

ONTARIO PROVINCIAL POLICE DISCIPLINE HEARING

**IN THE MATTER OF ONTARIO REGULATION 268/10
MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,
AND AMENDMENTS THERETO;**

AND IN THE MATTER OF

THE ONTARIO PROVINCIAL POLICE

AND

PROVINCIAL CONSTABLE MIKE J. POTTER, #10415

**CHARGES: NEGLIGENCE OF DUTY, and
UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY**

DECISION WITH REASONS

Before: **Superintendent Robin D. McElary-Downer**

Ontario Provincial Police

Representation:

Counsel for the Prosecution: **Mr. Norm Feaver**

Legal Services Branch, MCSCS and MAG

Counsel for the Defence: **Mr. Gavin May**

Ontario Provincial Police Association

Public Complainant: **DC**

Counsel for the Public Complainant: **Mr. Ted Tichinoff**

Hearing Date: **November 16, 2015**

This decision is parsed into four parts: PART I: OVERVIEW; PART II: THE HEARING; PART III: ANALYSIS AND FINDINGS; and, PART IV: DISPOSITION.

PART I: OVERVIEW

Background

On September 4, 2013, Provincial Constable Mike POTTER (PC POTTER) and Acting Sergeant Belanger attended DC's apartment after a 911 hang-up. Shortly after arrival, DC, in an intoxicated and emotional state, grabbed a knife. The officers disarmed her, grounded and handcuffed her, and arrested her. DC actively resisted her removal from her apartment. As the officers struggled to secure DC in the rear seat of the cruiser, PC POTTER stated he cuffed her in the head area three to four times. DC contends she was punched in the head three times.

Stemming from this incident, both PC POTTER and Acting Sergeant Belanger (now PC Belanger) were charged with misconduct. Following a three day hearing in August 2015, where PC Belanger, PC POTTER, DC, and DC's former spouse testified, PC Belanger was found not guilty of neglect of duty.

This hearing now centres on the alleged misconduct of PC POTTER. The tribunal heard viva voce evidence from one witness, Use of Force Expert, Staff Sergeant (S/Sgt.) Morphet. For other testimony, both sides requested the transcripts from the *Belanger and Ontario Provincial Police*, September 19, 2015, decision be relied upon concerning the sworn evidence of PC POTTER and DC.

Allegations of Misconduct

PC POTTER, #10415, being a member of the Ontario Provincial Police (OPP), faces two counts of misconduct which allege he committed neglect of duty, and unlawful or unnecessary exercise of authority, contrary to sections 2(1)(c)(i) and 2(1)(g)(ii) of the Code of Conduct, contained in the Schedule to Ontario Regulation 268/10, as amended.

The neglect of duty Notice of Hearing (NoH) was amended at the request of the prosecutor. The edited version states:

On or about September 4, 2013, while on-duty, PC POTTER was neglectful in his duties as a police officer, including that:

- He failed to report the fact he struck DC on the head with his hand three or four times while DC was handcuffed and seated in the rear of the police cruiser by not reporting the truth to his supervisor, not recording it in his notes or in any RMS report.

He knew or ought reasonably to have known that his conduct was inappropriate and neglectful.

The edited particulars of the unlawful or unnecessary exercise of authority state:

On or about September 4, 2013, while on-duty, PC POTTER used unlawful force in controlling a prisoner, DC, in that:

- He struck DC on the head with his hand three or four times while DC was handcuffed and seated in the rear of the police cruiser; and,
- The use of force resulted in a facial injury to DC.

He knew or ought reasonably to have known that his conduct was inappropriate.

Plea

On November 16, 2015, PC POTTER pleaded not guilty to both counts.

Decision

After reviewing and weighing the evidence presented, I find PC POTTER guilty on both counts. My reasons for this are as follows:

PART II: THE HEARING

Exhibits

The exhibits for this matter are listed in Appendix A. To alleviate unnecessary repetition, all exhibits will be referred to by number without the preface of Appendix A.

Representation

In this matter, Mr. May represented PC POTTER, and Mr. Feaver represented the OPP. While the public complainant, DC, and her counsel, Mr. Ted Tichinoff did not attend, the tribunal was assured by Mr. Feaver they were aware of the proceeding and content it proceed in their absence.

Evidence Called - *By the Prosecutor*

In advance of calling his witness, Mr. Feaver tendered the following exhibits:

Exhibit 9: *Belanger and Ontario Provincial Police*, September 19, 2015

Exhibit 10: Transcript of DC's testimony at the *Belanger* hearing, August 5, 2015

Exhibit 11: Transcript of PC POTTER's testimony at the *Belanger* hearing, August 5, 2015

Exhibit 12: Photographs of DC's injuries

Witness S/Sgt. Mark Morphet, (summary)

S/Sgt. Morphet has been with the OPP since 1989. He was promoted and transferred to the OPP Academy in 2002, and other than a three month secondment, he has been there since. He has served as the

Recruit Training Coordinator, Coach Officer Training Coordinator, Instructional Techniques Training Coordinator, and for the past six years, as the Provincial Coordinator for In-Service Training. He provided an overview of his responsibilities in these positions.

S/Sgt. Mophet advised he is currently the Manager for In-Service Training. In this capacity, he has the overall responsibility for the BLOCK Training Program, Firearms Instructors Program, Immediate and Rapid Deployment Instructors Program, Conducted Energy Weapon Program, and the First Aid Program. Just under sixty personnel come under his supervision. In regard to the BLOCK Training Program, there is an annual recertification for use of force.

S/Sgt. Mophet advised he was designated as a police use of force expert in the 2009 Maltar Inquest. In 2013, he testified in the Firman Inquest concerning use of force and conducted energy weapons. In 2014, he testified at the Labour Relations Board in regard to use of force.

In addition to his role in the Academy, S/Sgt. Mophet spent four weeks serving in Caldeonia during the historical up-rise. He also participated in the Grass Roots Program serving one week each year in the field during 2010 to 2014. S/Sgt. Mophet's Curriculum Vitae was tendered as exhibit 13.

The tribunal granted the prosecutor's request to deem S/Sgt. Mophet as an expert in the field of use of force.

