

# In the Provincial Court of Alberta

**Citation: R. v. Maskell, 2011 ABPC 176**

**Date: 20110615**  
**Docket: 100418706P1**  
**Registry: Edmonton**

Between:

**Her Majesty the Queen**

- and -

**Anthony Wayne Maskell**

Accused

## **Judgment of the Honourable Judge D.M. Groves**

### **Introduction**

[1] The accused, Anthony Maskell (“Maskell”) was charged with driving while disqualified contrary to s. 259(4) *Criminal Code* (“C.C.”), impaired operation of a motor vehicle contrary to s. 253(1)(a) *C.C.*, and refusing to provide a breath sample contrary to s. 254(5) *C.C.*, said to have occurred on March 11, 2010 in Edmonton, Alberta. The trial was heard on March 14 and 15, 2011. The Crown called three police witnesses who were all members of the Edmonton Police Service: Cst. Nadine Comeau (“Comeau”); Cst. Darin Goldenberg (“Goldenberg”); and Cst. Robert Weins (“Weins”). Defence called Mr. Maskell.

### **Exhibits**

[2] The following were entered as Exhibits in the proceedings:

- Exhibit #1 - Certified Copy of Order of Prohibition;
- Exhibit #2 - Group of Medical documents;
- Exhibit #3 - Copied pages from Dictionary and Anatomy Book;
- Exhibit #4 - Invoice for Medical Report; and
- Exhibit #5 - 18 photographs.

## **Evidence**

### **A) The Background Circumstances**

[3] Officers Comeau and Goldenberg were partnered and on patrol when they noticed a 1985 Capris travelling in front of them. Comeau queried the license plate. The query indicated the registered owner of the vehicle was a suspended driver born in 1952. The officers activated the police vehicle's overhead lights and the vehicle immediately pulled over and stopped. The officers did not note any aberration in Maskell's driving pattern.

[4] Goldenberg approached the driver's door with Comeau going to the passenger side. Goldenberg testified that he rapped on the driver's window and asked as well as motioned to the driver to roll the window down. Goldenberg stated that Maskell continued to look forward. Goldenberg stated that upon knocking a second time, Maskell responded with profanities.

[5] Goldenberg testified he attempted to open the driver's door and that Maskell grabbed the inside door handle and a "tug-o-war" ensued. Comeau made no mention of any of that in her testimony. Goldenberg testified that upon successfully opening the door, everything became "quite a dynamic situation". Goldenberg and Comeau both testified that it was at this point that Maskell grabbed for the gear shift, which they interpreted as being Maskell's intention to flee. Goldenberg's testimony was that Maskell actually touched the gear shift; however, Comeau was uncertain whether Maskell actually touched the gear shift before Goldenberg removed Maskell from the vehicle.

[6] There were inconsistencies between the testimony of Goldenberg and Comeau on what Goldenberg actually said to Maskell.

[7] Comeau said that Goldenberg was talking to Maskell through the open driver's door, whereas Goldenberg testified that upon opening the door, the situation became quite dynamic and that he had no time to say anything. Goldenberg does not remember asking Maskell his name. Comeau's evidence was that she heard Goldenberg make that inquiry. Goldenberg testified that he did not remember asking Maskell to turn off the engine, whereas Comeau testified to hearing Goldenberg make that request two times. On cross-examination Goldenberg admitted that his typewritten report, completed only a few hours after the incident, indicated that he did direct Maskell to turn off the engine. Therefore, Goldenberg conceded he must have said that, despite having no independent recollection of that at trial.

### **B) The Evidence Concerning Mr. Maskell's Removal from the Vehicle**

[8] What is not in dispute is that after Maskell's door was opened, in one single motion, Goldenberg grabbed Maskell by the lapel area of his shirt and extracted him from the car, putting

him to the ground in a prone position. The amount of effort and force used to accomplish that manoeuver was not agreed upon.

[9] Goldenberg testified that it was not difficult to extract Maskell from the vehicle. He testified that he had to ensure his footing was solid, but that he did not feel that he used all his strength to remove Maskell [Page 42, lines 39-41 and page 43, lines 1-13].

