

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

AND

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST
SGT. [REDACTED], AN OFFICER OF THE NELSON POLICE DEPARTMENT

NOTICE OF DISCIPLINE AUTHORITY'S DECISION

TO: Mr. [REDACTED], Complainant (the "Complainant")

AND TO: Sgt. [REDACTED], Nelson Police Department (the "Member")

AND TO: [REDACTED], Counsel to Sgt. [REDACTED] ("Counsel")

AND TO: [REDACTED], Discipline Representative ("Discipline Representative")

AND TO: Sgt. [REDACTED], Vancouver Police Department, PSS, (the "Investigator")

AND TO: Mr. C. Pecknold, Police Complaint Commissioner (the "Commissioner")

I Executive Summary of Decision

As a result of reported erratic driving, the Complainant was the subject of a roadside stop in a residential area of Nelson, B.C.

When approached by the attending officer, it was immediately apparent that the Complainant was highly emotional, angry and claiming to be suffering from PTSD.

After a brief exchange with the highly animated Complainant, the attending officer secured the relevant identification and insurance documents. A call for backup was made by radio advising that a highly irate driver had been stopped claiming to be suffering from PTSD. The attending officer then moved back to her police car to complete necessary inquiries and paperwork.

On the date in question, the Nelson PD was operating with less than its normal complement of police officers due to staffing issues. Notwithstanding those limitations, the Member immediately attended at the scene of the traffic stop taking up position at the right rear passenger side of the Complainant's vehicle.

I have found that the Member had reasonable grounds to believe that a threat to the life of the attending officer had been made by the Complainant while seated in his vehicle. The threat related to the possible use of a knife by the Complainant on the attending officer. As noted, at that time the attending officer was safe in her police vehicle approximately 20' away working on a traffic ticket.

In response to the perceived threat, the Member drew his service pistol while at the right rear of the Complainant's vehicle. At that time, the Complainant was continuing to exhibit irrational and irate behaviour while rummaging in the interior of his vehicle. No knife was seen. I have also found that the Member knew before arriving on scene that the Complainant was irate and claiming to be suffering from acute PTSD as a result of the traffic stop.

I have found that the Member began to move quickly to the driver's door with his service pistol before him. Just as the Member rounded the driver's side corner of the subject vehicle, the Complainant began to open the driver's door and started to exit. There was no knife or weapon in evidence at that point either.

What followed was an unfortunate immediate violent escalation of events. The Member attempted to arrest the Complainant. He repeatedly struck the Complainant on the head and upper body with his service pistol in attempts to apply brachial stuns and complete the arrest. Ultimately, with the assistance of the attending officer, the Complainant was subdued, arrested and handcuffed. The Complainant was seriously injured as a result of the arrest process.

I have found that the Member had reasonable grounds to believe some degree of force was necessary to restrain and safeguard the Complainant during the arrest that took place. However, there was never any weapon posing a threat as the Member approached the Complainant.

No efforts were taken by the Member to de-escalate matters even though the Member was well aware of the claims of a PTSD event. Furthermore, there was no apparent urgency to display a pistol either for officer safety or to reinforce officer presence, nor to use the same in striking the Complainant.

I have found that although the Member subjectively believed that his use of force was, in all of the circumstances, necessary, reasonable and appropriate, objectively such a position was unreasonable.

However, I have also found that the Member's motivations were focused on protecting his colleague and that the force used in completing the arrest of the Complainant did not evidence serious blameworthy conduct.

The allegation of misconduct by way of oppressive conduct pursuant to *section 77(3)a(ii)A of the Police Act* has therefore not been substantiated and is dismissed.

II Introduction and Overview

- (1) This is a Discipline Proceeding convened pursuant to sections 123-125 of the *Police Act*.
- (2) These proceedings relate to a complaint filed June 6, 2022 on behalf the Complainant ((the "Complaint"). The Complaint related to an alleged incident of misconduct on June 10, 2021.
- (3) One alleged disciplinary breach of trust arising from the Complaint was considered involving the Member, namely that:

*On June 6, 2021 the Member committed Abuse of Authority as a result of oppressive conduct pursuant to section 77(3)a(ii)A of the Police Act by recklessly using unnecessary force on the Complainant through the strikes with a service pistol without good and sufficient cause.
(the "Misconduct Allegation ")*

- (4) In accordance with section 117 of the *Police Act*, a review of the Misconduct Allegation was undertaken. The review concluded on July 20, 2023 and concluded that there appeared to be evidence set out in the Final Investigation Report dated July 7, 2022 (the "FIR") which, if proven, could substantiate the Misconduct Allegation with respect to the Member and potentially require the taking of disciplinary or corrective measures.

III History of Proceedings

- (5) On June 10, 2021, an incident took place at a traffic stop in Nelson that resulted in the arrest of the Complainant, and ultimately, his hospitalization. The hospitalization of the Complainant was required to treat significant injuries apparently sustained during the arrest process involving the Member.
- (6) On June 6, 2022, counsel acting on behalf of the Complainant submitted the Complaint to the Office of the Police Complaint Commissioner (the “OPCC”) with respect to the circumstances of his arrest. The Complaint included a brief summary of allegations detailing injuries allegedly sustained by the Complaint during the course of his arrest by the Member and other officers. Photos purporting to show the injuries were not transmitted in a form that could be viewed and further efforts to obtain better photos were not successful.
- (7) Following a review by OPCC staff, the Complaint was accepted as admissible and forwarded to the Professional Standards Section of the Vancouver Police Department for investigation.
- (8) As noted in the Complaint, the misconduct alleged related to the Member’s inappropriate use of force with respect to the Complainant during the course of his arrest. Specifically, allegations were made against the Member of abuse of authority in the use of force, including, among other issues, striking the Complainant with the Member’s service pistol, thereby engaging consideration of section 77(3)(a)(ii)A of the *Police Act*.
- (9) The Investigator completed his investigation and submitted the FIR to the relevant discipline authority, Chief Constable Fisher, on May 10, 2023.
- (10) On May 24, 2023, Chief Constable Fisher, as Discipline Authority, issued his decision pursuant to section 112 of the *Police Act* concerning this matter. The Discipline Authority found that the Misconduct Allegation was not substantiated.
- (11) In an order made June 19, 2023, the Commissioner determined that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
- (12) Specifically, the Commissioner expressed the view that the Discipline Authority was incorrect in finding that the use of force by the Member during the arrest of the Complainant appeared to be justified in all of the circumstances thereby negating any conclusion of misconduct.

