

**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

ONTARIO PROVINCIAL POLICE

AND

PROVINCIAL CONSTABLE J. (Jon) FITZPATRICK, #14520

CHARGE:

DISCREDITABLE CONDUCT

DECISION WITH REASONS

Before: Superintendent Mike Bickerton
Ontario Provincial Police

For the Prosecution: Ms. Hoursa Yazdi
Ontario Provincial Police

Counsel for the Defence: Ms. Connie D'Angelo
Ontario Provincial Police Association

Hearing Date: April 24th – 28th , 2023

This decision is parsed into the following parts:

PART I: OVERVIEW;

PART II: THE HEARING;

PART III: SUBMISSIONS, ANALYSIS and FINDINGS; and,

PART IV: DISPOSITION

PART I: OVERVIEW

Allegations of Misconduct

Provincial Constable (P/C) J. (Jon) Fitzpatrick is alleged to have committed Discreditable Conduct in that he did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended.

Particulars of Allegations:

On or about July 24, 2021, while on-duty at the Stormont, Dundas and Glengarry Detachment it is alleged P/C Fitzpatrick committed the following misconduct:

- J.M. and her husband were at the detachment to provide statements to further an investigation by P/C Spooner into domestic violence allegations.
- When J.M. requested to use the detachment bathroom facilities P/C Fitzpatrick told her words to the effect – she could only use the facility in the cell area.
- P/C Fitzpatrick was less than professional in his communication with J.M., and demonstrated incivility and aggressive behaviour toward her, and was seen yelling at J.M. only inches from her face. He was also seen yelling or screaming at J.M. to – shut up or for her to stop yelling. Notwithstanding Covid-19, he was not wearing a face mask (PPE) during this confrontation.
- P/C Fitzpatrick told Professional Standards J.M. kept talking over him and he used simple language with her, as authorized under case law.
- J.M. was not under arrest or in custody and rather than use the cell bathroom facilities she indicated she was leaving. P/C Fitzpatrick told her words to the effect – She couldn't leave, or she would be charged with obstruction of justice for failure to comply with a police investigation.
- P/C Fitzpatrick grabbed her by her shoulder and started to forcefully pull and drag her towards the cell area.

- P/C Fitzpatrick twisted her arm and took her to the floor hard using an arm bar technique. J.M. heard a loud crack in her elbow and immediately felt a sharp pain.
- P/C Fitzpatrick directed P/C Morneault, who had come out of the interview room with P/C Spooner, to search J.M., notwithstanding J.M. was not under arrest or in custody.
- P/C Fitzpatrick again took J.M. to the floor a second time using an arm bar technique.
- Despite applying significant physical force against J.M. twice, P/C Fitzpatrick did not arrest her, caution her, advise her of her rights to counsel or initiate charges.
- He knew or reasonably ought to have known he had unnecessarily applied force upon J.M. in an assaultive manner and in the absence of justification or authority.
- When 911 was called to respond to J.M.'s injured arm, they advised it would be some time before they could respond. P/C Fitzpatrick failed to take J.M. or make arrangements for her to seek immediate medical attention, and instead he waited for approximately two hours for the ambulance and paramedics to attend the detachment to check on J.M.'s injury.

P/C Fitzpatrick knew or reasonably ought to have known that his actions were discreditable conduct.

Representation

The hearing was held at OPP East Region Headquarters. P/C Fitzpatrick was represented by Ms. D'Angelo while Ms. Yazdi represented the OPP.

Plea / Penalty Position

P/C Fitzpatrick pleaded not guilty to the allegations.

Decision

After reviewing all the evidence and considering counsel's submissions and those of the public complainant, I find P/C Fitzpatrick guilty of discreditable conduct contrary to Section 2(1)(a)(xi) of the Code of Conduct.

My reasons for the decision are as follows:

PART II: THE HEARING

Exhibits

The exhibits for this matter are listed in Appendix A.

The following are to be considered overviews of evidence provided by witnesses and should not necessarily be taken to represent the entirety of testimony.

Prosecution Witnesses

Detective Sergeant (D/Sgt.) Howard Huggard – Evidence in Chief.

D/Sgt. Huggard was the assigned Professional Standards Bureau (PSB) investigator. He had approximately four years' experience as a PSB investigator at that time. PSB received the complaint from the Office of the Independent Police Review Director (OIPRD).

D/Sgt. Huggard obtained audio and video files from the Stormont, Dundas and Glengarry (SD&G) Detachment. The video recording equipment at the detachment did not record audio. The interview room located in the cell area was active as J.M.'s former partner was being interviewed. The events leading to misconduct allegations against P/C Fitzpatrick occurred in the cell area near the interview room, and some related audio of the interaction between P/C Fitzpatrick and J.M. was recorded.

The following points outline the remainder of D/Sgt. Huggard's testimony.

- D/Sgt. Huggard conducted formal interviews with P/C Spooner and P/C Fitzpatrick, obtained a duty report from P/C Morneault, and spoke with the public complainant, J.M.
- P/C Spooner had been identified as a subject officer but following his interview, P/C Spooner was reclassified as a witness officer.
- At the time of the incident, J.M. and her former partner were at the detachment to be interviewed in relation to a domestic disturbance that had occurred at a cemetery on July 24, 2020. Officers, while at the scene, had been unable to determine who the aggressor in the disturbance or assault had been.
- Neither J.M. nor her former partner were under arrest. J.M. had not been detained although her partner had been investigatively detained.

The ¹video and ²audio recordings were played. The persons depicted or appearing in the recordings were identified.

- The video and audio recordings seemed to corroborate what J.M. had described in her OIPRD complaint.
- P/C Spooner was interviewed on April 12, 2021. During the interview P/C Spooner was asked if he told P/C Fitzpatrick to put J.M. in the cells. P/C Spooner said he had not.
- P/C Fitzpatrick was interviewed on April 26, 2021.
- During P/C Fitzpatrick's interview he maintained he was arresting J.M. for causing a disturbance and obstruction. D/Sgt. Huggard felt there were no grounds to arrest for either offence. The police detachment was not a public place re. causing a disturbance, and he found no evidence J.M. was willfully obstructing the investigation.
- His investigation revealed P/C Fitzpatrick never advised J.M. of her Right to Counsel or Caution.
- He investigated concerns raised that the ambulance took two hours to respond to assist J.M. J.M. felt a police officer involved had called off the ambulance. D/Sgt. Huggard determined this was not the case and that the ambulance was delayed due to other calls for service.
- As part of his investigation D/Sgt. Huggard reviewed applicable sections of the Criminal Code as well as related OPP Policy. This included ³section 2.41 of OPP Police Orders (policy) regarding arrest and detention. His review of policy included that which is related to intimate partner violence investigations.
- As a result of his investigation D/Sgt. Huggard concluded P/C Fitzpatrick had committed discreditable conduct.

Cross Examination

- Aspects of OPP Policy including intimate partner violence were reviewed. D/Sgt. Huggard agreed involved persons were to be separated. J.M. and her former partner were in separate rooms which were ten feet apart.
- Aspects of the video recording were reviewed. D/Sgt. Huggard agreed with defence counsel's suggestions of what was depicted.
- D/Sgt. Huggard was uncertain as to when J.M.'s former partner was released from investigative detention.
- P/C Morneault placed J.M.'s former partner in the interview room and P/C Spooner placed J.M. in the fingerprint room. P/C Fitzpatrick was not involved in whom was placed where.

¹ Exhibit 11, USB with Cell area video

² Exhibit 10, USB with Interview room recording

³ Exhibit 12, OPP Police Orders section 2.41

- D/Sgt. Huggard disagreed J.M. was at the detachment for a further interview. He believed it was for photographs but was not certain.
- D/Sgt. Huggard was not aware of specific Covid-19 protocols at the SD&G detachment until further along in his investigation. He became aware of specific measures during his interview of P/C Fitzpatrick who provided the ⁴local directives in place at the time of his interaction with J.M.
- The directives restricted movement and access within the detachment including that only the “hard interview room” in the cell area was to be used. He agreed that, although the memoranda did not specifically say, P/C Fitzpatrick had told D/Sgt. Huggard his (Fitzpatrick’s) understanding was that only the washrooms in the cell area could be used by the public.
- J.M. was saying that her arm was broken and had a civil action in place. Her arm was not broken, J.M.’s injury did not trigger a Special Investigations Unit (SIU) notification. No medical documents were obtained indicating the extent of J.M.’s injuries.
- J.M.’s opinion that the OPP had delayed ambulance response was false.
- D/Sgt. Huggard thought P/C Spooner was a witness officer prior to his interview but did not know for certain. Upon completion of P/C Spooner’s interview D/Sgt. Huggard concluded P/C Spooner was a witness officer.
- J.M. was later committed for psychiatric assessment under the Mental Health Act (MHA). The doctor makes the ultimate decision whether to commit a person. Police provide grounds.
- D/Sgt. Huggard agreed J.M. was abusive and using profanities. While this was occurring, P/C Fitzpatrick was attempting to provide her with first aid, provided her with a blanket, and water to drink.
- D/Sgt. Huggard explained ⁵duty report orders PSB had sent to involved officers.
- He reviewed the detachment recordings multiple times and estimated more than ten times.
- D/Sgt. Huggard attempted to interview J.M. but it never panned out.
- J.M. received a copy of the investigative report through the OIPRD not the OPP.
- Discussed his understanding of section 2.41 of police orders regarding arrest and detention as well as section ⁶495 of the Criminal Code.
- Discussed his understanding of reasonable grounds and the principle that an officer must have a subjective belief that is objectively justified.
- Reviewed ⁷2.50 of OPP Police Orders regarding notetaking policy.
- D/Sgt. Huggard acknowledged P/C Fitzpatrick made excellent notes.

⁴ Exhibit 33 & 36

⁵ Exhibits 13 & 14(a)(b)

⁶ Exhibit 17, Section 495, Criminal Code of Canada

⁷ Exhibit 18, OPP Police Orders, 2.50

- P/C Fitzpatrick articulated his belief of the grounds he felt he had to arrest J.M. to D/Sgt. Huggard.
- He agreed P/C Fitzpatrick had said he felt P/C Morneault was in a position to be assaulted which P/C Fitzpatrick explained was why he used force upon J.M.
- D/Sgt Huggard indicated P/C Fitzpatrick did not use the word “grounding” to describe his use of force.
- D/Sgt. Huggard did not agree that if P/C Spooner had told P/C Fitzpatrick to put J.M. in a cell this would provide grounds to arrest.
- Reviewed ⁸Section 25 of the Criminal Code regarding authority to use force.
- D/Sgt. Huggard agreed officers are authorized to use force but explained it must be justified and lawful.
- He disagreed J.M. was actively resistant although she struggled after being arrested.
- Perception plays a role regarding an officer’s decision to use force.
- D/Sgt. Huggard described his understanding of the ⁹Ontario Use of Force Model.
- He agreed P/C Fitzpatrick was forthright in acknowledging he did not advise J.M. of her rights to counsel etc.