S/Sgt. Mophet advised that in response to a request from Detective Staff Sergeant Watson, he provided an opinion in regard to PC POTTER's use of force in relation to this matter. In forming his opinion, he was aware of these underlying facts: PC POTTER and Acting Sergeant Belanger arrested a female and handcuffed her to the front. While both officers attempted to get her into the cruiser, she was actively resistant. She was kicking and at one point protruded her foot through the security screen. PC POTTER utilized tactical communication. The female was in sock feet, and they were concerned she may cut herself on the C8. Attempts to get her foot back through the screen were not successful and PC POTTER cuffed her in the head.

S/Sgt. Mophet advised he factored into his opinions the Ontario Police College (OPC) Handcuffing Procedures, the OPC Physical Control Techniques and the New Ontario Use of Force Model (2004), which were tendered as exhibits 14, 15 and 16, respectively. He stated that an active resistant subject in the rear of a police vehicle is not unknown to training and operations. Essential control has occurred and

a subject can be deemed a prisoner in a case where a subject is arrested, handcuffed and under the supervision of two officers. If the handcuffed prisoner is non-compliant, there is a need for enhanced control of the situation. The officer is trained to select the most reasonable response option available. In this particular situation, he opined the reasonable response options would include tactical communication and, if necessary, soft physical control techniques to gain additional subject control. Further, a hard physical control technique, such as a slap to the head area, would not be considered a reasonable response.

S/Sgt. Morphet went on to describe soft physical control techniques. They are techniques with the least likelihood of causing injury to a subject, such as joint lock or pressure point, or simply hands-on escorting the subject. The techniques are used to gain control of a subject needing to be controlled. A joint control lock is a soft control lock to a wrist or elbow with pressure; it is a pain controlling technique to assist with controlling the subject. This response option is under the Use of Force Model's physical control. An officer can select this option based upon numerous factors, including the subject's behaviour at the time, the officer's personal perception of his/her own abilities, and tactical considerations. He advised the officer must continually assess, plan and act to the situation.

S/Sgt. Morphet described the facts as he knew them relating to this incident and made the following observations: The officers made a decision upon arrest to handcuff the subject to the front because the subject said she had a back injury. This is contrary to training procedures in the OPP. Procedure dictates subjects are handcuffed to the rear for their and officer safety. He noted once the subject was handcuffed to the front, she became actively resistant when attempts were made to get her into the rear of cruiser. Both cruiser doors were open and the subject's feet were hanging out and her head on the other side. This is when control of her became quite difficult for the officers. She protruded her foot through the open partition. There was a concern she may cut herself on the C8's vortex suppressor. There were unsuccessful attempts to put her foot back. PC POTTER attempted to push her in so he could close his door. PC POTTER also said that because of her known back injury, he was not comfortable pushing her forward. In the absence of not knowing what else to do at that point, and tactical communication was failing, he cuffed her to the head.

In the situation as described, S/Sgt. Morphet advised officers are trained in soft physical control techniques that concentrate on the neck up. For example, pressure under the ear lobe or a jugular notch technique will inflict fleeting pain and is applied to gain control. When applied properly, it does not leave marks or cause any lasting effect. This technique is included in basic constable training.

Conversely S/Sgt. Morphet advised hard physical control techniques are techniques which are more likely to cause injury to a subject, such as elbowing, slapping and kneeling. They are hard strikes and can be used as a distractionary measure. This is not a trained option when a subject is handcuffed because they are deemed to be under some measure of control. The occasions when a hard physical control technique may be required against a handcuffed subject may include when the subject attempts to grab ahold of an officer's gun or bites. In this case the officer may elect to use a hard physical control technique, such as a strike with the hand, to release the bite as a distractionary technique.

An officer may employ a hard physical control technique to a subject who is to be arrested and becomes actively resistant, such as made an attempt to flee or is assaultive. This would be for the purpose of gaining control and handcuffing the subject. S/Sgt. Morphet advised he could not understand why PC POTTER used a hard technique, nor would he speculate why it was used. In his opinion it is neither a trained nor a reasonable response to the situation. S/Sgt. Morphet's review of PC POTTER's additional statement and transcripts of his and DC's testimony and the *Belanger* decision has not changed his opinion.

In cross-examination, S/Sgt. Morphet advised he read the *Belanger* decision and related transcripts the week prior to attending the hearing. The OPC documents filed as exhibits 14, 15 and 16, form part of recruit training as well as BLOCK training each year. As part of PC POTTER's annual training, he would receive the same information on handcuffing, physical control techniques and the background information on the Use of Force Model. Every year officers must requalify on the *PSA (Police Services Act)* mandates, meaning the actual weapons and open hand techniques. In the last few years, officers have not been trained on the pressure points, but will be next year. Because of time limitation and the volume of information, it is difficult to train officers in every technique for every situation.

S/Sgt. Morphet advised the Use of Force Model is threaded throughout the officer's annual BLOCK training. Pressure point techniques, including the mandibular and jugular notch, would have been taught during a recruit's training but he would have to research when it was last delivered during BLOCK.

S/Sgt. Morphet advised he has never heard of a back injury being a reason not to handcuff in the rear. He suggested if an individual's shoulder was dislocated, there may be reason for an officer to handcuff at the front. He advised officers may have to make decisions contrary to their training; the goal of training is to provide them with enough information to make an informed decisions.

S/Sgt. Morphet agreed a greater threat to officer safety exists when a subject is handcuffed at the front. For example the potential to strike or disarm an officer, climb a fence, open a window, attempt an escape, and drive a car is enhanced as described in exhibit 14. He also agreed that even when a subject is handcuffed from behind, they can still strike, kick and head butt.

S/Sgt. Morphet described a palm heel strike as being a strike with the base of the palm which is quite effective as opposed to a punch. A brachial stun is a technique where an officer strikes the individual's side of the neck where a nerve bundle exists. It can incapacitate an individual temporarily. The OPP training is based on variables; the goal of a strike is to gain control of the subject. Officers are trained to apply as few strikes as possible to gain control of the subject.

S/Sgt. Morphet advised that a hard technique can be used as a distractionary technique to defend against assaultive behaviour. Officers are trained for situations that are most predominant and not every situation can be predicted. He agreed exhibits 14, 15 and 16 do not state a hard technique cannot be used on a handcuffed person. He advised a hard technique is used to control a subject, not to gain compliance.