- (13) The Commissioner made the decision to refer the issue of the misconduct allegation involving the Member for review in accordance with section 117 of the *Police Act*. A decision to refer the file for review by a retired judge under section 117 is an exception to the normal prohibition of further review specifically set out in section 112(5) of the *Police Act*.
- (14) On July 20, 2023 a decision was rendered under section 117(7) of the *Police Act* confirming that the Misconduct Allegation appeared to be substantiated. A Discipline Proceeding was ordered to be conducted November 2 and 3, 2023 in Nelson BC.
- (15) Subsequent to the section 117 decision, Counsel made an application to call the Complainant as a witness. The application was approved. As a result of that approval, the Discipline Representative was appointed and efforts were made to secure the Complainant as a witness at the scheduled hearing.

IV Misconduct and the Police Act

- (16) Section 77 of the *Police Act* sets out the definition of “misconduct” relevant to the allegation concerning the Member. Specifically, subsection 77 provides, in part, as follows:

- 77** (1) *In this Part, "misconduct" means*
- (a) conduct that constitutes a public trust offence described in subsection (2), or*
 - (b) conduct that constitutes*
 - (i) an offence under section 86 [offence to harass, coerce or intimidate anyone questioning or reporting delay, obstruct or interfere with investigating officer], or*
 - (ii) a disciplinary breach of public trust described in subsection (3) of this section.*
- (2) A public trust offence is an offence under an enactment of Canada, or of any province or territory in Canada, a conviction in respect of which does, or would likely*
- (a) render a member unfit to perform her or his duties as a member, or*
 - (b) discredit the reputation of the municipal police department with which the member is employed.*
- (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:*
- (a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,*
 - (i) intentionally or recklessly making an arrest without good and sufficient cause,*

*(ii) in the performance, or purported performance, of
duties, intentionally or recklessly
(A) using unnecessary force on any person,*

(17) An important overall limitation to the definitions of misconduct in section 77 of the *Police Act* is found in subsection 77(4) as follows:

77(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

(18) These proceedings are not an adjudication of claims or defences raised in other matters, or an appeal of other decisions under the *Police Act*. Rather, this decision reflects an examination of all of the evidence submitted in these proceedings related to the allegations of misconduct defined by subsection 77 of the *Police Act*, as qualified by subsection 77(4).

(19) Unlike the section 117 decision process, the test in a discipline proceeding is proof of the alleged misconduct based on clear and cogent evidence, not simply the appearance of evidence that might substantiate possible misconduct.

V Governing Legal Principles

(20) The authorities provided by Counsel augment a number of other authorities widely known in consideration of *Police Act* misconduct allegations. Notable are the decisions in *Lowe v Diebolt*, *Scott v OPCC* and *Lobel & Hoang*.

(21) I have reviewed all of the authorities submitted and summarized some of the materials below in my analysis.

(22) All authorities are set out in the FIR, or submissions, and have each been marked as exhibits in these proceedings.

(23) In summary, the authorities confirm that as Discipline Authority, my assessment of a member's arrest and use of force actions, must:

- (a) Consider whether or not the Member had subjectively determined that the use of force, by striking the Complainant with his service pistol during an arrest attempt was a necessary use of force;
- (b) Determine whether or not the Member's beliefs were objectively reasonable taking into consideration the Member's training, experience and the circumstances at hand viewed through the perspective of a reasonable officer of similar experience;
- (c) Take account the exigencies and immediacy of the moment facing the member before action was taken;

- (d) Consider the fact that members are often required to make decisions quickly in the course of an evolving incident, without the detached reflection that is available to those looking back on an incident;
- (e) Not evaluate the actions of a member with the benefit of hindsight, but rather through the perspective that might reasonably be taken by an officer with equivalent training and experience facing similar circumstances, in a practical, non-technical common sense manner;
- (f) Consider that at law, there is no requirement that a member perfectly calibrate their use of force to a perceived threat; and
- (g) Consider whether or not in taking the action in question, there was a “serious blameworthy” aspect to the conduct in question in that the Member either acted knowing that there was no legal authority to do so, or reckless as to whether or not such authority existed.

VI Records submitted for review

- (24) The following records were entered as exhibits in this proceeding:
 - (a) The FIR, dated May 10, 2023, comprising 62 pages of narrative, plus related attachments. The report details the evidence of relevant parties concerning the conduct of several officers on the date in question. The FIR also provides background on law considered relevant by the Investigator, the views of a use of force expert, as well as use of force policies and procedures;
 - (b) A flash drive containing the FIR records;
 - (c) Medical records of the Complainant; and
 - (d) The submissions of both Counsel, including several relevant authorities, which have been marked as Discipline Representative Submissions and Member’s Submissions.
- (25) These materials, and the testimony of the witnesses, collectively comprise the record with respect to these proceedings (the “Record”).

VII Position of Counsel for the Member

- (26) The position of Counsel for the Member was set out in considerable detail in written submissions filed as an exhibit marked Member’s Submissions in this proceeding.
- (27) With respect to the facts surrounding the Misconduct Allegation, the submission of Counsel for the Member can be summarized as follows:
 - (a) The evidence at the Discipline Proceeding was pivotal in addressing the areas of uncertainty raised in the section 117 Decision;

- (b) Specifically, Counsel acknowledges that the Member used force in his attempt to complete the arrest of the Complainant;
- (c) Counsel submits, however, that in doing so, the Member had good and sufficient cause to use such force;
- (d) Furthermore, Counsel argues that the force used by the Member was, in all of the circumstances, reasonable and proportionate, particularly when considered in the context of a reasonable officer of equivalent training and experience;
- (e) It is Counsel's position that considered as a whole, the evidence does not support the conclusion that the Member's actions rose to the level of serious blameworthy conduct;
- (f) Counsel maintains that there was no mistake of legal authority or lack of training on the part of the Member; and
- (g) Finally, Counsel submits that the unfortunate injuries sustained by the Complainant were largely the result of his own irrational, volatile and aggressive actions, both at roadside and in the police vehicle after the arrest, rather than actions of the Member.

(28) Counsel submits that it is trite law that the onus of proof under the *Police Act* is proof on a balance of probabilities, based on clear, convincing and cogent evidence: *F.H. v. McDougall*, [2008] 3 S.C.R. 41.

