Court of Queen's Bench of Alberta

Citation: R v Lindsay, 2021 ABQB 839

Date: 20211022
Docket: 170015663Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Trevor Ian James Lindsay

Accused

Reasons for Sentence
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] Trevor Lindsay committed an aggravated assault on Daniel Haworth in Calgary in May 2015, as explained in ***R v Lindsay***, 2019 ABQB 462.

[2] These reasons are the culmination of a long sentencing process, as explored in part in ***R v Lindsay***, 2021 ABQB 684.

[3] The Crown seeks incarceration for between two and three years.

[4] The defence seeks a suspended sentence or, alternatively, an intermittent sentence of up to 90 days, coupled with probation for two or three years, as well as community service (hours to be determined).

[5] The appropriate sentence is 90 days intermittent, one year of probation, and 75 hours of community service, as explained below

B. Principles of sentencing

[6] I adopt Renke J.'s helpful overview of sentencing principles in ***R v Pettitt***, 2021 ABQB 773:

> The foundational sentencing provision in the *Criminal Code* is s. 718:
>
> > 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
> >
> > > (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> > >
> > > (b) to deter the offender and other persons from committing offences;
> > >
> > > (c) to separate offenders from society, where necessary;
> > >
> > > (d) to assist in rehabilitating offenders;
> > >
> > > (e) to provide reparations for harm done to victims or to the community; and
> > >
> > > (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> The fundamental principle of sentencing is proportionality, captured in s. 718.1: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." See ***R v Hajar***, 2016 ABCA 222 at para 136; ***R v Hamlyn***, 2016 ABCA 127 at para 7; ***R v Safarzadeh-Markhali***, 2016 SCC 14 at paras 70-71; ***Friesen*** at paras 5, 75, 30; ***R v Lacasse***, 2015 SCC 64 at para 12; ***R v Ipeelee***, 2012 SCC 13 at paras 36, 37; ***R v Arcand***, 2010 ABCA 363 at para 48. The "gravity" aspect of proportionality focuses on the act and its consequences or on what was done. The "responsibility" aspect of proportionality focuses on the actor, the offender's level of fault in committing the offence, how the act was done, why the act was done, and by whom the act was done. A proportionate sentence is a "just sanction" because the punishment "fits" the crime. The punishment must be neither excessive nor inadequate. Proportionality ensures that the punishment is what the offender "deserves:" ***Arcand*** at para 46.

Aspects of the proportionality analysis include the following:

- Under s. 718.2(a), the assessment of the gravity of the offence and the degree of responsibility of the offender must be informed by "any relevant aggravating or mitigating circumstances relating to the offence or the offender."
- Pre-offence and post-offence factors may be relevant to the offender's degree of responsibility.
- Section 718.2(b) requires that parity in sentencing be respected: "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." See ***Friesen*** at paras 31-33; ***Lacasse*** at para 2; ***Arcand*** at para 61.
- Section 718.2(c) confirmed that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh." As for consecutive sentences, s. 718.3(4)(b) provides that

  > (4) The court that sentences an accused shall consider directing ...
  >
  > > (b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when
  > >
  > > > (i) the offences do not arise out of the same event or series of events ....

- Section 718.2(d) requires that the principle of restraint be respected: "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances."
- Under s. 718.2(e), "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders …."
- Since offences are committed in particular circumstances by particular individuals, the determination of a proportionate sentence is "highly individualized:" ***R v Nur***, 2015 SCC 15, McLachlin CJC at para 43; ***Arcand*** at para 66.

In some instances, statute or appellate authority specifies the primary penal objectives of sentencing for particular offences (e.g. deterrence, denunciation, rehabilitation). In other instances, factors relevant to the proportionality analysis assist in determining the appropriate objective or objectives to be promoted by a sentence. For example, the more serious the offence and the higher the degree of responsibility associated with committing that offence, the stronger the link to the objectives of denunciation and deterrence, which, in turn may attract more severe punishment in the form of longer periods of imprisonment. [paras 27-30]

C. Character evidence

[7] A particular feature of the present case is uncharged-offence conduct.

[8] As discussed in my decision this summer (cited above), the Crown raised an earlier (2013) uncharged offence involving Mr. Lindsay and another Calgary citizen (Godfred Addai-Nyamekye). Its purpose was to illuminate Mr. Lindsay's character for the purpose of the current sentencing.

[9] As explained in that judgment, I found that Mr. Lindsay assaulted Mr. Addai-Nyamekye in the latter stages of their encounter.

[10] The Crown also referred to a third incident (breaking the phone of a perceived vexatious user of 9-1-1 services in 2017), for which Mr. Lindsay received an administrative sanction from the Calgary Police Service.

[11] Per the Crown at the recent (October 14 and 15, 2021) sentence hearing, these other incidents reveal Mr. Lindsay as of bad character, with such character relevant when considering various sentencing objectives here.

[12] How can uncharged-offence evidence be used when sentencing?

R v Angelillo

[13] The Supreme Court of Canada explored some of the permitted uses in this decision (2006 SCCC 55):

> … the [uncharged offence] evidence in the instant case may be the type of extrinsic evidence that was in issue in *Edwards*. As Rosenberg J.A. recognized, **there may be situations in which evidence that relates to one of the sentencing objectives or principles set out in the *Criminal Code* shows that the offender has committed another offence but *never been charged with or convicted of it*.** Such facts may nevertheless be relevant and must not automatically be excluded in every case. As is often the case, **the admissibility of the evidence will depend on the purpose for which its admission is sought**. For example, let us assume that — as happens too often, unfortunately — a man is convicted of assaulting his spouse. The fact that he abused his spouse in committing the offence is an aggravating circumstance under s. 718.2(*a*)(ii). **Section 718 requires the court to determine the appropriate sentence that will, among other things, denounce unlawful conduct, deter the offender from re-offending, separate the offender from society where necessary, and promote a sense of responsibility in the offender and acknowledgment of the harm he or she has done. It is therefore important for the court to obtain all relevant information. This is why several provisions of the *Criminal Code* authorize the admission of evidence at the sentencing hearing.**
>
> First of all, the court may order the filing of "**a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence": s. 721(1)**. Unless otherwise specified by the court, the report must contain information about the accused: his or her age, *maturity*, *character*, *behaviour*, *attitude* and willingness to make amends: s. 721(3)(*a*). …

> Next, the *Criminal Code* explicitly requires that **information or evidence relating to the specific circumstances of the accused be taken into account in determining the terms of the sentence. Thus, the "character of the offender" is one factor to consider before ordering a period of probation (s. 731(1)) or ordering that a sentence be served intermittently (s. 732(1)).** As well, where, as in the case at bar, the court must decide under s. 742.1 whether a conditional sentence of imprisonment is appropriate, it must also, in its analysis, decide whether it is satisfied that for the offender to serve the sentence in the community would not endanger the safety of the community.
>
> **… These [uncharged-offence] facts are relevant and, in my opinion, are admissible in principle because they relate to the sentencing objectives and principles that are expressly set out in the *Criminal Code*.** The offender cannot invoke the presumption of innocence to *exclude* character evidence, since that presumption has in fact been rebutted with respect to the offence of which he has been convicted. [paras 27-30] [emphasis added]

