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2020 CAD 02



ROYAL CANADIAN MOUNTED POLICE

in the matter of

a conduct hearing pursuant to the

Royal Canadian Mounted Police Act, RSC, 1985, c R-10

Between:

Commanding Officer, "K" Division

Conduct Authority

and

Constable Simon Bigras, Regimental Number 49566

Subject Member

Conduct Board Decision

Christine Sakiris

February 28, 2020

Staff Sergeant Jonathan Hart and Mr. Jordan Levis-Leduc, Conduct Authority Representatives
Sergeant Joel Welch, Subject Member Representative

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SUMMARY

Constable Bigras faced one Allegation under section 5.1 of the RCMP Code of Conduct. He was alleged to have used more force than was reasonably necessary in effecting the arrest of Mr. M.

The arrest was carried out, in collaboration with members of the Edmonton Police Service, after Mr. M. sought to evade members of both forces for over an hour. Mr. M. suffered injuries in the course of his arrest.

Constable Bigras initially faced a second Allegation under section 8.1 of the RCMP Code of Conduct. This Allegation was withdrawn by the Conduct Authority Representatives before the hearing took place.

Allegation 1 was found to be established on a balance of probabilities. While the Conduct Board found that Constable Bigras had used more force than was reasonably necessary in effecting the arrest of Mr. M., it did not find that Mr. M.'s injuries could be attributed to Constable Bigras' actions. The Conduct Board imposed a financial penalty of 12 days' pay, to be deducted from Constable Bigras' pay.

INTRODUCTION

[1] On July 20, 2018, the Commanding Officer and Conduct Authority for “K” Division (the Conduct Authority) signed a *Notice to the Designated Officer* requesting the initiation of a conduct hearing in relation to this matter. On July 30, 2018, I was appointed as the Conduct Board pursuant to subsection 43(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*].

[2] The *Notice of Conduct Hearing* (the Notice) contained two allegations and was served on Constable Bigras on January 30, 2019, together with the investigation package. The first allegation consisted of Constable Bigras using more force than was reasonably necessary in effecting the arrest of Mr. M., in contravention of section 5.1 of the RCMP Code of Conduct. The second allegation concerned Constable Bigras providing an incomplete or inaccurate account of his actions, in contravention of section 8.1 of the Code of Conduct.

[3] On March 15, 2019, Constable Bigras provided his response to the Notice, pursuant to subsection 15(3) of the *Commissioner’s Standing Orders (Conduct)*, SOR/2014-291.

[4] As is required in this process, I reviewed a copy of the Notice, the Investigation Report and accompanying materials, Constable Bigras’ response as well as additional documentation admitted over the course of pre-hearing conferences in this matter. These include forward-looking infrared (FLIR) video footage from Edmonton Police Service (EPS) helicopter Air 1, as well as expert medical reports secured by both parties. All these materials shall be referred to collectively as the Record.

[5] The hearing in this matter was originally scheduled for the week of October 7, 2019. However, it was rescheduled due to exigent and unforeseeable circumstances. On October 16, 2019, I provided the parties with a *Determination of Established Facts*, which sets out my findings of fact based on my review of the Record. I note here that I relied on the *Determination of Established Facts* in rendering my findings and in determining the appropriate conduct measures. I considered the *Determination of Established Facts* in conjunction with the oral testimony that I heard over the course of the hearing.

[6] At the pre-hearing conference of October 29, 2019, I granted the Conduct Authority Representatives' request to withdraw Allegation 2.

[7] The hearing on Allegation 1 was held in Edmonton, Alberta, from December 16 to 18, 2019. The oral decision establishing Allegation 1 was delivered on December 17, 2019. The oral decision on conduct measures was delivered by videoconference on January 10, 2020. This written decision incorporates and expands upon those oral decisions.

ALLEGATION

[8] As previously noted, there is a single allegation before the Conduct Board and it reads as follows:

Allegation 1

On or about July 25th, 2017, at or near Strathcona County, in the province of Alberta, [Constable (Cst.)] Simon Bigras, while on duty, contravened section 5.1 of the *Code of Conduct of the Royal Canadian Mounted Police* against [Mr. M.].

Particulars of Allegation 1

1. At all material times, Constable Simon BIGRAS (Cst. Bigras) was a member of the Royal Canadian Mounted Police ("RCMP") and at the Strathcona County detachment, in the province of Alberta. His duty was police dog handler with the RCMP Police Dog Services.
2. On the evening of July 25th, 2017, with respect to file 2017-972404, RCMP members as well as Edmonton Police Service members were involved in a pursuit of a stolen vehicle ("the vehicle") driven by an individual later identified as [Mr. M.]. The vehicle was believed to contain firearms at the time it was stolen.
3. The efforts of responding police officers, including Cst. Bigras, led the vehicle to come to a complete stop in a private yard within Strathcona County.
4. [Mr. M.] opened the door of the vehicle, then exited the vehicle with his hands up above his head stating "I give up, I give up" or words to that effect. He then, of his own volition, laid down on his stomach and put both hands behind his back.
5. At this point in time, [Mr. M.] had no physical injuries.