S/Sgt. Morphet referred to the Use of Force Model and said there is no hard line between hard and soft physical control. The Model does not distinguish between a subject being handcuffed or not, because the handcuffs are just a factor in the situation. He advised re-assessment of the situation is an-going process.

S/Sgt. Morphet agreed the goals of subject control are to stop the continuation of the offence, to address officer safety, public safety and the subject's safety.

In re-examination, S/Sgt. Morphet confirmed there are different types of training and not all types are taught every year. There is an expectation that officers retain the skills they are taught.

Submissions

Defence counsel (summary)

Mr. May expressed his gratitude to Mr. Feaver and Mr. Tichinoff for coming to an agreement concerning how this matter would proceed. It seemed most expeditious to file the exhibits and focus on the issues at stake.

Mr. May turned to the unlawful or unnecessary exercise of authority NoH. He advised nothing is factually in dispute on the first bullet because PC POTTER admitted to striking DC in the head. The issue this tribunal needs to determine is did it amount to unlawful or unnecessary exercise of authority. The other

issue is it states DC was seated, but the evidence indicates she was supine on the seat; not that anything turns on this point, other than S/Sgt. Morphet referred to her being seated.

Mr. May submitted the second bullet in the NoH referred to PC POTTER's use of force had resulted in a facial injury. The injury referred to is a black eye. In *Belanger*, the tribunal found DC's injury most likely occurred before she was incarcerated. It also accepted evidence that she banged her head against the security screen. So there is no conclusive medical evidence concerning how DC incurred a black eye. Mr. May suggested the prosecutor has not met the burden of proof in regard to the causal link, and therefore PC POTTER should be found not guilty of unlawful or unnecessary exercise of authority. If on the other hand, the tribunal finds PC POTTER caused the black eye, then the question would remain was it unnecessary? Mr. May pointed the tribunal's words in *Belanger* where it stated, 'As unfortunate as it may be, persons who resist arrest and are combative with police sometimes inadvertently incur injury.'

Specific to the neglect of duty particulars, Mr. May advised the bullet states PC POTTER failed to report to his supervisor and record in his notebook and on RMS that he struck DC. When PC POTTER testified in *Belanger*, he said he did make notes about it, but stated he was not in the habit of giving a blow by blow account of everything, such as "I used my left hand for this and right hand for that". Rather he stated he did use physical force on DC and left it at that – so he did write something in his notes. With respect to what he told his supervisor, he did in fact tell his supervisor he used soft hand techniques. The reality of the fact is PC POTTER mis-explained or used a misnomer to explain his actions, instead of using the actual terms. So he did tell Acting Sergeant Belanger something – he was not trying to hide anything.

Mr. May submitted his issue with the allegation that PC POTTER did not report the use of force in the RMS report is the prosecutor has not produced any evidence to suggest he was duty bound to do so. PC POTTER put the information in his notes and if he was required to include it in his RMS report, then his error should be viewed as training issue, not misconduct. Mr. May asked that PC POTTER be found not guilty of neglect of duty.

Mr. May submitted the crux of the matter is: Did PC POTTER's open strikes to DC's head amount to unlawful or unnecessary use of force?

Mr. May turned the tribunal's attention to the exhibit 17, his Book of Authorities, and submitted the first case, *R v. Nasogaluak*, [2010] 1 SCR 206, is a Supreme Court of Canada decision which involved the

RCMP (Royal Canadian Mounted Police), who stopped a suspected impaired driver. The suspect had to be forcibly removed from his vehicle so one officer punched him twice in the head and then again as the suspect continued to resist. The suspect was finally pinned down on the pavement by two officers and a third officer punched him twice in the back because the suspect refused to give up his hands. The punches ultimately led to broken ribs and a punctured lung. At trial, the judge found the police had used excessive force. On page 13 the court stated:

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.

The court went on to discuss section 25 of the *Criminal Code (CCC)*, which is an embodiment of common law. It essentially states that when police officers are performing their duty, they are justified in using as much force as necessary for that purpose, provided it is reasonable. The court said in paragraph 34 of *Nasogaluak*:

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.

Mr. May advised section 25 is essentially a three step analysis: the person must be a police officer acting in the course of their duty; it must be a lawful arrest; and, the force used to affect the arrest is only as much as is necessary.

Mr. May referred to paragraph 35 which stated:

Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R v. Bottrell* (1981), 60 C.C.C.(2nd) 211 (B.C.C.A):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p.218]

Mr. May submitted the facts of *Nasogaluak* are not as important as in how the court applied the law.

Mr. May advised the case *R v. Zheng*, 2011, ABPC 19, involved an Edmonton police officer who was charged with one count of assault with a weapon and two counts of assault. Although the facts of the case

are convoluted, the court found in paragraph 181, the officer committed an assault against the victim who was handcuffed in the rear seat of the cruiser and assault against the other victim who he shoved in the shoulder. The court went on to determine whether the officer was justified in the assaults as per section 25 of the CCC. The Court stated:

Essentially, s. 25(1) is a safe harbour from liability for those who are required to enforce the law. The police are often placed in situations in which they must make difficult decisions quickly, and they are to be afforded some latitude of the choices they make. See *R. Asante-Mensah*, [2003] 2 S.C.R. 3at para. 73. Courts recognize that law enforcement is dangerous; no one wants police officers to compromise their safety. On the other hand, s. 25(1) is not an absolute waiver of liability, permitting officers to act in any manner they see fit: *Chartier* at para. 64. The police are entitled to be wrong, but they must act reasonably.

Police officers act in dangerous and unpredictable circumstances. No doubt a trained police officer will have instruction and a game plan to follow when entering premises to execute a search warrant. But the officer will have to react to the circumstances that present themselves.

In this matter, two officers responded to a call and all was seemingly quiet until DC produced a knife. In Mr. May's opinion, she was handcuffed quite properly in the front due to her pre-existing back injury. The struggle is on from the point they try to leave the premise. Mr. May pointed to the New Ontario Use of Force Model which stated:

After the officer chooses a response option the officer must continue to *Assess-Plan* and *Act* to determine if his or her actions are appropriate and /or effective or if a new strategy should be selected. The whole process should be seen as dynamic and constantly evolving until the SITUATION is brought under control.