Other uncharged-offence cases

[14] In my decision earlier this year in this case, I surveyed some of the "character revealed by uncharged-offence conduct" cases and tried to distill the key principles:

> … the ***Criminal Code*** expressly refers to "character" in various contexts e.g. report by probation officer on absolute or conditional discharge (s. 721); making of probation order (s. 731); intermittent sentences (s. 732); delaying parole (s. 743.6); parole ineligibility (ss 745.4, 745.5, 745.51, and 745.63), dangerous or long-term offender proceedings (s 757).
>
> In ***R v Lees*** 1979 CanLII 43 (SCC), [1979] 2 SCR 749, the Supreme Court of Canada approved the use of untried or potential offences to **rebut the convicted person's assertions of good character**. (See also ***R v Woodcock***, 2010 ONSC 3752 (Pardu J.) at para 35.)
>
> In ***R v Roopchand***, 2016 MBCA 105, the Manitoba Court of Appeal approved the use of character evidence to **rule out a conditional sentence** "as a viable sentencing option. [The trial judge] did not use the existence of the untried charge to punish the accused" (paras 10 and 11). On this same purpose, see also ***R v Flis*** (cited above) at para 23 and ***R v Joseph*** (cited above at para 39.
>
> In ***R v Khan and Chtirkova***, 2009 BCPC 114, Gulbransen PCJ endorsed the use of uncharged-offence evidence as character evidence "particularly relevant to the question of **whether** it would be contrary to the public interest **to grant a discharge**" (para 20).
>
> In ***R v BM*** (cited earlier), the Ontario Court of Appeal stated:
>
> > **A sentencing judge should not rely on prior uncharged acts as "aggravating factors" as the sentencing process should not impose punishment**
> > **for untried and uncharged offences**. However, prior abusive conduct may nonetheless be relevant at the sentencing stage to

> show the character and background of the offender **as it relates to the principles of sentencing**: see *R. v. Edwards* (2001), 2001 CanLII 24105 (ON CA), 155 C.C.C. (3d) 473 (Ont. C.A.) at para. 63; *R. v. Roberts* (2006), 2006 ABCA 113 (CanLII), 208 C.C.C. (3d) 454 (Alta. C.A.) at para. 28. The **background and character of the offender may be considered, for example, in order to assess the need for individual deterrence, rehabilitation, or the protection of the public**. Such information is essential for crafting a sentence suitable for a particular offender. [para 11] [emphasis added]

In ***R v Suppiah***, 2021 ONSC 3871, MacDonnell J. held:

> …Mr. Suppiah's **prior abuse of his wife is not an aggravating factor in relation to the offence, but it sheds light on his background and his character** and thus it is relevant to an assessment of the need for specific deterrence and rehabilitation: *R. v. B.M.*, 2008 ONCA 645, at paragraph 11; *R. v. Edwards* (2001), 2001 CanLII 24105 (ON CA), 155 C.C.C. (3d) 473, at paragraph 63 (Ont. C.A.). **The prior history in this case reveals a longstanding predilection to spousal abuse, which highlights the need to clearly and firmly impress upon Mr. Suppiah the necessity of changing his behaviour**. [para 32] [emphasis added]

In ***R v Moore***, 2014 ONSC 1788, MacDonnell J. stated:

> Accordingly [after considering ***Edwards*** and ***BM*** on acceptable uses of uncharged-offence evidence going to character] I accept that Mr. Moore's conduct in shooting Mr. Khan can be taken into account in assessing his character. **It is relevant to a consideration of whether the shot that he fired at Mr. Darakjian in the Arax robbery was an aberration, as something inconsistent with his character, and in that way it is relevant to his prospects for rehabilitation. Beyond that, however, it has no relevance to the sentencing calculus.** [emphasis added]

In ***R v Wertman***, 2009 BCSC 1177, Sigurdson J. wrote:

> The sentencing judge was alive to the fact that **she could not sentence the accused for prior uncharged conduct. There is no indication in the reasons for sentence that the judge took the prior noise complaints into account as an aggravating circumstance or that she purported to impose additional punishment in her sentence for uncharged conduct**.
>
> However, the fact of there being prior complaints was not challenged, only their relevance. I think that the **fact of prior complaints is admissible for a limited purpose and that it is**

> **relevant to the nature of the particular offence for which the accused were charged**. That is particularly so given the terms of the Noise By-law which prohibits the "sound of radio…or any other music or voice amplification equipment … which can easily be heard by an individual or member of the public who is not on the same premises." (emphasis added) [paras 19-20] [bold emphasis added]

In ***R v Golic***, 2017 BCSC 1679, Humphries J. issued an important caveat about the use of uncharged-offence evidence:

> … I agree with the Crown that the [uncharged-offence] evidence is generally relevant and could go to the issue of **character and lack of remorse**. It may be relevant to the issue of **rehabilitation**.
>
> The Crown may also submit that it is **useful if there is evidence of good character or expressions of remorse to come**.
>
> I agree that the evidence is potentially relevant and should be admitted. ***It is important to emphasize that the evidence cannot be used to increase sentence. Mr. Golic is not on trial for threatening. The use of the evidence must be closely circumscribed.*** The weight to be attached to it, if any, and the importance it will ultimately assume is still to be seen. [paras 21, 22, and 24] [emphasis added]

In ***R v McKay***, 2004 MBQB 146, Duval J. held:

> The hearsay **information respecting incidents of violence within the correctional facility which the Crown seeks to tender** through the report of Mr. Huzack **cannot be used for the purpose of increasing the punishment which would be appropriate in respect of the offences before the court, although relevant for the purpose of establishing the offender's character, behaviour, and attitude since the commission of the offences before the court.** [para 14]

In ***R v McDonald***, 2015 ABPC 282, Norheim PCJ stated:

> I am satisfied that the evidence of Mr. McDonald's subsequently incurred impaired driving charges, if proven by the Crown beyond a reasonable doubt, **would be a relevant consideration in the sentencing process. It would tend to support the position that the defendant has a drinking problem, and may weigh in favor of a sentence crafted to deal with this problem**. … [para 21]

In ***R v Clements***, 2013 MBPC 69, Krahn J. held:

> … as noted in *Angelillo*, I must be **very careful not to punish the accused on this sentence for the untried offences** or even for his other convictions. In this case, the **background of the offender is**

