

OFFICIAL TRANSCRIPT

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No. 0400381261Q1

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

HER MAJESTY THE QUEEN

- and -

HECTOR PATRICIO JARA

Accused

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE SANDERMAN

THE COURT: Please be seated.
MR. PALSER: Good morning, My Lord.
THE COURT: Mr. Palser, Ms. Trach.
MS. TRACH: Any last words of wisdom?
MR. PALSER: I am glad you qualified it as
wisdom, sir. Nothing from the Crown, sir.
THE COURT: Nothing? Okay.
MS. TRACH: No, sir.
THE COURT: Okay. First of all, I want to
thank both Mr. Palser and Ms. Trach for the economic

1 use of the court time. It's been a very efficiently
2 run trial. The two of you clearly identified the
3 issues early on and then you focused your
4 presentations to address those issues and it was
5 really a pleasure to hear the trial and maybe you can
6 take this message back to Mr. Engel, Ms. Trach, that
7 there's no real need to embrace the fishing expedition
8 at all times.

9 I think this trial really showed the basic
10 concept of a trial is very, very simple. You try and
11 get all of those who were involved in the
12 investigation stage or involved in the incident that
13 gives rise to the charges before the court and they
14 are examined and they are cross-examined and we then
15 attempt to determine what passes for the truth, and I
16 don't mean that -- that's not a derogatory comment
17 when I say that because we can never really know what
18 the truth was.

19 We never -- there are limitations to establishing
20 the facts in any case, but we establish what passes
21 for the truth and then we try and establish whether
22 the facts have been proven beyond a reasonable doubt
23 and then we apply the law that exists in the country
24 on the day of the trial to determine whether any
25 criminal liability attaches to the individual and
26 that's best done by focusing on what is really in
27 issue before the court, rather than getting into side

1 issues and getting into matters that really are of
2 little assistance in determining the criminal
3 responsibility of any accused.

4 Now, in this case as in, I guess, in all criminal
5 cases, things aren't black and white, though. There's
6 no disrespect to Mr. Palser that I should accept all
7 of the evidence and reject that of Mr. Jara. Things
8 aren't black and white in criminal cases. There are
9 many, many shades of grey. It's the rare case, the
10 very, very rare case where a judge can accept totally
11 the version given by one individual and reject that of
12 another because the nature of the beast is that people
13 have different perceptions, they have different
14 language skills, have different ability to recall and
15 to remember and it's a blending of all of the evidence
16 that comes before the court that ends up being the
17 bottom line that judges find shades of grey.
18 Everything isn't black and everything isn't white and
19 there are many possibilities in relation to the shades
20 of grey. I guess much like the shades of screen that
21 Constable Pennie was looking at up in Air-1.

22 But any trial in which -- I may say this instead,
23 it has been a somewhat disturbing trial and it's been
24 a disturbing trial because of an allegation of police,
25 an allegation of police brutality has been raised here
26 and one would like to believe, maybe I have a
27 Pollyanna type of viewpoint, but one would like to

1 believe that peace officers who are sworn to uphold
2 the law would not engage in such alleged discreditable
3 conduct. So whenever these types of allegations are
4 made, they have to be scrutinized very, very closely
5 by the court.

6 Now I am the first to concede and not to concede,
7 but the first to acknowledge that police officers have
8 a very difficult job. One of the authorities that
9 Ms. Trach provided in her binder was a decision that I
10 wrote in a civil case *Potts and Huynh* sometime last
11 year in which I set out my feelings about the
12 difficult job, the difficult jobs that police officers
13 have.

14 In that case, I was dealing with the concept or
15 the aspect of inner city policing, but any type of
16 policing is fraught with danger and presents really
17 special challenges to the peace officer. It's
18 difficult work. There's no doubt about that. And
19 professional police forces have only been in existence
20 for less than two centuries.

21 If I recall my history correctly, when Sir Robert
22 Peel was the home secretary in the government in Great
23 Britain in the late 1820s, he created the Metropolitan
24 London Police Force and it was the first professional
25 police force that came into existence and since then,
26 all others have derived sort of their structure and
27 their purpose from that first police force.

1 Over the last two centuries or close to two
2 centuries, legislators have recognized that special
3 powers have to be given to police officers so that
4 they can properly enforce the law.

5 Now, as times have changed, so have the powers
6 possessed by police officers. The Common Law and
7 Parliament have expanded the powers on occasion and on
8 other occasions, they have been curtailed by
9 Parliament or curtailed by the courts saying no,
10 that's too much power. They shouldn't be allowed to
11 do that.

12 So it's a fluid, dynamic situation. Powers are
13 given to the officers that are required or necessary
14 for them to do their job, but no more. And it's very
15 necessary to find the proper balance to ensure that
16 peace officers are equipped with the requisite
17 authority to perform their job in a professional
18 fashion, yet not abuse unnecessarily the rights of an
19 individual, and it's very difficult to find that
20 balance.

21 Now in this country, police officers are given
22 powers that ordinary citizens do not have and they are
23 also given special training to exercise those powers
24 and they are given special training in order to deal
25 with difficult and trying situations. But with
26 that -- with the granting of those powers and with
27 that special training, we then have high expectations

1 for them because they are our public servants.