6. Cst. Bigras, whose RCMP vehicle was immobilised at an angle within a few feet of the front of [Mr. M.'s] vehicle, exited his vehicle and proceeded towards [Mr. M.'s] location and made his way around the stopped vehicle.
7. In his "Police Dog Services – Case Report", Cst. Bigras wrote that he "saw the driver's door open and saw the driver get out", and added that he "got out of [his] vehicle and ran towards the open door of the truck and saw the driver had laid down on his stomach with both hands behind his back."
8. Cst. Bigras did not have any intervention options in his hand at this time and had left his police dog in his vehicle.
9. As Cst. Bigras approached [Mr. M.], a fellow police officer also approached [Mr. M.] while pointing his firearm at [Mr. M.] or in his general vicinity.
10. Cst. Bigras approached the right side of [Mr. M.] – who continued to lie face down on the ground with his hands behind his back and not resisting arrest – and kicked [Mr. M.'s] face and/or upper body.
11. The force used by Cst. Bigras made [Mr. M.'s] entire body shift to the left.
12. Given [Mr. M.'s] behaviour demonstrated at the time, the kick delivered by Cst. Bigras was unreasonable and unnecessary and inconsistent with RCMP policy and training standards.
13. Cst. Bigras then placed his right knee on [Mr. M.'s] back in order to handcuff him. [Mr. M.] was not resisting the handcuffing.
14. As the handcuffing ensued, several responding police officers made their way to [Mr. M.] and Cst. Bigras' location and attempted to aid Cst. Bigras with the handcuffing.
15. These efforts led some of the police officers to strike [Mr. M.].
16. During the arrest, bodily injuries could be seen on the face of [Mr. M.].
17. [Mr. M.] suffered multiple injuries due to the arrest. He was admitted to the Royal Alexandra Hospital in Edmonton for "major trauma blunt – high force".
18. Cst. Bigras' excessive use of force significantly contributed to [Mr. M.'s] bodily injuries.
19. Cst. Bigras' use of force was contrary to the general principles which were established by the RCMP to guide police officers when determining if any given situation requires the use of force, and if so, the appropriate level of force to be used to ensure proper enforcement and administration of the law.

20. Cst. Bigras' actions could amount to Assault and/or Assault Causing Bodily Harm.

[*Sic throughout*]

Applicable tests to make a determination on the Allegation

[9] The burden is on the Conduct Authority to establish the Allegation on a balance of probabilities. Practically speaking, this means that I must find that the Conduct Authority has established that it is more likely than not that Constable Bigras contravened section 5.1 of the RCMP Code of Conduct.

[10] The Supreme Court of Canada has observed that this burden can only be satisfied by sufficiently clear, convincing and cogent evidence.¹ There is no objective test of sufficiency. A trier of fact must make a decision on the totality of the evidence before him or her.² In the RCMP conduct hearing process, the totality of the evidence before me includes the Record, as well as the oral evidence and exhibits received during the hearing.

[11] It has long been recognized that “[p]olice use of force is subject to judicial oversight in matters before the courts.”³ In exercising that oversight, the courts have recognized that police officers are called upon to make quick decisions in difficult, dangerous and unpredictable circumstances.⁴ As such, “a certain amount of latitude”⁵ is afforded to police officers.

[12] The oversight function is exercised in criminal, civil and administrative matters, such as police discipline cases.⁶ In each context, the act subject to oversight is framed differently. In criminal matters, the officer may face a charge of assault or of unlawful confinement. In civil matters, the officer may have to answer to an allegation of negligence or to the tort of trespass to

¹ *F.H. v McDougall*, 2008 SCC 53.

² *Ibid.*

³ *Day v Woodburn*, 2019 ABQB 356 [*Day*], at paragraph 216, referencing *R. v Nasogaluak*, 2010 SCC 6 [*Nasogaluak*], at paragraph 32.

⁴ See *Day* at paragraph 221; *Crampton v Walton*, 2005 ABCA 81 [*Crampton*], at paragraph 44.

⁵ *R. v Asante-Mensah*, [2003] 2 SCR, at paragraph 73.

⁶ Paul Ceyssens, *Legal Aspects of Policing* (Scarborough, Ont: Carswell, c 1994 -) at pages 3-76 [*Legal Aspects of Policing*].

the person, in which assault and/or assault and battery are alleged. In the case of police discipline within the RCMP, the contravention is set out in the RCMP Code of Conduct.

[13] Section 5.1 of the RCMP Code of Conduct provides that “Members use only as much force as is reasonably necessary in the circumstances.”

[14] In order for Allegation 1 to be established, the Conduct Authority must prove each of the following on a balance of probabilities:

- a. the identity of the member;
- b. the member’s actions, which constitute the use of force; and
- c. that the use of force was not reasonably necessary in the circumstances.

[15] The first two elements are fairly self-explanatory. The third is more nuanced.

[16] The Member Representative referenced the Supreme Court of Canada decision in *Nasagaluak* as the source of the guiding principles in assessing whether a police officer’s use of force was reasonably necessary in the circumstances. The Supreme Court of Canada stated at paragraph 32 of that decision:

[...] 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.**

[Emphasis added]

[17] The question then is what factors are to be considered in assessing whether these principles have been met. As recognized in *Nasagaluak*, the constraints on a police officer’s use

of force, as previously set out, are “deeply rooted in our common law tradition and are enshrined” in section 25 of the *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*].⁷

[18] Where a police officer’s use of force is subject to review, section 25 of the *Criminal Code* describes the circumstances in which that use of force will be justified. Subsection 25(1) of the *Criminal Code* provides:

Protection of persons acting under authority

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

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

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.