Redirect

- D/Sgt. Huggard did not know the SD&G Covid-19 protocols specifically until P/C Fitzpatrick raised the issue.
- Prior to interviewing P/C Spooner who was designated a respondent officer, D/Sgt. Huggard believed P/C Spooner to have been a witness officer but chose to complete the interview as though P/C Spooner remained a respondent officer until his belief was confirmed.
- To de-escalate conflict, officers are taught to lower their voice, not raise it.
- D/Sgt. Huggard explained grounds have to be present to affect an arrest. There is no perception to it. There has to be grounds to affect arrest to move forward with everything else.
- J.M.’s arm was not broken but there was apparently soft tissue damage.
- D/Sgt. Huggard described the arm-bar apparently employed by P/C Fitzpatrick upon J.M., as being taught to ground a person to take away ability to kick. This was his opinion.

J.M.

Note: some of J.M.’s evidence related to the domestic violence situation prior to police involvement. The below will attempt to focus on evidence directly related to the NOH. Prior

⁸ Exhibit 22, Section 25, Criminal Code of Canada

⁹ Exhibit 24, Ontario Use of Force Model

events may provide context; however, it is the interaction between P/C Fitzpatrick and J.M. that this tribunal is considering.

- J.M. recalled the events of July 24, 2020, vividly as it ruined her life.
- She had gone to the police station to document her injuries and provide a statement and left being victimized by the police and vulnerable to further abuse from her husband.
- J.M. described being attacked by her husband (former partner) at a cemetery.
- Somebody heard what was going on and called the police.
- The police arrived and J.M. provided a verbal statement. The police also contacted her husband to return to the cemetery.
- She recalled P/C Spooner and a female officer (*known to be referring to P/C Morneault*) being present along with other officers, but she was unsure of exactly how many.
- J.M. primarily interacted with P/C Spooner and the female officer.
- Officer Spooner decided to take J.M. and her child to J.M.'s mother's house. The child would remain there while J.M. went to the OPP detachment to give statement and have injuries documented. She was driven to her mother's house and then to the detachment by P/C Spooner.
- J.M. believed her husband was going to be "breached" and charged.
- On arrival at the detachment J.M. was placed in a room (*fingerprint room*) to wait. She assumed it was P/C Spooner who placed her in the room but was not certain.
- Her husband was being interviewed and P/C's Fitzpatrick, Morneault and possibly other officers were in the area outside of the room she was in. P/C Fitzpatrick was sitting at a desk.
- J.M. recalled opening the door twice to ask to go home because she was tired. She was answered by P/C Fitzpatrick both times. She felt the statement she had provided previously was enough.
- P/C Fitzpatrick told J.M. if she tried to leave, she would be charged for obstruction of justice. She took the threat seriously.
- P/C Fitzpatrick's tone boastful, egoic and cocky. His voice was raised a bit, his chest was puffed out, and he was acting macho.
- The second time she opened the door she asked P/C Fitzpatrick if she could use the washroom.
- J.M. described herself as having attitude in her tone. She was tired and did not like the fact that she had to stick around to give a further statement. She had already given a statement. She did not necessarily want new charges against her husband. She wanted him to get help.
- She had been pressured by the Children's Aid Society (CAS) not to have her husband around. She wanted to hold on to her children and her husband to attend rehab but that night cost her the children anyway.

- About 10 minutes later the second conversation took place. J.M. asked P/C Fitzpatrick if she could use the bathroom. She stated P/C Fitzpatrick pointed her to the cell area. J.M. said she was not going in the cells to use the washroom. She said P/C Fitzpatrick told her it was the Covid-19 pandemic and was close to her face. He told her the only place for people like her to use the bathroom was in the cells. J.M. testified she told P/C Fitzpatrick she would just hold it.
- J.M. was not offered a privacy curtain.
- J.M. said that P/C Fitzpatrick began to drag her toward the cell area. She stood her ground to stop from being dragged off. She did not understand what was happening.
- P/C Fitzpatrick grounded her then P/C Spooner approached and put hands on her. She was grounded a second time. As she was taken down, she heard a loud pop in her elbow. She told the officers she could not breath and explained it may have been due to anxiety.
- J.M. said that it took two hours for the ambulance to respond, and she felt the delay was intentionally cause by the police to make her suffer.
- J.M. said when P/C Fitzpatrick “went hands on”, she asked him why he was doing this. She could not recall his response. She recalled P/C Fitzpatrick was yelling while she was pleading for her life. She had not been told she was under arrest until she was at the hospital.
- She was also formed (meaning under the Mental Health Act) at the hospital. The actions of the police caused her to lose her children and ruined her life.
- J.M. said she was released the following day by the attending psychiatrist who apologised and told her she was fine. She required no medication or follow up treatment.
- J.M. found it bizarre that a victim would have to use the bathroom in a cell.
- She felt when P/C Fitzpatrick said the cells were for people like her that he was being racist.
- P/C Spooner went hands on (J.M.) when he saw P/C Fitzpatrick manhandling her. She also recalled a female officer being involved.
- J.M. described other officers that were present at different times including a sergeant she described as Metis.
- She vaguely recalled the female officer being involved and thought the female officer may have taken her bracelet off. The female officer was kind to her after and did not hurt her like P/C Fitzpatrick and P/C Spooner did.
- J.M. explained when she used the term “grounding” she meant being taken to the ground with weight and pressure.
- The grounding happened very fast, and she felt P/C Spooner was just trying to help his fellow cop.
- She felt P/C Fitzpatrick did not like her attitude and wanted to rough her up.
- She repeatedly asked what was happening and could not recall the response from officers if any.

- She was not advised of her rights until she was at the hospital.
- J.M. was concerned about the obstruction charge mentioned by P/C Fitzpatrick. Some time ago when she was 16 (unrelated incident) she had been assaulted but did not want to press charges but was told she could be charged with obstruction. She felt when P/C Fitzpatrick said this to her, she had to stay and cooperate.
- J.M. did not recall any conversation with P/C Fitzpatrick about causing a disturbance and indicated he was louder and was causing a disturbance.
- She, again, described P/C Fitzpatrick as having his chest puffed out, he was right in her face, boastful, egoic, and cocky.
- J.M. acknowledged she did not recall all that was said to her.
- J.M. described her experience as having destroyed her life. Her children were taken away by the CAS, she lost her reputation and credibility with the CAS, her mental health was called into question. She was injected with a foreign substance at the hospital.
- Following the incident, she was sexually assaulted by her husband and conceived a child. She could not report the sexual assault due to her recent experience with the police.

While on recess J.M. returned to the hearing room and indicated P/C Fitzpatrick had put, or had someone else put, a dead fish beside her car to intimidate her. An investigation by uninvolved OPP officers revealed dead fish appear in the parking lot frequently. They are apparently dropped there by birds who prey on the fish in a waterway across the road from OPP East Region Headquarters. P/C Fitzpatrick was not responsible.

Cross Examination

- J.M. indicated, although the incident occurred in July, she did not complete her OIPRD complaint until the fall, possibly November. She became homeless following the incident of July 2020, and was unable to report the matter sooner. She learned of the OIPRD online and completed the complaint herself.
- J.M. described the incident with her husband and the entire event that evening as having ruined her life. She described her recollection of the events involving her husband at the cemetery. When the police arrived, she provided information and the officers made notes.
- The female officer and P/C Spooner asked her to come to the detachment to document her injuries. They offered to drive her to her mother's house to drop off the baby while she went to the detachment.
- She did not recall which officer told her they would be documenting her injuries and did not recall being told she was being asked to provide a statement as there were conflicting stories about what had occurred between she and her husband.

- It was P/C Spooner who drove her to her mother's house and then to the detachment. She did not recall details of any conversation she may have had with P/C Spooner.
- When they arrived at the detachment P/C Spooner placed her in an interview room or fingerprint room. She did not specifically recall who told her to sit in the fingerprint room.
- She was not under arrest or handcuffed or anything like that.
- J.M. believed her husband was going to be breached because that was the way revocable consent works. She revoked her consent, and her husband should have left. That is why he should have been breached.
- She knew her husband was at the detachment and was being interviewed. She had seen him at the detachment.
- She agreed there was no mention of her physical contact toward her husband in her OIPRD complaint. She explained that as a result of pain and trauma she may have blocked certain events.
- J.M. did not recall speaking to P/C Morneau while she was in the fingerprint room.
- The first time she went to the door was to tell P/C Fitzpatrick she was tired and wanted to go home. The second time was to ask to use the washroom.
- When J.M. asked to go home P/C Fitzpatrick told her if she tried to leave, she would be charged with obstruction.
- J.M. disagreed with the suggestion that the first time she spoke to an officer it was with P/C Morneau.
- When she went to the door to speak with P/C Fitzpatrick, both times, he had been sitting at a desk and walked toward her when she went to the door.
- J.M. acknowledged she may have "had attitude" and explained she was tired, confused and wanted to go home. She felt she had no choice but to stay and to provide a statement. If she tried to leave, she would have been charged with obstruction.
- When she asked P/C Fitzpatrick to use the washroom he replied with words to the effect; haven't you heard there is a pandemic. The only place for people like you to use the washroom was in there - pointing to the cells.
- P/C Fitzpatrick started to drag J.M. toward the cells. She was grounded twice and heard her elbow pop. She was in pain and told the officers she could not breathe. P/C Spooner had come to help P/C Fitzpatrick.
- J.M. disagreed with the suggestion P/C Fitzpatrick took control of her to arrest her for obstruction. She questioned how she could be obstructing when P/C Fitzpatrick was being louder than her. She acknowledged she had "attitude" and was raising her voice but repeated, P/C Fitzpatrick was louder.
- She did not recall P/C Spooner telling P/C Fitzpatrick to put her in a cell.
- J.M. described herself as holding her ground when P/C Fitzpatrick had taken hold of her. She was panicked and confused. She did not understand why P/C Fitzpatrick was doing this and why they were hurting her.