2 Above all else, a police officer serves the
3 community. He or she is a public servant who is
4 engaged in the business of maintaining the public
5 peace, of enforcing the law and apprehending
6 offenders, and the public expects them to carry out
7 their tasks in a very professional fashion, and the
8 public expects peace officers to maintain high
9 standards of performance at all times.

10 In fact, they take an Oath of Office. The public
11 probably doesn't realize that. They take an Oath of
12 Office when they agree to serve as a police officer.
13 Yesterday, I went and I found that Oath of Office. I
14 had never looked at it before, and when I read it, it
15 struck me that it's somewhat similar to the Oath of
16 Office that a barrister and solicitor swears when he
17 or she becomes a member of the Bar.

18 It's actually an Oath of Office to a calling, to
19 a type of service. This is their Oath of Office for
20 the Edmonton Police Service.

21 I, solemnly and sincerely swear, that I
22 will be faithful and bear true allegiance
23 to Her Majesty the Queen, Elizabeth the II,
24 her heirs and successors according to law
25 and the office of peace officer, in and for
26 the City of Edmonton, that I will
27 diligently, faithfully and to the best of

1 my ability execute, according to law, the
2 office of peace officer and will not ...

3 And the last part of it deals with their promise
4 not to reveal information that they may come into
5 possession of through the course of their employment,
6 except when giving evidence in court.

7 So they swear that they will enforce the law, but
8 they also, in swearing that oath, confirm that they
9 are bound by the law, as well. They are not above it.
10 You know, they do fill a very important role in the
11 administration of the criminal law, but it is a
12 well-defined role. It's well-defined by their Oath of
13 Office, it's well-defined by the courts, it's
14 well-defined by statute. They are not allowed to play
15 the role of judge and jury and they are certainly not
16 concerned about punishing offenders.

17 As I said a moment ago, they enforce the law in
18 accordance with acceptable standards. They preserve
19 the public peace and they apprehend offenders and when
20 required to do so, they come to court to give evidence
21 to tell the court what they've done so that their
22 actions can be considered.

23 Now, I have been involved in the criminal justice
24 system for over 30 years, and I certainly have the
25 greatest of respect for those many officers I have
26 encountered who knew their role and performed it well
27 in accordance with their oath. They were true

1 professionals. So it's against this backdrop that I
2 find it necessary to analyze the evidence in this
3 case.

4 Now, these are the facts that are revealed by the
5 evidence. No quarrel can really be taken with them,
6 at least from my perspective.

7 The members of the Edmonton Police Service were
8 engaged in a pursuit of a vehicle which began sometime
9 around 1:40 a.m. on April 3rd, 2004. They were
10 pursuing a stolen vehicle. This was a car that had
11 been stolen within the previous 48 hours and was
12 valued at approximately \$7,500. That car was being
13 driven by Mr. Jara.

14 The pursuit began in the east end of Edmonton and
15 he was first noticed going northbound on 50th Street
16 towards 137th Avenue, and his express purpose, at that
17 time, was to flee. He wanted to avoid detection. He
18 was aware he was being pursued, he was aware that
19 peace officers wanted him to stop. He made a
20 conscious decision that he was not going to stop, that
21 he was going to attempt to get away.

22 Now, that pursuit lasted 27 kilometres. That's a
23 long, considerable -- that's a long distance. It's
24 it's a considerable distance and during that time that
25 he was being pursued, he travelled on or he crossed a
26 number of major thoroughfares in the City of Edmonton
27 and the route is contained in Exhibit 1 on the voir

1 dire.

2 He either travelled upon or crossed 137th Avenue,
3 Victoria Trail, the Manning Freeway, Fort Road,
4 Yellowhead Trail. Then he was going in a westerly
5 direction on 126th Avenue and 128th Avenue, and he
6 finally jogged over and got up onto the St. Albert
7 Trail and went northbound on the St. Albert Trail.

8 During the time that he travelled these 27
9 kilometres, he was travelling speeds up to 100
10 kilometres per hour when the speed limit was
11 considerably less. He turned off his headlights.
12 Many of these kilometers he was travelling left of
13 centre. The evidence that was presented was
14 approximately five kilometres, a little over five
15 kilometres left of centre and on some of these roads,
16 he was actually on the left-hand side of a median that
17 divided the two-way traffic, so he was going down the
18 wrong lane of traffic.

19 When he was in a residential district up in the
20 northeast end of Edmonton, he went up onto some lawns,
21 he went through a four-way stop sign, he went through
22 red lights. The driving pattern certainly was
23 dangerous driving, there's no question about that and
24 the reason that he travelled in this fashion was in
25 order to avoid apprehension by peace officers who were
26 wanting him to stop.

27 Now, the actions of the police in pursuing

1 Mr. Jara were beyond reproach. He was being followed
2 by the helicopter, the spotlight was not used, he
3 wasn't alerted to the fact that they were following
4 him and the pursuing vehicles dropped back so not
5 to -- I gather so not to further agitate Mr. Jara to
6 cause him to drive in a more reckless fashion. He was
7 stopped. He was stopped through the use of spike
8 belts.