[19] I agree with the Member Representative that conduct boards must guard against the wholesale importation of criminal law concepts into the RCMP conduct process. However, I find that there are three bases of support for the application of section 25 of the *Criminal Code* in the analysis of section 5.1 of the RCMP Code of Conduct.

[20] First, in interpreting the *RCMP Act* and its regulations, I must look to the policies that support its application. While not official policy documents, and thus non-binding, the *Annotated Code of Conduct* and the *Conduct Measures Guide* inform the interpretation of the *RCMP Act* and its regulations. These documents begin with commentary from the Commissioner and the Professional Responsibility Officer, which expressly state that these documents are intended to assist members in understanding how the RCMP Code of Conduct is to be applied. Both of these documents clearly reference the application of the principles set out in section 25 of the *Criminal Code*.

⁷ *Nasogaluak*, at paragraph 33.

[21] Second, section 25 of the *Criminal Code* has been found to apply in administrative police discipline cases.⁸ Therefore, it can be relied upon by a member who is facing an alleged contravention of section 5.1 of the RCMP Code of Conduct and is seeking to establish that their use of force was justified. I do not agree with the Conduct Authority Representatives that the application of section 25 of the *Criminal Code* necessarily requires me to make a finding as to whether an assault took place. As noted in paragraph 12, the contravention at the heart of the oversight function is framed differently in criminal, civil and administrative contexts. “Assault” is not a constituent element of the “offence” in all of these contexts. Section 5.1 of the RCMP Code of Conduct does not require a conduct board to find that an assault has taken place. The wording of section 5.1 of the RCMP Code of Conduct reflects the constraints set out in *Nasogaluak*. There is no basis for me to expand upon its scope.

[22] Finally, as noted in *Legal Aspects in Policing*, one must look to both criminal and civil jurisprudence for a “unified analysis of the principles that have evolved”⁹ in the oversight of police use of force. Therefore, the manner in which section 25 of the *Criminal Code* has been interpreted in the jurisprudence informs my analysis. It is important to note that many of the factors set out in the jurisprudence submitted by both parties are explicitly set out in the *Annotated Code of Conduct* and *Conduct Measures Guide*, and are reflected in the explanation of the Incident Management Intervention Model in the Incident Review Report. This is further evidence of the “unified analysis” referenced in *Legal Aspects in Policing*.

[23] I find that Constable Bigras may rely on section 25 of the *Criminal Code* in order to establish that his use of force was justified in the circumstances. In order to do so, Constable Bigras must establish each of the following elements, on a balance of probabilities:¹⁰

- a. At the time in question, he was required or authorized by law to perform an action in the administration or enforcement of the law. In other words, he was acting within the scope of his lawful duties.

⁸ *Supra*, note 5.

⁹ *Supra*, note 5.

¹⁰ *Crampton, Supra*, note 4

- b. He acted on reasonable grounds in performing that action.
- c. He did not use unnecessary force. This third element focusses on the amount of force used.

[24] My assessment must be based on the totality of the circumstances as they existed at the time the force was used.¹¹ Numerous factors are to be considered when assessing the amount of force used. These will be detailed in my analysis below.

EVIDENCE

[25] As previously noted, I issued a *Determination of Established Facts* on October 16, 2019, which I considered in conjunction with the oral evidence received at the hearing. The only witness to provide oral evidence at the hearing was Constable Bigras.

[26] In assessing Constable Bigras' evidence, I considered whether he was being truthful as well as whether his evidence was reliable (i.e., whether he was in a position to accurately perceive and recollect what he observed). In doing so, I considered the totality of the evidence. It was open to me to find Constable Bigras' evidence to be truthful or not, and reliable or not. However, it is not possible to find the evidence not to be truthful and reliable at the same time.¹²

[27] Constable Bigras spoke at length about his career within the RCMP as well as the impact his work has had on his personal health and family life. He provided a frank and forthright account of the events of July 25, 2017. He answered questions directly and he did not seek to minimize the facts presented to him. I found his account to be consistent, on the whole, with the evidence on Record. Therefore, I found his evidence to be credible. With the exception of two areas, which I will detail further on in the present decision, I found his evidence to be reliable.

¹¹ *Nasogaluak*, at paragraph 35.

¹² *R. v Morrissey*, 1995 CanLII 3498, 97 CCC (3d) 193 (CA), at page 205.

Events leading to the arrest

[28] The evidence establishes that, at all material times, Constable Bigras was a member of the RCMP and posted at Strathcona County Detachment. He was a Police Dog Handler with RCMP Police Dog Services.

[29] On the evening of July 25th, 2017, with respect to file 2017-972404, RCMP members as well as EPS members were involved in a pursuit of a stolen vehicle.

[30] The stolen vehicle was a red Dodge Ram pickup (the truck). The identity of the driver was not initially known to police. It was only after his arrest that the driver was identified as Mr. M.

[31] Mr. M. was observed driving erratically, at excessive rates of speed, and putting public safety at risk. The EPS was alerted to Mr. M.'s actions. The owner of the truck advised the EPS that there were firearms in the vehicle.

