikes with his right hand but it is not clear exactly how many and whether or where they connect.

[35] As Cst. Diaz is striking Mr. Riby-Williams with his hand, Cst. Hughes strikes or attempts to strike him once with his baton. It is unclear whether or where this initial baton strike lands. As this is happening, Mr. Riby-Williams pushes himself up and struggles to his feet. He continues to hold on to the backpack and he bends forward from the waist as Cst. Diaz pulls on his t-shirt with one hand and starts swinging his baton in the direction of Mr. Riby-Williams' upper body with the other.

[36] Cst. Diaz appears to strike or attempt to strike Mr. Riby-Williams about his upper body as many as six or seven times with his baton. As this is happening, both he and Cst. Hughes are pulling on Mr. Riby-Williams' shirt as Mr. Riby-Williams tries to move away from them. Cst. Hughes directs three strikes toward Mr. Riby-Williams' legs with his baton.

[37] At a certain point, Mr. Riby-Williams bends at the waist and moves backward so that his shirt is pulled off over his head. As this happens, he is bent over so that the back of his head is pointed towards Cst. Hughes and directly exposed or vulnerable. Cst. Hughes holds his baton at the ready but does not strike Mr. Riby-Williams with it at this point.

[38] At the same time, Cst. Diaz continues to direct strikes towards the back of Mr. Riby-Williams' upper body from a standing position beside him. It is unclear from the video how many of these blows connect, or where.

[39] After Mr. Riby-Williams' shirt comes off, he turns and runs away from the officers, still holding his backpack. He stumbles and falls to the ground before rolling forward and getting back to his feet.

[40] Cst. Diaz comes up behind Mr. Riby-Williams at this point and appears to swing the baton toward the back of his upper body one or two more times. The struggle then continues as Mr. Riby-Williams and the two officers move out of view on to Rupert Street. At the same time, two other officers run out of the SkyTrain Station towards them.

[41] The video recordings do not depict what happened with Mr. Riby-Williams after this. The elapsed time in the video footage, from when the officers move in to arrest Mr. Riby-Williams inside the SkyTrain Station, to the time Mr. Riby-Williams runs on to Rupert Street after being struck with the batons, is less than one minute.

[42] In his evidence in chief, Mr. Riby-Williams recalled that, after he fell, rolled, and ran towards Rupert Street, two other police officers (not Cst. Diaz or Cst. Hughes) came towards him and he said "I give, I give" and put his hands up.

[43] He said he was directed to get down, so he got down on his knees with his hands still above his head. He said he was then kicked in the back and fell on to his stomach. He believed Cst. Diaz kicked him, based on the associated voice that was saying something. He thought he might be beaten further, so he got off his stomach and back to his knees with his hands up, and was again kicked in the lower back or buttocks and on to his stomach. At this point he was not wearing a shirt and he was bleeding from multiple areas including his elbows, knees, and head. He got some abrasions on his stomach and knees from the ground.

[44] An officer put their knee on his back and his hands were pulled behind him and handcuffed. He said that Cst. Diaz was taunting him by saying something along the lines of, "We got you now, you're not going far this time."

[45] He also said that, while he was on his stomach, he heard Cst. Diaz and Cst. Hughes talking about checking cameras.

[46] He said that Cst. Hughes began to read him his rights, but after saying, "You have the right to remain silent," and possibly a few more lines, Cst. Hughes said "Blah, blah, blah, you've heard this before." He said he asked Cst. Hughes to read him his rights again, and Cst. Hughes started to give him his rights but "gave up on it again." He said he was then in and out of consciousness while he waited for an ambulance. Eventually the ambulance came and he was taken to the hospital.

[47] Photographs of Mr. Riby-Williams' injuries were entered into evidence in the public hearing, and Mr. Riby-Williams described the medical attention he received. The photos show large abrasions on Mr. Riby-Williams' elbow, knee, back, hip, and palm; a cut on his lip; bruising on his back and arm; and a large gash on his head (closed with stitches). He said he got four stitches to close the laceration on his head, and band-aids on his elbows. Photos from the scene of his arrest show a considerable amount of blood on the right side of Mr. Riby-Williams' head.

[48] Mr. Riby-Williams also described interacting with Cst. Diaz at the hospital. He said that Cst. Diaz was suggesting to him that he hated the police and was claiming that he had said so directly to Cst. Diaz at the SkyTrain Station. Mr. Riby-Williams believed Cst. Diaz was trying to coax him into saying he hated the police while he was in a vulnerable state. Mr. Riby-Williams denied ever expressing or having hatred for the police.