9 The vehicle that he was driving became disabled
10 and became disabled on the St. Albert Trail as he was
11 travelling in a northerly direction. Upon it becoming
12 disabled, upon the vehicle becoming disabled, Mr. Jara
13 decided to leave it. He was right across the ditch.
14 He was still on the St. Albert Trail but across the
15 ditch and across another road was City Ford.

16 He took a look over there and the thought entered
17 his mind, and he made a decision, I am going to
18 hightail it for City Ford to see if I can steal
19 another vehicle and continue. But then he realized
20 that that would be futile. The reason he realized it
21 would be futile were police cars were closing in upon
22 him. Air-1 was above him and then in the words of
23 Constable Pennie, Mr. Jara came to the decision or at
24 least it was apparent to Constable Pennie and apparent
25 also to Mr. Jara the jig is up. I am going to give
26 up. And on his own volition, he went to the ground on
27 his belly. He dropped down to the ground on his belly

1 to await the police arrival. And they were, they were
2 closing in on him quickly.

3 The evidence of Constable Pennie, Constable
4 Wasylyshen, Constable Frattin and Mr. Jara confirms
5 indeed that he lay, he put himself down onto the
6 ground on his stomach as officers were approaching
7 him.

8 Now he put himself in this position to await
9 arrest and to await apprehension. When he did this,
10 there were at least a half dozen peace officers within
11 the immediate vicinity or closing in upon him. There
12 was Constable Bechthold, Constable Fox, Constable
13 Wasylyshen, Constable Sparreboom, Constable Maschmeyer
14 and although Constable Mitchell, heard very little
15 evidence of him being seen, his reassuring voice was
16 heard in the background by Constable Frattin.

17 Of these officers and Constable Frattin, she was
18 the smallest of the lot. She was a rookie officer who
19 is still receiving some on-the-job training and would
20 be the smallest of the lot, but if we put her aside,
21 whether it was Constable or Sergeant, put Mitchell
22 aside, who didn't take part in this, we have five
23 officers who are there, three of them would testify on
24 the trial, Bechthold and Maschmeyer were canine
25 officers. Neither one testified, but I think I can
26 safely assume that we have five, healthy physically
27 strong, well-trained males approaching Mr. Jara when

1 he's lying in this submissive position. We also have
2 Constable Frattin, a smaller female officer.

3 So those are the circumstances in which Mr. Jara
4 finds himself as he is awaiting the arrival of the
5 peace officers. And I fully appreciate Mr. Palser's
6 argument, and I can see where these officers, each one
7 of them, would be more concerned with what they were
8 doing when they approached Mr. Jara. None of them was
9 sitting back taking sort of a wide view of everything
10 and able to report what took place. So one has to
11 piece together from their individual pieces of
12 evidence what took place. And the same thing could be
13 said about Mr. Jara. He has a limited point of view
14 and he becomes involved in a very tumultuous
15 experience within a couple of moments, so his powers
16 of perception are affected by that, plus the fact that
17 he had been taking drugs within a the previous 24
18 hours, methamphetamines.

19 So each of these officers are aware of what they
20 are doing and they are focusing upon that. The
21 expression "tunnel vision" was used by some of them in
22 their evidence and that was probably a very accurate
23 description. They are not aware of what others were
24 doing.

25 This is what happened when Mr. Jara was lying on
26 his belly. Someone's foot came into contact with his
27 head. He was probably, probably, I can't say for

1 certain, kicked by Constable Bechthold just with the
2 side of the foot, but as Mr. Jara himself said, hey,
3 this was no big deal. Mr. Jara didn't take particular
4 exception or umbrage to that. It was a cheap shot, a
5 lack of professionalism, but not necessarily excessive
6 force in these circumstances. It may not have been
7 intentional, but in any event, there was a blow
8 delivered to the side of his head, not a hard blow, by
9 probably Constable Bechthold because he was the first
10 to arrive on the scene. It certainly wasn't excessive
11 force.

12 The next physical force that's applied to
13 Mr. Jara was the knee on the back area. This was in
14 accordance with the training that officers of the
15 Edmonton Police Service received. If this was a
16 proper controlled technique that was employed in this
17 case in order to ensure that the person they were
18 about to arrest was kept on the ground and kept in his
19 submissive position.

20 When the knee was placed to the back area of
21 Mr. Jara, of course, it drove his body down into the
22 ground. It drove his face into the -- onto the
23 pavement or the gravel that was present there in the
24 pavement. It gave him a probably a bloody nose,
25 possibly a split lip and maybe his teeth were driven a
26 little bit into his lip. But this is acceptable force
27 that's being applied. This is a proper restraint

1 that's being applied to Mr. Jara at that time. That
2 certainly wasn't excessive.

3 What this may have done and what the blow to the
4 side of the head may have done and what the subsequent
5 tasering may have done, certainly may have made
6 Mr. Jara reassess his decision to be compliant because
7 indeed, he had presented himself in a fashion where
8 these officers should have realized he wasn't
9 presenting a danger to them at that time and in a
10 situation such as that, one could say, what was wrong
11 with talking to him? What was wrong with opening the
12 lines of communication?