[32] EPS members, including members of the tactical and K9 units were involved. They followed Mr. M. at a distance, guided by EPS Air 1 helicopter. EPS Air 1 tracked Mr. M.'s speed, which at times reached 180 km/hr.

[33] The RCMP was engaged, at the request of the EPS, when Mr. M. drove out of the City of Edmonton and entered Strathcona County. Constable Bigras was dispatched to join EPS members in their efforts to stop the truck.

[34] The communications "patch" between the EPS and the RCMP was poor. EPS members and Constable Bigras also reported difficulty receiving and/or understanding EPS Air 1 communications.

[35] For more than one hour, Mr. M. drove recklessly on public roads and highways, through ditches and at least one fence, and onto private property in his efforts to evade police. There was

a risk of grievous bodily harm or death as a result of Mr. M.'s actions to evade police and the presence of firearms in the truck.¹³

[36] At approximately 10:54 p.m., after the successful deployment of a tire deflation device (spike belt), Mr. M. stopped the truck in a private yard within Strathcona County. As Mr. M. stopped the truck, an EPS vehicle stopped behind him, with the front passenger side of its bumper adjacent to the rear driver-side bumper of the truck. At the same time, Constable Bigras stopped his vehicle at an angle, at the front passenger side of the truck.

[37] The FLIR video confirms Mr. M.'s statement that, after he stopped the truck, he opened the driver door and stepped out of the truck. Mr. M. took a few steps to the left, away from the truck, with both of his arms up in the air. He then laid down on the ground, with his arms straight out to the side, and placed both of his hands on the small of his back.

[38] Mr. M. indicates in his statement that he uttered words to the effect of "I give up, I give up" as he exited the vehicle. However, none of the officers involved heard him do so.

[39] EPS Air 1 advised that Mr. M. was out of the truck, with his hands up, and that he had "proned himself out". All of the officers involved indicated that communications from EPS Air 1 would cut in and out, and/or were difficult to decipher.

[40] The arrest that followed took less than one minute.

[41] As Mr. M. started to lie down on his stomach, an EPS member exited his vehicle and approached Mr. M. with his service pistol drawn. At the same time, Constable Bigras exited his vehicle, without his intervention options in hand and without his police dog. He ran around the front of the truck towards Mr. M. Constable Bigras approached Mr. M.'s right side and kicked Mr. M. once to his head area. The impact caused Mr. M.'s body to shift to the left.

¹³ This conclusion is supported by the Incident Review Report (at pages 495 and 516 of the Investigation Report) and the statements of the EPS members who were interviewed.

[42] Constable Bigras then knelt on Mr. M.'s back with his right knee; grabbed Mr. M.'s left arm and pinned Mr. M.'s right arm with his left knee. Mr. M. was not resisting Constable Bigras' efforts to handcuff him at this time. Both Mr. M. and Constable Bigras are consistent on this point.

[43] As Constable Bigras was working to handcuff Mr. M., several EPS members approached and attempted to assist Constable Bigras with the handcuffing. In the course of these efforts, the EPS members delivered the following strikes to Mr. M.:

- a. at least two kicks to Mr. M.'s head area;
- b. several knee strikes to Mr. M.'s head area – the EPS officer who delivered the knee strikes reported that the first was hard enough to cause him to reduce the strength of subsequent strikes in order to avoid injuring himself;
- c. a hand strike to Mr. M.'s face;
- d. two closed fist strikes to Mr. M.'s lower body/torso;
- e. two kicks to Mr. M.'s rib area and one to his left bicep area;
- f. two fist strikes to Mr. M.'s waist or lower body.

[44] Mr. M. was significantly injured in the course of the arrest. His injuries were clearly visible. His right eye was swollen and he was bleeding from his face.

Injuries to Mr. M.

[45] Emergency Medical Services were called to attend to Mr. M.'s injuries. However, due to the delay in Emergency Medical Services arriving on scene, the EPS members ultimately transported Mr. M. to the hospital.

[46] Mr. M. was treated in the Emergency Department of the Royal Alexandra Hospital. He was diagnosed with the following injuries, which were found to be the result of “blunt force trauma”:

- a. multiple lacerations to the face;
- b. marked right prefrontal, preseptal and premaxillary soft tissue swelling;
- c. nasal bone fracture;
- d. right orbital floor fracture (also involving hemorrhage within the right maxillary sinus);
- e. right anterior lamina papyracea fracture;
- f. ecchymosis to the left side of the face; and
- g. possible “intracranial injury”.

[47] Mr. M. was released into the custody of the EPS five to six hours after being brought to the Emergency Department. He was referred to the orthopedic surgery clinic for possible surgical repair of the fractures.

[48] The evidence showed that Mr. M. had been driving in an erratic fashion, through ditches and at least one fence. He was not wearing his seat belt while driving. EPS members who arrived on scene after the arrest and accompanied Mr. M. to the hospital advised hospital staff that the injuries may have been the result of Mr. M.’s erratic driving. Mr. M. vehemently denied both at the hospital and in his subsequent statement to investigators¹⁴ that he had suffered any injuries prior to his arrest. Investigators did not find any evidence of blood on the steering wheel of the vehicle.

¹⁴ As this matter involved actions of a member of the RCMP, the investigation was conducted by the Alberta Serious Incident Response Team. Any reference to the term “investigator” is to be understood as an investigator with Alberta Serious Incident Response Team.