- J.M. described the physical and emotional injuries she had suffered and the negative impacts they have had on her life.
- She explained she held her ground but was not fighting or resisting. She vaguely recalled P/C Morneault assisting with searching her.
- At the hospital, P/C Spooner charged her for matters related to the domestic violence incident with her husband. J.M. felt the charges were bogus and was done to deflect from what had happened to her at the detachment.
- She reiterated; it was her belief that the ambulance was delayed by the police who wanted to make her suffer.
- Officers Fitzpatrick, Morneault, and Spooner offered her assistance, water, an ice pack, a blanket etc. after she was injured.
- After she was taken to the floor by P/C Fitzpatrick, she swore at him.
- J.M. explained she was not disruptive at the hospital until staff were going to inject her without her consent. She was in pain and when she found out the hospital was going to “form” her (MHA) she became more upset.
- It was P/C’s Morneault and Spooner that were with her at the hospital.
- It was P/C Spooner who arrested her at the hospital. J.M. acknowledged yelling due to the injustice that was being done.
- The fact that she was formed under the MHA was because of what the police told the attending physician.
- J.M. lied to the CAS about her husband staying with her and explained that was why she was trying to get him to leave on the night in question.
- J.M. acknowledged she has begun a civil action against P/C Fitzpatrick in relation to the incident and its affect on her life.
- J.M. has posted about police on ¹⁰social media including a page related to police brutality and other less than flattering material. She also posted a copy of the OPP investigative report online.
- When she referred to P/C Fitzpatrick perhaps making a racist remark it was because she felt she had a darker complexion and may be of Indigenous descent.

P/C Spooner

- P/C Spooner has been with the OPP since 2014. On July 24, 2020, he was working at the SD&G detachment.
- P/C Spooner was dispatched to a report of domestic violence near the St. Andrews Cemetery. P/C Morneault was also dispatched, and she responded in her own police cruiser.

¹⁰ Exhibit 26, Tweets from J.M.

- P/C Fitzpatrick and P/C MacDonald arrived at the cemetery after P/C Spooner.
- J.M. was at the cemetery with a baby. P/C Morneault spoke with her.
- P/C Spooner carried out investigative tasks including interviewing the person who had called the police.
- P/C Fitzpatrick and P/C MacDonald had arrived at the scene as well.
- P/C Spooner indicated his role was to try to determine what had occurred between the female (J.M.) and her partner.
- P/C Spooner drove J.M. and her baby to J.M.'s mother's house to drop off the baby. P/C Spooner then drove J.M. to the OPP detachment. P/C Spooner did not particularly recall any conversation with J.M. to this point in time. He did speak briefly with J.M.'s mother before leaving her residence.
- P/C Morneault drove J.M.'s partner to the detachment.
- Further investigation was required as J.M. and her partner (Mr. McCrann) had differing accounts of what had occurred between them.
- P/C Spooner was aware at that time (July 2020) due to Covid-19 protocols, the lobby and soft interview room at the detachment were not to be used.
- On arrival at the detachment P/C Spooner brought J.M. to the fingerprint room. She was not under arrest or otherwise detained.
- Mr. McCrann was placed in the hard interview room. P/C Spooner was going to interview Mr. McCrann and P/C Morneault was going to monitor and act as scribe for the interview.
- P/C Fitzpatrick was in the cell area at this time to keep an eye on J.M. This was because they (OPP officers) were not to have people in the cell area unsupervised.
- P/C Spooner entered the interview room with Mr. McCrann.
- Generally, you cannot hear what is happening outside of the room.
- As P/C Spooner was explaining the interview KGB format he could hear talking from outside of the room. The talking got louder, and he felt there was an argument going on. P/C Spooner described what he heard as a verbal altercation. Mr. McCrann was not initially paying attention to the goings on outside but began to pay attention to it.
- P/C Spooner assumed the voices he heard to be P/C Fitzpatrick and J.M.
- He believed what he heard was "stop talking". Both P/C Fitzpatrick and J.M. had been yelling.
- P/C Spooner paused the interview with Mr. McCrann and did not want to continue until the situation, which had been escalating, calmed down.
- P/C Fitzpatrick's tone was higher than J.M.'s and stood out to P/C Spooner.
- P/C Spooner explained, to him, a verbal altercation was arguing by two individuals.
- P/C Spooner approached J.M. and P/C Fitzpatrick. His attempts to bring down the level of the argument was not working. J.M. seemed to be getting more agitated.
- P/C Spooner assisted P/C Fitzpatrick in walking J.M. out of the fingerprint room. She was agitated and was not listening to P/C Spooner or Fitzpatrick.

- P/C Spooner explained he got involved but did not have time to ask what was happening. He recalled J.M. asking, “What did I do?”
- P/C Spooner did recall speaking directly to P/C Fitzpatrick. He did not ask P/C Fitzpatrick to put J.M. in a cell. He explained he did not have any information that would warrant putting her into a cell.
- P/C Spooner did not see any grounds for arresting J.M. but did not know what had transpired before he became involved.
- P/C Fitzpatrick had control of J.M.’s arm. Both P/C Spooner and Fitzpatrick had “hands on” J.M. as they walked her out of the fingerprint room.
- P/C Morneault had entered the area to search J.M.
- P/C Spooner did not arrest J.M., charge her, or advise her of her Right to Counsel, nor had P/C Fitzpatrick.
- He recalled, at some point, P/C Fitzpatrick mentioning obstructing or disturbing the peace. He did not recall exactly when this was mentioned.
- As J.M. was being searched by P/C Morneault, J.M. pulled away. P/C Spooner was to J.M.’s right and P/C Fitzpatrick to her left. P/C Fitzpatrick had J.M. by the arm. When she pulled away both she and P/C Fitzpatrick went to the ground; J.M. first followed by Fitzpatrick.
- It appeared to be a “grounding” where P/C Fitzpatrick had grounded J.M. P/C Spooner said he formed this opinion when he watched the video later.
- J.M. was yelling that her arm was broken, and she could not breath.
- P/C Spooner did not see any injury to J.M.’s arm, but P/C Fitzpatrick had said he heard her arm pop.
- J.M. was directing some of her yelling at P/C Fitzpatrick and said she was going to have him fired.
- P/C Spooner indicated when he reviewed the cell video later it appeared that P/C Fitzpatrick had used an arm bar to ground Ms. Fitzpatrick.
- A sergeant was notified of the incident and an ambulance was called. The ambulance service advised their response would be delayed due to the volume of calls they had.
- P/C Spooner recalled the Covid -19 measures in place at the detachment. Due to restrictions placed on the use of public washrooms the only option was to use the cell washrooms.
- P/C Spooner testified J.M. interrupted his interview, but his investigation was not being obstructed.
- P/C Spooner explained de-escalation to him, meant in a situation where emotions are high, it is a sort of mediation to lower agitation levels.
- He heard P/C Fitzpatrick get louder to a point where he was yelling when he said, “be quiet.”
- When the ambulance arrived, J.M. was taken to the hospital. P/C Spooner and Morneault

attended the hospital as well.

- P/C Spooner saw J.M. using her arm without any apparent discomfort. The doctor later said there were no broken bones in J.M.'s arm. P/C Spooner related the evening's events to the doctor.
- J.M. was placed under arrest for domestic assault and was advised of her rights to counsel and caution.
- Duty counsel was contacted for J.M. She hung up on the lawyer.
- The doctor admitted J.M. to the hospital under the Mental Health Act. J.M. had been yelling and screaming at the hospital. The doctor did not explain his grounds for admitting J.M. to P/C Spooner.

Cross Examination

- P/C Spooner was initially designated as a respondent officer.
- He provided his duty report seven months after the incident.
- P/C Spooner, in response to questions, reviewed investigative steps taken regarding the initial domestic violence call. (*Not directly related to allegations in NOH*)
- Officers were not able to determine who the dominant aggressor was while at the scene.
- Mr. McCrann had been placed under investigative detention at the scene. The investigation revealed he was the victim of domestic violence.
- He received information from J.M.'s mother that J.M. suffered from PTSD, Bi-polar disorder, and possibly a personality disorder and had not been taking her medication. P/C Spooner was unsure if he told P/C Fitzpatrick about J.M.'s health issues.
 - *The cell video was played, and questions were posed to P/C Spooner about what he observed.*
- P/C Spooner could not recall what a gesture, pointed out by defence counsel from the video, meant. He believed it was a gesture to keep it (i.e., the noise) down. P/C Spooner clarified he did not know for sure and was guessing.
 - *Defence counsel played an audio loop of a conversation.*
- P/C Spooner described what he heard. He could not define if he heard his voice.
- P/C Spooner did not hear P/C Fitzpatrick use racist terms or belittle when addressing J.M.
- (From the video) P/C Spooner described seeing J.M. standing close to P/C Fitzpatrick and she appeared to be yelling at him.
- P/C Fitzpatrick indicated J.M. was obstructing P/C Spooner's interview.
- P/C Spooner had additional information regarding J.M.'s mental health that P/C Fitzpatrick may not have had.
- J.M. did not comply with P/C Fitzpatrick's direction to lower her voice.
- P/C Spooner agreed his perception of the circumstances would be different from P/C

Fitzpatrick's. He agreed J.M. was actively resistant.

- P/C Spooner did not ask P/C Fitzpatrick to articulate his grounds for arresting J.M.
- P/C Spooner testified in his duty report that he had J.M.'s left arm. He acknowledged he had previously stated the wrong arm.
- J.M. was not listening to P/C Spooner due to her level of agitation.
- P/C Spooner disagreed with the suggestion that when he was interacting with J.M., he pulled on her purse which may have caused her to fall to the ground.
- P/C Spooner could not recall what gestures he may have made and who turned the cell lights on. When he reviewed the video, he acknowledged defence counsel's suggestions as to what gestures were and who the lights were turned on were possible.
- When P/C Morneault was searching J.M., she (J.M.) continued to shout and pull away.
- When P/C Spooner reviewed the cell video, he perceived Ms. Morneault to have been grounded by P/C Fitzpatrick. At the time of the interaction P/C Spooner had not noticed this.
- When P/C Spooner wrote his duty report his statement on page three; that P/C Fitzpatrick and J.M. fell was based on his perception at that time.
- The video camera at the detachment is on the ceiling.
- P/C Spooner acknowledged his perception regarding falling became the grounding of J.M. by P/C Fitzpatrick after he (Spooner) saw the video.
- P/C Spooner recalled J.M. saying, "Why are you doing this."
- P/C Spooner believed it was not until after J.M. was on the ground that P/C Fitzpatrick mentioned she was obstructing. P/C Spooner did not tell P/C Fitzpatrick he (Spooner) was not obstructed.
- All officers offered J.M. first aid.
- None of the officers did anything to delay the ambulance.
- P/C Spooner was aware that it had been reported J.M. had previously thrown objects at her daughter and a Children's Aid Society worker.
- P/C Spooner later formed grounds to arrest J.M. for assaulting Mr. McCrann.
- Later, at the hospital, P/C Spooner saw J.M. moving and using her injured arm.
- J.M. was loud and disruptive at the hospital.
- J.M. was treated at the hospital, and she had no broken bones in her arm or elsewhere.
 - *Testimony was provided describing J.M.'s behaviour at the hospital which is not directly related to the NOH.*
- J.M. was admitted to the hospital under the Mental Health Act (MHA).
- P/C Spooner recalled speaking with Sgt. McPherson but did not recall discussing specifics such as obstruction.