13 And although these officers all said that they
14 were trying to direct him to get his hands out and to
15 bring them out from underneath his belly, of course
16 when they were doing that, they were also applying
17 force to him. So although they are suggesting certain
18 things to him, their actions are maybe inconsistent
19 with what they are asking him to do.

20 In any event, Mr. Jara refuses to bring the hands
21 out, and I find that. I find one of the officers
22 described it as he was sort of in a crocodile
23 position, he had his hands underneath him. But one
24 has to realize he's had force applied to his head,
25 he's been driven down into the ground, he's been
26 grabbed by these officers and maybe it caused him to
27 reassess his position.

1 In any event, he begins to rock a bit. There's
2 no doubt he begins to rock a bit. He begins to roll
3 around. He doesn't present his arms out to these
4 officers. But what do they do rather quickly? We
5 have the evidence of Constable Fox and Constable
6 Sparreboom. These officers both admitted that they
7 used their tasers on Mr. Jara, and the tasers were
8 used by them at least once, maybe twice each. It
9 doesn't matter whether he was tasered twice, three
10 times or four times, he was tasered. The ultimate
11 question was whether or not it was necessary in these
12 circumstances.

13 Constable Fox said I tasered Mr. Jara to get his
14 arms out from underneath his belly in order to
15 handcuff him, and he attempted to justify why he did
16 this, and he went into a fairly detailed explanation
17 as to why he thought tasering was appropriate in these
18 circumstances. He said Mr. Jara, I am paraphrasing
19 here, that this is the nub of Constable Fox's
20 evidence. He said: The magnitude of the risk that
21 Mr. Jara exposed others to during the chase warranted
22 this. That's one thing that he hung his hat on. He
23 said: He almost ran me over. So he's personalizing
24 it. That's not a professional reaction. I infer that
25 this was one of the times he must have been putting a
26 spike belt down or something, but he said: He almost
27 ran me over.

1 Constable Fox also said Mr. Jara made it clear
2 that he wanted to get away from the police. Because
3 of this, he concluded that he may have been grabbing
4 at a weapon underneath his stomach, and the impression
5 I got when Constable Fox gave his evidence was that it
6 was an almost a "them against us" mentality.

7 He had clearly identified Mr. Jara not as an
8 individual who had broken the law, but somebody who
9 was in direct opposition to him. The impression I got
10 from Constable Fox's evidence was that in this
11 situation, when confronted with this, any compliance
12 tool is justified. If I have got it, I am going to
13 use it.

14 Now, there's no doubt that Constable Fox was
15 caught up in the emotion of the chase. There may have
16 been an adrenaline rush, I don't know, but in any
17 event, he was personally affected by what had happened
18 during the chase. He assumed the worst of Mr. Jara
19 then and he was prepared to make a decision based upon
20 this worst assumption.

21 There is, as I have said earlier, there were
22 enough officers present dealing with Mr. Jara that it
23 was not necessary at this time to employ the taser
24 without exhausting other avenues of control. This
25 subject had given himself up to deal with the
26 officers. I don't -- I can't say from my perspective
27 how Constable Fox could justify using the taser. I

1 can see even less how Constable Sparreboom could
2 justify using the taser.

3 His evidence -- Constable Fox, to his credit, to
4 his great credit, explained why. I may not accept the
5 explanation, but at least he was candid. This was an
6 officer who had been up for 27 hours straight, who
7 came to court to give his evidence and he told us why
8 he did so and that is to his credit.

9 Constable Sparreboom, basically his evidence was
10 well, I came in, I joined the fray. I saw something
11 was going on and I just sort of jumped in and I
12 tasered him. That's basically what his evidence is,
13 without any real analysis as to why he did so.

14 There was no real acceptable rationale attempted
15 to be given by Constable Sparreboom. He just, I came,
16 I saw something, I thought it was necessary to use the
17 taser, I did so. As I said earlier, it's this
18 mentality, I have it, I'll use it, which is a terribly
19 frightening concept if one thinks that if I've got
20 this particular weapon, I may as well use it, without
21 looking at other alternative methods of dealing with a
22 citizen.

23 Constable Sparreboom's evidence maybe wasn't
24 surprising, having regard to the clear lack of
25 professionalism he showed in making notes afterwards.
26 He made no note whatsoever of what he had done that
27 night and, in fact, he did not fill out a Use of Force

1 Report. He had used his taser. It's abundantly clear
2 that, indeed, it's necessary for the officer to fill
3 out a Use of Force Report. He didn't. And maybe his
4 evidence was just a reconstructing of what he thought
5 took place, but it was very, very spotty and not very
6 good evidence.

7 I guess I get back to this concept. The man has
8 given up. He's put himself in a submissive position.
9 What about some basic communication in the first
10 instance to determine if he is going to be a resistor,
11 if he will willingly come with them, if he will
12 present his hands for handcuffing. But no, that
13 wasn't the attitude that was shown by the members of
14 the Edmonton Police Service on this occasion.