And further:

The officer continuously assesses the situation and selects the most reasonable option relative to those circumstances as perceived at the point in time.

Mr. May submitted, given all the circumstances, it is the officer's perception of the situation at the point in time. It is not simply 'Oh I am in the back of the cruiser and she has her feet stuck through the window – what am I going to do?' It is "I responded to a call, a knife was produced, I disarmed her, we got her cuffed to the front and now in a struggle to the cruiser". These are the entire circumstances that were going through PC POTTER's head and he had to continually reassess the situation.

Mr. May pointed to page 32 of *Zheng* where the court held:

Police officers are not expected to measure the precise amount of force the situation requires: *Bolianatz* at para. 36 citing *R. v. Bottrell*

(1981), 60 C.C.C. matter 92d) 211 at 218 (B.C.C.A.). See also *Asante-Mensah* (S.C.R.), supra, at para. 73. Nor will they be denied the protection of s. 25(1) if they fail to use the least amount of force that would achieve the desired result. Allowance must be made for an officer, in the exigency of the moment, misjudging the degree of necessary force:...

Mr. May advised we now have the luxury of reflecting and selecting the least amount of force that should have been used, such as a jugular notch of brachial stun. PC POTTER did not have this luxury. We do not know, nor will we ever know, if DC would have responded to some type of lesser force. The difference between this matter and *Zheng* is PC POTTER had no ulterior motive other than to get DC secured in the cruiser and the doors closed. He was just trying to get her under control so they could transport her. An officer is entitled to make a mistake. They can use more force than necessary as long as it is within the range of options that could have been applied.

Mr. May turned to *Vlad v. Edmonton (City) Police Service*, 2002 ABQB 518, *Jackman v. Edmonton (Police Service)*, 2015 ABLERB 15 and *Ontario Provincial Police and Smith*, April 30, 2013. He submitted it is important to know all the facts, something he opined S/Sgt. Morphet did not.

Mr. May submitted PC POTTER was doing what he was trained to do. The techniques used by the officers were not working. Three of the four goals of subject control were not being met: DC was continuing an offence by causing mischief to property; she was a danger to the officers because she was attempting to bite and kick Acting Sergeant Belanger; and, she was a danger to herself by, what we now heard through the evidence of S/Sgt. Morphet, nearly cutting herself on the C8's sharp locking mechanism. Because the goals were not being met, they had to up the game somehow. PC POTTER used an open hand and slapped her on the head three to four times and it worked. DC pulled her feet in and the officers were able to close the door. The law does not say you have to use the least amount of force, it says you have to use a reasonable amount of force.

Mr. May suggested the force was necessary, it was not excessive and it was not unreasonable. For these reasons, he asked that PC POTTER be found not guilty.

By the prosecutor (summary)

Mr. Feaver advised Mr. May was absolutely incorrect because he misstated the Use of Force Model. If one were to assume, for arguments sake, DC was being assaultive at the time, then it would mean every single intermediate weapon would have been available to use at the time. In other words, according to

Mr. May, it would have been reasonable to taser or pepper spray DC in the back seat, or use any other hard control. Just because the option presents itself on the wheel of force, it does not mean an officer should resort to it, unless it is reasonable. The reasonableness comes from looking at the entirety of the situation. So when Mr. May makes submissions to the contrary, they are incorrect. The purpose of this hearing is to determine if PC POTTER went too far in his choice of force.

In regard to Mr. May's submission about the lack of direct medical evidence, Mr. Feaver advised without a video of the incident, it would be near impossible to eliminate other possible explanations for DC's bruising. There is clear proof the bruising occurred as a result of the events that evening, although there is some uncertainty in how she received the bruising. Mr. Feaver submitted that based on a balance of probabilities, it is more likely than not DC's bruising was caused by PC POTTER striking her head. The location of her injury was the same place where he had struck her.

Mr. Feaver agreed with Mr. May's submission that sometimes injuries occur, but that is as long as the injury is a consequence of something happening. This is not the case in this matter. Here the injuries were caused by an unprovoked striking by PC POTTER. There was no need for him to strike DC. She was not presenting any risk to him. It is not like an injury was incurred when she was taken to the ground. This is a completely separate offensive act by PC POTTER against DC, not a defensive act.

Mr. Feaver submitted the line between soft and hard techniques for physical control is very clear. Soft techniques are when you are hands on guiding and ushering. When you move to striking overtly, that is when you cross the line into hard techniques.

Mr. Feaver submitted one does not need Police Orders or an expert for items that simply require logic. PC POTTER said in his testimony he had never struck a handcuffed person before. This situation was clearly a circumstance outside the norm and realm of his experience. Therefore one does not need an expert to prove PC POTTER was required to document the incident in his notes and RMS report.

Mr. Feaver submitted there are a number of differences between this matter and *Nasogaluak*. First, the use of force control technique used was to gain control of a subject, whereas DC was already in the back of the cruiser handcuffed. In other words, the lawful arrest had already occurred. Section 25 of the CCC provides justification in effecting an arrest, not after the arrest. There was no emergency in this matter, but rather a case of a non-compliant prisoner. Police deal with non-complaint prisoners regularly and this does not justify police striking them in the head, especially when they are handcuffed and seated or supine

in the back of a cruiser.

Mr. Feaver found it interesting that in *Zheng*, the officer was found guilty on the criminal standard for applying soft physical control; in this matter PC POTTER utilized hard physical control techniques. Mr. Feaver submitted PC POTTER did not have to make a difficult decision. DC was not reaching for his gun nor was she trying to bite him, circumstances that would otherwise justify a hard physical control technique. She presented no active risk which warranted PC POTTER's use of force. His explanation was not reasonable. He is essentially saying, to prevent DC from injuring her foot, he had to strike her in the head. In other words, in order to prevent her from hurting herself, he had to hurt her.

Mr. Feaver cautioned the tribunal in accepting Mr. May's submission that one had to look at the totality of the circumstances. Use of force means assessing, planning and acting to what is happening in the moment, not what happened thirty minutes before. The threat was eliminated, the knife was gone and left was a woman who was clearly not happy she had been handcuffed. The situation had clearly de-escalated.