Re-Direct

- P/C Spooner spoke with Sgt. McPherson when the interview was completed with Mr. McCrann, and before P/C Spooner left for the hospital. He recalled P/C Morneault being present but did not recall if P/C Fitzpatrick was present.

P/C Morneault

- P/C Morneault began her career with the OPP in August of 2018 and started patrol duties in February 2019. She had been employed as a cadet with the Montreal Police before joining the OPP.
- On July 24, 2020, P/C Morneault was working nights.
- At 2129 hours (9:29pm) P/C Morneault was dispatched to a cemetery in South Stormont in relation to a domestic violence incident.
- On arrival she saw J.M. with her small baby near the cemetery.
- P/C Morneault noted injuries to J.M. and began to take a statement from her.
- P/C Morneault discussed J.M.'s statement with other officers, and it was decided to bring her and Mr. McCrann back to the detachment for further interviews. The dominant aggressor in the incident could not be determined at the scene.
- P/C Spooner arrived at the scene at about the same time as P/C Morneault. P/C Fitzpatrick and P/C MacDonald arrived shortly after.
- P/C Spooner transported J.M. to the detachment and P/C Morneault drove Mr. McCrann. She followed P/C Spooner to J.M.'s mother's home to drop the baby off then to the detachment.
- On arrival at detachment J.M. was placed in the fingerprint room and Mr. McCrann in the interview room. P/C Morneault could not recall who placed who in the rooms.
- P/C Spooner began to interview Mr. McCrann and P/C Morneault monitored and scribed the interview from a separate adjacent room.
- P/C Fitzpatrick was watching J.M.
- Not long after P/C Spooner's interview started, P/C Morneault could hear J.M. yelling. She could not recall what J.M. was saying but said it was difficult to scribe because she could not hear what was occurring in the interview.
- The interview began at 2314 hours and was paused by P/C Spooner at 2321 because of the noise.
- At this point P/C Morneault heard J.M. and P/C Fitzpatrick yelling. P/C Morneault exited the monitor room and P/C Spooner had exited the interview room.
- P/C Morneault saw J.M. inside the fingerprint room near the doorway and P/C Fitzpatrick was just outside the doorway. P/C Spooner went to assist P/C Fitzpatrick. J.M. appeared agitated. P/C Morneault stood back as she did not believe it would take three people to

control J.M.

- P/C Morneault could not recall what conversation was taking place at this time.
- P/C Morneault recalled P/C Fitzpatrick saying bring her to cell two or words to that effect and that J.M. was obstructing.
- From what P/C Fitzpatrick said, P/C Morneault believed J.M. was arrested for obstructing police and was being put in a cell.
- At first P/C Morneault was confused but when P/C Fitzpatrick said obstruct, she believed that was the reason J.M. was going into the cells.
- P/C Morneault was asked to search J.M. As she was searching J.M., she (J.M.) and P/C Fitzpatrick fell to the ground. P/C Morneault did not see how they ended up on the ground as her back was partially to them.
- J.M. was yelling in pain and said her arm was broken. Officers offered J.M. first aid and assistance and an ambulance was called.
- P/C Morneault did not hear any officer advise J.M. she was under arrest or advise her of her right to counsel or caution her.
- P/C Morneault could not recall if she spoke with Sgt. McPherson that night.

Cross Examination

The cross examination began by recapping information related to the incident at the cemetery.

- P/C Morneault believed J.M. knew Mr. McCrann was at the detachment. She had about four months experience as a police officer at the time of the incident.
- P/C Morneault believed obstruct to mean disrupting police work or preventing an investigation.
- P/C Morneault agreed with defence counsel's suggestion that criminal obstruct police required an act and intent.
- P/C Morneault disagreed with the suggestion that if a person did not do something they were being told to do, it could indicate intention. She explained there could be mental health aspects to consider.
- P/C Morneault described how she scribed the interview.
- P/C Morneault could not recall if she ran CPIC checks on J.M.
- P/C Spooner paused the interview with Mr. McCrann due to yelling outside of the interview room. P/C Morneault could not recall what J.M. had been saying but recalled her yelling and stated, at one point, P/C Fitzpatrick and J.M. were yelling at each other.
- P/C Morneault could not specifically recall what P/C Fitzpatrick had said to J.M. but recalled at some point, P/C Fitzpatrick using the word obstruct.
- P/C Morneault recalled searching J.M. before J.M. was placed in a cell. She recalled possibly removing jewellery from J.M. but could not recall specifically what it was.

- P/C Morneault recalled officers offering J.M. assistance such as an ice pack and a blanket.

Re-direct

- P/C Morneault could not specifically recall when she may have heard P/C Fitzpatrick use the word obstruct.

Defence Witnesses

P/C Fitzpatrick

Evidence in Chief

- P/C Fitzpatrick began his OPP career in 2017 and is currently a detective constable with the Street Crime Unit, who conduct investigations related to property crime, drugs, surveillance, assisting the Organized Crime Enforcement Bureau, and the drafting/execution of search warrants.
- He has received training related to scenes of crime examination, commercial vehicle investigations, child exploitation, criminal investigations, coach officers' course, and other training related to front line and investigative duties. P/C Fitzpatrick has volunteered in the community over several years and in various capacities.
- On July 24, 2020, P/C Fitzpatrick was working an overtime shift in a front-line duty capacity. He was partnered with P/C McDonald.
- At 9:29pm (2129 Hrs.) he was dispatched to a disturbance at a cemetery involving a male and female arguing. P/C Fitzpatrick described his actions and involvement at the cemetery.
- P/C Spooner and P/C Morneault had also attended the scene.
- *P/C Fitzpatrick described investigative steps at the scene of the disturbance. Although the details provided background, they are distinct from the issues identified in the NOH.*
- It was Mr. McCrann's contention that J.M. had assaulted him.
- Officers at the scene reached a consensus that they would return to the detachment with J.M. and Mr. McCrann for further investigation. The description of events provided by Mr. McCrann and J.M. were opposing and inconsistent.
- J.M. was described as a witness.
- On arrival at the detachment Mr. McCrann was placed in the hard interview room. J.M. was placed in the fingerprint room. P/C Fitzpatrick offered to monitor J.M.
- There were Covid-19 restrictions in place at the detachment at that time restricting movements within the detachment and the use of satellite detachments.

- J.M. was present at the detachment voluntarily, in order to provide a KGB statement.
- After a short time, J.M. opened the door of the fingerprint room and asked to use the washroom.
- P/C Fitzpatrick told her she would have to use the cell area. J.M. was upset about having to use the cell washroom and raised her voice while questioning why she was being asked to use the cell facilities.
- P/C Fitzpatrick told J.M. it was the only washroom she could use due to Covid-19 restrictions.
- J.M. was upset and continued to raise her voice.
- P/C Fitzpatrick told her to lower her voice and warned her that she was causing a disturbance and obstructing the investigations and she would be placed in the cells.
- J.M. was becoming louder. P/C Fitzpatrick said his voice was initially calm before he raised his voice. This appeared to quiet J.M. down.
- P/C Fitzpatrick explained he was trying to de-escalate the situation, to calm J.M. and diffuse the situation.
- Although they had not discussed her injuries, J.M. believed the police were refusing to photograph them.
- P/C Fitzpatrick was 4-6 feet away from J.M. when he was telling her to lower her voice.
- J.M. became quiet and went back into the fingerprint room.
- While J.M. was in the room P/C Fitzpatrick heard her yelling again. She opened the door and P/C Fitzpatrick moved toward her. He spoke with what he described as a firm tone while he told her to lower her voice.
- J.M. would not lower her voice. At the time, P/C Fitzpatrick did not know what she was saying.
- P/C Fitzpatrick told her Mr. McCrann was being interviewed and she had to be quiet. She was disrupting the interview. P/C Fitzpatrick raised his voice to try to get J.M. to stop.
- P/C Fitzpatrick stated he recognized J.M. may have some mental health issues.
- P/C Spooner exited the interview room. P/C Fitzpatrick heard P/C Spooner say to put J.M. in a cell and that he had been interrupted.
- P/C Fitzpatrick tried to gain control of J.M. She was shouting and asking why he was doing this. P/C Fitzpatrick told her she was causing a disturbance. He believed she was doing it willingly and knowingly.
- P/C Fitzpatrick attempted to gain control of J.M. and place her under arrest.
- He attempted to grab J.M. by the arm and she pulled back into the fingerprint room. P/C Fitzpatrick followed her into the room and took hold of her right arm.
- P/C Spooner came into the room and took control of her left arm.
- P/C Fitzpatrick placed J.M. in a standing arm bar to gain a position of advantage. J.M. was squirming and pulling away.
- P/C Fitzpatrick was not trying to ground J.M. but she went down to the floor.

- She was assisted to her feet by P/C Fitzpatrick and P/C Spooner.
- P/C Morneault had approached at some point. P/C Fitzpatrick asked P/C Morneault to remove J.M.'s bracelet and to search her.
- P/C Fitzpatrick switched sides and P/C Fitzpatrick had J.M. by the left arm. She continued to struggle. P/C Fitzpatrick lost his balance and he and J.M. fell to the floor. He heard her arm pop when they went down. She complained of pain and not being able to breath.
- J.M. was assisted to a seating position and offered first aid and an ambulance was called.
- P/C Fitzpatrick saw J.M. moving her injured arm and did not believe it was broken.
- P/C Fitzpatrick later spoke with Sgt. MacPherson on two occasions about the incident, specifically the confrontation and injury to J.M. and that he had arrested her for obstruct.
- The ambulance had been delayed as it had been re-routed to another call.
- Following the altercation, J.M. was claiming police brutality and that she was going to call the news media.
- J.M. was transported to hospital. P/C Fitzpatrick later learned she did not have a broken arm and had been admitted to hospital under the authority of the Mental Health Act.
- P/C Fitzpatrick did not advise J.M. of her Right to Counsel as he did not believe she was in a position to comprehend.
- P/C Fitzpatrick later advised P/C Spooner, who was at the hospital with J.M., that duty counsel had called wishing to speak to her. J.M. did not want to speak with duty counsel.
- P/C Fitzpatrick explained his understanding of the law with respect to arrest and obstruct police.
- P/C Fitzpatrick stated he was acting in good faith that night and was not being malicious. He was trying to execute his duties as best he could. He was trying not to let J.M. obstruct the interview and her continued disruptive behaviour constituted obstruction.
- P/C Fitzpatrick stated he did not intentionally take J.M. to the ground but was trying to get her into a position of disadvantage.
- P/C Fitzpatrick stated when he raised his voice, he was trying to de-escalate the situation.