> **important in order to assess his moral culpability and the degree of deliberate risk taking**. The untried offence and the subsequent conviction also provide **relevant information to the court to independently evaluate the risk assessment set out in the PSR, that is, that he is a low risk to re-offend**. The subsequent conviction impacts the weight and credibility that can be placed on the accused's assertions that he has stopped drinking and has learned his lesson. [para 27] [emphasis added]

In ***R v Deiaco***, 2019 ONCA 12, the Ontario Court of Appeal emphasized the limited use of character illumination derived from uncharged-offence evidence:

> Nor did the sentencing judge err in admitting or relying on the voluntary, videotaped interviews Mr. Deiaco gave about his work in the sex trade business. She considered and applied properly the factors identified by Rosenberg J.A. in *R. v. Edwards* (2001), 2001 CanLII 24105 (ON CA), 54 O.R. (3d) 737 (C.A.), at para. 64, for admitting and using uncharged offences when sentencing offenders. **The sentencing judge cautioned herself not to punish Mr. Deiaco for the uncharged conduct, properly confining her use of Mr. Deiaco's voluntary admissions to proof of his background and character as information relevant to the objectives of sentencing**. Specifically, she used Mr. Deiaco's uncontested boastful admissions as demonstrating that he has **no insight into his behaviour or its impact, a consideration that may reduce the impetus for imposing a rehabilitative sentence**. We would not interfere with the sentencing judge's discretionary decision to admit this evidence and to use it as she did. [para 5] [emphasis added].

Finally, in ***R v MSG***, 2021 BCPC 157, Boblin PCJ said:

> Another factor that affects M.'s sentence is the fact that the offences he committed were in the context of the ongoing physical, psychological and emotional abuse of his spouse over decades. **Although I must not sentence M. for uncharged conduct, and uncharged conduct is not an aggravating factor, the history of his relationship with T. is relevant to his character and his prospects for rehabilitation**. [para 170]

From these cases, I conclude that:

1. uncharged offences, if established, can illuminate the convicted person's character;
2. character can be relevant by way of an express ("character"-referencing) statutory provision (e.g. suitability for absolute or conditional discharge, parole eligibility, and dangerous-offender designation);

3. character can also be relevant to general sentencing considerations e.g. rehabilitation prospects, risk of re-offending, protection of the public, and genuineness of remorse;
4. it can also be relevant in a rebuttal sense where the convicted person puts forward good-character evidence on sentencing; and
5. **it is not relevant as an "aggravating factor"** ***per se*****, in the sense that proof of the uncharged offence translates directly, or necessarily, into a more severe sentence**, in the way that proof of a prior conviction can (as explained thoroughly by the Manitoba Court of Appeal in ***R v Wright***, 2010 MBCA 80 at paras 7-18). [paras 87 and 89-102] [emphasis in original except for the last paragraph (emphasis added)]

[See also ***R v Pete***, 2019 BCCA 244 (post-offence convictions): A sentencing judge should not treat post-offence convictions as prior convictions or as an aggravating circumstance calling for a harsher sentence. **The danger in doing so is that the offender may be treated more harshly than his or her record warrants**. **The degree of culpability of a first-time offender is not as high as someone who has been convicted and sentenced of other offences at the time of the commission of the subject offence**. [para 40] [emphasis added]

Crown's proposed use of character evidence here

[15] The Crown said that Mr. Lindsay's misconduct in the Addai-Nyamekye (2013) and "phone" (2016) incidents bear on three sentencing objectives: **deterrence, denunciation, and public protection**. Deterrence-wise, it submitted that character bears on both **specific (individual)** and **general deterrence**.

[16] I agree with the Crown that both prior incidents are relevant in gauging Mr. Lindsay's character and also that character can be relevant where a character-related sentencing principle is engaged.

[17] The issue is whether any such principles are engaged here.

Character evidence and deterrence

[18] I find that character evidence arising from proved uncharged offence(s) can bear on **specific deterrence** i.e. the need for a sentence to send a deterrence message to the offender in question.

[19] I also find that such evidence does not bear on **general deterrence** i.e. the need to send a deterring message to others. (Here the Crown referred specifically to other police officers.)

[20] The case law confirms the personal (individual) focus of character evidence when it comes to deterrence.

[21] In ***R v BWP; R v BVN***, 2006 SCC 27, the Supreme Court of Canada confirmed the **crime-in-question focus of general deterrence** i.e. no linkage to the convicted person's character per se:

> Deterrence, as a principle of sentencing, refers to the imposition of a sanction for the purpose of discouraging the offender and others from engaging in criminal conduct. When deterrence is aimed at the offender before the court, it is called "specific deterrence", when directed at others, "general deterrence". The focus of these appeals is on the latter. General deterrence is intended to work in this way: potential criminals will not engage in criminal activity because of the example provided by the punishment imposed on the offender. When **general deterrence** is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because **the court decides to send a message to others who may be inclined to engage in similar criminal activity**. [para 2] [emphasis added]

[22] In ***R v BM***, 2008 ONCA 645, the Ontario Court of Appeal also confirmed the potential relevance of character evidence to **specific deterrence**:

> … prior abusive conduct may … be relevant at the sentencing stage to show the **character and background of the offender as it relates to the principles of sentencing**: see *R v. Edwards* (2001), 2001 CanLII 24105 (ON CA), 155 C.C.C. (3d) 473 (Ont. C.A.) at para. 63; *R v. Roberts* (2006), 2006 ABCA 113 (CanLII), 208 C.C.C. (3d) 454 (Alta. C.A.) at para. 28. The **background and character of the offender may be considered**, for example, in order to assess the need for **individual deterrence**, rehabilitation, or the protection of the public. **Such information is essential for crafting a sentence suitable for a particular offender**. [para 11] [emphasis added]

[23] In ***R v Flis***, 2003 ABQB 44, Greckol J. (as she then was) focused on the **personal focus** of character evidence:

> … Such [untried-alleged-offence] evidence may be admissible for the purpose of showing the background and character of Mr. Flis, as that information may be relevant to the objectives of sentencing, including those inherent in the inquiry of whether a conditional sentence would be fit and proper. **Such evidence may be admissible to help assess the danger to the community posed by the offender while serving his sentence in the community in terms of the risk of his failing to comply with court orders or re-offending**. [para 36] [emphasis added]

[24] While in a different (prior record) context, ***R v Wright***, 2010 MBCA 80 also confirmed the **personal focus** of character evidence on sentencing:

> … although a **sentencing judge cannot punish an accused again for previous convictions**, a prior criminal record can assist that judge in **determining the normative character of that accused** and, when that record shows repeated related criminal behaviour, it may be viewed as an aggravating factor (thereby causing the sentence to be increased along the appropriate range of sentences) in order **to better address certain objectives of sentencing more particular to the offender, such as specific deterrence, protection of society and/or the prospects of rehabilitation**. [para 16] [emphasis added]