(29) Counsel further submits that police officers do not have to be perfect in the application of force, such as might arise during an arrest, rather they must only be reasonable: *R. v. Nasogaluak*, 2010 SCC 6; *Anderson v. Smith*, 2000 BCSC 1194.

(30) In this regard, Counsel submits that the Member's use of force in arresting the Complainant was completely justified under policy and law to ensure officer safety.

(31) Counsel further submits that:

"..Section 25 of the Criminal Code authorizes to use force in carrying out lawful duties, but only as much force as is necessary to carry out said duties Officers are not required to use only the absolute least amount of force that will achieve a desired objective, nor is the use of force that an officer employs to be assessed to a nicety.."

(32) Counsel further notes that an Adjudicator:

"..must not assess conduct with the benefit of hindsight and must not substitute his or her judgment as to what could or should have been done in the circumstances for that of the officer. The question is whether any belief the officer had with respect to the need for force and the amount of force required was reasonable and is not to be answered by reference to what others might have done in similar circumstances" (PH 2010-3, Part 1, p. 13, Pitfield, Ret.J.).."

- (33) With respect to the perspective to adopt in assessing the objective reasonableness of the Member's subjective beliefs, Counsel submits that it is that of a police officer with similar training, experience, knowledge, and skills that is key. It is submitted that what is relevant is the perspective of a police officer who also has the same vantage point, with the benefit of the same observations and information as that of the Member at the time.
- (34) It is submitted by Counsel that the analysis of conclusions that might have been reached by a "reasonable police officer" must look at the totality of the circumstances, rather than looking at each piece of information or evidence separately, or one at a time.
- (35) Counsel submits in order to substantiate an allegation of abuse of authority, it is not sufficient to establish that the officer's conduct was unlawful (objectively unreasonable). There must also be evidence that the police officer acted knowing they lacked the lawful authority, or was reckless as to whether they had the authority (i.e., 'just didn't care whether they did'). Recklessness in this context means that the officer did not even turn his mind to whether he had grounds in circumstances where the officer knew he should turn his mind to that question.
- (36) On the specifics of this case, Counsel submits that the Member had both the duty and lawful grounds to arrest the Complainant as a result of overhearing a credible possible serious threat directed towards Cst. ■
- (37) Furthermore, it is submitted that the Member subjectively believed that he was authorized to use force to arrest the Complainant and that such actions was objectively correct based on the Member's training and the National Use of Force Framework.
- (38) It is submitted that a reasonable officer with experience and training equivalent to that of the Member would have assessed the threat made by the Complainant as significant, warranting the possible use of lethal force, such as a firearm.
- (39) As such, Counsel submits that there was good and sufficient cause not only to move to arrest the Complainant, but also good and sufficient cause to draw the Member's service pistol and, if necessary, to use the same to complete the safe arrest of the Complainant.
- (40) Counsel submits that the force option or tactic the Member chose – the brachial stun - was an advanced tactic meant for close quarter battle. It is noted that the Member testified about the "precarious" situation he was in once he was next to the Complainant with his firearm drawn. It is submitted that the Member honestly believed that he had very limited options, particularly as he assessed that the Complainant was assaultive both by lunging for the car door, and then grabbing the Member's chest and neck, knocking his sunglasses off and cutting his face.

- (41) Counsel further submits that the fact that the brachial stun tactic is not routinely used does not render it unreasonable or disproportionate. It is submitted that the fact that police use of force resulted in injury to the Complainant does not mean that it was unreasonable or disproportionate as any use of force can cause injury. Counsel argues that such is the unfortunate reality of dealing with assaultive subjects.
- (42) Counsel argues that the Member was not required in law (or pursuant to training) to use the least amount of force required, nor to execute it perfectly (Nasogaluak, at para. 35).
- (43) It is submitted that the fact that the Investigator, who is a similarly situated police officer, would have made a different choice as to the precise tactic to use does not mean that the Member's choice was outside the range of reasonable force options and therefore disproportionate. It is argued that the law allows for a range of force options in situations where officer presence and communication alone cannot safely or reasonably be used, and this was regrettably one of those.
- (44) Finally, Counsel argues that there is no evidence of misconduct on the part of the Member with respect to his use of force in arresting the Complainant, including the strikes made with his service pistol, nor evidence of any reckless misconduct that can be characterized as serious blameworthy conduct.
- (45) As such, Counsel submits that the allegation has not been substantiated on the evidence before this proceeding and seeks dismissal of the allegation of misconduct.

VIII Submissions of the Discipline Representative

- (46) The Discipline Representative submits that the evidence substantiates the misconduct allegation of abuse of authority by the unnecessary use of force against the Member.
- (47) On the issue of the Member's authority to use force, the Discipline Representative submitted that the *Criminal Code*, RSC 1985 c, C-46 provides at section 25:

25(1) Everyone is required or authorized by law to do anything in the administration or enforcement of the law

(b) as a peace officer or public officer,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or

grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

(48) The Discipline Representative further submits that the decision of *Akintoye v. White*, 2017 BCSC 1094 ("*Akintoye*") considered section 25 of the *Criminal Code* and is helpful in analyzing the Member's actions in this matter:

97. *Section 25(1) is not a source of extra police powers. Instead it operates to justify the use of force when a police officer's conduct is permitted pursuant to a separate statutory or common law power.*

98. *The defendants accept that under s. 25, they bear the onus of proving on a balance of probabilities, three requirements described in Chartier v. Graves, [2001] O.J. No. 634 at para. 54 (S.C.), as follows:*

1. *the officer's conduct was required or authorized by law in administering or enforcing the law;*
2. *he or she acted on reasonable grounds in using force; and*
3. *he or she did not use unnecessary force.*

99. *The third requirement focuses on the level or degree of force used.*

100. *In R. v. Nasogaluak, 2010 SCC 6, the Supreme Court of Canada specified the degree of "allowable" force is constrained by the principles of proportionality, necessity and reasonableness, cautioning: "course must guard against the illegitimate use of power by the police against members of our society, given its grave consequences" (at para. 32).*

101. *A subjective-objective or modified objective test is applied to assess the reasonableness of a police officer's belief that the force used was necessary; he or she must subjectively believe the force used was necessary and that belief must be objectively reasonable in all the circumstances.*