Mr. Feaver submitted that while Mr. May contends it was PC POTTER's striking that led to DC's compliance in bringing her foot through the window, Sergeant Belanger's actions also led to this. Mr. Feaver agreed PC POTTER's use of force was within range, but it was not reasonable.

Mr. Feaver submitted *Vlad* was factually different than the matter at hand. In *Vlad* the court stated:

Cardoso explained that officers are trained to use an escalating level of force which is to be proportionate to the threat being presented.

Mr. Feaver advised DC was not presenting a threat to anyone other than maybe the potential of hurting her foot. The court went on to say:

There was no force applied to the Plaintiff after he was handcuffed other than the fact that Cardoso applied some wrist pressure in attempting to walk the Plaintiff over the police vehicle. I do not believe that he was struck after he was handcuffed, nor do I accept that at any time he was punched or kicked.

PC POTTER and Acting Sergeant Belanger utilized similar techniques as in *Vlad* in guiding DC to the cruiser. For some unknown reason PC POTTER abandoned the soft techniques, even though they remained available to him to get the door closed and her foot out of the screen. This is despite Acting Sergeant Belanger being able to get her foot through and close the door without the hard techniques.

According to S/Sgt. Morphet the reasonableness of using hard physical control techniques is when the officer is trying to stop assaultive behaviour, like reaching for an officer's gun or trying to bite; basically these hard physical techniques are to stop assaultive behaviour at that particular time.

Mr. Feaver made submissions concerning the *Jackman* and *Smith* cases. He found *Smith* related to this matter in that the officers' actions in the cell were consistent with hands on – soft physical control techniques – until PC Smith kicked the accused. He contended it was not the intensity of Smith's kick that what was problematic, it was the unreasonableness and unnecessaryness of it.

Mr. Feaver submitted DC was actively resistant in getting into the cruiser. Once she was in the cruiser, DC was not assaultive. All she was doing was thrashing about in the back seat and putting her foot through the security window. S/Sgt. Morphet was very clear that officers are not trained to do what PC POTTER did. By PC POTTER's own admission, he struck DC about the head in order to get her foot through the window.

Mr. Feaver submitted the allegation found in the neglect of duty charge has easily been made out. PC POTTER admitted to striking DC three or four times. He failed to report he struck DC however by not reporting it to his supervisor and not recording it in his notes or in the RMS report. Mr. Feaver submitted it was not until PC POTTER completed his second duty report that he utilized terminology which indicated he struck DC. Additionally, PC POTTER was misleading, at best, to his supervisor when he told him he used soft hand techniques. Mr. Feaver referred to PC POTTER's evasiveness when he testified during the *Belanger* hearing. On page 24 of this transcript, PC POTTER said: "No, and I knew that I was going to be interviewed, I would imagine at some point in time, and I'm sure that I would be asked to expand on that." Mr. Feaver submitted that in other words, PC POTTER acknowledged that at some point he would have to come clean on it. In PC POTTER's second duty report he reported he cuffed DC and explained he did so because he was directly asked about it.

Mr. Feaver advised pages 12, 29, 30, 50, 51, 68-69, 70-71 and 96 of DC's testimony are helpful reference points to when DC testified in regard to being struck. He also pointed to page 9, lines 6 to 10, page 11, lines 4 to 5, pages 19 and 20, lines 31 to 32 and 1, page 20, lines 9 to 12, page 24, line 25 to page 25, line 6 and page 70, lines 3 to 9.

Mr. Feaver submitted that in this case, there was no imminent threat or rapidly changing circumstance which would dictate the use the force applied by PC POTTER. The officers used soft physical control

techniques to get DC to the cruiser, they continued to use them as they twisted her foot back through the window. It is beyond Mr. Feaver why PC POTTER departed from this when the techniques they were using against an actively resistant person were working. The techniques got DC out of the apartment and into the cruiser.

Mr. Feaver advised it was difficult to find any cases on point. Those which he found were *Kerr and Metropolitan Toronto Police, OPC*, July 9, 1981, *Venables and York Regional Police Service, OCCPS*, October 3, 2008, and *Sutton and Barrie Police Service*, July 5, 1982. The cases were filed as exhibits 18, 19 and 20, respectively.

Defence's reply (summary)

In reply, Mr. May asked the tribunal to remember no lapse of time had occurred from the point of removing DC from her apartment until she was placed in the cruiser. It was one continuous scene with no breaks. He advised it is considered a hard physical technique when persons are grounded. He advised the prosecutor has the burden of proof to prove it was PC POTTER's duty to record the necessary information in his RMS report.

Mr. May submitted he found S/Sgt. Morphet went through pains not to answer his questions and he thought he was evasive.

PART III: ANALYSIS AND FINDINGS

Summary of misconduct

On September 4, 2013, PCs POTTER and Belanger attended DC's apartment in response to a 911 hang-up. Shortly after arrival, DC, in an intoxicated and emotional state, grabbed a knife. The officers disarmed her, grounded and handcuffed her, and arrested her. DC actively resisted her removal from her apartment and placement in the cruiser. As the officers struggled to secure DC in the cruiser, PC POTTER stated he cuffed her in the head three to four times. DC contends she was punched in the head three times.

As a result of the incident, PC POTTER faces two counts of misconduct, unlawful or unnecessary exercise of authority and neglect of duty. The particulars of the allegations state:

- He struck DC on the head three to four times while DC was handcuffed and seated in the rear seat of the police cruiser;
- The use of force resulted in a facial injury; and,

- He failed to report the fact he struck DC by not reporting the truth to his supervisor, (PC Belanger), not recording it in his notes or in any RMS report.

Unless the prosecutor has met the burden of proof, I cannot make a finding against PC POTTER on these allegations. In this matter, as in all police disciplinary matters, the standard of proof is a balance of probabilities based on clear, cogent and weighty evidence. To me, this means it is evidence that produces in my mind a clear conviction the facts sought to be proven are true. This notion will be adhered to throughout my analysis. I have identified a number of issues to help determine if the burden has been met.

Issues to be decided

Before moving forward, it is important to state Mr. Feaver and Mr. May have agreed to the following facts: PC POTTER used force against DC by striking her in the head, while she was handcuffed to the front and in the rear seat of the cruiser. What they dispute is:

1. The force used by PC POTTER was excessive, and it caused a facial injury to DC;
2. PC POTTER was untruthful to his supervisor in reporting the use of force; and,
3. PC POTTER had a duty to document the use of force in his notebook and RMS report.