Cross Examination

- When J.M. asked to use the washroom, her tone was normal. She was told she had to use the cell due to Covid-19 restrictions.
- P/C Fitzpatrick explained his understanding of restricted use specified in email directives, and acknowledged he did not recall if bathrooms were not specifically addressed.
- J.M. was not offered a privacy gown to use the cell washroom.
- P/C Fitzpatrick repeated that P/C Spooner had told him to put J.M. in a cell.
- He believed he had grounds for obstruct.
- P/C Fitzpatrick believed J.M. understood his warnings regarding obstructing because she went back into the fingerprint room.

- P/C Fitzpatrick did not at any time advise J.M. of her rights. He did not charge her.
- P/C Fitzpatrick did not tell J.M. to stop resisting, but agreed it was a commonly used police tactic.
- P/C Fitzpatrick could not explain why J.M. was not charged with obstruct. He did not follow up on it. He acknowledged he should have followed up.
- Raising your voice is typically not part of de-escalation training.

Sgt. McPherson

Evidence in Chief

- Sgt. McPherson was a supervisor at the Stormont, Dundas and Glengarry Detachment in July of 2020.
- At 11:36pm (2326 hrs) he attended the detachment regarding a female who may have suffered a broken arm.
- While driving to the Long Sault Detachment he spoke to P/C Spooner. P/C Spooner advised while he was interviewing a male, the female was yelling and ended up in a struggle with P/C Fitzpatrick.
- The female was grounded by P/C Fitzpatrick and may have suffered a broken arm. She may have had mental health issues.
- On arrival at the detachment Sgt. McPherson spoke to P/C Spooner and Fitzpatrick. P/C Fitzpatrick said when the female asked to use the washroom, she was told to use the cells washroom and she became upset. She was told to lower her voice and was told she was causing a disturbance.
- The female went back into the fingerprint room before coming back out and raising her voice again. P/C Spooner came out of the interview room and told Fitzpatrick to put her in a cell.
- The female resisted being searched and when P/C Fitzpatrick tried to take control of her, she collapsed to the ground, and he had lost his balance.
- Sgt. McPherson sought to clarify with P/C Fitzpatrick regarding whether it was cause a disturbance or obstruction. He asked for clarification as cause disturbance could not occur in a police station. The Sgt. believed obstruction had to be active.
- When Sgt. McPherson spoke to P/C Spooner, he believed the female had been actively obstructing.
- Sgt. McPherson felt J.M. was playing up her injury as he saw her yelling in pain before the paramedics touched her. He was later told that the hospital had determined the female's arm was not broken.
- Sgt. McPherson was under the impression J.M. was going to be charged with obstruct.

Cross Examination

- Sgt. McPherson did not see what had transpired in the cell area.
- He was called because of what had occurred at the detachment not because of the earlier domestic call.
- Sgt. McPherson found out after the fact that an obstruct charge was not laid. He also found out later that P/C Fitzpatrick had not advised J.M. of her Right to Counsel. He did not recall discussing charges being laid with anyone
- Sgt. McPherson could not recall why charges were not laid.
- Sgt. McPherson described limited use of detachments space including washrooms during Covid. He indicated some discretion might have been considered when a person was at the detachment voluntarily on a case-by-case basis.
- Sgt. McPherson saw a small bruise on J.M.'s bicep.

Re-Direct

- P/C Fitzpatrick was not charged criminally.
- Sgt. McPherson did not recall any officer calling regarding washroom use at any time prior to this incident. He indicated if the washroom had been used, it would have to be decontaminated.
- The late entry in his notebook was made because he was driving and could not write notes when the conversation took place.

Part III: SUBMISSIONS, ANALYSIS AND FINDINGS

Submissions

Defence Counsel

The following is an overview and is not intended to reproduce all verbal or written submissions. Additionally, defence counsel cited some 52 written authorities, contained in 1052 pages of material. I have reviewed all submissions; however, I will not be addressing each case, individually.

- Defence counsel summarized the events of July 2020 including events from the domestic disturbance investigation.
- Covid-19 procedures were in place at the detachment in July 2020. This affected where people could be placed and where they could have access to. Email directives were cited. (See related Exhibits)

- P/C Fitzpatrick was aware of the directives.
- Information had been received that J.M. suffered mental health challenges believed to have been Post Traumatic Stress Disorder, bi-polar disorder and possibly a personality disorder.
- Addressed the offence of obstruct police with reference to submitted ¹¹materials

Analysis:

R v Tortelano

...obstructing under s. 118(a) of the Criminal Code and it is necessary for the Crown to show conduct amounting to a wilful interference with the execution of the officer's duty to such degree as to completely frustrate the officer in the accomplishment...

R v Nasser repeated similar principles to those found in *Tortelano* and other cases submitted by defence counsel. The underlying facts leading to obstruct charges were not comparable to the misconduct matter before this tribunal. I will consider the principles outlined as they may apply to the misconduct allegation. It is not within the jurisdiction of nor the purpose of this tribunal to determine whether or not the criminal offence of obstruct police occurred. Part of the contextual consideration may address whether PC Fitzpatrick had grounds to arrest for the offence of obstruct police as has been his contention. The statute and corresponding jurisprudence make clear obstruction requires willfulness, and intent on the part of the person alleged to have been obstructing.

- In *R vs. Yussuf* the Court wrote:
 - *...in the phrase "wilfully obstructs." It modifies not the act of the accused but the effect of the act of the accused, the "obstruction." Interpreting the words by giving them their natural meaning in the context in which they are used makes it apparent, in my view, what must be willed is the outcome of making it more difficult for the police to carry out their duties.*
- *I am therefore of the view that, as was stated in R. v. Blackwell 2007 BCSC 1240 at para. 110, "the conduct prescribed [by section 129(a)] is conduct that is intended to obstruct the individual officer in the execution of his duty at the time." In other words, the offence is only committed by those who act intentionally and do so intending to make it more difficult for the police to execute their duty.*

The Court went on to outline the following elements:

¹¹ Defence Authorities, Tabs 15-18

Element 1 - There must be peace officer who is in the execution of a lawful duty as a peace officer;

Element 2- The accused person must know or be wilfully blind to the fact that this person is a peace officer and must know or be wilfully blind to the act the officer is executing;

Element 3- The alleged obstructive conduct must be an intentional act by the accused person, or an intentional omission by the accused person constituting a failure by the accused to comply with a legal duty;

Element 4- That act or omission must make it more difficult for a peace officer to carry out their duties; and

Element 5 - The accused person must intend to make it more difficult for the police to execute their duty.

Defence Submissions continued:

- P/C Spooner's interview was interrupted by J.M.'s behaviour. This constituted obstruction.
- Mr. McCrann was made uncomfortable by J.M.'s outbursts.
- J.M. fell to the ground when her purse was removed not as a result of a grounding technique.
- P/C Spooner and P/C Fitzpatrick said they were attempting to de-escalate the situation with J.M.
- While P/C Morneau was searching J.M., P/C Fitzpatrick felt J.M. was a physical threat to P/C Morneau. It was for this reason he used what was described as an arm bar technique.
- As a result of investigation P/C Spooner later formed the grounds to arrest J.M. in relation to what had occurred between she and Mr. McCrann at the cemetery.
- When advised of her Right to Counsel regarding the assault arrest, J.M. waived her rights.
- P/C Fitzpatrick did not intentionally ground J.M.

R. v. Montsion, 2020 ONCJ 464 the Court wrote the following regarding police use of force: (Quoting the Supreme Court of Canada) ...the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against illegitimate use of power by the police against members of our society, given its grave consequences.

Judicial review of a forcible arrest requires an assessment of the reasonableness of the use of force in the totality of the circumstances. The perspective is that of a reasonable officer with training and field experience in circumstances similar to those faced by the subject officer. The court may consider factors such as:

- *the urgency of the situation;*
- *the nature and imminence of a threat to the police, the public, or the suspect;*
- *whether the suspect was acting in a hostile manner towards the police, resisting arrest or failing to comply with the arrest procedure;*
- *the relative sizes and weights of the officer(s) and the suspect;*
- *the time to react;*
- *information available to the officer, including information about a history of conduct that might represent a threat to police;*
- *information that remained unknown to the police (e.g., whether or not the suspect had a weapon);*
- *training and experience of the officer.*

Police officers receive instruction on ss. 25 and 26 of the Criminal Code and the fundamental concepts of necessity, reasonableness, and proportionality. They are taught that the force they use must be necessary and reasonably justified: there has to be a reason for it and the reason has to be objectively observed. Mr. Federico explained:

That means police officers are taught that means a reasonable police officer, a reasonable person standing in their stead would see the grounds that the officer is seeing.

Police officers are taught that every situation is unique and dynamic. They are cautioned not to jump to conclusions or rely solely on assumptions. Their obligation is to assess the situation based on their observations and to think about their options. The assessment must be continuous, allowing officers to adjust their response as the situation changes. Officer training seeks to develop critical thinkers and analytical responders, avoiding an automatic, unthinking approach where officers rush in headlong, oblivious to risks to the police or the subject.

Mr. Federico spoke about de-escalation. This, he explained, is series of vocal communications aimed at calming things down with a view to reaching a mutually satisfactory resolution of the event and minimizing the need for force. Suggested phrases include, "I'm here to help you"; "Don't be afraid"; "No one's going to hurt you." Officers are often required to make very quick judgment calls in the heat of the action – split second decisions on the fly and under stress. Training cannot

cover the specifics of every incident, but it can give officers techniques and tools to help prepare them for virtually every incident.

Analysis

Police use of force is generally to be viewed through the lens of the reasonable person in the community. Was the force reasonable under the circumstances? Would somebody else standing in the officer's place come to similar conclusions? Was the force used proportional to the situation?

No situation is the same and there is no playbook for police officers on when and how to use force for every situation or circumstance.

Defence Submissions continued:

- Hindsight should not be relied upon to assess an officer's actions, rather, those deciding if the officers' actions were reasonable should do so from the perspective the officer was faced with at the time of an incident.
- J.M.'s evidence contained many inconsistencies. She would go off on tangents, at times her evidence was not logical, she held a pre-existing bias against the police, she made unfounded allegations of racism, she had financial interest in the outcome of this hearing, and she exaggerated at times. J.M.'s credibility and reliability is in doubt.

Analysis: Test for Credibility and Reliability (Defence materials Tabs 19, 20, and 39)

From the case provided and based upon experience, I consider credibility to be when a witness presents that they sincerely believe they are speaking the truth. Reliability relates to the actual accuracy of their testimony. In determining this, I consider a witness's ability to accurately observe, recall and recount the events in issue. A credible witness may give, in some cases, unreliable evidence.

The matter of Faryna v. Chorny identifies the following O'Halloran test:

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

As I embark on my analysis below, I will apply this test. Not every aspect of what each witness said will be weighed with respect to credibility and reliability. I will attempt to focus on issues related to the allegations in the Notice of Hearing (NOH).