102. *Recognizing police officers often engage in dangerous and demanding work that requires them to react quickly, they are not expected to measure the level of force used "with exactitude". Put another way, they are not required to use the least amount of force necessary to achieve a valid law enforcement objective. Although entitled to be wrong in judging the degree of force required, an officer must act reasonably (Crompton v. Walton, 2005 ABCA 81 at para.22). The common law accepts that a range of use of force responses may be reasonable in a given set of circumstances (Bencsetler v. Vancouver (City), 2015 BCSC 1422 at para. 153). The reasonableness, proportionality and necessity of the police conduct are assessed in light of those circumstances, not based on hindsight.*

(49) The Discipline Representative further submits that It is accepted that when determining both the reasonable grounds on which an officer is acting and the use of as much force as is necessary, the decision maker must consider the context and the dynamic and evolving situation the officer finds themselves in. The standard for an officer's decisions in the heat of the moment is not perfection (*R v. Nasogaluak*, 2010 SCC 6 ("*Nasogaluak*") at para. 35.)

(50) However, counsel notes that the Supreme Court of Canada also confirmed in *Nasogaluauk* the following principle which is applicable to this matter:

32. ... But police officers do not have an unlimited power to inflict harm on a person in the course of their duties. *While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against member, given its grave consequences.*

34. *Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect himself or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis (Chartier v. Greaves, [2001] O.J No. 634 (QL) (S.C.J.), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonable have been prevented in a less violent manner.*

(51) When considering what constitutes intentional or reckless conduct by a police officer under section 77(3)(a)(ii) of the *Police Act*, the Discipline Representative submits that guidance is provided by Mr. Justice Affleck in the *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970 decision:

36 ..."*Abuse of authority*" is defined for the purpose of the complaint against the petitioner as the intentional or reckless arrest of the complainant without good and sufficient cause. I do not reads the phrase "without limitation", as the retired judge apparently did, to mean that intention or recklessness can be ignored when considering the petitioner's conduct. In my view, the section should be read to

apply to conduct which has a serious blameworthy element and not simply a mistake of legal authority alone.

(52) Specifically, it is submitted that:

- (a) It is submitted that the use of force was not necessary in the proper performance of his police work pursuant to section 77(4) of the *Police Act* and that the Member used force that was intended to cause grievous bodily harm without the correlating need to do so in contravention of section 25 of the *Criminal Code*;
- (b) The Member's response was disproportionate to the threat presented by the Complainant. It bears repeating that this series of events commenced as a result of a traffic stop. The Complainant was upset but had been clear that he had PTSD and had been complying, albeit angrily, with Cst. ■ requests and directions. The Member mistakenly misunderstood a comment from the Complainant, through a car window at some distance, and immediately escalated the situation in an objectively unreasonable manner;
- (c) The Member's actions were not merely an imperfect response to a dynamic and evolving situation as contemplated in *Nasogaluak*, instead it was solely the Member's actions that created the entire scenario which led to significant force being used against the Complainant and ultimately injuring him;
- (d) While there is contradictory evidence as to what the Complainant was saying in his car and his motivations for searching his vehicle, and it must be emphasized that there was never any knife available to the Complainant and that he denies searching for one or threatening Cst. ■ it is not denied that the Member had an honestly-held belief that there was the potential for danger in the *initial moments* leading to the Member's confrontation with the Complainant; and
- (e) However, it is the actions that the Member took in response to his understanding of the scene that are in contravention of the *Police Act* and amount to misconduct.

(53) When assessing the Member's actions in repeatedly striking the Complainant, counsel submits that the Member himself did not even provide evidence that he subjectively believed that the type of force he was using was necessary – he admitted it was not working and thus was unnecessary to keep striking the Complainant. When applying the subjective-objective test as articulated in *Akintoye*, the Discipline Representative submits that the Member's actions fail on both a subjective and objective basis.

(54) The Discipline Representative further submits that while it is acknowledged that the Member was not required to use the least amount of force possible, it is submitted that the Member's actions and unnecessary use of serious force is the illegitimate use of power that the court warned of in *Nasogaluak*. Counsel argues that the Member's actions were not within a range of reasonable options (*Akintoye*).

(55) The Discipline Representative further submits that the Member not only intentionally used unnecessary force against the Complainant, he created a situation that could have been much worse for the public by using his pistol in such a manner.

(56) Further it is submitted that the Member struck numerous blows on the Complainant's head and neck for the Member to move to a different technique to subdue the Complainant, and even then the strikes subsided largely due to Cst. [REDACTED] successful interventions in bringing the Complainant to the ground. It is further submitted that it is unreasonable to suggest that the Member was unaware that he could be inflicting grievous bodily harm upon the Complainant by taking these actions.

(57) The Discipline Representative further notes that upon being brought to the ground, it was the Complainant's evidence that he suffered a further series of blows and impact to his arm that resulted in a fracture. It is argued that this was a further unnecessary use of force as the Complainant was restrained and unarmed.

(58) Even if there had been an initial imminent threat to either officer or a member of the public, which is denied, counsel submits that:

- (a) The Member took actions against a Complainant who was elderly, unarmed and experiencing a medical crisis, that carried the risk of serious and life-altering injuries;
- (b) The Complainant's evidence is that the injuries have indeed been life-altering. There is medical evidence that indicates that the Complainant suffered [REDACTED] in the incident; and
- (c) The Complainant's facial wounds immediately following the altercation are evident on the dash camera footage.

(59) The Discipline Representative further submits that the Complainant has been consistent, even in his heightened state after the altercation when he was making threats against himself, that he did not threaten to hurt an officer. It is noted that:

- (a) the Dash Camera Footage – Camera 2, Video 1 shows the Complainant in a very agitated state, suffering from another [REDACTED];
- (b) The Complainant does not recall this time period clearly. His evidence was that he had just taken a beating to his head and was suffering a [REDACTED] (he was [REDACTED]); and

- (c) It is evident from his actions in that video that the Complainant was not primarily concerned with looking good on video.

(60) In contrast, it is submitted by the Discipline Representative that:

- (a) It was admitted by the Member that he specifically accused the Complainant of making threats to ensure that it was captured on the dash camera footage;
- (b) The Member admitted that this was an attempt to justify his use of force against the Complainant considering the appropriateness of his actions and trying to justify them; and
- (c) This further establishes the blameworthy conduct of the Member as articulated in the *Scott* decision.