[49] Mr. Riby-Williams went on to describe being taken from the hospital to the police station, held in cells, and ultimately released. He was initially given a violation ticket and faced criminal charges, but proceedings were ultimately not pursued against him.

[50] Mr. Riby-Williams said that, in total, he believed he was hit five to ten times with the batons. He could not necessarily tell when he was being hit with the batons versus being hit with the officer's hands or fists. He said that he never fought with the officers; never said anything threatening to them; never raised his hands towards them; and never swore at them.

[51] He has no criminal record and has not been arrested other than on August 10, 2011.

[52] In cross-examination, Mr. Riby-Williams acknowledged that he was carrying an identification card with his name on it the entire time he was dealing with the officers. He could not recall whether the officers asked him for ID. He acknowledged that he knew he was liable to receive a violation ticket for being in the fare paid zone without having paid any fare. He agreed the officers asked him if he had a fare. He agreed that instead of directly answering that question he changed the topic and said something about meeting someone.

[53] He denied that he intended to ride the SkyTrain without paying the fare. He said he went up to the platform, in the fare paid zone, so he could meet his friend sooner than if he had waited downstairs. He denied the suggestion put to him that he saw the officers issuing a ticket to someone else and that he left the platform to avoid getting a ticket himself.

[54] He said that when the officers first approached him he did not realize they were law enforcement officials; he thought they might be "transit security" and thus, in his view, without authority to stop him. He said he did not recall exactly when he learned they were police officers with associated powers.

[55] Mr. Riby-Williams agreed he told the officers he felt like they were having a quiet night and they were looking for someone to pick on. He said this comment was based on the way they were treating him from the beginning.

[56] He agreed that ultimately the officers were trying to confirm his identity so they could give him a ticket. He understood that when he was arrested for obstruction, it was because the officers did not believe he was who he said he was. He could not explain why he did not show the officers his ID, other than to say he had provided his name verbally and did not feel they had grounds to stop him and he did not believe he was required to provide his ID. He acknowledged he knew the officers were concerned whether the name he provided was correct, but denied knowing that providing his ID would solve the problem.

[57] He agreed that his hyphenated surname (Riby-Williams) often confused people, but said he did not clarify or spell out his full surname for the officers on this occasion because he had already stated it clearly and felt they had already decided they did not believe him.

[58] Mr. Riby-Williams was cross-examined on the video recordings. He agreed that Cst. Diaz was much smaller than him. He agreed that he started to resist the officers when they first approached him and grabbed his wrists, before Cst. Diaz tried to scoop his leg and before he was hit in the face. He said he resisted because their attitude towards him was intimidating, they closed in on him, and he felt threatened.

[59] He also said he felt that he was being unlawfully arrested and was asking why he was being arrested. He did agree that he was told he was under arrest for obstruction and he understood this was due to the fact the officers did not believe he provided his real name.

[60] He disagreed with the suggestion that Cst. Diaz did not punch him in the face after trying to scoop his leg. He said he had previously thought it was Cst. Hughes who punched him in the face at that point, after being presented with an earlier statement to that effect. He said he could see from the video that in fact it was Cst. Diaz who first punched him. He resisted counsel's suggestions that the video actually showed no punch at that time. In my view the video is inconclusive on this point.

[61] He said that once Cst. Diaz punched him and tackled him to the ground, he was panicked, afraid, and trying to get away. He agreed that Cst. Hughes said he was going to use his baton after drawing it, but denied that this was a warning. He disagreed with the suggestion that the officers never had him under control in the video, and disagreed with counsel's characterization of his conduct as fighting with the police.

[62] Mr. Riby-Williams agreed that Cst. Hughes said he was going to use a Taser against him if he did not stop, but he disagreed that was why he finally said, "I give, I give" and allowed himself to be arrested after running on to Rupert Street. He said he had already stopped, when the two other officers approached him.

[63] Mr. Riby-Williams was cross-examined on his consumption of alcohol and marijuana earlier in the day. He firmly maintained that he had only had three or four beers, between 1 p.m. and 9 p.m. He denied that his memory was badly affected by alcohol and marijuana.

[64] He was cross-examined on earlier statement where he denied using drugs, and explained that he did not consider marijuana to be a hard drug or a hallucinogen, and it does not cause violent or disruptive behaviour.