[25] A similar (**personal**) focus is seen in ***R v KM***, 2007 CanLII 13937 (ONSC) (Hill J):

> The prosecution submitted that Ms. K.M.'s actions are relevant to the **background and character of the offender** herself, **an especially relevant subject to issues of specific deterrence and the risk which the offender may, in the future, pose to children**. [para 20] [emphasis added]

[26] Same in ***R v ES***, 2018 ONSC 4808 (Trimble J.):

> The fact that an accused commits any offence while he is on probation or on bail is an aggravating factor on the sentencing, even if the accused is not charged at the time of the subject offence, with an offence of a similar nature (see: *R. v. Murray, 2007 ONCA 799*, para. 6 where the offence on bail is the same as the offence for which the accused was on bail, and *R. v. Marshall*, 2015 ONCA 692, para. 50 where the offence on bail was dissimilar). **Evidence of breach of a release condition is relevant to the accused's conduct while on judicial interim release, and to the character of the offender insofar as it informs issues of remorse, risk, specific deterrence, and the fitness of various sentencing options** (see: *R. v. Fouquet*, [2005] ABQB 673, para. 21 to 25 dealing with breach of a firearms prohibition while on parole, and *R. v. McCauley*, 2007 CanLII 13937 (ON SC), [2007] O.J. No. 1593 (S.C.), para. 17 to 24 dealing with breach of a drug prohibition while on bail). [para 40] [emphasis added]

[27] And ***R v Roud***, (1981) 21 CR (3d) 97 (ONCA) (SCC leave dismissed May 11, 1981), where the Ontario Court of Appeal drew the same link between character evidence and **specific (individual) deterrence**:

> Nothing could be more prejudicial to an accused on the issue of sentence than [background and character] evidence which tends to be general and perhaps more so if examples are injected in the general setting. How can a convicted man defend himself from what is said in such circumstances? Yet **in such a case as this one on the issue of sentence, where the question of individual deterrence and rehabilitation of the convicted man are central issues along with the question of the protection of the public, it seems logical that such evidence must be dealt with, for the background and character of the accused man are necessary information for the sentencing Court.** The accused must be given every opportunity to cross-examine and to call whatever evidence he chooses.
>
> In my respectful view, the evidence was relevant and admissible and I do not think the learned trial Judge erred in the use he made of it. **He did not, as he must not do, punish the appellant for past acts, but on the other hand I think he properly sought to understand the appellant in determining the quantum of sentence appropriate for the offence** of which he had been convicted by the jury. He had a duty to the public, and he had a duty to the appellant. I do not see how he could have discharged either without fairly complete information as to the appellant, his background and his character. [p 42] [emphasis added]

[28] Same link in ***R v Taylor***, 2004 CanLII 7199 (ONCA) (criminal-record context):

> …a criminal record, depending on its nature, may be an "aggravating" factor in the sentencing context in the sense that it renders a stiffer sentence "fit" in the circumstances because it rebuts good character and **because of what it tells the**

> **trial judge and society about the need for specific deterrence, the chances of successful rehabilitation, and the likelihood of recidivism**. [para 40] [emphasis added]

[29] And in ***R v Vukaj***, 2013 BCSC 79 (Griffin J.) (use of previous conditional discharge):

> There is only limited relevance to the evidence of the conditionally discharged offences and the evidence that Mr. Vukaj did have a history of repeatedly assaulting and threatening his wife. While I accept the complainant's evidence of this history, this evidence is not to suggest that he should now be sentenced for his prior assaults and threats: he cannot be. The current sentence must be only in relation to the offences for which I have convicted him after trial. However, **this history provides insight into Mr. Vukaj's character which assists the court in considering sentencing objectives such as the prospects of rehabilitation and the need for specific deterrence**. [para 27] [emphasis added]

[30] See also ***R c Owolabi Adejojo***, 2019 QCCQ 1555 (Galiatsatos, JCQ):

> However, this subsequent [charged] offence is nevertheless highly relevant on sentencing. Said relevance was well explained by the British Columbia Court of Appeal in ***R.* v. *Johnston***:
>
>> The fact that a person convicted of an offence has since the date of that offence committed similar offences cannot be regarded as irrelevant to the sentencing process. Other similar offences, whether committed before or after that for which an accused is being sentenced, may well be of considerable importance in determining the **character** of the accused, the extent, if any, to which there **has been rehabilitation**, the **likelihood of rehabilitation in the future**, the **extent to which the accused is likely to be deterred** by the fact of conviction, brief incarceration or a term of probation and – to some extent a factor related to all of these – the extent to which imprisonment is appropriate for the **protection of the public** against the commission of further similar offences by the accused.[42]
>
> Thus, it would be unwise to treat him like the typical first offender. The fact that he would act so aggressively in a jail setting towards authority figures – while awaiting his trial for sexual assault no less – speaks volumes about his **character, his dangerousness, his likelihood of rehabilitation and his likelihood of being adequately deterred.** [paras 130 and 132] [emphasis added]

Character evidence here not bearing on general deterrence

[31] The Crown did not cite any cases drawing a link between uncharged-offence-based character evidence and **general deterrence**.

[32] That is not surprising. As reflected in the cases above considering **specific deterrence**, character is relevant because that sentencing principle (and others, as discussed below) focus on the individual characteristics of the offender.

[33] The aim of factoring in such character evidence is to craft a sentence that fits the offender i.e. to customize the sentence for the offender's particular circumstances, including pre-existing and current character.

[34] With **general deterrence**, the focus is not on the individual offender and his or her full circumstances, but on the message sent by the sentence to the community at large or possibly some subset, such as police officers or others whose duties put them in contact with arrested, detained, jailed or incarcerated persons.

[35] The focus of the latter is necessarily the **convicted-of incident**. The message is (effectively): "Look at **this offence**; look at **this sentence**; see what will or might be in store for you if you behave in the **same way**."

[36] Recall that the uncharged-offence evidence is not used to increase the offender's punishment per se. He or she is being punished only for the convicted-of offence.

[37] The fact a sentence might be different for the offender in question because of his or her uncharged-offence conduct i.e. tailored to fit his or her individual circumstances is not inherently part of the "message to the community", whose members have an infinite variety of background circumstances, including character.

[38] While an overlap may exist with some slice of the community (i.e. persons happening to have similar background circumstances, even similar uncharged offences), speaking to that particular slice is not the focus of general deterrence.

[39] All to say: the uncharged-offence evidence does not inform the **general-deterrence** dimension.