My analysis will be parsed into two sections, one being the use of force component and the second being the neglect of duty component. Starting first with use of force, three issues arise:

1. *Was the use of force PC POTTER applied against DC excessive?*
2. *If the force was excessive, was it unreasonable in light of the situation?*
3. *What is the legal standard in cases such as this?*

Specific to the neglect of duty allegations, I will address these issues:

4. *Was PC POTTER untruthful to his supervisor in the manner in which he reported the use of force?; and,*
5. *Did PC POTTER have a duty to document the use of force in his notebook and RMS report?*

My analysis and findings will be captured under the above noted issues. For some parts of my analysis, I will adopt my findings from the *Belanger* decision.

1. *Was the use of force PC POTTER applied against DC excessive?*

Degree of force and black eye

In analyzing the evidence relative to this question, it is first helpful to determine the degree of force PC

POTTER applied against DC. PC POTTER characterized it as three to four cuffs or slaps across DC's head using his open hand.¹ DC characterized the strikes as; pounding, hitting, hard punch, punched me out, hit with all his force, punch, and he thumps me². In view of the evidence, I prefer DC's characterization over PC POTTER's for these reasons:

In contrast to PC POTTER's candid, but guarded testimony, DC delivered her evidence concisely and with conviction specific to when she was struck. She knew she had been hit three times. She said the first strike, which hit her face, caused her to see "white lightening"³. Before she could call him a "bastard"⁴, the next two strikes were delivered. She repeatedly said PC POTTER yelled, "Are you going to be nice now?"⁵ after the last of the strikes. Unlike her other testimony where I found alcohol interfered with her facts and recall, it was evident to me the striking was crystalized in her memory. Despite the rigorous cross-examination, she never wavered in regard to the how she was struck, the impact upon contact, and the words of PC POTTER. To this end, I found her evidence believable.

On the other hand, PC POTTER framed the strikes as cuffing or slapping. The descriptors he relied upon caused me to envision trifling contact similar to one swatting another about the head – contact that would most likely distract an individual, but not likely to cause injury. I found PC POTTER's descriptors downplayed the degree of force he applied to DC. I am satisfied the strikes he applied were hard and fast.

DC suffered a black eye.⁶ I found in the *Belanger* decision she most likely incurred the facial injury on the eve of her arrest, before she was incarcerated, meaning after she was taken into custody and before lodged in the detachment cell. I accepted the officers' evidence that she banged her head against the cruiser's centre partition while on route to the detachment. No medical evidence has been proffered to support that her blackened eye was a consequence of PC POTTER's strikes. Notwithstanding, the balance of probabilities clearly point to not a self-inflicted injury from the partition, but rather PC POTTER's first strike to DC's face which was hard enough to cause "white lightening". While I have witnessed subjects bang their head on the cruiser partition, and for that matter the walls of a cell, the most injury that has resulted is marks and redness to the forehead, not a blackened eye. I therefore rely on my own experience and of the evidence presented, when I find a causal link has been established between PC POTTER's

¹ Exhibit 11: Transcript of PC POTTER's testimony at *Belanger* hearing, August 5, 2015, page 11, lines 11-14, page 23, lines 29-30, page 42, line 30

² Exhibit 10: Transcript of DC's testimony at *Belanger* hearing, August 5, 2015, page 12, line 15, page 29, line 26, page 30, lines 14-16, pages 50/51, lines 32-1, page 68, line 31, page 69, line 7, page 70, line 19, page 96, line 29

³ Exhibit 10: Transcript of DC's testimony at *Belanger* hearing, August 5, 2015, page 30, line 15, and page 70, line 20

⁴ Exhibit 10: Transcript of DC's testimony at *Belanger* hearing, August 5, 2015, page 70, line 20, 21

⁵ Exhibit 10: Transcript of DC's testimony at *Belanger* hearing, August 5, 2015, page 12, line 17-18, page 29, line 27, page 71, lines 23-23

⁶ Exhibit 12: Photographs of DC's injuries

strikes and DC's blackened eye.

Opinion of the Use of Force Expert

The tribunal found the evidence of S/Sgt. Morphet very helpful. Contrary to Mr. May's submission that S/Sgt. Morphet went through pains not to answer his questions, I found he delivered his responses thoughtfully and thoroughly. To his credit, he sought clarification from counsel before responding to the questions. I found S/Sgt. Morphet extremely conversant in the field of use of force and he expressed his experience and knowledge in a balanced, reliable and creditable nature.

S/Sgt. Morphet articulated the distinction between soft and hard physical control techniques. He said that once an individual is handcuffed and under the supervision of two officers, control has been established. If an individual is non-compliant and tactical communication is ineffective, officers are trained to select a soft physical control technique to gain compliance. A hard physical control technique, such as an open hand strike is not a trained option. The exception to this is when a suspect attempts to grab the officer's gun or bites. This confirmed in my mind that PC POTTER was sufficiently trained to deal with non-complaint handcuffed subjects in the application of soft physical control techniques.

There was evidence from the officers DC had attempted to bite PC Belanger before they placed her in the cruiser. According to S/Sgt. Morphet, a hard physical control technique to stop the bite could have been justified. PC Belanger had forgotten about the attempted biting until he heard PC POTTER testify, which led me to believe, at least in the mind of PC Belanger, it was not a substantial threat – something he viewed as noteworthy. It is interesting that while the officers may have been justified in applying a hard physical control technique at that point, neither did. I further note DC's attempt to bite came before she was placed in the cruiser, and there was no evidence she tried it again.