15 Mr. Jara is a big man, he's a powerful man, but
16 he placed himself completely at their mercy by lying
17 down on the ground in that fashion. His was not an
18 aggressive position. His was not a position from
19 which he could actively resist, well, I shouldn't say
20 that. He could actively resist by rolling around, but
21 it wasn't one where he could lash out to do tremendous
22 harm to these officers and there was no evidence
23 whatsoever that he had a weapon or no evidence that he
24 was prepared to engage them in any fisticuffs or any
25 aggressive activity.

26 I will deal with the broken finger on the left
27 hand, the broken fingers on Mr. Jara's left hand. I

1 don't find that was intentional at all by Constable
2 Wasylyshen. It's understandable why this took place.
3 This took place within the dynamics of an arrest
4 because after Mr. Jara is tasered, there's no doubt
5 that there's a reaction. There are involuntary
6 spasms. He's aware that pain has been inflicted upon
7 him. He reacts to that, and I find that after he was
8 tasered, he even began to roll around to a greater
9 extent and was becoming more of a resistor, and he's a
10 physically powerful man. He was rolling from side to
11 side and he was refusing to present either arm to the
12 officers who wanted to handcuff him at that time.

13 In order for them to get the arms out from
14 underneath his stomach, Constable Fox was on his right
15 arm, Constable Wasylyshen was on his left arm, they
16 were attempting to jockey for position. They were
17 attempting to get proper leverage to pull it out and
18 Mr. Jara was not assisting them. He wasn't allowing
19 them to do that. He was resisting by tensing his
20 muscles and by resisting their efforts to do so.

21 I find that when Constable Wasylyshen attempted
22 to grab hold of his arm, in order to bend it back by
23 employing the arm lock to get it behind his back, he
24 grabbed the fingers and he injured the fingers. But
25 this was not intentional. I don't find this was an
26 intentional act. It was accidental and it was not
27 excessive force. This was something that happened

1 within the dynamics of the arrest.

2 I cannot seriously consider Mr. Jara's claims of
3 threats from Constable Wasylyshen when they were
4 driving in the car, nor his celebration as alleged by
5 Mr. Jara when he heard of Mr. Jara's injury when
6 receiving medical treatment. Mr. Jara sort of gave
7 the Tiger Woods fist pump on the stand when he said
8 that's what Wasylyshen did. I reject that. I accept
9 the evidence of Constable Wasylyshen and Constable
10 Frattin in that regard that this never took place.
11 There was no threats on the part of Constable
12 Wasylyshen and there certainly wasn't this callous
13 reaction.

14 In fact, once Mr. Jara was handcuffed, he was
15 cooperative. They took him for the medical treatment.
16 He received the medical treatment, and I accept the
17 evidence of the officers that when they then left to
18 go to the north division, he wasn't cuffed at all. He
19 was placed in the car and he was cooperative and
20 getting along well with the officers. Maybe if
21 communication would have been opened with him in the
22 first instance that would have been the result up on
23 St. Albert Trail, as well.

24 So the excessive force that was used and there
25 was excessive force, was the use of the taser. It
26 wasn't warranted and it wasn't necessary in these
27 circumstances. So this, then, results in a breach of

1 the security of his person and it was cruel and
2 unusual treatment at the hands of the officers.

3 So there's a breach of Section 7 and Section 12
4 of the Charter. That's the basic finding. But I
5 can't leave, although I found Constable Wasylyshen to
6 be an honest witness and I have accepted his evidence
7 and I found him to be a candid witness, I can't leave
8 without commenting upon the attitude displayed by
9 Constable Wasylyshen when being cross-examined by
10 Ms. Trach.

11 As I said, he was honest, he was candid. He had
12 a very positive demeanor, and I have accepted his
13 evidence in this trial without hesitation. Yet, the
14 arrogance he more than quietly displayed on the
15 witness stand is disturbing. Ms. Trach asked him
16 legitimate questions. When questioned by her as to
17 his feelings in relation to adverse judicial comment
18 in the past, he said he could not comment or he would
19 not -- could not answer her questions as he had not
20 read the decisions.

21 Now, how can he expect to learn from his mistakes
22 if he refuses to acknowledge them and take the
23 necessary corrective action? This arrogant posturing
24 does little to enhance the reputation of the Edmonton
25 Police Service which has been the object of some
26 legitimate criticism in years. All professionals
27 should be willing to acknowledge their mistakes and

1 take appropriate remedial action if it's warranted.
2 Those who do not learn from their past experiences are
3 condemned to repeat those same errors in the future.
4 Either Constable Wasylyshen should correct this
5 deficiency or possibly his superiors should talk to
6 him about this attitude.

7 Now, having found excessive use of force in
8 relation to the use of the taser, what remedy is
9 available to Mr. Jara? He seeks a remedy pursuant to
10 Section 24(1) of the Charter of Rights of Freedoms.
11 Section 24(1) reads:

12 Anyone whose rights or freedoms, as guaranteed by
13 this Charter, have been infringed or denied, may
14 apply to a court of competent jurisdiction to
15 obtain such remedy as the court considers
16 appropriate and just in the circumstances.