Denunciation also not informed by character evidence here

[40] The Supreme Court of Canada explained this sentencing principle in ***R v M(CA)*** [1996] 1 SCR 500:

> … The objective of denunciation mandates that a sentence should also communicate **society's condemnation of that particular offender's conduct**. In short, a sentence with a denunciatory element represents a symbolic, collective statement that **the offender's conduct should be punished** for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its **abhorrence of particular types of crime**, and the only way in which the courts can show this is by the sentences they pass". … A sentence which expresses denunciation is simply the means by which these [societal] values are communicated. In short, in addition to attaching negative consequences to **undesirable behaviour**, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*. [para 81]

[41] Here too the focus is on the **convicted-of offence**, not the offender's character as illuminated by uncharged-offence evidence or the uncharged offences themselves.

[42] This is confirmed in ***R v Letkemean***, 2021 MBCA 68:

> It is well established that **when the principles of denunciation and general deterrence are paramount, the focus of the sentencing judge is to be more on the offence committed, rather than on the offender**, so as to better reflect the gravity of the conduct; although factors personal to the offender are always relevant, they necessarily take on a lesser role (see *KNDW* at para 21; and *Friesen* at para 104). [para 51] [emphasis added]

[43] See also ***R v LR***, 2021 BCPC 7 (Doulis PCJ):

> **When the principles of denunciation and deterrence have priority, the sentencing judge's focus is more on the offence than on the offender**. Although they necessarily take on a reduced role, factors personal to the offender, such as rehabilitation and *Gladue* factors remain important. "The reason for this priority focus on conduct is to better reflect the gravity and wrongfulness of the conduct and the serious harm it causes": *R. v. KNDW*, 2020 MBCA 52 (CanLII), at para. 21, referencing *R. v. Friesen*, 2020 SCC 9. [para 82]

[44] And ***R v Adam et al***, 2007 BCSC 764 (Romilly J.):

> In addressing the sentencing objectives, I first deal with denunciation. The sentences imposed in this case must serve to **denounce the conduct of these accused**. … [para 121] [emphasis added]

[45] As with general deterrence, the denunciation-of-conduct objective is not informed by background-to-that-conduct (i.e. uncharged offence) evidence.

D. Specific deterrence

[46] As noted, the Crown also emphasized specific deterrence, on which (as discussed above) uncharged-offence evidence may bear.

[47] Is specific deterrence required here?

[48] The answer is no, whether or not the uncharged-offence evidence is factored in.

[49] Each of the three incidents occurred in the course of Mr. Lindsay's duties as a Calgary police constable.

[50] Mr. Lindsay resigned from the Calgary Police Service in the fall of 2020. Nothing in the record reflects any intention – if such were even possible – to seek to rejoin the Service or to become employed elsewhere in front-line law enforcement.

[51] Service-call information introduced during the sentencing showed that Mr. Lindsay handled or was involved in several thousand call-outs during his approximately six years as a police constable, with nothing in the record reflecting any unjustified force, animus, loss of temper, undue aggression or any other subpar performance on any of those calls i.e. beyond the three examined or noted in these proceedings.

[52] I also note Mr. Lindsay's adherence to his release conditions throughout the course of his nearly five years on release.

[53] Finally, his current employment features daily interactions with diverse individuals, including persons experiencing employment difficulties for any number of reasons, and his

supervisors and colleagues uniformly praise Mr. Lindsay's calm and compassionate dealings with these individuals.

[54] Mr. Lindsay does not pose any material risk to the public.

[55] I see no need for specific deterrence in these circumstances.

E. Public protection

[56] The Crown also emphasized this sentencing objective.

[57] However, for the same reasons that specific deterrence is not a concern here, public protection is not a material factor, again whether or not the uncharged offences are factored in.

F. Sentencing objectives actually engaged here

[58] As discussed, denunciation focusing on the convicted-of offence -- the aggravated assault of Mr. Haworth – is a factor here.

[59] So is the fundamental principle that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender": s. 718.1 of the ***Criminal Code***.

[60] Both of these sentencing objectives require careful examination of the conduct in question, since that is the conduct to be denounced and gauged for both gravity and the offender's degree of responsibility.

Gravity of the offence

[61] The gravity here is serious:

- beyond the initial punch to Mr. Haworth's face, which caused him to bleed, and the follow-up punches to his head, Mr. Lindsay's throw of Mr. Haworth to the pavement caused a skull fracture and a subdural hematoma and necessitated (after an initial discharge from hospital) a second visit to hospital, for cranial surgery to alleviate pressure caused by those injuries and an overall hospital stay of nine days;
- Mr. Haworth's brother Robert testified to distinct personality changes following these injuries. For instance, he testified that:
    - "before the [incident and when] Daniel was [working] in construction, I would work with him … his mind was like a steel trap on details of specs on drawings and scheduling for jobs. Afterwards, he had to carry around a note pad because his short-term memory was affected … he needed to write down small things, [which] caused him to get frustrated and maybe [be] more irritable than before";
    - "he [could] be irritable before the injury, if [impaired]. In a sober state, he would have been calm, intelligent, witty, and funny"; and
    - [post-incident] "he did seem somewhat depressed [albeit he had been depressed from time to time pre-incident] and not the same outgoing person … [he] wouldn't really make jokes any more … at coffee break, he would be a loner."

[62] The defence noted that, despite his injuries and any after-effects, Mr. Haworth was able to work (at minimum, in the summer and fall of 2015, on the complicated construction of two skateparks), that he had formed a new relationship, and that he was sufficiently capable of travelling, on his own, up to Grande Prairie (from Calgary) and back.

[63] While I am unable, on the available evidence, to draw a straight line from these injuries and their after-effects to Mr. Haworth's suicide approximately nine months later, it is inescapable that these injuries and after-effects left Mr. Haworth in a worse position than before the incident.

[64] I find that, despite his substance addictions and the associated turbulence at periods in his life, Daniel Haworth was, at root, a personable, engaging, and talented person and that he was loved by his family and friends.

[65] He suffered a major head injury at the hands of Mr. Lindsay, who was not justified to use any violent force against him.

[66] Mr. Haworth's difficulties in life were worsened as a result.

Degree of responsibility of the offender

[67] What is the degree of Mr. Lindsay's responsibility for Mr. Haworth's injuries i.e. the extent of his moral blameworthiness for them.

[68] This is where the Crown's submissions largely miss the mark.

[69] Its cases are all materially distinguishable from the circumstances here, featuring a during-arrest context, subjective beliefs by Mr. Lindsay that Mr. Haworth was about to engage, and later was engaging, in assaultive behaviour, and uses of force sparked by those beliefs.

[70] As explained in the 2019 decision, I found that Mr. Lindsay did not have objective grounds for either belief.

[71] I found that Mr. Haworth did not present any material risk to Mr. Lindsay at any point in their encounter and also that he showed no objective signs of spitting at or otherwise endangering Mr. Lindsay or even trying to do so. In other words, Mr. Lindsay had no reasonable grounds for perceiving any risk coming from Mr. Haworth.