Defence Submissions Continued

- Cited authorities related to police powers, notetaking procedure, and reasonable grounds.
- A Charter Breach does not, by default, constitute police misconduct.
- The Notice of Hearing was reviewed. Every bathroom was off limits.
- Under all circumstances presented yelling was justified.
- J.M. was told if she left, she would be arrested for obstruct. She was arrested for obstructing the interview.
- P/C Fitzpatrick asked P/C Morneault to search because J.M. was under arrest.
- P/C Fitzpatrick was not the investigating officer to lay charges.
- Sgt. McPherson's testimony backed P/C Fitzpatrick's decision regarding obstruction.

Analysis:

In defence materials provided, the Supreme Court of Canada in *R vs. Storrey* stated:

It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a prima facie case for conviction before making the arrest.

The test outlined in *Storrey* is settled law and will be applied, as appropriate, elsewhere in this decision. I acknowledge that Police Disciplinary hearings are not strictly bound by criminal jurisprudence, however, the actions of an officer can properly be viewed through the lens of and guided by Court decisions.

Defence Submissions Continued.

Defence Counsel included *Constable Craig Galassi and the Hamilton Wentworth Police Service, 2003 CanLII 75459 (ON CPC)*.

Analysis

Paragraph 15 outlined the following regarding the test for discreditable conduct:

- *With respect to counts one and two, the issue really turns upon the test of what might reasonably be expected to bring discredit upon the reputation of the HWPS. The test is well enunciated in the decision of *Girard v Delaney* (1995) 2 PLR 337 (Board of Inquiry), and page 349 as follows:*
- *The test is primarily an objective one.*
- *The Board must measure the conduct of the officer by the reasonable expectations of the community.*
- *In determining the reasonable expectations of the community, the Board may use its own judgment, in the absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case.*
- *In applying this standard, the Board should consider not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time.*
- *Because of the objective nature of the test, the subjective element of good faith (referred to in the *Shockness* case) is an appropriate consideration where the officer is required by the circumstances to exercise his discretion.*

I am aware that a well-intentioned officer who may have been acting in good faith, is a consideration in my deliberations. I am also aware that good faith in and of itself, does not provide absolute immunity from findings of misconduct. Using the *reasonable person* test in view of all circumstances and evidence remains the over arching test, in my view.

Continued Defence Submissions.

The prosecution cited the 2022 decision of *the Ontario Provincial Police and P/C Otchere* regarding use of force. The general scenario is comparable. The first officer in *Otchere* was

engaged with a driver. The first officer engaged in the arrest of the driver that was deemed by the Court to have been unsupported and unlawful. P/C Otchere essentially came to the aid of the first officer in the spur of the moment when a physical altercation had ensued between the first officer and the driver.

The first officer was found guilty, criminally, of assault and the conviction was upheld on appeal. The officer pled guilty to misconduct charges. P/C Otchere was found not guilty of misconduct for his actions taken in assisting the first officer.

In comparing the two cases, P/C Fitzpatrick's role, having initiated the arrest and use of force against J.M., is analogous to that of the first officer in *Otchere*. P/C Spooner's role was analogous to P/C Otchere's role in that he (Spooner) was coming to the aid of P/C Fitzpatrick. In consideration of the allegations against P/C Fitzpatrick, I do not find this submission particularly helpful.

Public Complainant (J.M.) Submissions.

J.M. was unrepresented and was granted some leeway with submissions. Defence counsel did raise some concerns/objections in this regard.

- J.M. discussed contextual matters not necessarily related to the allegations against P/C Fitzpatrick. This included her strained relationship with her mother and ongoing issues with the Children's Aid Society (CAS), and issues related to Mr. McCrann and problems in their relationship.
- J.M. discussed her mental health diagnosis of Post Traumatic Stress Disorder, autism, Tourette's syndrome, and bi-polar disorder and that she had received treatment and therapy. J.M. suggested she may have been misdiagnosed. She described having been prescribed medication at various times.
- J.M. disagreed with the suggestion that she "went off" on the evening in question. Her anxiety caused her to get louder.
- J.M. identified the fact that she was not charged with obstruction and questioned why.
- Mr. McCrann had been breaching his conditions from jail and had bribed her. Officers failed to investigate this properly.
- The injuries she had caused to Mr. McCrann were in self defence. The injuries J.M. suffered were visible and more serious than what had been presented previously in these proceedings.
- There was corruption in the OPP and officers were covering up for one another.
- P/C Fitzpatrick was agitated from his first contact with J.M. He had worked overtime, was tired and frustrated and probably overworked. He lost his temper with her that evening.
- J.M. suggested if her mental health crisis was serious, she would not have been released from the hospital when she was.

- The CAS took her children as a result of the events and police actions that evening.
- J.M. stated she was still in excruciating pain from her arm injury and nerve damage. She was on medication as a result of the injury. She will never be able to live a normal life due to her injury and she is fearful of police. This was a life altering event for her. When she attends AA (Alcoholics Anonymous) meetings she cannot clap her hands.
- J.M. described a number of activities she could no longer partake in or perform and undergarments she could not wear due to her injuries.
- If police had grounds to arrest her, why was she not charged with obstruction.
- She no longer trusted the police.

Prosecution Submissions.

- J.M. was at the police station and P/C Fitzpatrick was uncivil toward her. He failed to uphold the reputation of the OPP.
- The events at the cemetery, domestic violence investigation and events at the hospital were not relevant.
- What happened between P/C Fitzpatrick and J.M. at the detachment is what is at issue.
- P/C Fitzpatrick escalated the situation, applied unnecessary force, and yelled at J.M. and did not lay any charges nor advise J.M. of her Right to Counsel. His actions in totality amounted to discreditable conduct.
- Referred to *Faryna and Chorny* (see above analysis re. *O'Halloran* test).
- Referred to *Burrows v. Ontario Provincial Police, 2012 ONCPC 13 (CanLII)* for further analysis of credibility assessments.

Analysis

In *Burrows* the Ontario Civilian Police Commission (OCPC), on appeal, wrote:

- *Both counsel agreed that this case turns on the issue of credibility. Only the Appellant and Jennifer Burrows were present during the alleged altercations. It is clear from the decision that the Hearing Officer was guided by the "O'Hallaran test"; indeed on page 17 she quotes from Faryna v. Chorny (1952) 2 D.L.R. (B.C.C.A.) in which Justice O'Hallaran described the test....*

OCPC was quite specific that a Hearing Officer must not only announce the test but apply it correctly.

Prosecution Submissions Continued

- The prosecution referenced Exhibits 10 and 11 the video and audio recordings related to the interaction between P/C Fitzpatrick and J.M.
- The prosecution reviewed policy outlined in Exhibit 12 regarding arrest procedures and policy found in Exhibit 23 regarding use of force.
- J.M. went to the detachment voluntarily to provide a further statement on request of P/C Spooner.
- During the confrontation J.M. repeatedly asked what was happening and why it was happening.
- There is no clear evidence P/C Fitzpatrick told J.M. she was under arrest and none that he advised her of her Right to Counsel.
- Recapped the evidence of P/C Spooner for context.
- P/C Spooner did not tell P/C Fitzpatrick to put J.M. into a cell.
- The evidence indicated J.M. may have interrupted the interview of Mr. McCrann but this is not obstruction.
- Recapped the evidence of P/C Morneault for context.
- Even if P/C Fitzpatrick felt justified in using force and moving J.M. to the cells, he did not use verbal communication tactics but did use the arm bar technique.
- J.M. owned up to her actions and behaviour that evening.
- Sgt. McPherson's evidence indicated there was an option for P/C Fitzpatrick to have asked about J.M.'s use of the washroom i.e., one other than in the cells.
- Submitted *Jacobs v. Ottawa (Police Service), 2016 ONCA 345 (CanLII)* regarding the Standard of Proof in Police Services Act Hearings.

Analysis

Jacobs affirmed the Supreme Court of Canada's finding; clear and convincing evidence is the standard of proof in Police Services Act hearings.

The Court wrote:

Counsel for the respondents fairly concede that if the Supreme Court determined the issue of the standard of proof under the PSA in Penner, the appeal must be allowed and it is unnecessary to engage in a statutory interpretation of s. 84(1). In my view, we are bound by the Supreme Court's statement in Penner that the standard of proof in PSA hearings is a higher standard of clear and convincing evidence and not a balance of probabilities.

I interpret this to mean evidence must be clear, cogent, and weighty. It means the evidence upon which I arrive at a finding must demonstrate that an allegation is substantially more likely

to be true than false i.e., that which is clear, convincing, reliable, and persuasive. The standard, at least to me, is less than *beyond a reasonable doubt* but higher than *the balance of probabilities*.

Prosecution submissions Continued

- The prosecution submitted their position on the test for discreditable conduct.

Analysis: The test for discreditable conduct.

Upon review of the cases provided and based on experience and training, I understand the test for discreditable conduct to include objectively placing myself in the position of a dispassionate reasonable citizen fully apprised of the same facts and circumstances, aware of the applicable rules and regulations, in the same situation to assess whether an officer's behaviour was discreditable. This includes considerations of whether actual discredit resulted from or is likely to result from the officer's behaviour. A subjective portion of the test involves some consideration of the context of the situation faced by an officer. A *technical breach of the law* made in good faith may not be found by any reasonable person in the community to bring discredit upon the OPP.

Prosecution Submissions Continued

- The prosecution suggested the Court has moved away from the *Waterfield test* as outlined in *Fleming v. Ontario, 2019 SCC 45, [2019] 3 S.C.R. 519*

Analysis

The Supreme Court of Canada identified the ancillary powers test as follows:

To determine whether a particular police action that interferes with individual liberty is authorized at common law, the ancillary powers doctrine must be applied. At the preliminary step of the analysis, the police power that is being asserted and the liberty interests that are at stake must be clearly defined. The analysis then proceeds in two stages. First, the court must ask whether the police conduct at issue falls within the general scope of a statutory or common law police duty. Second, the court must determine whether the conduct involves a justifiable exercise of police powers associated with that duty. At the second stage, the court must ask whether the police action is reasonably necessary for the fulfillment of the duty. There are three factors to be weighed in answering that question: (1) the importance of the performance of the duty to the public good, (2) the necessity of the interference with individual liberty for the performance of the duty, and (3) the extent of the interference with individual liberty.

... If the police can reasonably attain the same result by taking an action that intrudes less on

liberty, a more intrusive measure will not be reasonably necessary no matter how effective it may be. An intrusion upon liberty should be a measure of last resort.

Issue: Credibility and reliability

The parties suggested the issue of credibility and reliability assessments related primarily to two witnesses; P/C Fitzpatrick and J.M.

I am reminded of the O'Halloran test :

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

As indicated elsewhere in this decision I consider credibility, from a lay person's perspective, to be when a witness presents that they sincerely believe they are speaking the truth. Reliability relates to the actual accuracy of their testimony. In determining this, I consider a witness's ability to accurately observe, recall and recount the events in issue. A credible witness may give, in some cases, unreliable evidence.