(61) Finally, it is submitted that it is evident that the Complainant ultimately sustained grievous bodily harm as defined in *R v. Guimond*. The Complainant suffered numerous fractures, cuts and bruises as a result of the Member's physical actions upon him. There was a risk that impacting the Complainant's head and neck could have resulted in injuries more severe than were ultimately suffered.

(62) In summary, the Discipline Representative submits that misconduct has been clearly established and evidences serious blameworthy conduct.

IX Credibility

(63) I am satisfied that all witnesses in this proceeding provided evidence in an honest and trustworthy manner. I also find that all of the witnesses were genuinely trying to recall and report their observations and conclusions with respect to the events that took place on the day in question.

(64) However, the reliability of some of those recollections were affected by a variety of factors. Fortunately, the video recordings in evidence assisted in providing a clearer outline of events. I do note, however, that some aspects of the audio recording was not clear.

(65) Both Cst. ■ and the Member had aspects of their evidence where the recollection of events raised some reliability concerns.

(66) As an example, Cst. ■ testified that the license and registration documents requested of the Complainant were "thrown" out the subject vehicle's window at the Member. The video recordings do not substantiate that statement.

(67) In a further example, the Member reported in his police statement that he had confronted the Complainant as he exited his vehicle by giving loud verbal commands and that the Complainant was under arrest. Again, the video evidence does not substantiate that these statements took place until the Member and the Complainant were almost physically engaged with each other adjacent to the driver's side door.

(68) There are also key issues of reliability related to the recollections of the Complainant. It is clear that the Complainant suffers from a number of medical issues which were explained in the course of his oral testimony. The issues included [REDACTED] [REDACTED] [REDACTED] when stopped roadside. The Complainant was frank in acknowledging that he did not recall details of several aspects of the encounter with police as a result of his various conditions.

(69) On a number of points the Complainant understandably struggled to recall specific facts and the timing around his movements and the movements of others. Similar challenges arose in the Complainant's recollection of what was said and when.

(70) Considered in its totality, and against the video record, some of Cst. [REDACTED]'s recollections, those of the Member and those of the Complainant were all unreliable, in part, thereby affecting the overall credibility of each of these witnesses. Given the stress experienced by all concerned, such an issue is entirely understandable.

X Findings of Fact

(71) The evidentiary review has been greatly assisted by dash cam video on Cst. [REDACTED] police car. The video recordings display the majority of the encounter with the Complainant and his vehicle.

(72) Considering all of the evidence I find that:

- (a) At all material times the Member was acting as Sergeant with the Nelson Police Department. He had over twenty years of experience at the time the incident in question took place;
- (b) The Member was at all times acting in the normal course of his duties as a police officer;
- (c) On the day in question, the Member was the only uniformed officer officially on duty for the Nelson Police Department. The normal staffing complement would see the Member and two uniformed constables serving the community that day;

- (q) Cst. ■ advised the Member that the driver of the vehicle was indeed irate. Cst. ■ then moved to the driver's seat of her police car to begin work on the ticketing process;
- (r) The Member placed himself to the rear, and on the passenger side, of the Complainant's vehicle;
- (s) The Member maintained a watching presence behind the subject vehicle. During this time the Complainant continued to act angrily throwing material throughout the cabin of subject vehicle, talking to himself loudly, and in an animated manner;
- (t) The Member moved closer to the passenger side door briefly, then stepped back. A sunroof in the subject car was open allowing the member to hear some of what was being said by the Complainant as he muttered to himself.
- (u) It is unclear on the evidence in the FIR whether or not the passenger side window of the Complainant's vehicle was open partially or completely;
- (v) The Member overheard words emanating from the Complainant to the effect that: *"That's it. I think I have a knife. I need a knife. I'm gonna end this. I'm stabbing her"*;
- (w) While the Member was listening, he was also able to observe the Complainant rummaging through his glove box and front seat areas searching for something;
- (x) At no time did the Member see a knife, or indeed any other weapon, near the Complainant;
- (y) The Member believed that Cst. ■ then seated in her police car, was at risk of being attacked by the Complainant with a knife. He immediately moved his right hand to a holstered service pistol, removed the same and held the gun briefly in a low ready stance as he quickly moved towards the driver's side door around the back of the car;
- (z) As the Member moved along the driver's side of the subject vehicle, the Complainant began to quickly exit from the driver's door;
- (aa) In response, the Member turned, and then rushed around the back of the car with the pistol held almost waist level in his right hand;
- (bb) As the Member came around the driver's side of the subject vehicle, the pistol was raised and pointed directly at the Complainant. The Member had not created space between himself and the Complainant, but rather had chosen to close the distance to something less than an arm's distance;
- (cc) The Member had quickly closed the distance between himself and the Complainant within seconds to the point where the Member could easily reach the subject;
- (dd) The Complainant, at that point, had fully exited the vehicle and closed the driver's door;
- (ee) There was no knife or weapon of any kind in the Complainant's hands;
- (ff) The Member continued to hold his pistol raised in his right hand and pointed it towards the Complainant;
- (gg) No commands of any kind had been issued by the Member to this point;

Physical Interaction with the Complainant

- (hh) The Member next grabbed the Complainant with his left hand while still holding the gun in his right;
- (ii) At the same time, the Complainant quickly moved to open the rear driver's side door, ultimately holding onto the door frame with both hands as the Member grappled with Complainant for control;
- (jj) Contrary to assertions from the Member, the Complainant did not lunge at the Member;
- (kk) While holding onto the top of the passenger door, the Complainant did not enter the back seat area as a struggle began with the Member;
- (ll) As the Member struggled with the Complainant, the two found themselves wrestling on the outside of the rear passenger door. The Member continued to brandish his pistol in his right hand while attempting to control the Complainant with his left;
- (mm) The Member struck the Complainant twice in the upper neck region again issuing commands for the Complainant to submit to arrest, to stop resisting arrest and drop to the ground;
- (nn) The Complainant responded by shouting, and strongly and physically resisting any attempts to complete the arrest;
- (oo) During the struggle, the Member's right hand holding the pistol was pointed horizontally across the Complainant's chest;
- (pp) The Member briefly grabbed the Complainant's collar and struck him on the right side of his chest with his pistol;
- (qq) As this escalating confrontation was taking place, Cst. ■ left her police car and quickly ran to assist the Member;
- (rr) At this point the Complainant was clearly resistant to the efforts of the two officers to establish control continuing to struggle any attempt to complete an arrest;
- (ss) During this struggle, the Member moved his right hand and pistol aggressively hitting the Complainant on his right side under the arm attempting to gain control using a brachial stun technique;
- (tt) The Member believed that he could not re-holster his service weapon because of the struggle that was underway;
- (uu) Ultimately, the Member pushed the Complainant to the front of the driver's side rear door and forced the closure of the door;
- (vv) As this was taking place, neither officer was having success in controlling the Complainant;
- (ww) During the struggle, the Complainant had knocked off the Member's sunglasses and placed his hands on the Member's upper chest and around his neck;