[72] But I also found that Mr. Lindsay's subjective beliefs were genuine and that some use of force (albeit not the force actually deployed) was justified, as reflected in these excerpts from the conviction judgment (2019 ABQB 462):

> ***First strike***
>
> **I accept Cst. Lindsay's statements at face value i.e. that he subjectively felt terrified and feared a spitting attack immediately before the first strike**. …
>
> I find that **Cst. Lindsay's fear of a spitting attack at that point had no objective basis**. …
>
> **As for Cst. Lindsay's testimony that the purposes of the first strike were to get Mr. Haworth to face forward and to distract him so that he could be moved toward the car, as found just above, the "face forward" aspect was anchored in his assessment of an imminent spitting attack**. With no objective grounds for that assessment, the first strike cannot be justified on that basis.

> … **I accept that Cst. Haworth believed the strike was necessary for distraction purposes**, but it was not. He did not have reasonable grounds to use the strike for that purpose. [paras 104-107]
>
> ***Further strikes and throw-down***
>
> … **Cst. Lindsay's perception of Mr. Haworth spitting at him or Cst. Lapointe or both of them was not anchored in reality. He may have assumed from seeing blood on the window that Mr. Haworth intended to spit again and somehow inferred that he did**, but there was no evidence of any basis for that inference or perception.
>
> Simply put, **he described an action – being spat at – that did not happen. In other words, he was mistaken about that**. [paras 102 and 103] [emphasis added]
>
> **Cst. Lindsay's main rationale for the three strikes and the throwdown was his perception that Mr. Haworth had spat blood at him or Cst. Lapointe or both of them. I have already found that he was mistaken about that**. … [para 108] [emphasis added]
>
> **As noted earlier, the test here is subjective/objective: it is not enough that Cst. Lindsay believed that Mr. Haworth spit at him**. His belief must be objectively reasonable i.e. a belief that a reasonable person would have had in these circumstances. [para 110] [emphasis added]
>
> ***Some use of force justified***
>
> The **use of some force was justified** after Cst Lindsay saw that Mr. Haworth had spit blood. The aim was to prevent the risk of accidental or careless blood exposure through further spitting. [para 124]
>
> ***Credibility finding***
>
> **This case does not turn on credibility. I accepted Cst. Lindsay's testimony that he felt terrified and feared a spitting attack before the first strike, that he believed a "distraction strike" was necessary at that point, and that he perceived being spat at before the three strikes and the throwdown i.e. that he subjectively felt, feared, believed, and perceived as described**.
>
> As for differences between his descriptions of Mr. Haworth's movements outside the car ("constantly changing directions", etc.) and what the videos captured, and having found earlier that the videos captured these events accurately, **I accept his subjective perceptions as described. He was in the middle of these stressful events. I accept that his experience of them may be different than what the videos show. He was mistaken about those aspects.** [paras 134 and 135] [emphasis added]

[73] Based on these pre-existing findings, I find that Mr. Lindsay's moral blameworthiness here -- i.e. his degree of responsibility – is low.

[74] This is not a case of a rogue officer bent on teaching an unruly detainee a "lesson", a corrections officer running a detained person's head into a wall to for no purpose other than to

injure and intimidate, an orchestrated group assault of a prisoner for purely punitive reasons, or anything akin. Instead, it is a case – undoubtedly tragic – featuring two critical mistakes i.e. errors in judgment, that led to uses of force found, after the fact, to be objectively unreasonable.

[75] Those features materially distinguish this case from the Crown's catalogue of unjustified-from-the-start civilian-on-civilian assaults.

[76] That includes ***R v Childs***, 1991 ABCA 300, where even in a perceived-robbery (actually a lawful repossession of a vehicle) situation, no uses of force were justified (given that the "robbery" had been thwarted and the lopsided number of "defenders").

[77] The same features also distinguish this case even from the Crown's assault-by-police-officer cases, none of which featured an officer genuinely believing that force was necessary but later being shown to lack reasonable grounds for that belief.

[78] The common denominator of the Crown's police-officer cases is gratuitous violence, unanchored to any law-enforcement purpose or any subjective belief in the need for force.

[79] That factor – gratuitous violence – is absent here.

G. Key sentencing authorities

[80] The continuum of crimes by police officers was recognized in ***R v Letkeman***, 2021 MBCA 68:

> The Crown alleges that the judge erred by mischaracterising the accused's moral blameworthiness. Essentially, two arguments are advanced. First, **the Crown says that the judge created a false distinction between various types of crimes committed by police officers in order to justify treating this offence as less morally blameworthy**. Second, the judge is said to have erred by finding that the accused's "blind spot" in judgment when it came to impaired drivers or "moral flaw" (*Letkeman 2020* at para 43) attenuated his moral blameworthiness, and that this "blind spot" reasoning overtook his duty to impose a fit sentence.
>
> **With respect to the first argument, the judge identified cases of dishonesty (e.g., false affidavit, perjury), as well as cases involving excessive force or violence toward a suspect or prisoner (e.g., assault, unlawful confinement, attempted murder), and then found that driving offences committed by police officers "may not be as heinous or immoral as the other types" of conduct** (at para 22) (emphasis added). He further stated that the conduct in this case **"is not in the same league as those officers who have perjured themselves, stolen exhibits such as drugs or other items, or used excessive force out of anger or retribution toward a suspect or prisoner"** (at para 46).
>
> In my view, the judge, while considering various types of police misconduct as a tool for assistance, did not rigidly use those categories and try to pigeonhole this case in order to assess the accused's moral blameworthiness. **He did not use the other cases as a straightjacket and draw false distinctions between crimes in order to determine the accused's moral blameworthiness. Instead, he reasonably distinguished this case from those that involve a deliberate leap into criminality**. [paras 35, 36 and 40] [emphasis added]

[81] The following additional excerpts from ***R v Letkeman*** are also helpful here, as the officer there, while trying to enforce the law, also miscalculated in using force, causing serious injury to an individual:

> The offence [criminal negligence by an RCMP officer] occurred after the accused decided to follow a Jeep (the Jeep) which he suspected was being operated by an impaired driver due to the manner of driving. In the course of the approximately four-minute, slow-speed pursuit, during which the driver did not comply with a traffic stop, **the accused twice intentionally struck the Jeep. On the first occasion, in a vain attempt to stop it, he deliberately collided into it, using a "precision immobilization technique" or PIT maneuver, which he was not trained to perform. On the second occasion, he intentionally T-boned the side of the Jeep while it was stationary, in a further attempt to disable it and stop its driver. The second impact caused serious injury to Lori Flett (Ms Flett), who was a passenger in the Jeep**.
>
> ... knowing that the stationary Jeep was full of occupants, but in a further attempt to disable it and stop the chase, **the accused drove into its passenger side, striking it with great force. The collision caused the Jeep to spin, coming to rest on the opposite side of the trail. Ms Flett, who was situated by the rear passenger side door directly at the point of impact, sustained a fractured pelvis and serious neck injuries as a result**.
>
> In determining an appropriate sentence, I recognise the **unique position of trust held by police officers in our society**. As stated in *Doering* (at para 27):
>
> > . . . [B]reach of trust can arise even where there is no deliberate exploitation of authority. Police criminality is, on its face, a violation of the general trust reposed in police to uphold and enforce the law. It is an implicit condition of that trust that police will obey the laws that they are enforcing. Viewed in this light, it is difficult to imagine an offence by a police officer that does not, in some way, breach the public's trust.
>
> Applicable statutory aggravating factors in this case are that the accused, **in committing the offence, abused a position of trust or authority in relation to the victim** (see section 718.2(a)(iii) of the *Code*) and that the offence had a **significant impact on the victim** (see section 718.2(iii.1)).
>
> Specific deterrence is of less import here, but **general deterrence and denunciation are paramount. As I have said, a sentence must convey to the police that overzealous conduct of this kind will be seriously sanctioned, and thereby act as a deterrent for other officers**.
>
> **Denunciation is intended to instill and uphold the values of the community**. ...
>
> Although the accused's "blind spot" meant that **he did not intend or foresee the consequences of his actions, it is important to remember that subjective perception is not required to ground liability for the offence of criminal negligence. Rather, the criminal law provides for culpability for acts**

> **committed with a blind eye to the risks that would have been apparent to a reasonable person**.
>
> **Police officers have received jail sentences for serious misconduct, even where the criminality is grounded in recklessness**.
>
> That said, while not factually similar, at least **some guidance can be gleaned from a canvass of sentencing authorities for police officers' use of excessive force resulting in convictions for assault or assault causing bodily harm. Those authorities reveal a pattern of relatively low sentences that recognise the typically favourable personal circumstances of police officers and the fluid and difficult situations in which they find themselves** (see *R v Walker*, 2006 CarswellOnt 4132 (Sup Ct J), conditional discharge; *R v Peters*, 2008 BCSC 1839, six-month conditional sentence; *R v Eegeesiak*, 2010 NUCJ 10, concurrent suspended sentences with one year of probation; *R v Rice*, 2015 ONCA 478, conditional discharge; *R v Lavallee*, 2016 ABCA 44, 60-day intermittent sentence followed by two years of probation; and *R v Hearnden*, 2019 ONSC 4306, conditional discharge with 12 months of probation). As well, in *R c Charette*, 2006 NBBR 242, a police officer received a total sentence of 12 months' imprisonment for assault causing bodily harm of a detainee, attempted obstruction of justice for deleting the video of that incident, as well as assault of another detainee one month later.
>
> While my **[dissenting] colleague finds that this was not a crime committed in the pursuit of public safety and that the accused intended to cause injury, the judge, as I have already outlined, found otherwise**.
>
> ... the appeal is allowed in part. **The order, including the requirement for [240 hours of] community service [and a three-year probation order], is set aside; the fine of $10,000 is retained; and a period of incarceration of three months is imposed**.
>
> [paras 2, 10, 59-65, 81 and 97] [emphasis added]

[82] I also find a useful benchmark in ***R v Sevigny***, 2019 ABPC 81 (DePoe PCJ), where a transit peace officer used a harsh take-down maneuver, with no justification, against a jaywalking citizen, who suffered relatively minor injuries:

> [The complainant] was facing away from the accused [transit officer] when this maneuver was undertaken and offered no physical resistance. It appeared from the evidence that it took him by surprise. **He did not break his fall in any manner and was easily taken down. He struck his head forcefully on the sidewalk, which produced a significant laceration on his forehead**. [part of Appendix 1 (conviction reasons)] [emphasis added]

[83] The sentence for assault causing bodily harm was a $1,500 fine, probation of 12 months, and 50 hours of community service.

[84] The key differences are the absence of both objective and subjective perceptions of a need for force (i.e. greater moral blameworthiness than the present case) and less serious injuries.

[85] Another useful reference is ***R v Baxter***, 2018 ONCJ 608 (O'Donnell J.) (assault by police officer causing bodily harm). During an arrest, the officer, with no justification, pushed the arrestee face-first into and along a fence and then "grounded" the arrestee, causing facial cuts.

[86] O'Donnell J. rejected the officer's testimony that he had perceived the arrestee reaching for a weapon (i.e. no objective or even subjective belief accepted).

[87] He emphasized denunciation and deterrence, finding that incarceration is not necessary to achieve those objectives.

[88] He also stressed that the "context in which [the offence of assault causing bodily harm] occurred was a dynamic arrest situation to which Sergeant Baxter had to respond in the moment. While the use of force was unjustified, [he] had a legitimate law enforcement purpose in engaging [the complainant] …." It also emphasized that there was no "odious motive" and "no basis to conclude that [the officer's] conduct was rooted in malice or payback."

[89] The sentence there was a conditional discharge, probation for eighteen months, and 200 hours of community service.

[90] The next comparison case is ***R v Thomas***, 2012 ONSC 6653 (Code J.), where an off-duty police officer was found to have been justified in arresting and using "one or two punches" to subdue a dangerous driver, but who continued (absent justification) with multiple punches against the non-resistant arrestee, causing a broken jaw:

> There is now a substantial body of modern case law in [Ontario] holding that a custodial sentence is generally required in cases of assaults by police officers and court officers on prisoners, in order "to give sufficient weight to the principles of general deterrence and denunciation". All of these cases involved some aggravating features such as: ongoing assaults by a group of officers; defenceless prisoners who were handcuffed or shackled; cover-ups with falsified notes and false reports; and the laying of charges against the innocent victim of the assault. Jail sentences of thirty days to sixty days intermittent have been held to be the "lenient" end of the range in such cases. See: *R. v. Feeney* (2008), 2008 ONCA 756 (CanLII), 238 C.C.C. (3d) 49 (Ont. C.A.); *R. v. Byrne* (2009), 2009 ONCA 134 (CanLII), 242 C.C.C. (3d) 201 (Ont. C.A.); *R. v. Hudd* (1999), 1999 CanLII 1734 (ON CA), 126 O.A.C. 350 (C.A.); *R. v. Preston*, [2005] O.J. No. 6450 (O.C.J.), aff'd [2008] O.J. No. 5136 (C.A.); *R. v. Marji*, 2012 ONSC 6336. [para 49]

[91] Code J. found that the trial judge's imposition of a 90-day jail sentence was "well within the appropriate range of sentence for assaults by police officers, in the above kind of case" (para 50).