[49] I do not find the evidence of the EPS members who advised hospital staff that Mr. M. had been injured while driving through ditches and a fence to be reliable, as they arrived late on scene and were not aware of everything that had transpired. Mr. M.'s evidence on this point is corroborated by the findings of the investigators. Therefore, I find that Mr. M. did not have any injuries when he exited the truck.

Expert opinions

[50] The parties submitted four expert opinion reports in advance of the hearing, without objection. All were determined to be admissible.

[51] An expert's evidence may, as a result of their special knowledge or training, assist me in evaluating the evidence. However, I must ensure that the factual basis for their opinions is consistent with the evidence and assess the weight to be given to their evidence. I cannot simply adopt their conclusions as my own. Rather, their reports are one aspect of the evidence I will consider in my determination of the ultimate issue, namely whether the force used by Constable Bigras was reasonably necessary in the circumstances.

Incident Review

[52] The RCMP conducted an Incident Review into this matter. The Incident Review was completed by Staff Sergeant McCoshen, and the peer review opinion was provided by Inspector Fiedler. Their review involved an assessment of whether Constable Bigras had adhered to the Incident Management Intervention Model and supporting RCMP policies.

[53] I note that Staff Sergeant McCoshen and Inspector Fieldler were not provided with all of the statements of the EPS members. Having had the benefit of reviewing all of these statements, I did not find that the factual bases for Staff Sergeant McCoshen and Inspector Fieldler's opinions were compromised.

[54] Staff Sergeant McCoshen and Inspector Fieldler were of the view that the incident involved a risk of grievous bodily harm or death as result of Mr. M.'s actions. Both noted Mr.

M.'s erratic driving, his prolonged efforts to evade police and the presence of firearms in the truck in support of their assessment.

[55] Both were of the opinion that this risk was reduced when the spike belt was successfully deployed, forcing Mr. M. to bring the truck to a stop. They were also of the opinion that Mr. M.'s behaviour upon exiting the truck demonstrated a change in behaviour that, in applying the RCMP Incident Management Intervention Model, should have reduced Constable Bigras' assessment of the level of risk. They opined that Constable Bigras' actions, namely in approaching Mr. M. without his intervention equipment and potentially putting himself in the line of fire, did not adhere to sound tactical practices.

[56] Finally, both were of the opinion that the single kick delivered by Constable Bigras "was unreasonable, disproportionate and inconsistent with RCMP policies and training standards".¹⁵

Expert medical reports

[57] The evidence clearly established that Constable Bigras delivered a single kick to Mr. M.'s head area. While Constable Bigras acknowledged that the FLIR video clearly shows him doing so, he maintained that he had no recollection of kicking Mr. M. Both parties secured expert medical reports to examine Constable Bigras' state of mind at the time of the incident, as well as whether his memory of the events was impaired.

[58] The first psychological report was provided by Mr. Leslie Block, Constable Bigras' treating psychologist, and was submitted by the Member Representative. I will not go into the specific diagnoses referenced by Mr. Block in his report. I will note that while Mr. Block explains, in some detail, how those diagnoses could impact an individual in a stressful situation, I do not find that his report supports the conclusion that Constable Bigras met the diagnostic criteria for those diagnoses prior to July 25, 2017. While Constable Bigras may have been

¹⁵ Incident Review Report of Staff Sergeant McCoshen, at page 496 of the Investigation Report; and Peer Review Report of Inspector Fieldler, at page 516 of the Investigation Report.

experiencing some symptoms, Mr. Block notes that the events of that night appear to have been the primary trigger for his ultimate diagnoses.

[59] The Conduct Authority Representatives' counter-expert report reflects a multidisciplinary Independent Medical Examination and was written by Dr. Cynthia Baxter, Forensic Psychologist. Dr. Baxter's report does not support a finding that Constable Bigras met the diagnostic criteria for his ultimate diagnoses prior to July 25, 2017. Nor does she share Mr. Block's opinion with respect to Constable Bigras' current diagnoses. However, she did acknowledge that Constable Bigras' current testing may reflect the improvement in his symptoms since he began treatment with Mr. Block.

[60] Both medical experts note that Constable Bigras was involved in a high-stress incident and were of the opinion that he exhibited signs of a "fight or flight" response. However, neither report provided an exculpatory medical explanation for the alleged inappropriate use of force.

[61] Both experts were of the opinion that a police officer's memory may be affected by the stress of a critical incident. As noted by Dr. Baxter, "[o]fficers with high physiological exertion often recall significantly fewer correct details about an encounter, but once stress becomes excessive, there is a significant decline in memory performance."¹⁶

DECISION ON THE ALLEGATION

Identity and actions of Constable Bigras

[62] The evidence establishes that Constable Bigras delivered a kick to Mr. M.'s head area.

Was the use of force reasonably necessary in the circumstances?

[63] The circumstances which led to Mr. M.'s arrest have been previously set out in the present decision.

¹⁶ Independent Medical Examination Report provided by Dr. Cynthia Baxter, at page 19.

[64] My assessment of whether the kick delivered by Constable Bigras was reasonably necessary or not in the circumstances must be based on the totality of the circumstances as they existed at the time of the incident.¹⁷

[65] The Conduct Authority Representatives argued that while Mr. M.'s actions initially involved a high level of risk, that risk was significantly diminished once Mr. M. exited the vehicle. They argued that there was no reason for Constable Bigras to have approached Mr. M. as he did and that he committed tactical errors in so doing.