[65] He resisted the suggestion that he was uncooperative with the police because he was under the influence of alcohol and marijuana.

[66] A witness, Caterina Masi, can be seen in the video footage from outside the SkyTrain Station, watching some of the incident unfold. She testified at the public hearing. She said she was at the SkyTrain Station that night to meet a female friend who would be arriving on the train. She happened to know Mr. Riby-Williams, and she recognized him when she arrived at the SkyTrain Station.

[67] She recalled that Mr. Riby-Williams was at the bottom of the escalator inside the Station having a "demanding conversation with two cops." She said the police officers' demeanor was aggressive and that Mr. Riby-Williams seemed confused. She

remembered the officers telling Mr. Riby-Williams that he was resisting arrest. She did not remember hearing Mr. Riby-Williams say anything to the police.

[68] She described the use of force against Mr. Riby-Williams as she recalled it. She said she did not hear Mr. Riby-Williams saying anything while the police were hitting him with their fists and batons. She said Mr. Riby-Williams was not hitting back at the officers or acting aggressively towards them.

[69] Cst. Diaz and former Cst. Hughes both elected not to testify at the public hearing.

Discussion

[70] As mentioned, the allegation of abuse of authority against Cst. Diaz is not disputed and I find that it has been proven.

[71] Public Hearing counsel submits there should be a finding that Cst. Diaz intended to cause bodily harm to Mr. Riby-Williams. He points out that Cst. Diaz pleaded guilty to a criminal charge of assault causing bodily harm arising from this incident, and argues that in doing so he necessarily admitted that he intended to cause bodily harm to Mr. Riby-Williams.

[72] I do not accept this submission. In pleading guilty to assault causing bodily harm, Cst. Diaz did not necessarily admit that he intended to cause bodily harm to Mr. Riby-Williams. Instead, he admitted that he intentionally applied force to Mr. Riby-Williams, and as a consequence Mr. Riby-Williams suffered bodily harm.

[73] Specific intent to cause bodily harm is not an essential element of the offence of assault causing bodily harm: see *R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 966. In fact, in British Columbia, it is apparently not even necessary for bodily harm to be objectively foreseeable: see *R. v. Sagmoen*, 2021 BCCA 356, at para. 26, citing *R. v. Brooks* (1998), 41 C.C.C. (3d) (B.C.C.A.).

[74] Commission Counsel argues that, again having regard to Cst. Diaz's guilty plea, I should find that the abuse of authority in this case was intentional rather than reckless. Commission Counsel says that because criminal assault is defined as the intentional application of force against another person without that person's consent, and Cst. Diaz has admitted through his guilty plea to the intentional application of force to Mr. Riby-Williams, it follows that his misconduct in this case was intentional and not reckless.

[75] I do not accept this submission either. The fault requirement for a finding of abuse of authority under the *Police Act*, where it is alleged that an officer used unnecessary force, is not the same as the *mens rea* for assault under the *Criminal Code*. The *mens rea* for assault (and assault causing bodily harm) is the intention to apply physical force without consent. Here there is no question that Cst. Diaz intended to apply force to Mr. Riby-Williams. He has admitted that he did, and that the force he used was excessive.

[76] The question is not whether Cst. Diaz intended to apply force to Mr. Riby-Williams, but whether he knowingly and intentionally used more force than was necessary, or whether he was reckless as to whether he was using an unnecessary amount of force.

[77] As set out in *The Matter of Cst. Tiwana*, PH 14-02, the framework for alleged abuse of authority by intentionally or recklessly using unnecessary force under s. 77(3)(a)(ii)(A) of the *Act* is:

- The officer's use of force was objectively unnecessary; and
 - i. The officer did not subjectively believe the force was necessary;
 - ii. The officer subjectively believed the force was excessive; or
 - iii. The officer subjectively believed the force was necessary and not excessive, but this belief was not reasonable.

[78] The issue, then, is whether Cst. Diaz subjectively believed the force he used was necessary and not excessive. There is no question that the use of force was objectively

unnecessary. There is no question that any belief that the use of force was necessary and/or not excessive was unreasonable. There is also no question that if Cst. Diaz subjectively (but unreasonably) held these beliefs, then his conduct was reckless and seriously blameworthy such that he committed misconduct under the *Act*. This is not a case where there is a risk that a lack of authority might be confused with abuse of authority: see *The Matter of Cst. Ludeman and Cst. Logan*, PH 19-01, at paras. 121-128.