[92] However, in light of "exceptional" mitigating circumstances (principally, the "unusually skilled police officer [having] served his community in an exceptional way"), Code J. allowed the sentence appeal, substituting one year of probation with 100 hours of community service (paras 54 and 55).

[93] The final comparator is ***R v Zheng***, 2012 ABPC 72 (Dixon PCJ), another arrest scenario, involving punches, a take-down to the ground, further punches, kneeling on the unresisting arrestee's head, and later pushing the arrestee down to the ground and stepping on his neck and head.

[94] The arrestee suffered “pain and stiffness to the right side of his head and jaw and soreness to his ribs. His nose was bleeding and had a lump. He was incapacitated for three days and experienced rib soreness for at least a month.”

[95] The sentence was a four-mouth conditional sentence order (first 45 days full house arrest; thereafter absences permitted for community service) and 100 hours of such service.

H. Conclusion

[96] Here are the aggravating factors (largely as outlined by the Crown):

- multiple applications of force (four punches to the head, followed by a hard grounding via a throw);
- the force was applied while Mr. Lindsay, an arresting police officer, stood in a position of trust or authority in respect of Mr. Haworth, and represented an abuse of that trust or authority (with the force found to be unjustified on any objectively reasonable grounds);
- handcuffed throughout, Mr. Haworth was effectively defenseless and, particularly, unable to break his fall to the pavement; and
- the offence had a significant impact on Mr. Haworth i.e. the identified injuries, hospital stay, recovery period, and personality changes described by his brother.

[97] The mitigating factors are:

- Mr. Lindsay subjectively perceived that Mr. Haworth posed an imminent spitting risk (before the first punch) and that he was spitting blood at him (before the further punches and grounding) i.e. he did not use force out of malice, to punish, or otherwise gratuitously;
- Mr. Lindsay was justified in using some (limited) force to prevent any risk of contact with blood (albeit none of the force actually deployed);
- the uses of force were reactive (albeit disproportionate), not premeditated;
- Mr. Lindsay’s use of force (again, objectively unjustified) were aimed at protecting not only himself but also his close-at-hand police partner;
- after Mr. Haworth was on the ground, Mr. Lindsay radioed for an ambulance immediately and (with his partner) placed Mr. Haworth in a safe position pending the arrival of paramedics;
- Mr. Lindsay has no criminal record;
- his post-offence conduct has been uniformly pro-social, productive, and beneficial to his family, fellow university students, work colleagues, and the community at large; and
- he has the steadfast support of his family, a supportive network of friends and present and former work and university colleagues, and ongoing employment with a supportive employer.

[98] This offence effectively ended Mr. Lindsay's career with the Calgary Police Service, but as a not-unexpected consequence, it does not mitigate here.

[99] I also reject the defence's request for mitigation on account of undue or excessive publicity. Given Mr. Lindsay's (former) role, the injuries to Mr. Haworth, the charge, and the capture of their encounter on video, it is not surprising, and in any case not unwarranted, for considerable media and public attention to have been paid to this case. In any case Mr. Lindsay did not present any evidence of particular difficulties or hardship stemming from the publicity here.

[100] I also do not accept the defence's position of remorse, asserted as reflected in a handful of the defence's letters of support for Mr. Lindsay. Those letters are too remote, too indirect, and too vague for me to gauge the existence of remorse here.

[101] As for the defence arguments about the difficulties of incarceration for police officers generally and for Mr. Lindsay specifically, the former is an issue for corrections officials to manage, not a mitigating factor on sentencing. On the latter, the defence did not provide sufficient details of specific hardship.

[102] All to say: Mr. Haworth deserved safe and measured treatment, even though he was a (non-dangerous) handful on the day in question.

[103] There is admittedly an asymmetry here: Mr. Haworth was loud and argumentative with Mr. Lindsay. He may even have been disrespectful to him. But police officers are trained to handle difficult people and duty-bound to be even-handed and proportionate in dealing with them.

[104] Mr. Haworth presented no material risk to Mr. Lindsay or his partner that day. He did not deserve the very rough handling he received.

[105] Mr. Lindsay perceived he was about to be spat at and, later, that that was happening.

[106] I cannot explain what gave rise to those perceptions.

[107] But I accepted Mr. Lindsay's testimony as credible i.e. as an honest explanation of what he perceived was happening that day.

[108] At the core of these tragic and upsetting events were mistakes by Mr. Lindsay, not malice, not cruelty, not vindictiveness.

[109] His moral blameworthiness is low, compared to gratuitous-violence-by-police-officer cases.

[110] I cannot fault Mr. Lindsay for his subjective beliefs of imminent harm here or for his decision to use (some) force to manage the later-stage spitting-blood risks here.

[111] But I can, and do, hold him responsible for his decision to deploy far-from-proportionate force to counter those risks.

[112] I am not prepared to essentially excuse Mr. Lindsay's force uses as purely reactive i.e. in the possible sense that events overwhelmed him, and he just reacted instinctively.

[113] In all the circumstances here, and even factoring in Mr. Lindsay's subjective beliefs of imminent harm, he was responsible for his actions, required to evaluate his options, and respond with proportionate force.

[114] This is not to require superhuman self-control or robotic decision-making: it is to hold Mr. Lindsay to his effective duty to not handle a finishing-nail problem with a sledgehammer i.e. to retain his faculties, think reasonably, and act proportionately.

[115] That standard is what police officers are trained to do, what the public expects them to do, and what the Court will hold them to, even making allowances for decisions made in dynamic contexts.

[116] The over-reaction here went far beyond what can be sheltered under reasonable allowance.

[117] Looking at the benchmark cases cited above, as well as the cases cited by the defence, I find that incarceration is warranted here, to express the Court's denunciation of Mr. Lindsay's excessive reaction here and to send a message to others in comparable positions that clearly disproportionate uses of force are unacceptable and that offenders will be brought to account.

[118] As for the term of incarceration, I note the ranges in the cases cited above and in the defence's cases. Stressing the absence of malice, pre-meditation, and gratuitous violence, while at the same time noting the extent of injuries and consequences here, I find that 90 days' (intermittent) incarceration is warranted.

[119] I also impose a term of probation for one year, on terms set at the conclusion of the oral delivery of a synopsis of this judgment on October 21, 2021.

I. Closing note

[120] I thank Mr. Baharustani and Mr. Macleod, as well as Ms. Rath, for their professionalism and assistance over the course of this long proceeding.

[121] I also offer my sympathies to the Haworth family on the loss of their son and brother.

Heard on the 14th and 15th day of October, 2021.
Oral synopsis of this judgment delivered via Webex on the 21st day of October, 2021
Dated at the City of Calgary, Alberta this 22nd day of October, 2021.

M. J. Lema
J.C.Q.B.A.

Appearances:

John Baharustani
for the Crown

D. W. MacLeod, Q.C., O'Brien Devlin MacLeod
for the Accused