17 The operative words there are "appropriate" and
18 "just". It's a fundamental concept of our criminal
19 justice system that all of us, all of us who live
20 under the rule of law, are accountable for our own
21 actions. We bear personal responsibility for what we
22 do and this concept is even incorporated into Section
23 718 of the Criminal Code, the Purposes and Principles
24 of Sentencing. 718(f) says: One of the purposes of
25 the principles of sentencing is to promote a sense of
26 responsibility in offenders.

27 In other words, we are responsible for our

1 actions. We are accountable for what we do, and we
2 are accountable and we have to acknowledge the harm
3 done to the victim and to the community. That's what
4 Section 718(f) says.

5 Now when I read Section 24(1), and I look at the
6 operative words of "just" and "appropriate," it would
7 not be just and appropriate to stay the charges for
8 this one single Charter breach. A stay of proceedings
9 is, as both Mr. Palser and Ms. Trach indicated, is
10 only employed in the clearest of circumstances.

11 I believe that there's something fundamentally
12 wrong with the notion that the public is to be wronged
13 and to suffer then on occasions by the failure of a
14 public servant to do his job properly or to do their
15 jobs collectively properly.

16 Here's the first wrong. The first wrong is
17 Mr. Jara endangered the public by driving in the
18 fashion that he did. He has to bear responsibility
19 for this and to be held accountable for it. That's
20 central to our system of justice.

21 He's held accountable in two fashions, and he
22 bears personal responsibility in two ways.

23 1. An appropriate punishment can be meted out
24 pursuant to Section 718. And secondly, he gets a
25 record of a criminal conviction so that the public
26 knows that he has offended and that he has put them at
27 risk in the past. That's the first wrong in this

1 scenario.

2 The second wrong is that the public, and the
3 public suffers in all of these three instances. The
4 public suffers when a public servant fails to execute
5 his duties as expected. When he breaches this
6 professional standard, and he does something where he
7 betrays the public trust why, then, should a third
8 wrong come into existence to compound, to compound it
9 because a stay would prevent Mr. Jara from being held
10 accountable for his actions just because the police
11 used excessive force. And to let this happen, to let
12 him escape responsibility would lessen the public
13 faith in the criminal justice system and undermine
14 respect for the law.

15 So that would be the third wrong, the third wrong
16 that the public would suffer. This doesn't mean that
17 these officers should get away with this. If -- and
18 they weren't on trial, Mr. Jara was on trial, but
19 their conduct is conduct that deserves negative
20 comment, and I have commented upon it negatively this
21 morning. But just as Mr. Jara is to be held
22 accountable for his wrongdoing, there are other
23 mechanisms to hold peace officers accountable for
24 their transgressions.

25 There are civil remedies. There are criminal
26 remedies. There are remedies under the Police Act.
27 The public should not suffer from irresponsible

1 behaviour of a peace officer when his actions have
2 nothing to do with the gathering of evidence against
3 the accused. That's a different situation, the
4 exclusion of evidence.

5 Here, the remedy sought is too extreme for the
6 Charter breach, but the remedy that is appropriate
7 here is not a stay, but a reduction in the sentence
8 that would normally be imposed upon Mr. Jara. I am
9 not one to use the term "mitigating" factors, there
10 are few mitigating factors in sentence.

11 A mitigating factor in the sentence is a factor
12 that the accused has control over such as the entering
13 of a guilty plea, thereby sparing people the need to
14 testify, thereby giving up his constitutional right to
15 have a trial. The excessive force that was used
16 against Mr. Jara is not mitigating, because he had no
17 control over it. He didn't do anything to mitigate
18 the punishment, but it is a sentence reducing factor
19 that has to be recognized, much as time in custody is
20 a sentence reducing factor and because Mr. Jara has
21 had excessive force directed and used against him by
22 two officers through the employment of the taser, that
23 any sentence that would normally be imposed in
24 relation to his determined criminal liability will be
25 reduced and that's still up in the air as to how much
26 it will be reduced.

27 MR. PALSER: Sir, I wonder if I could have just

1 a brief adjournment. I recognize that there's some
2 information I wanted to bring today and unfortunately
3 have not and it will allow my friend and I to speak
4 just briefly around some pretrial issues.

5 THE COURT: Now, I assume all these exhibits
6 should be exhibits on the trial proper.

7 MR. PALSER: Yes.

8 THE COURT: Because they were just on the voir
9 dire, there is just this little bundle. That's all
10 there is, I think, is that all right? Those will be
11 Exhibits 1 through, I don't know, 4.

12 MR. PALSER: In fact, I had thought, I may have
13 been mistaken, that we had actually made those
14 exhibits on the trial proper.

15 THE COURT: Well, there's no stickers on them.
16 That's all I know. There's no stickers on them. 15
17 minutes?

18 MR. PALSER: Yes, sir. That would be great.

19 (ADJOURNMENT)

20 THE COURT: Please be seated everyone.

21 MR. PALSER: Thank you, My Lord.

22 Sir, perhaps this is my weakness in not having
23 canvassed the history of proceeding of Masogalovach
24 (phonetic) which, of course, you may have adopted the
25 line of reasoning that has been explored there.
26 Masogalovach (phonetic) is actually currently under
27 appeal and set to be heard by the Court of Appeal on

1 January 11th, 2006.

2 The specific issue or at least one of the
3 specific issues under appeal is exactly the approach
4 you have adopted today which is because of a Charter
5 breach, a reduction in sentence is appropriate.