New Ontario Use of Force Model (2004)

The New Ontario Use of Force Model bears serious consideration. The Model centres on the situation the officer is confronted with in order to determine the most appropriate course of action. I refer to these key excerpts:

The officer continuously assesses the situation and selects the most reasonable option relative to those circumstances as perceived at that point in time.

and,

After an officer chooses a response option the officer must continue to *Assess-Plan* and *Act* to determine if his or her actions are appropriate and/or

effective or if a new strategy should be selected.⁷

According to PC POTTER, he assessed the situation before he struck DC. She was flailing in the back seat, with her feet through the partition window. He was reluctant to reach across her for fear of being bitten. He worried she may injure herself on the C8, damage the cruiser and injure PC Belanger. After contemplating his other use of force options, he struck her three to four times. With all this evidence before me, I have not been convinced his hard physical control technique was necessary. Even if it were, I have not been persuaded the number of blows that followed the first strike were proportionate or necessary in the circumstances. PC POTTER departed from his training and failed to assess the effectiveness of his first strike, something I find was fatal on his part. Albeit DC withdrew her feet after PC POTTER's final strike, we will never know if it actually took three to four strikes because they came in such quick succession. Simply put, PC POTTER did not re-assess and DC had no chance to comply.

Lastly, I find PC POTTER's words, "Are you going to be nice now?" after the final strike was delivered concerning. They suggest to me the strikes were for punishment. Contrary to my own use of force training and field experience, they simply are not common words communicated by an officer seeking compliance from a non-complaint subject.

Finding:

Based on my analysis of the evidence, I find the use of force PC POTTER applied was excessive.

2. If the force was excessive, was it unreasonable in light of the situation?

The arrest and removal of DC from her apartment to her placement in the cruiser posed a significant challenge to PCs POTTER and Belanger. DC was unquestionably combative and resistant. Despite this, the officers managed to successfully lift and pull her onto the rear seat of the cruiser by relying on soft physical control techniques. The last thing left to do was to remove DC's feet, which were protruding through the centre window kicking at the C8 and close the doors. PC POTTER said the following:

So it was at this time, I'm standing outside the door, looking down at her. I had noted that she had tried to bite Officer Belanger's hands. I noted that she had her hands cuffed to the front, so she was able to raise them up at any given time if I were to lean in to try to pull her feet back. I took note of the fact that she had an existing back injury, so I merely couldn't shove her shoulders up and bend her in that direction because fearing you'd aggravate the back injury. She's in a controlled space in the back of the cruiser. I felt that there was the

⁷ Exhibit 16: New Ontario Use of Force Model (2004), pages 7-8

imminent need to control her, to prevent her from injuring herself, damaging the cruiser or injuring Officer Belanger.⁸

PC POTTER's explanation challenges me to accept the reasonableness of his strikes. He knew DC was in a controlled space – and this controlled space enhanced the control already established through the handcuffs. He knew she attempted to bite his partner – but that happened before she was lifted into the back seat. There is no evidence she tried it again. His decision to employ a hard physical control technique, a technique that increases the likelihood of injury, is contrary to his rationale he wanted to prevent DC from injuring herself. Concerning potential harm to PC Belanger; I am not sure what if any injury DC would have inflicted on him, since he was on the other side of the partition. PC POTTER did not raise any personal officer safety concerns other than DC could raise her arms if he reached inside. I find this does not justify striking a handcuffed individual in the head.

If on the alternative PC POTTER's testimony truly reflected a valid concern and perception, that DC may bite or raise her arms at him or cause injury to herself or PC Belanger, I have not been persuaded he needed to resort to the quantity of blows he delivered. He never stopped to assess the effectiveness of his first strike. Further, if PC POTTER was acting in good faith and truly believed the situation warranted a hard physical control technique, it defies logic why he did not say so at the first opportunity. I find his use of the words 'soft hand techniques' when he spoke with his supervisor and completed his first duty report akin to playing mischief with words. I find PC POTTER's failure to accurately describe what he did highly detrimental to his credibility.

Finding:

Based on the totality of evidence, and lack thereof, I find the force PC POTTER applied against DC unreasonable.

3. *What is the legal standard in cases such as this?*

The historical cases provided by Mr. May were very useful in that four of the five turned on section 25.(1) of the CCC when determining allegations of unlawful and unnecessary use of force:

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
...
(b) as a peace officer or public officer,
...
is, if he acts on reasonable grounds, justified in doing what

⁸ Exhibit 11: Transcript of PC POTTER's testimony at *Belanger* hearing, August 5, 2015, pages 10-11, lines 28-8

he is required or authorized to do and in using as much force as is necessary for that purpose.

I agree with Mr. May that before a police officer is justified in using force, the officer must be acting in the course of their duty and the arrest they are effecting must be lawful. The legislation goes on to prohibit an officer from using a greater force unless he or she believes it is necessary to protect himself or another from death or grievous bodily harm. Although PC POTTER told this tribunal he was concerned for PC Belanger's safety, the evidence before this tribunal did not suggest either officer believed they were facing eminent grievous bodily harm or death.

I turn my mind to *Nasogaluak* where the court held police action should not be judged against a standard of perfection⁹. According to the Use of Force Expert, S/Sgt. Morphet, PC POTTER had other use of force options available and was trained to apply such, including the application of pressure points. This undoubtedly would have been the most appropriate tactic. Although I am confident others would not have selected PC POTTER's tactic, it was a choice he made in the heat of a dynamic situation. That being the case, I will not hold PC POTTER to a standard of perfection because he made the wrong choice. I do, however, hold him accountable to the Ontario Use of Force Model standard and his training. By that I mean, PC POTTER failed to *Assess-Plan* and *Act* to determine if his action was appropriate and or effective.¹⁰ Referring back to my earlier statement, PC POTTER's fatal error was in his failure to assess the effectiveness of his first strike.

I turn to *Zheng*¹¹ where the court held a police officer is not expected to measure the precise amount of force the situation requires. I find this excerpt helpful as I infer there is some latitude for an officer who misreads a situation, in particular when in the heat of the moment. No doubt the application of soft physical control techniques would have been the appropriate choice compared to the employment of hard physical control techniques. While I do not condone PC POTTER's choice of technique, I struggle less with it than his failure to continually assess the situation, plan and act.