[66] The Member Representative argues that Constable Bigras' use of force was justified in the circumstances. He disputed the Conduct Authority Representatives' characterization of risk once Mr. M. exited the vehicle. In order to establish that his actions were justified in accordance with section 25 of the *Criminal Code*, all three elements of the test in *Crampton* must be satisfied.

Was Constable Bigras acting within the scope of his duties?

[67] The Conduct Authority Representatives did not contest that Constable Bigras was acting within the scope of his duties. He was dispatched to assist EPS members in their efforts to stop Mr. M.

Did Constable Bigras act on reasonable grounds in arresting Mr. M.?

[68] The Conduct Authority Representatives conceded that Constable Bigras had a reasonable basis on which to conclude the arrest was required. The more difficult question is whether the force applied by Constable Bigras in executing that arrest was reasonably necessary in the circumstances.

¹⁷ *Nasogaluak*, at paragraph 35.

Did Constable Bigras use unnecessary force while effecting Mr. M.'s arrest?

[69] As noted in *Nasogaluak*¹⁸ the question is not simply whether an officer honestly believed that the force was necessary and the amount of force used was a measured response to the situation. The officer's belief must also be objectively reasonable.

[70] The Member Representative argued that Constable Bigras made a judgment call, in a high-risk and dynamic situation. This position finds support in *DaCosta*,¹⁹ where the Ontario Superior Court of Justice stated: "A critical contextual circumstance for many arrests is the dynamic and fluid nature of an apprehension with the need for rapid, on-the-spot decisions by a police constable." However, this goes both ways. Officers are expected to be able to escalate and de-escalate their responses as a situation evolves.

[71] The jurisprudence points to a number of factors that are to be considered by a trier of fact in assessing whether the force used by a police officer was reasonable in the circumstances. These include, but are not limited to: the events preceding the arrest; the number and personal characteristics of the officer(s) involved as well as their abilities or restrictions; the suspect's physical stature, state of mind, actual or apparent intoxication and interaction with police; the presence and use of weapons; and the nature, duration and apparent motives for use of force employed by the police.²⁰

[72] Mr. M.'s actions leading up to his arrest constituted a risk of death or grievous bodily harm to the public and to the police officers involved. It was an intense, highly dynamic situation. All of the officers involved characterized the incident in this manner. It is also recognized as such in the Incident Review Report of Staff Sergeant McCoshen and the peer review opinion of Inspector Fieldler.

¹⁸ *Nasogaluak*, at paragraph 34. This paragraph is also cited in *R. v DaCosta*, 2015 ONSC 1586, 2015 CarwellOnt 3348 [*DaCosta*], at paragraph 102.

¹⁹ *Ibid*, *DaCosta*, at paragraph 99.

²⁰ A comprehensive list can be found in *Day* at pages 28 to 30.

[73] Constable Bigras was not acting alone. He was aware that there were multiple EPS vehicles following Mr. M.; that some of the officers were part of the tactical team; and that they were being assisted by EPS Air 1.

[74] EPS members were part of specialized units (tactical and K-9) and were physically fit. Constable Bigras is an experienced member with specialized training as a Police Dog Services member and is physically fit. While Constable Bigras and the EPS members were larger in stature than Mr. M., it should be noted that none knew Mr. M.'s identity or personal characteristics prior to his arrest.

[75] Constable Bigras' ability to coordinate his response with that of the EPS members was impeded by the poor quality of communications between the two police forces and from EPS Air 1. All of the officers involved noted this fact. Constable Bigras was not the only officer who reported not hearing EPS Air 1 advise that Mr. M. had exited the vehicle and proned himself out.

[76] In his oral evidence, Constable Bigras provided a sincere and open account of how the events of that evening affected him. He described his panic when he felt that he was trapped in his police vehicle as the truck approached him, before ultimately coming to a stop.

[77] Constable Bigras acknowledged that this panicked reaction led him to make tactical errors. He maintained that he has no recollection of having kicked Mr. M. While the expert medical reports recognize that he may have had a "fight or flight" response, which in turn may have contributed to his tactical errors, neither report established an exculpatory medical explanation for his use of force.

[78] An officer's fear is, without question, one of the factors that is to be considered when assessing the totality of the circumstances. However, it is not determinative. The officer's assessment of a threat must also be objectively reasonable.²¹

²¹ *Day*, at paragraphs 239 to 241.

[79] The following factors lead me to conclude that Constable Bigras' subjective belief that the force applied was a necessary and measured response to the situation was not objectively reasonable.

[80] Constable Bigras was aware that a spike belt had been successfully deployed. He acknowledged that he heard a communication to that effect from EPS Air 1. While Mr. M. initially continued in his attempts to evade police, Constable Bigras knew that his tires were damaged. Mr. M.'s ability to drive was impacted and he eventually came to a stop in an open area, where he exited the truck with his arms up.

[81] Constable Bigras acknowledged that Mr. M. was driving at a relatively slow speed as he came to a stop. The video from EPS Air 1 shows that the truck was moving slowly and did not appear to be close to colliding with Constable Bigras' vehicle. I find that Constable Bigras' perceptions in this moment were impacted by his emotional state. I do not find his recollection of the manner in which the vehicle approached him to be reliable.