6 Given that fact, sir, and because this is a
7 fairly significant issue under review, I just
8 canvassed very briefly with my friend if we might
9 entertain putting this over, pending a decision in
10 that hearing.

11 In the circumstances, I know it might seem
12 perverse of me, I would be willing to consent to the
13 release of Mr. Jara, pending the outcome of that
14 hearing.

15 THE COURT: It's never perverse when somebody
16 is released from gaol, Mr. Palser.

17 MR. PALSER: Well, society may have a different
18 view on that, sir, but I do note and why I say it's
19 somewhat perverse, though, is that Mr. Jara does have
20 a concerning history most recently with allegations of
21 breach. And so while I am thinking in the interests
22 of fairness, I must consent to his release, I do not
23 want to make sure that we craft conditions that are
24 stringent and that he recognizes that any breach of
25 them will mean that he will be back.

26 I would be suggesting, sir, I do note, and I take
27 it with a grain of salt that he has been in custody

1 for 53, was it 53 days?

2 MS. TRACH: 53 days.

3 MR. PALSER: But I would seek a cash deposit,
4 suggesting something very modest, but in the range of
5 \$500 cash. He does have family support that been here
6 present throughout many of these hearings, and I think
7 that is reasonable. All, of course, the mandatory
8 conditions, most importantly not to be in a motor
9 vehicle without the registered owner present with the
10 sole exceptions, of course, of public transportation
11 or taxies.

12 Not to possess cell phones, not to possess any
13 tools outside of a work site, with the sole exception
14 of transporting directly to or between the sites
15 during his working hours and to abstain from the use,
16 possession and consumption of alcohol or non-medically
17 prescribed drugs, and the corollary condition that he
18 provide on, you know what, I just realized it strikes
19 me that with the recent decision of *Shoker*, I am not
20 sure if the Court still has jurisdiction to give an
21 actual demand provision there. I don't believe you do
22 anymore.

23 THE COURT: No.

24 MR. PALSER: So I will not say it any longer.

25 THE COURT: Okay.

26 MR. PALSER: Those would be the key ones, sir,
27 that I would be seeking for Mr. Jara. I am not sure

1 if my friend has any submissions on this.

2 MS. TRACH: Well, sir, I do take a position
3 with respect to the cash. He was released initially
4 on a \$500 cash bail and it took him three weeks to
5 come up with that. He sat in custody for three weeks,
6 and he has been in custody for a significant period of
7 time, obviously not working, does not have a way to
8 come up with that money.

9 The other issue that I take with the conditions
10 is I do have some concern with the abstention clause.
11 Of course, I leave it in the Court's hands, but
12 Mr. Jara has explained that he does have a substance
13 abuse problem. While he certainly does need to deal
14 with that problem, I am concerned about the clause
15 setting him up for a further breach.

16 THE COURT: Well, let's do this right now. I
17 understand why you are consenting to his release when
18 normally you wouldn't be, Mr. Palser, because, one, I
19 think it's in everybody's best interests to have
20 direction from the Court of Appeal in relation to what
21 should happen because of a contentious issue that it
22 remains outstanding until the Court of Appeal tells us
23 how to deal with it and it would be terribly unfair to
24 have Mr. Jara remain in custody to await the pleasure
25 of the Court of Appeal, so he should be released.

26 But Mr. Jara realizes that how he performs while
27 in the community is going to have a tremendous effect

1 upon what happens to him when he is sentenced. I
2 think that is the biggest hammer over his head right
3 now is that he can -- he can do many things that will
4 make his position much worse when we come back to have
5 sentence imposed. He has a factor that I have
6 determined in his favour. If he misbehaves while on
7 release, that factor could disappear in its entirety.

8 MR. PALSER: Sir, I just want to make sure for
9 the record, while I recognize that this may be a
10 circumstance where we can consent to his release, that
11 consent is contingent upon him not being able to harm
12 anyone else in society.

13 THE COURT: Yes.

14 MR. PALSER: A precondition to that being
15 possible is that he stay sober.

16 THE COURT: No, I --

17 MR. PALSER: If he's not sober, the confidence
18 that I have, and I think this Court should have on him
19 not presenting a significant risk to the public should
20 evaporate, and I note since this event, just let me
21 get my dates right, this is again April 3rd, 2005, we
22 have at least five different sets of breach and drug
23 charges that have accumulated since -- while he was on
24 release. He also has three sets of, well, three
25 breaches and two further drug charges, I think,
26 pending at the present time, and my friend may correct
27 me.

1 This is someone that that hammer that has been
2 hanging over his head has not shown tremendous ability
3 to restrain his behaviour in this regard. So I ask
4 that you consider that strenuously with respect to
5 with respect to the conditions you release him on.