In assessing credibility, I turn my mind to and was guided by the established tenets outlined in jurisprudence provided or referenced by the parties in their submissions. I am guided by the principles therein.

I am reminded through submissions and otherwise that this matter should not be addressed or viewed as a credibility contest. P/C Fitzpatrick's guilt or innocence is assessed through the established standard of proof in *Police Service Act* hearings; clear and convincing evidence on all evidence heard. Guilt or innocence should not be based on credibility findings in isolation. The issue of guilt or innocence and credibility and reliability, while inter-related, need to be addressed individually.

In this matter, much of the interaction between P/C Fitzpatrick was recorded on video from the cell area. This equipment was not able to record audio. Some audio was recorded on a separate recording system from a nearby interview room. In my view, the incident and issues arising in the notice of hearing were, for the most part, captured in the recordings. In my view this diminishes, to a degree, the challenges often associated with credibility and reliability assessments.

With respect to P/C Fitzpatrick, he generally presented as a credible witness in that he appeared to believe he was testifying truthfully. I had no concerns that would cause me to disregard his evidence. I had some concerns with P/C Fitzpatrick's reliability in that there were areas of his testimony where he was steadfast certain things were said or done that were not borne out or corroborated in other testimony or evidence presented. For example, P/C Fitzpatrick said P/C Spooner told him to put J.M. in a cell. P/C Spooner, even when pressed, had no recollection of ever saying this. Although he did not outright deny saying it, I watched and listened closely when P/C Spooner was responding to this line of questioning. His expression and intonation were those clearly communicating doubt and confusion to the suggestion he ever told P/C Fitzpatrick to put J.M. in the cell. P/C Fitzpatrick may have believed this to be true, but I did not accept it as accurate or correct.

P/C Fitzpatrick's explanation of why and for what offence he placed J.M. under arrest seemed to be evolving, to a degree, as he testified from causing a disturbance to obstructing police. I do not conclude P/C Fitzpatrick was being deliberately misleading, but his responses gave me pause with respect to how much I could rely on his explanations. There seemed to be some confusion in the form of a disconnect or disjointedness between what P/C Fitzpatrick did while interacting with J.M. and what he testified to. The amount of time between the event and his testimony may explain this although I draw no conclusion in this regard.

P/C Fitzpatrick offered little in the way of explanation as to why J.M. was never charged with obstructing police. His testimony indicated that he believed the offence was committed. An arrest was made, and force was used for this purpose. I would speculate, without drawing a hard and fast conclusion, an officer with P/C Fitzpatrick's education and experience, may have offered some form of explanation or further insight into the decision-making process regarding charges. P/C Fitzpatrick's response was (paraphrased) that he thought she would have been charged but he did not follow up on it i.e., whether charges were laid. His response gave me pause regarding his reliability in relation to this line of questioning. Again, an educated and trained officer with P/C Fitzpatrick's experience would reasonably be expected, given all the circumstances, to have offered more than what could be considered comparable to a shoulder shrug regarding why J.M. was not charged with obstruct police. I find a reasonable person from the community would conclude the same. P/C Fitzpatrick's explanation was not in *harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

J.M. was emotional and self-admittedly had other possible motivations, including a civil suit, to have overstated or exaggerated some of her evidence. She acknowledged hosting a website that shared unfavourable opinions and anecdotes about the police. J.M. seemed to have a particular negative predisposition with respect to P/C Fitzpatrick. This was evidenced through some of her testimony. This is understandable, to a point, as her experience with P/C Fitzpatrick

was confrontational as described in the notice of hearing. It was apparent, at times, that J.M.'s disdain for P/C Fitzpatrick led to overstatements and assumptions.

At one point during the proceedings, J.M. went outside to her car. She found a dead fish near her car and returned to the hearing room accusing, without evidence, P/C Fitzpatrick of placing the fish there. As it happens, dead fish appear in the parking lot occasionally as they are apparently picked up by predatory birds from a waterway across the street. P/C Fitzpatrick undoubtedly had nothing to do with the fish appearing beside J.M.'s car.

J.M. made statements about injuries she suffered at the hands of P/C Fitzpatrick. The evidence is clear J.M. was indeed injured through the actions of P/C Fitzpatrick, but there was no evidence upon which I could conclude or infer the injuries were as serious or as life altering as J.M. testified to. In some areas of her testimony, J.M. seemed to be unnecessarily dwelling on the extent of her injuries and the behaviour of P/C Fitzpatrick and others.

Any concerns I had with J.M.'s evidence as they relate to the notice of hearing allegations against P/C Fitzpatrick did not rise to the level of me disregarding all that she said. I could not however, accept all of her evidence, particularly in relation to the extent of her injuries and their effect on her life, without corroboration. There was no medical evidence presented to substantiate the seriousness of the injuries as described by J.M.

Again, I find the reasonable person in the community would find that some of J.M.'s evidence was not in *harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

In the matter before this tribunal, findings were not based solely on the testimony of any witness alone. As mentioned, a good portion of the interaction was recorded.

Issue: The use of the washroom by J.M.

The following may provide context to what led to the confrontation described in the notice of hearing and in evidence.

Ontario and the rest of the world were under the ominous health threat of the Covid-19 pandemic in July of 2020 (more on this elsewhere). As outlined in evidence and in submissions, restrictions were in place at OPP detachments during this time. This included restricted access to certain areas in OPP buildings previously accessible to the public including washrooms.

J.M. was at the detachment voluntarily to provide a statement. She was being observed by P/C Fitzpatrick as they were in an area of the detachment not normally accessed by the public

unescorted. She asked P/C Fitzpatrick if she could use the washroom and was directed to use the toilet in the cell. There was no evidence she was offered reassurance regarding her privacy or any detailed explanation as to why she was being asked to use a cell toilet. There was no evidence that other options as to which washroom to use were considered or explored by P/C Fitzpatrick. To be clear, there was no specific obligation on P/C Fitzpatrick to have done so. I have acknowledged that restrictions were in place due to the pandemic, and these were trying times with respect to procedure and policy changes regarding OPP detachment use and accessibility. With that said, as suggested by Sgt. McPherson when presented with the hypothetical, although not required or mandated, it would have been reasonable, under the circumstances, for any officer to have at least considered options for a witness to use a washroom other than in a jail cell.

In her testimony, J.M. indicated she responded to this request in a boisterous and quarrelsome manner. She was understandably upset to have been told to use a cell bathroom. The tone of her reaction might not have been what you would expect from every person, indeed it was, in rather short order, loud and argumentative. Notwithstanding her reaction, J.M.'s disinclination to use a jail cell toilet when she was voluntarily present to provide a statement as, at that point in time, a witness, was understandable.

Sgt. McPherson indicated that it would have, hypothetically, been an option for an officer, under the circumstances at the time, to have called a supervisor for direction or clarification. This was not a choice made by P/C Fitzpatrick at the time. Again, to be fair and clear, PC Fitzpatrick was not obliged to do so.

J.M., as depicted on the recordings, was loud and challenging. The situation and communication between she and P/C Fitzpatrick deteriorated and continued to escalate resulting from where she had been told to go to the cell bathroom.

Issue: The Arrest of J.M. by P/C Fitzpatrick.

Ontario Provincial Police Policy found in ¹²*Police Orders* and referenced by the parties' states:

To ensure the arrest is complete, a uniform member conducting an arrest shall: identify themselves as a peace officer; take custody by touching the person being arrested; advise the person that they are under arrest and provide the reason for the arrest; and forthwith inform that person of their lawful rights and privileges, including right to counsel ...

¹² OPP Orders Section 2.41

The following is based on evidence presented and viewed through the lens of my training and experience as a police officer having held various responsibilities including supervision and leadership roles at all rank levels up to and including the present.

As described above, communication between P/C Fitzpatrick and J.M. deteriorated rapidly and the confrontation escalated to a point where they were shouting at each other. At this time P/C Spooner was interviewing Mr. McCrann in a nearby room. The shouting and associated behaviour interrupted the interview.

During their exchange P/C Fitzpatrick indicated he warned or otherwise communicated to J.M. she was obstructing. He also described considering or contemplating that she was causing a disturbance and/or disturbing the peace.

The law and evidence presented make it clear that causing a disturbance in the criminal law context would not apply to these circumstances. A person cannot cause a disturbance, in the criminal sense, while in the cell area or a secure area within a police detachment.

The law and jurisprudence with respect to obstruct police make it clear that the person obstructing must have a willful intention to obstruct in order to make out this offence. J.M. raising her voice and behaving as described after being told to use a jail cell toilet, although arguably unbecoming, fell woefully short of constituting the offence of obstruction of police. Interrupting or disrupting police at a police station under the circumstances portrayed in evidence and alleged in the NOH does not constitute criminal obstruction of police. If police were to arrest every person who disrupted or interrupted police business while at a police station, we would be, unfortunately, laying this offence on a prolific basis. It is not anomalous, unusual, or unexpected for some people to behave in ways that interrupt us while they are at the police station. There was no evidence presented at this tribunal nor to P/C Fitzpatrick at the time of his interaction with J.M., that established, even to the slightest extent, she had any intention or a conscious willfulness of disrupting the interview of Mr. McCrann or any other police activity. She was arguing and voicing her disagreement with having to use a jail cell bathroom.

I conclude P/C Fitzpatrick did not have defensible legal grounds to arrest J.M. for Causing a Disturbance or for Obstructing Police. I would expect an officer with P/C Fitzpatrick's experience, education, and training to have known this. I do not believe a reasonable person in P/C Fitzpatrick's place at the time would believe grounds or necessity existed for him to arrest J.M.

Canadian Law in keeping with the *Canadian Charter of Rights and Freedoms* and related OPP policy and procedures make arrest requirements and procedures perfectly clear. Every OPP officer is or should clearly be aware of the lawful steps for arrest.

There was no evidence P/C Fitzpatrick clearly advised J.M. she was under arrest and what offence she was being arrested for. There were some indications he mentioned the words or perhaps cautioned J.M. for “obstruct” or “obstruction” and perhaps for causing a disturbance. Further, the evidence is clear, P/C Fitzpatrick never advised J.M. of her Right to Counsel and Caution. There are circumstances where it may be impractical to immediately take these steps. There are no circumstances where the police are excused from taking these steps. P/C Fitzpatrick simply failed to do so. P/C Fitzpatrick attempted to explain that he did not feel J.M.’s mental/emotional state would have allowed her to understand her right to counsel. With respect, this does not exempt him, or any police officer, from advising a person of their rights.

Issue: The force used by P/C Fitzpatrick.