[82] Constable Bigras was aware that there were multiple EPS members in the immediate area. He acknowledged that when he ran around the front of Mr. M.'s vehicle, he saw Mr. M. lying on the ground, with his hands behind his back. While Constable Bigras does not specifically recall it, the FLIR video shows that, at the same time, an EPS officer was approaching Mr. M. with his firearm drawn.

[83] Nonetheless, Constable Bigras continued over to Mr. M. and kicked him in the head area. He then placed his knee on his back, and began to handcuff him. Constable Bigras was consistent throughout his evidence that Mr. M. did not resist the handcuffing.

[84] While Constable Bigras insisted that he had no memory of delivering the kick, he suggested, in his oral evidence, a possible rationale for why he would have done so. He stated that, even though Mr. M. was lying down on the ground with his hands behind his back, there would have remained a risk that Mr. M. had a firearm concealed in his waistband. He suggested that he delivered the kick to distract Mr. M. before securing his hands. I do not find Constable

Bigras' evidence on this point to be reliable. As he has no recollection of the incident, the suggested rationale for the necessity of the kick is speculative.

[85] Finally, based on my review of the FLIR video, the statements of all of the officers involved, and the opinions offered by Staff Sergeant McCoshen and Inspector Fieldler, I agree that Constable Bigras did not adhere to RCMP policies and training standards. I note here that evidence of a breach in policy is a factor in determining whether Constable Bigras' use of force was reasonably necessary in the circumstances, but it is not determinative of the ultimate issue.²²

Did Constable Bigras' actions cause the injuries to Mr. M.?

[86] There is no question that Mr. M. suffered significant injuries in the course of his arrest. However, I do not find that all those injuries are attributable to Constable Bigras' actions. Mr. M. is quite clear in his statement that the first kick he received was to his head. He goes on to describe subsequent strikes to his face area. He distinguishes between the initial strike to his head and subsequent strikes to his face and head.

[87] The Conduct Authority Representatives conceded that Constable Bigras could not have caused all of Mr. M.'s injuries. However, they sought to establish that Constable Bigras caused a laceration to Mr. M.'s right cheek. While Constable Bigras did approach Mr. M. from the right, I do not agree with the Conduct Authority Representatives that the FLIR video demonstrates that Mr. M.'s head was pointed straight down towards the grass versus off to one side; and that Constable Bigras made direct contact with the right side of Mr. M.'s face. The FLIR video simply does not provide a sufficient level of clarity to support that finding on a balance of probabilities.

[88] The presence or absence of injuries is to be considered, but it is not determinative. As noted in *Smith v Van Sabben*, 2009 SKQB 496, at paragraph 95:²³ “[...] an injury does not

²² *Supra*, note 6 at pages 3-100.

²³ As cited in *Legal Aspects of Policing*, *supra* note 6 at page 3-101.

signify whether force was reasonable or unreasonable, just as the absence of injury does not signify that force was reasonable.”

Conclusion

[89] There is no question that Mr. M.’s actions, while seeking to evade police, created a risk of grievous bodily harm or death. Constable Bigras was acting within the scope of his duties. He had a reasonable basis on which to arrest Mr. M.

[90] I find that the totality of the evidence demonstrates that when Mr. M. exited the truck, he did so with his arms out and then laid down on the ground with his hands behind his back. Mr. M.’s behaviour had de-escalated and he was surrendering to police. However, Constable Bigras failed to de-escalate his own behaviour in effecting the arrest.

[91] Constable Bigras has not demonstrated that the kick was justified. I find that Constable Bigras’ evidence of the threat posed by Mr. M. as he brought the vehicle to a stop, as well as a possible rationale for the kick, was not reliable. Therefore, his subjective belief of the necessity of the kick is not objectively reasonable in the circumstances.

[92] I find that particulars 1 through 17 and 19 are established. Particulars 18 and 20 are not established. It is not necessary for me to find that all of the particulars are established in order to determine that the allegation is established, just that the essential element of the allegation, namely that the force used by Constable Bigras in the course of arresting Mr. M. was not reasonably necessary in the circumstances. Allegation 1 is established.

CONDUCT MEASURES

[93] In arriving at my decision on conduct measures, I am guided by section 36.2 of the *RCMP Act*, which sets out the purposes of the conduct process. These include, at paragraph (e):

(e) to provide, in relation to the contravention of any provision of the Code of Conduct, for the imposition of conduct measures that are proportionate to the nature and circumstances of the contravention and where appropriate, that are educative and remedial rather than punitive.

[94] Following my oral decision on the Allegation, the Conduct Authority Representatives advised that the Conduct Authority was no longer seeking dismissal in this matter. Therefore, I heard submissions from both parties as to the appropriate range of measures, short of dismissal. The Conduct Authority Representatives requested that I impose a financial penalty of 35 days. The Member Representative argued that a financial penalty of between 3 and 6 days was appropriate.

[95] As Mr. M. filed a complaint with the Civilian Review and Complaints Commission for the RCMP, I was required, in accordance with section 45.57 of the *RCMP Act*, to consider representations from Mr. M. with respect to the impact of the impugned conduct on him before imposing conduct measures. To that end, the Conduct Authority Representatives reached out to Mr. M.'s counsel to offer him the opportunity to make representations to this Conduct Board. On January 6, 2020, after confirming that certain documentation and the video from EPS Air 1 was before the Conduct Board, counsel for Mr. M. confirmed that Mr. M. will not be making any representations.