6 THE COURT: Yeah, the problem has been
7 methamphetamines, has it, as opposed to alcohol or is
8 it alcohol?

9 MS. TRACH: No, as I understand it, there is
10 not an alcohol problem.

11 MR. PALSER: So it would be the drugs.

12 THE COURT: Drugs. What I am prepared to
13 do --

14 MS. TRACH: I apologize, sir. I asked
15 Mr. Jara if the cell phone clause gave him any sort of
16 problems with his work and he said no. He just
17 informs me now that he has realized the only phone
18 they have in their home and perhaps his mother can
19 confirm this is a cell phone, they don't have a land
20 line. And so I am wondering if we can amend the
21 clause in some way so that at least he can use the
22 phone at home.

23 MR. PALSER: Except for his home, but not to
24 possess that cell phone outside the residence.

25 THE COURT: That's fine. Well, Mr. Jara, I am
26 going to release you, then, the until the Court of
27 Appeal hears this on the 11th --

1 MR. PALSER: January 11th.

2 THE COURT: I don't have a 2007, yes, I do,
3 the other side.

4 MR. PALSER: And sir, I had been talking to the
5 Appeals Division. They thought they would be able to,
6 while they can't guarantee, obviously, the decision
7 would be rendered, but they would know for sure, they
8 thought, by January 27th, 2007, would be a date that
9 we could put this over to and they would have
10 either --

11 THE COURT: That's a Saturday.

12 MR. PALSER: Oh. That's the date they gave me.
13 Let's go the 29th would it be, then, sir?

14 THE COURT: The 29th is a Monday. Okay.
15 Let's do it this way, then, I will release Mr. Jara to
16 appear. Now, I don't know where I am going to be. I
17 don't have my schedule for 2007 yet, but I will assume
18 that I will be in Edmonton on the 29th, 9:30 on the
19 morning of the 29th.

20 MR. PALSER: If it's easier, sir, might we just
21 put it over to the Friday QBAC.

22 THE COURT: All right.

23 MR. PALSER: And then we can just set a date
24 that works with everyone's schedule.

25 THE COURT: Fair enough. Let's put it over,
26 then, to February 2. That was -- that was the first
27 Friday after the 27th. You will appear, Mr. Jara, on

1 the 2nd day of February, 2007, at 9:30 in the morning
2 to have a date for sentencing scheduled. You won't be
3 sentenced on that day, but the date for sentencing
4 will be scheduled at that time.

5 You will be released on these charges, then, to
6 appear for sentencing at that time on a recognizance
7 in the sum of \$500 without cash deposit, without cash
8 deposit, and the following statutory conditions: Keep
9 the peace and be of good behaviour. The following
10 conditions: You will not be in any motor vehicle.
11 You will not drive any motor vehicle, not be in any
12 motor vehicle, unless registered owner is in the
13 vehicle driving the vehicle, except public transit.

14 You can take a cab, take LRT, take the bus,
15 there's no problem with that. You will not be in
16 possession of any cell phone, with the exception of
17 you may use the cell phone that is in your home, your
18 mother's home, that's registered there -- pardon me,
19 that's registered in her name, within the confines of
20 the home. You cannot take that phone outside of the
21 home. You can't be in possession of any other cell
22 phone. You will not be in possession of any tools,
23 except those tools that are required by you on the job
24 site, in the job site that you are working or while
25 you are in transport to and from that job site, the
26 tools may be in your possession for that purpose, but
27 no other time, and you will not be in possession and

1 you will not -- you will abstain from the use of any
2 nonmedically prescribed drugs. All right?

3 I know that that may be difficult for a person
4 who has got a drug problem, that's difficult. And I
5 appreciate what Ms. Trach is saying, we're not trying
6 to set you up for a fall, but Mr. Palser's concerns
7 about having some meaningful conditions in place until
8 the sentencing are valid, all right?

9 As I said, I repeat it for you, you can improve
10 your position for sentencing by being clean and by
11 obeying these conditions before, until we come back in
12 court or you can make your situation an awful lot
13 worse. We talked earlier about personal
14 responsibility. It's up to you. Okay?

15 MR. PALSER: Sir, I wonder if you would
16 entertain also a very not a terribly restricted
17 curfew, but something just like a 12 to 5 in the
18 morning or just to keep that dead time --

19 MS. TRACH: My concern with that is that
20 Mr. Jara indicates that he will be working with his
21 brother-in-law doing drywalling and they have night
22 contracts sometimes. He may be required to work in
23 the middle of the night.

24 THE COURT: Yes, I don't think I will. If
25 Mr. Jara runs afoul of the law, he runs afoul of these
26 conditions, you know what will happen, Mr. Jara, you
27 will be arrested, and when we appear on the 2nd day of

1 February, you will be coming out the side door in a
2 blue outfit and you don't want that to happen, do you?

3 MR. PALSER: Thank you, sir.

4 THE COURT: All right until the --

5 MR. PALSER: February 2nd.

6 THE COURT: Until February 2nd, okay.

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8 PROCEEDINGS ADJOURNED TO FEBRUARY 2, 2007, 9:30 A.M.

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11 Delivered orally at the Law Courts, Edmonton, Alberta on
12 the 31st day of October, 2006.

13

14 R. Palser, Esq.

15 For the Crown

16

17 Ms. L. Trach

18 For the Accused

19

20 J.J. Love, CSR(A)

21 Official Court Reporter

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