XII Misconduct Allegation - Unnecessary use of force – The Law - S. 77(3)(a)(ii)A of the Police Act

(73) The Misconduct Allegation relates to the unnecessary use of force by the Member in repeatedly striking the Complainant with a service pistol immediately upon exiting his vehicle.

(74) The specific allegation is that the Member committed Abuse of Authority by oppressive conduct pursuant to section 77(3)(a)(ii)A of the Police Act by recklessly using unnecessary force on the Complainant through the repeated strikes on the Complainant without good and sufficient cause.

(a) Analysis

(75) There is no dispute that the Member was at all times engaged in the lawful execution of his duty. Furthermore, there is also no dispute that the arrest resulted in the use of significant force on the Complainant by the Member.

(76) In order to consider the use of force allegation of misconduct concerning the Member arising under section 77(3)(a)(ii) (A) of the *Police Act*, I have considered the following factors in the context of the findings of fact set out above:

- (a) Did the Member subjectively believe that the use of force on the Complainant by drawing his service pistol and assaulting the Complainant with the same in the execution of brachial stun techniques was necessary and part of his duty?*
- (b) Did the Member subjectively believe the use of force by striking the Complainant with his service pistol was not excessive?*
- (c) Objectively, were the Member's beliefs about the use of force reasonable?*
- (d) Were the actions of the Member in assaulting the Complainant with his service pistol undertaken intentionally or recklessly using unnecessary force? and*
- (e) Did the actions of the Member reflect serious blameworthy conduct?*

(a) *Did the Member subjectively believe that the use of force on the Complainant by drawing his service pistol and assaulting the Complainant with the same in the execution of brachial stun techniques was necessary and part of his duty?*

(77) The first issue is a subjective consideration of the Member's belief that the use of force on the Complainant by drawing and using his service pistol to assault the Complainant was necessary in all of the circumstances of this case.

(78) The evidence of the Member is that he subjectively believed that drawing his pistol and confronting the Complainant as he did was essential to safely complete an arrest. I am satisfied that the Member subjectively believed that these actions were essential based on a serious threat that he had heard spoken by the Complainant, and the Member's instinctive assessment that Cst. ■ was at serious risk as a result of those words.

(79) The use of the service weapon in striking the Complainant during the arrest process was also subjectively viewed by the Member as essential. The Member held that view as a result of the challenging situation he found himself in as he attempted to arrest the Complainant.

(80) I therefore find that the Member subjectively believed the use of force in directly confronting and striking the Complainant with the Member's service weapon in order to complete an arrest was necessary. This included drawing the Member's service pistol, brandishing the same and the subsequent use of the weapon as a tool in applying brachial stun strikes on the Complainant.

(b) *Did the Member subjectively believe the use of force by striking the Complainant with his service pistol was not excessive?*

(81) The next issue relates to a further analysis of the Member's subjective beliefs with respect to the amount and nature of force used to control the Complainant by drawing his service pistol and using it to repeatedly strike the Complainant.

(82) I find that after hearing what the Member considered to be threatening words directed towards Cst. ■ the Member subjectively believed that immediate action was needed to draw the Member's service pistol and arrest the Complainant.

(83) The Member's instinctive reaction was to respond to what he thought was a threat to use of knife to harm Cst. ■ The Member decided to move past presence and straight to a threat of lethal force.

(84) However, as noted above, there was no evidence of an actual knife in the possession of the Complainant. The Complainant was in his car and Cst. ■ was in hers.

(85) Subjectively, I find that the Member remained uncertain of the actual risk at hand. He was aware that the Complainant was reported to be suffering from PTSD and in a state of high agitation. He was also aware that the encounter with police had arisen from a relatively simple traffic stop.

(86) The move by the Member towards the driver's door with his pistol extended before him was undertaken with a subjective belief that a heightened risk remained. However, it is my finding that as the Member confronted the Complainant, then exiting his vehicle, it was clear that no knife was in evidence. I find that subjectively the Member was then re-assessing the risks presented by the Complainant.

(87) As the first contact was made with the Complainant, the Member subjectively believed he did not have time to holster his pistol and move to other use of force options. As a result the Member began almost immediately to struggle for control of the Complainant with a subjective belief that he needed to use his weapon hand, with the pistol, to subdue and arrest the Complainant.

(88) I find that the Member subjectively believed that as a result of fast moving events, he had no time to re-holster his weapon safely. Subjectively I find that the Member believed he needed to use the pistol, repeatedly, to apply brachial stuns, through strikes to the Complainant's head and upper body as, in effect, he had no choice but to use his right hand to complete the arrest of the Complainant and in that hand was the pistol.

(89) Having considered all of the foregoing, I have concluded that, subjectively, the Member believed, with minimal risk analysis, that the use of his service pistol to strike the Complainant to complete the arrest of an actively resistant subject was a reasonable use of force tool in all of the circumstances, and not an excessive use of force.

(c) Were the Member's beliefs about the use of force objectively reasonable?

(90) With respect to this issue, I must consider whether or not in all of the circumstances, the Member's beliefs were objectively reasonable. The question is whether or not the Member's use of force by striking the Complainant repeatedly with his service pistol was objectively necessary and reasonable, taking into consideration his training, experience and duty.