[96] I am mindful that, in applying the principle of proportionality, I must consider the public interest as well as parity of sanction. While I may be guided by prior conduct board decisions, I must make my determination on the facts of this case.

[97] In determining the appropriate conduct measures, I must first determine the appropriate range of measures. I must then consider the aggravating and mitigating factors. An appropriate sanction does not simply have to fall within the accepted range. It must reflect the aggravating and mitigating factors in this case.

Range of conduct measures

[98] I do not agree with the Conduct Authority Representatives that this matter falls within the aggravated range. This is not a case of multiple strikes to a restrained suspect as was the case in 2018 RCAD 11.

[99] I have received no evidence of premeditation or of retributive action. Rather, I have found that Constable Bigras' offending action was the result of a failure to de-escalate. This places his behaviour within the normal range of 2 to 20 days.

Aggravating factors

[100] After considering the parties' submissions, I have retained the following aggravating factors:

- a. Constable Bigras does have prior discipline. In 2014, he was found to have contravened section 2.1 of the RCMP Code of Conduct for discourteous behaviour towards a colleague. The Conduct Authority Representatives argue that this behaviour is evidence of a propensity towards anger or a lack of control over his emotions. However, Constable Bigras' performance reviews do not indicate a concern of this nature.
- b. Public awareness of the incident. I have not ascribed weight to the views expressed in the article submitted by the Conduct Authority Representatives. However, I agree with them that incidents of inappropriate use of force undermine the public's confidence in the RCMP.
- c. I agree with the Conduct Authority Representatives that inappropriate use of force by police officers undermines the judicial process, both with respect to a suspect's rights and the potential to compromise criminal prosecutions. In this case, it appears that the court found that Mr. M.'s rights under the *Canadian Charter of Rights and Freedoms*²⁴ had been breached and his sentence was reduced accordingly.

Mitigating factors

[101] I do not agree with the Member Representative that the facts of this case support a finding of provocation. However, after hearing the parties' submissions and considering the

²⁴ Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

extensive supporting documentation submitted by the Member Representative, I have retained the following mitigating factors:

- a. While Constable Bigras' medical diagnoses were not found to be exculpatory, they do constitute a mitigating factor.
- b. Constable Bigras has sought medical treatment and continues in that treatment today.
- c. Constable Bigras' performance reviews show a highly effective, motivated and well-respected member.
- d. Constable Bigras has demonstrated a dedication to his colleagues and the communities he has served, through his community engagement and on the job. From as little as one and a half years of service, Constable Bigras has actively sought to mentor and guide more junior members. His performance reviews reflect this with appreciation. A letter of support from a junior member of the Police Dog Services provides a more personal example of the impact of these efforts.
- e. By all accounts, Constable Bigras is fiercely dedicated to his work and is highly motivated to return. He has many colleagues and supervisors who, with full knowledge of the circumstances of this matter, are eager to welcome him back. Several note that the detachment and the Police Dog Services program are diminished in his absence.
- f. Constable Bigras' performance reviews highlight his ability to moderate his responses and maintain his composure during highly stressful calls.

[102] Constable Bigras must be held accountable for his inappropriate use of force in this case. However, I have no evidence to suggest that Constable Bigras has a history of, or demonstrates a propensity to, inappropriate use of force. To the contrary, his supervisors note both in his performance reviews and in the letters of support that Constable Bigras is a member they can rely on to demonstrate calm under pressure and to ensure the safety of members and the public. I find that the evidence demonstrates that Constable Bigras' actions were out of character and are unlikely to be repeated.

[103] Constable Bigras demonstrates high rehabilitative potential. He has sought medical treatment to address the health issues that may have contributed to his actions and he is motivated in continuing to do so. His performance reviews demonstrate a consistent drive to learn and improve. His dedication to his work and professionalism is lauded in his performance reviews and in the many letters of support submitted.

CONCLUSION

[104] I do not agree with the Member Representative's recommendation of a financial penalty of 3 to 6 days. It simply does not reflect the aggravating factors identified. However, the mitigating factors in this case preclude the imposition of measures at the top of the range.

[105] Having found Allegation 1 to be established, and in accordance with paragraph 45(4)(c) of the *RCMP Act* and paragraph 4(1)(j) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291, I impose the following conduct measure: a financial penalty of 12 days' (96 hours) pay, to be deducted from Constable Bigras' pay.

[106] As noted by the conduct board in 2018 RCAD 11, at paragraph 204, a member's ability to protect their own health also protects the health and safety of their coworkers and the members of the public with whom they interact. Constable Bigras' evidence demonstrated that he recognized this to be true. I encourage him in the concrete steps he is taking to ensure that he is well placed to continue to make positive contributions to the RCMP and the communities it serves.

[107] Any interim measures in place should be resolved in accordance with section 23 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

[108] Either party may appeal this decision by filing a statement of appeal with the Commissioner within the 14 days of the service of this decision on the Subject Member, as set out in section 45.11 of the *RCMP Act* and section 22 of the *Commissioner's Standing Order (Grievances and Appeals)*, SOR/2014-289.

February 28, 2020

Christine Sakiris

Ottawa, Ontario

Conduct Board