[79] In deciding the issue of Cst. Diaz's mental state, I must apply the standard of proof for allegations of misconduct under the *Police Act*, which is the balance of probabilities. This standard requires "evidence that is sufficiently clear, convincing, and cogent" to establish the point in issue. See *The Matter of Cst. Batiuk*, RR 15-02, at p. 1, citing *The Matter of Cst. Dickhout*, PH 10-03 (decision dated March 9, 2012) at para. 37.

[80] Under this standard, I must "scrutinize the relevant evidence to determine whether it is more likely than not" that a particular allegation or proposition is true: *F.H. v. McDougall*, 2008 SCC 53, at para. 49. In this case, that allegation or proposition is that Cst. Diaz intentionally used unnecessary or excessive force

[81] Based on the record developed through this public hearing, I am not convinced to the requisite standard that Cst. Diaz intentionally abused his authority by deliberately using excessive force against Mr. Riby-Williams, in the sense of knowing the amount of force he used was unnecessary.

[82] This conclusion is based in large part on the fact that Mr. Riby-Williams actively resisted arrest, and there is no evidence that Cst. Diaz used his baton or otherwise forcefully struck Mr. Riby-Williams before he started resisting, or after he stopped resisting. Mr. Riby-Williams would perhaps take issue with the assertion that he was actively resisting. From his perspective, as expressed in his evidence in this public hearing, he was attempting to get away from what he felt was an unlawful arrest and then an unlawful "beating." For present purposes, however, I am assessing the situation from the perspective of Cst. Diaz, based on all the evidence.

[83] I also take into account that the entire use of force incident was brief, less than one minute according to my review of the video. This was a dynamic situation that was unfolding in real time. I also consider the fact that Cst. Diaz was a relatively junior police officer with only a few years' experience at the time.

[84] For largely the same reasons, I cannot say that I am satisfied Cst. Diaz specifically meant to cause bodily harm to Mr. Riby-Williams, although I do find that this was an obviously foreseeable consequences of his actions, particularly in repeatedly striking Mr. Riby-Williams in the upper body with the baton, and a risk he can hardly have failed to appreciate. I find that he intentionally hit Mr. Riby-Williams with enough force that he must have known there was a substantial likelihood of bodily harm as that term is defined in the *Criminal Code*.

[85] A few more issues were raised in submissions on behalf of Cst. Diaz.

[86] Cst. Diaz disputes, as a matter of fact, that he specifically intended to hit Mr. Riby-Williams in the head. It is argued that Mr. Riby-Williams was moving around, Cst. Diaz was in an elevated state, and he was simply swinging at Mr. Riby-Williams indiscriminately. To the extent this assists Cst. Diaz, I accept that he may not have been aiming directly for Mr. Riby-Williams's head in all or perhaps any of his blows; but it is clear that he was hitting him forcefully in the upper body and he should have appreciated there was a risk Mr. Riby-Williams would be hit in the head or otherwise seriously injured.

[87] Another factual issue raised by Cst. Diaz is the role Mr. Riby-Williams played in escalating the situation. I will accept that the situation may well have been avoided if Mr. Riby-Williams had been more cooperative with the officers, but I do not find that he did anything to assault or threaten the officers, or otherwise engaged in any conduct that remotely justified the level of force used by Cst. Diaz in striking him with the baton as he did.

Conclusion

[88] The evidence does not persuade me that Cst. Diaz consciously abused his authority or acted in bad faith. I find it more likely that he was reckless in the sense of subjectively but unreasonably believing that the circumstances called for the level of force that he used.

[89] In particular, Cst. Diaz recklessly used unnecessary force in repeatedly striking Mr. Riby-Williams about the upper body with his baton, while Mr. Riby-Williams was, at most, actively resisting being arrested for obstruction after failing to provide his name during a fare infraction stop. Cst. Diaz's use of force in these circumstances was extreme, and carried a risk of injury to Mr. Riby-Williams that was completely out of proportion to any plausible threat he posed to the officers or the public. This was not a simple mistake of legal authority, or an excusable error in judgment, on the part of Cst. Diaz.

[90] On this basis I find that Cst. Diaz committed the disciplinary default of abuse of authority contrary to s. 77(3)(a)(ii)(A) of the *Act*.

"R. McKinnon"

Ronald A. McKinnon
Adjudicator

December 29th 2022