(91) Considering all of the circumstances, I cannot find that the Member seriously considered the actual risks posed by the Complainant as he sat in his car. Before the Member drew and pointed his gun at the Complainant, and subsequently as he used the gun to assault the Complainant, he was aware that:

- (a) Cst. ■ was out of view behind the Complainant's car. In fact, she was seated in her police vehicle as the physical altercation took place;
- (b) The Complainant was in a heightened state of agitation and claimed to be suffering from PTSD. The Member was uniquely qualified to deal with such a situation having completed his ■ on the subject of such issues in policing;
- (c) The Complainant was subject to arrest as a result of the threat uttered;

- (d) Special care may have been required to de-escalate the interaction with the Complainant that had taken place with Cst. ■
- (e) Although there had been utterances from the Complainant that could reasonably construed as a threat to use a knife on Cst. ■ there was in fact no knife in the possession of the Complainant;
- (f) At the time Cst. ■ was threatened, she was removed from the Complainant's presence with the Member interceding in her support. There was in fact a minimal risk to either officer;
- (g) Once contact had been made with the Complainant, commands had been issued by the Member in various words directing the Complainant to submit to immediate arrest and cease resisting that arrest process;
- (h) The Complainant actively and aggressively resisted arrest, immediately struggling physically with both the Member and later Cst. ■
- (i) The interaction was taking place in a residential neighbourhood with people on the adjacent sidewalks. In such circumstances, common sense dictates that any possible use of a gun, whether or not it was actually discharged, was extremely dangerous from a risk assessment perspective; and
- (j) Professional training advice set out in the FIR confirms that brachial stun attempts are fraught with difficulty and often ineffective.

(92) The reasonableness of the Member's beliefs about his use of force that must be measured against the common sense standard of behaviour from the perspective of a reasonable police officer with the same level of training and experience, confronted by similar circumstances.

(93) I have, of course, considered that *R. v. Asante-Mensah*, 2003 SCC 38, confirms at para. 73 that:

"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".

(94) As well, as noted earlier in this decision, it is clear that the law recognizes that officers are not required to measure the force they use with precision.

(95) I have also considered the training of the Member set out in the FIR and the provisions of the National Use of Force Framework. However, simply because such training and framework indicates that a use of force option may be applicable, it may not always be appropriate in the discharge of an officer's lawful duties.

(96) Officers are required to consider the facts and law before using force on a member of the public through the appropriate exercise of judgment. Clearly there will be circumstances where such decisions are made very quickly, as with possible violence or imminent risks to the officers or other persons.

(97) As noted above, however, there were uncertain exigent or emergency circumstances facing the Member as he first encountered the Complainant. The Complainant's vehicle had been securely stopped, he remained inside. The Member was aware that there were there was a serious verbal threat that appeared directed at Cst. ■. Furthermore, he knew that the Complainant was very upset, claiming to be suffering from PTSD.

(98) The Member explained his decision to draw his service pistol in the context of limited options. He did not believe that officer presence alone would provide the protection required. That, however, was not a conclusion that the investigator drew. Nor, I find, would a reasonable officer of similar training and experience being aware of the circumstances noted above draw the same conclusion.

(99) Considering all of the evidence in the Record, and specifically the Member's training history, his policing experience and the National Use of Force Framework, his understanding of the significance of PTSD in policing situations and the need to avoid escalating a crisis, I find that it is common sense that a reasonable officer of similar training and experience, confronting the circumstances apparent to the Member would not respond to issues presented by the Complainant as he did.

(100) Considering all of the foregoing, I find that a common sense assessment of the anticipated response from a reasonable officer of similar experience and training to that of the Member, confronting similar circumstances and considering their duty at law, would conclude that the rapid confrontation of the Complainant, then in a high state of agitation, with both a uniform and pointed pistol was an unnecessary escalation of events.

(101) The subsequent multiple strikes to the Complainant's head in an effort to apply a brachial stun was similarly objectively an unreasonable use of force unjustified by policy, training and law.

(d) Were the actions of the Member in assaulting the Complainant with his service pistol undertaken intentionally or recklessly using unnecessary force?

(102) I am satisfied that the Member acted recklessly in drawing his service pistol and confronting the Complainant. I am satisfied that a reasonable officer with the Member's training and experience, particularly with respect to PTSD issues, would recognize that there was a limited imminent risk given the lack of an apparent knife, the location of the Complainant and Cst. ■. Furthermore, I find that such an officer would immediately identify the clear need for a de-escalation of the situation that had confronted Cst. ■ in part to address the apparent PTSD issues affecting the Complainant.

(103) I am not satisfied that the required justification for use of force decisions made by the Member, and in particular, his decision to draw his pistol and use it to assault the Complainant, was supported by the objective facts then in existence.

- (104) Drawing a service pistol in a residential environment to confront an agitated man seated in his car was objectively reckless. The Member himself noted that his training indicated just the sight of another police uniform might escalate matters and defeat efforts to attain control by officer presence. Yet notwithstanding that position, he not only confronted the Complainant, but also challenged him with a drawn pistol, clearly a significant escalation of matters with an uncertain outcome.
- (105) The use of the Member's service pistol to assault the Complainant was the inevitable result of a dangerous decision to draw the weapon in the first place followed by additional risk created by directly physically confronting the Complainant.
- (106) Considering all of the foregoing, I find that there is, in fact, clear, compelling and cogent evidence to support a finding that the Member acted recklessly in applying excessive and unnecessary force by striking the Complainant repeatedly on the head and upper body with the Member's service pistol to apply brachial stuns in order to complete the arrest and control of the Complainant.

(e) Serious Blameworthy Conduct

- (107) As noted above, the concept of "*serious blameworthy conduct*" implies deliberate or intentional action to act improperly or, alternatively, action that is reckless as to whether or not such action is improper or illegal.
- (108) Implicit in an assessment of such conduct is the exercise of judgment in decision making. As noted above, mere errors of judgment do not rise to misconduct evidencing serious blameworthy conduct even if officers act contrary to their legal authority.
- (109) Police officers are expected to use their training and experience to assess the situation they are facing and exercise judgment in taking appropriate action, often in challenging circumstances. Not all decisions are objectively correct, however, misconduct is not established by proving that an incorrect tactical decision has taken place.
- (110) The exercise of judgment by an officer requires due consideration of the facts and law relevant to the circumstances with limited time and in challenging circumstances. Notwithstanding these principles, it is not an appropriate exercise of judgment to ignore facts or information that may be relevant to decision making. This is particularly important where law or policy mandates consideration of such matters before acting to use of force against a member of the public.