As the situation quickly escalated as described and shown by the recordings, P/C Fitzpatrick chose to take hold of J.M. in an arm bar technique. By the description of his colleagues and as depicted in the video, this resulted in the grounding of J.M. whether or not this was the intended outcome. A popping sound was heard from J.M.’s arm resulting from the force exerted by P/C Fitzpatrick. J.M. was injured. The extent of her injuries is not corroborated by medical evidence. While she *may* have overstated the extent of her injury, the fact that she was, in fact, injured is not in dispute.

Although P/C Fitzpatrick claimed to have tried to de-escalate the situation, there was no evidence P/C Fitzpatrick tried at least through effective communication, to calm the situation. P/C Fitzpatrick was a participant along with J.M. in the escalation of tension. He did not initially request assistance even though his colleagues were close by. P/C Fitzpatrick acknowledged that he was trained in de-escalation techniques and that he believed J.M. had mental health issues.

To his credit, P/C Fitzpatrick fairly, acknowledged shouting was not a method of de-escalation that was consistent with his training to be employed with persons suffering from mental health challenges. He can be seen and heard shouting quite loudly at J.M. To be clear, there are times when officers may be required and authorized to shout at people, but these are typically in tactical situations often when there is an imminent threat to public safety, for example. The circumstance P/C Fitzpatrick and J.M. was in was not, in my view, such a situation.

I am aware that actions and decisions of officers should not be viewed with the benefit of hindsight, and the observer should attempt to place themselves in the position of the officer at the time of an interaction.

In doing so, as an experienced officer and from the perspective of the reasonable person in the community completely aware of all the circumstances, I find P/C Fitzpatrick’s actions were not justified in law, or in policy and, by his own description, were not consistent with his training.

P/C Fitzpatrick did not have grounds to arrest J.M. under the circumstances described in evidence. Even if I were to accept that this was a mistaken belief on his part, the steps he took to affect the arrest, omitting legally required steps of arrest, and the amount of force used were unjustified and unnecessary.

I am reminded of the quote cited above where the Supreme Court of Canada wrote:

If the police can reasonably attain the same result by taking an action that intrudes less on liberty, a more intrusive measure will not be reasonably necessary no matter how effective it may be. An intrusion upon liberty should be a measure of last resort.

Although not written under the same context, the sentiment can be attributed to the actions of P/C Fitzpatrick. Even if he believed he had grounds to arrest, he did not follow required steps and used force that was disproportionate to the circumstances before employing or attempting other means to de-escalate. It seems, from the recordings and evidence presented, P/C Fitzpatrick lost his patience with J.M., understandably, to a point, and he seems to have become exasperated by her behaviour. This may well have set off the sequence of questionable decisions and actions on the part of P/C Fitzpatrick that followed.

Issue: Discreditable Conduct.

Much of the evidence presented and submissions included significant detail about incidents that occurred at the cemetery between J.M. and her then partner. The prior incident may have provided some context but was not principally related to the allegations against P/C Fitzpatrick as outlined in the NOH. These findings are specifically in relation to the interaction at the OPP detachment between J.M. and P/C Fitzpatrick.

As I conduct this analysis, in addition to my own observations, I will attempt to consider the expectations of the community by placing myself in the position *of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case*. I have considered *not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time* addressed elsewhere in this decision. I will also consider the subjective element of good faith given what P/C Fitzpatrick faced at the time of the incident.

I have already found P/C Fitzpatrick did not have sufficient, if any, grounds to arrest J.M. for causing a disturbance or obstructing police. He did not follow proper arrest procedures as required by statute and reflected in OPP policy. He did not advise J.M. of her rights at any time. He used force upon J.M. when he was not necessarily justified as his grounds for arrest were not legally sound. The force was sufficient enough to take J.M. to the ground and injure her arm. P/C Fitzpatrick made little if any effort consistent with his training to de-escalate. He shouted at

J.M. which he acknowledged is not a method of de-escalation taught or endorsed by the OPP when interacting with someone he believed had mental health issues. Defence submission *R. v. Montsion*, outlined (above) accepted de-escalation practices generally employed by police. Again, none were observed in the behaviour and subsequent testimony of P/C Fitzpatrick. He said he tried or intended to de-escalate but his actions do not support this notion to any significant degree.

P/C Fitzpatrick seemed to believe, at the time of this interaction, that he was making a lawful arrest or was otherwise acting in good faith. Even if I were to accept that this was his belief at the time, his intentions i.e., good faith-based beliefs in his mind, cannot completely mitigate his actions and behaviours and their outcomes. Good faith or honest mistakes are important considerations but are not to be contemplated as blanket protections from misconduct findings.

Some of the principles outlined in *Storrey* above include the reasonableness of an officer's actions and specifically arrest. I do not find a reasonable person in the community placed in P/C Fitzpatrick's position at the time, would conclude the arrest was justified or necessary. The constellation of events following P/C Fitzpatrick's decisions and actions and the outcomes go beyond what I could consider excusable or justifiable honest mistakes or good faith-based errors. I am certain the reasonable person would find similarly.

I now turn my mind to whether actual discredit has occurred. The evidence has shown J.M. has actively posted her experience with P/C Fitzpatrick and the OPP on social media. It is reasonable to infer that at least some of the persons who may have reviewed J.M.'s posts would consider the events to have shed an unfavourable light upon and brought discredit to the OPP. The extent of actual discredit cannot reasonably be quantified.

It is widely known that Police discipline matters are publicly accessible and are often reported on in the media. This matter has been posted on social media, at least by J.M. I find there is no doubt further discredit would befall the OPP should the facts as outlined become more widely known. The people in the communities we serve would not expect an officer to, at least, appear to lose their composure, arrest a person without telling them clearly why, without having sound grounds, without ever advising them of their rights, without employing patience and de-escalation efforts, and then using unwarranted force causing an injury. Regardless of the officer's good faith intentions at the time, the reasonable person would expect the officer to be held accountable for behaviours that clearly did not conform with the law and corresponding policy. Such behaviours would shed an unfavourable light on the OPP resulting in a diminished confidence in and view of the police. To excuse such behaviour without accountability would, in my view, damage public confidence and trust and could be seen as the OPP condoning such actions. It necessarily follows that discredit to the OPP would result. I found the evidence establishing discreditable conduct was clear, convincing, cogent, and reliable.

Conclusion

On July 24, 2020, the world remained under the serious medical and social constraints and significant angst associated to the Covid-19 pandemic. Ontario, indeed, most of the world, was under a number of health guidelines and directives resulting in restricted freedoms. People in Ontario and throughout the world were becoming gravely ill and countless people tragically lost their lives due to Covid-19.

The pandemic put physical, travel, health, financial, familial, emotional, and other strains on everyone. The police were not immune to these added stresses and challenges. Police Officers, much the same as all health care workers and first responders, remained on the front lines and were exposed to health risks i.e., Covid-19 infections at an even higher rate than the average citizen. The burdens and risks associated to the pandemic were amplified for first responders and their families. P/C Fitzpatrick was not immune to these realities, and I am sensitive to this.

P/C Fitzpatrick, along with all his front-line colleagues in policing, emergency services, and health care, had to go to work and did so willingly and dutifully, despite the added dangers to themselves and their families. Many officers and their families became ill with the virus causing staffing shortages and requiring others to work overtime in order to continue to protect the people in the communities we serve.

On the night in question, it seems P/C Fitzpatrick was working overtime to cover for staff shortages. By virtue of my rank and position I was exempt, for the most part, from having to engage in front line activities. Notwithstanding that I was not physically there with them, I have the utmost respect and sense of gratitude to the front-line officers, emergency services, and health care workers who remained “in the trenches” during the most trying global pandemic scenario in modern history.

With the added hours, elevated health risks, physical and emotional demands, and other restrictions in place, front line workers were stretched thin, were physically and emotionally drained, and, undoubtedly many, at times, reached their breaking point. Police officers are expected to have a veneer of composure and professionalism at all times. Despite our best efforts we are all human beings and are, from time to time, not immune to frailties and limitations shared by our fellow citizens. P/C Fitzpatrick is a highly successful achiever amongst his colleagues. He is a respected officer whose success thus far in his career, is indicative of a highly valued employee.

I can only surmise that when P/C Fitzpatrick was interacting with J.M., the human limitations described above affected his decisions and behaviours that evening. All of this may serve to

mitigate consequences for his actions, but they cannot serve to absolve him from disciplinary accountability.

PART IV: DISPOSITION

I find P/C Fitzpatrick guilty of Discreditable Conduct in that he did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended.



K.M. (Mike) Bickerton
Superintendent
OPP Adjudicator

Date electronically delivered: October 26, 2023

Appendix “A”

The following exhibits were tendered during the hearing:

- Exhibit 1: Delegation – Adjudicator, Superintendent Bickerton
- Exhibit 2: Designation – Prosecutor, Inspector Young
- Exhibit 3: Designation – Prosecutor, Inspector Doonan
- Exhibit 4: Designation – Prosecutor, Inspector Fournier
- Exhibit 5: Delegation of All Officers
- Exhibit 6: Designation – Adjudicator, Superintendent Barron
- Exhibit 7: Designation – Prosecutor, Ms. Yazdi
- Exhibit 8: Hardcopy Amended Notice of Hearing
- Exhibit 9: Notes – D/Sgt. Huggard
- Exhibit 10: IIV Room Video (Red USB)
- Exhibit 11: Detachment/Cell Video (Blue USB)
- Exhibit 12: Police Orders 2.41
- Exhibit 13: March 1, 2021, Duty Report Morneault Order
- Exhibit 14(a): February 19, 2021, Duty Report Order
- Exhibit 14(b): Memo Accompanying Above
- Exhibit 15: Order from IIV March 29, 2021
- Exhibit 16: Order from IIV March 25, 2021
- Exhibit 17: Criminal Code of Canada, 495
- Exhibit 18: Police Orders 2.50 Notetaking
- Exhibit 19: Criminal Code of Canada, 129
- Exhibit 20: Fitzpatrick Duty Report
- Exhibit 21: Duties – Police Service Act 42
- Exhibit 22: Criminal Code Canada, 25
- Exhibit 23: Police Orders 2.42
- Exhibit 24: P/C Spooner Duty Report
- Exhibit 25: P/C Spooner Notes
- Exhibit 26: Crown Brief Synopsis
- Exhibit 27: General Occurrence Report
- Exhibit 28: KGB Forms
- Exhibit 29: P/C Morneault Duty Report and Notes
- Exhibit 30: Electronic Defence Materials – Emails, Policy, Procedures
- Exhibit 31: Dispatch Audio MP3 – Radio Calls

- Exhibit 32: P/C Fitzpatrick Duty Report/Notes
- Exhibit 33: Detachment Covid-19 Directive Emails
- Exhibit 34: Defensive Tactics Study Guide
- Exhibit 35: Sgt. MacPherson Notes
- Exhibit 36: Defence Book of Authorities