Findings:

The legal standard for use of force is clear in that police officers have the authority to use force if they are in the lawful execution of their duty and the force is necessary. Cited cases extend reasonable latitude, stating officers should not be held to a standard of perfection, nor should they be expected to measure the

⁹ Exhibit 17, Book of Authorities, Tab 1: *R v. Nasogaluak*, [2010] 1 SCR 206, para 35

¹⁰ Exhibit 16: New Ontario Use of Force Model (2004)

¹¹ Exhibit 17, Book of Authorities, Tab 2: *R v. Zheng*, 2011, ABPC 19, page 32

precise amount of force required. In this matter, I have not held PC POTTER to these. Given the dynamics of the situation I can accept that a mistake was made. What I fail to accept, however, is PC POTTER's failure to resort to the fundamental basics of use of force training, and that is access, plan and act. Following the first strike, PC POTTER failed to determine the effectiveness of the tactic and it is here his mistake became unforgivable. Based on the legal standard, I find the strikes that followed the first one excessive and unnecessary.

4. *Was PC POTTER truthful to his supervisor in the manner in which he reported the use of force?* PC Belanger was PC POTTER's supervisor the night they arrested DC. PC Belanger testified at his own hearing that once they had returned to the detachment, PC POTTER told him he had used 'soft hand techniques' against DC. PC Belanger understood 'soft hand techniques' to mean PC POTTER was hands-on controlling her, and he did not make further inquiry.¹² Had this been the only evidence, I would lean on the side of caution and give PC POTTER the benefit of the doubt that he did not intend to be untruthful or less than forthcoming with his supervisor – despite it being close to the line. When bundled though with this other evidence, a picture emerges that PC POTTER had no intent to divulge the level of force he used against DC:

- PC POTTER utilized the same term, 'soft hand techniques' in his first duty report¹³. According to him, this term meant he was cuffing her with an open hand¹⁴. It was not until his second duty report, when he was asked to explain what the term meant, that he reported he cuffed DC in the head.¹⁵
- PC POTTER conceded an individual reading his first duty report would not get an immediate understanding he cuffed DC. He rationalized he knew he would be interviewed at some point in time, and he imagined he would asked to expand on it then.¹⁶

I find the foregoing points to a deliberate and conscious attempt to avoid full disclosure.

- PC POTTER did not record in his notes either 'soft hand techniques' or 'cuffing'.¹⁷ According to him that by noting 'we struggled with her'¹⁸, it meant force was applied against DC.

I find PC POTTER's mischief with words a purposeful attempt to avoid reporting his force exceeded soft physical control techniques.

- PC POTTER stated he had never struck a handcuffed person before¹⁹ but added he never made

¹² Exhibit 9: *Belanger and Ontario Provincial Police*, September 19, 2015, page 17

¹³ Exhibit 11: Transcript of PC POTTER's testimony at *Belanger* hearing, August 5, 2015, page 23, lines 9-10

¹⁴ Exhibit 11: " " page 23, lines 28-30

¹⁵ Exhibit 11: " " page 23, lines 27-30

¹⁶ Exhibit 11: " " page 24, lines 5-10

¹⁷ Exhibit 11: " " page 19, lines 28-30 and page 20, line 1

¹⁸ Exhibit 11: " " page 20, lines 28-30

¹⁹ Exhibit 11: " " page 20, line 11

note of it because it was not outside what he would be expected to do²⁰.

PC POTTER employed a tactic averse to his training. I find his explanation implausible and it points to his desire not to disclose the truth of the matter.

Finding:

This tribunal has determined PC POTTER applied a hard physical control technique when he struck DC in the head three to four times. Based on the totality of evidence, there is no doubt in my mind PC POTTER was less than truthful with his supervisor. I find he knowingly mischaracterized his force against DC as 'soft hands technique' in an effort to diminish his application of force and hide the truth.

5. *Did PC POTTER have a duty to document the use of force in his notebook and RMS report?*

Mr. May is correct in saying the prosecutor failed to tender evidence regarding notebook and RMS policy. This tribunal does not require policy to know it is a fundamental duty of officers to complete comprehensive notes and reports which include observations and actions taken when an individual is arrested and/or charged. PC POTTER is a seasoned police officer with fifteen years. He apparently made comprehensive notes about DC so it stands to reason he would have known the importance to include his application of force.

Finding:

The evidence is clear PC POTTER had an obligation and duty to make record of his use of force in his notes and RMS report; and I find he did not.

PART IV: DISPOSITION

The allegations of unlawful or unnecessary exercise of authority (unnecessary exercise of force) and neglect of duty has been proven based on clear and convincing evidence. I found the evidence clear, cogent and weighty. To this end, I find PC POTTER guilty of both counts of misconduct, pursuant to sections 2(1)(c)(i) and 2(1)(g)(ii), respectively, of the Code of Conduct the Code.

R.D.M.D.

Robin D. McElary-Downer
Superintendent
OPP Adjudicator

Date decision electronically delivered: December 22, 2015

²⁰ Exhibit 11: Transcript of PC POTTER's testimony at *Belanger* hearing, August 5, 2015, page 25, line 20, lines 8-10

APPENDIX A

Exhibit 7: Prosecutor's designation (unlawful or unnecessary exercise of authority)

All remaining exhibits were sequentially numbered and attached to the neglect of duty NoH.

Exhibit 8: Prosecutor's designation

Exhibit 9: *Belanger and Ontario Provincial Police*, September 19, 2015

Exhibit 10: Transcript of DC's testimony at *Belanger* hearing, August 5, 2015

Exhibit 11: Transcript of PC POTTER's testimony at *Belanger* hearing, August 5, 2015

Exhibit 12: Photographs of DC's injuries

Exhibit 13: Staff Sergeant Morphet's Curriculum Vitae

Exhibit 14: Ontario Police College, Handcuffing Procedures

Exhibit 15: Ontario Police College, Physical Control Techniques

Exhibit 16: New Ontario Use of Force Model (2004)

Exhibit 17: Book of Authorities

Tab 1: *R v. Nasogaluak*, [2010] 1 SCR 206

Tab 2: *R v. Zheng*, 2011, ABPC 19

Tab 3: *Vlad v. Edmonton (City) Police Service*, 2002 ABQB 518

Tab 4: *Jackman v. Edmonton (Police Service)*, 2015 ABLERB 15

Tab 5: *Ontario Provincial Police and Smith*, April 30, 2013

Exhibit 18: *Kerr and Metropolitan Toronto Police, OPC*, July 9, 1981

Exhibit 19: *Venables and York Regional Police Service, OCCPS*, October 3, 2008

Exhibit 20: *Sutton and Barrie Police Service*, July 5, 1982