- (111) Such is the case with the drawing a service pistol in circumstances where issues of the mental stability of a suspect are evident. The risks to all concerned were greatly raised by the actions of the Member. Opportunities for de-escalation were lost as a result of the Member's haste in responding to an apparent threat to a colleague by drawing and using his service pistol as a weapon.
- (112) However, it must also be acknowledged that the Member was part of a seriously under staffed police detachment in Nelson that day. On the day in question, the Member was the only Nelson PD officer on duty. Normally he would have been supported by two constables. The Member was called out urgently to support Cst. ■ who had been seconded to the local integrated road safety unit. Needless to say, the stress levels for both officers concerned were very high.
- (113) It is also important to note that the Member believed in good faith that he was there to defend and protect Cst. ■ given the apparent anger and combative attitude demonstrated by the Complainant roadside. In the circumstances, the Member took action to support Cst. ■ albeit at great cost to the Complainant, acting in the genuine belief that a threat of lethal force was required.
- (114) In the circumstances of this case, I find that some of the actions of the Member were reckless. However, I am satisfied that the Member's decision to use his service pistol to strike the Complainant was not taken in bad faith, but rather the result of an unfortunate error in judgment.
- (115) The Member had found himself in a situation where he was dealing with a defiant and confrontational subject at a time he held a pistol in his hand. I find that the Member genuinely believed, as a result of his prior training and experience, that having drawn his pistol in response to an anticipated threat, he did not have time to re-holster his weapon as he confronted the Complainant. The Member had found that as he moved behind the subject vehicle he was almost immediately in a physical struggle with the Complainant who was ignoring the implicit threat of lethal force and the Member's directions to submit to an arrest.
- (116) The use of the Member's service pistol to strike the Complainant was the unfortunate result of the Member's decision to draw the weapon in the first place. I am satisfied, however, that the Member felt he had no choice but to use the body of the gun to apply brachial stun strikes in an attempt to gain control over the Complainant and complete the arrest. The alternative would have seen the Member struggling to complete the arrest with only his left hand.
- (117) In considering serious blameworthy conduct, I am mindful of the fact that the Member made the decision to pull and display his service pistol quickly and was left with no alternative to holster the same as he came into contact with the Complainant. The

Member was, in effect, hampered in his use of force options because he had made the wrong first choice.

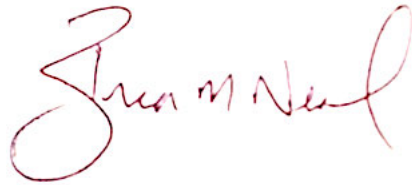
- (118) I am also mindful of the genuine concern expressed by the Member for the safety of Cst. ■ It is clear that the Member was seriously concerned with the apparent threat that he had heard from the Complainant in the context of a combative traffic stop, and made an unwise decision to escalate matters to possible lethal force.
- (119) Considering all of the circumstances, I find that the assault of the Complainant was indeed serious, resulting in significant injuries both physical and mental.
- (120) However, I have found the Member simply made an error of judgment in moving too quickly to brandish his service pistol leading almost immediately to the inevitable use of that pistol in a failed attempt to apply brachial stuns to achieve the arrest of the physically resistant Complainant.
- (121) As noted above, the law is clear that police officers do not have to be perfect in the application of force, they must only be reasonable: *R. v. Nasogaluak*, supra; *Anderson v. Smith*, supra.
- (122) Further, as noted in *R. v. Asante-Mensah*, supra, “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”. Here the Member was under a duty to arrest the Complainant in relation to the threat overheard and without doubt, that arrest proved to be a difficult process in exigent circumstances.
- (123) Although I have found that a officer of equivalent training and experience would not draw a service pistol if confronted with the circumstances surrounding the arrest of the Complainant, the Member was left with no reasonable and safe way of re-holstering his pistol once the struggle for arrest began. In those circumstances, unfortunately, the Member was forced to continue to hold the weapon as he attempted to gain control of the Complainant by making repeated brachial stun strikes to the Complainant’s head and upper body.
- (124) Considering all of the foregoing, including, in particular, the Member’s testimony at the Discipline Proceeding, I find that while the Member’s actions resulted in significant and serious injuries to the Complainant, those actions are properly characterized as an error in judgment. This was a decision process taken in the good faith pursuit of protecting Cst. ■ and securing the arrest of the Complainant. The Member did not evidence any intent to commit misconduct or act contrary to law. As the law confirms, officers who make errors of judgment in performing their duties, are not guilty of misconduct.

- (125) I find that the Member acted improperly in drawing his pistol in assaulting the Complainant. His actions were reckless in drawing the pistol, but absent any intent to act contrary to law or policy. The decision to use the pistol to assault the Complainant in the context of an arrest was also reckless, however, given the circumstances at that time, not an intentional act of misconduct nor negligent. Rather, I find that the Member was giving priority to his training and experience in making the difficult decisions required in a challenging situation acting to protect a colleague and complete a difficult arrest.
- (126) Taking into consideration all of the evidence of the Member's actions, the circumstances roadside and the detailed explanations provided in the Discipline Proceeding by the various witnesses, including the Complainant, Cst. ■ and the Member, I find that the Member simply made a mistake in drawing his service pistol, resulting in a chain of events that led to the assault of the Complainant with that pistol.
- (127) Those actions were collectively errors in judgment made in good faith during an attempt to complete a lawful arrest that I find did not rise to the level of serious blameworthy misconduct.

(f) Conclusion – Misconduct Allegation

- (128) As a result of the foregoing analysis, I have determined that the Misconduct Allegation has not been substantiated with respect to the Member. It is therefore dismissed.
- (129) Although I have found that the Member has not committed an act of misconduct under the *Police Act*, it is my recommendation, not order, that further training in de-escalation techniques and crisis management be completed by the Member to enhance his skills and professionalism.
- (130) As well, if there are training opportunities to specifically deal with the best policing techniques for dealing with vulnerable members of the public, such as the Complainant, the Member's overall value as a senior officer in the Nelson Police Department will be significantly enhanced.

(131) Finally, if there is an appropriate opportunity for reconciliation involving the Complainant and the Nelson Police Department, I would commend pursuit of such an objective to all concerned. These unfortunate events have had a profound impact on the Complainant and the Member. Concerted efforts to address those matters may well have lasting benefits for all concerned.

A handwritten signature in red ink that reads "Brian M. Neal". The signature is written in a cursive style with a large initial "B".

Brian M. Neal, K.C.(rt)
Discipline Authority
December 22, 2023
Victoria, B.C.