[10] On cross-examination Goldenberg denied throwing Maskell to the ground, stating:

A: "I did not throw him... I reached in and grabbed him from this area of the shirt [indicating the upper chest area which Goldenberg refers to as the lapel area].

Q: "Yes?"

A: "Pulled him out of the vehicle, into a prone position, so stomach down, which puts me in a kneeling position at that point. You suggested I threw him, I did not.

Q: "Well --"

A: "I was in contact with him the whole time."

Q: "He never stood up when you pulled him out?"

A: "No sir, he did not."

Q: "He did not have time?"

A: "That is correct."

Q: "You pulled him far enough that his legs came out of the vehicle --"

A: "Yes."

Q: "And you put him down on the ground, correct?"

A: "Yes."

Q: "And you threw him onto the ground, you let him fall onto the ground, didn't you?"

A: "No sir I did not. That's not what I'm suggesting. That is not -- from the lapel area of the shirt, I reached into the vehicle I pulled him towards me, so out of the vehicle, and then turned my hips, placing him down on the ground. As he comes in contact with the ground, my hands shift to his arms, just like I am trained to do."

Q: "Well, he hit the ground pretty hard didn't he?"

A: "Yes he did."

[11] Goldenberg is a strong, physically fit, 38 year old officer. He is 5'8", weighing approximately 170 pounds, who works out four times a week. At trial, Maskell was 58 years of age, just under 5'6", weighing approximately 160 pounds.

[12] Maskell's evidence regarding this incident was somewhat different than that of the officers.

[13] Maskell remembered the officers activating their emergency lights and that he immediately pulled over. He remembered Goldenberg being very aggressive and demanding from the start. He does not remember Goldenberg asking him to roll the window down, but he does remember the door being opened. Maskell testified to remembering being asked some questions and at the same time being told to turn off the engine.

[14] As evidenced in Exhibit #5, photographs #2 and #3, Maskell's car was an older model vehicle with the gear-shift located just slightly behind the ignition on the steering column. On cross-examination Maskell denied ever reaching for the gear-shift, explaining that given the location of the ignition in relation to the gear-shift, if asked to shut off the engine, he would necessarily have to move his hand in the direction of the gear-shift.

[15] Maskell testified in direct-examination that while he may have been belligerent with the police, he had no specific recollection of this. Maskell's evidence was that given the way Goldenberg initially treated him, he may have retorted in a like manner.

[16] Maskell then testified:

A: "Okay? And I was asked to turn the car off a couple of times. And while in between the asking of that, there was other things that he was pursuing. But I'm not sure exactly what, but alls I remember is he lost his cool, he grabbed me, and with one motion, he pulled me outside the car and he threw me right on my face. And I would never hit the ground – I'm an active person in sports, wrestling, whatever. I've never hit the ground with such force in my life, and it was all I could do to keep – without passing out. That's how hard I hit the ground." [Page 109, lines 18-24]

[17] Comeau testified that at this point she ran around the back of the vehicle to where Goldenberg had Maskell on the ground. She estimated it would have taken her 1 to 2 seconds to travel this short distance. Within these 1 to 2 seconds Maskell was out of the vehicle and on the ground. Comeau then assisted Goldenberg to handcuff Maskell. She testified that in the process she may have placed her knee on Maskell's back. After handcuffing him, the officers brought Maskell to his feet, completed a pat-down search, and took Maskell to the police vehicle.

### **C) The Evidence Concerning the Cause of the Injuries to Mr. Maskell's Face**

[18] Another police vehicle was in the vicinity. The officers inside saw that Goldenberg and Comeau had an individual face down on the ground, and they stopped to see if they could be of assistance.

[19] Officer Weins testified that he and his partner arrived on scene after Maskell was handcuffed. Weins testified that Maskell was brought to his feet and then propped up against Maskell's vehicle. Weins testified at page 93, lines 32-35:

“...And they stood him up, and they had to kind of push him against the side of the car to hold him up. It appeared like he wasn't able to hold himself up from what I could see. His legs were kind of – he was kind of stumbling around, fumbling around. He wasn't able to hold himself very steady.”

[20] Maskell's evidence regarding being placed up against his car is as follows:

A: “And then I was handcuffed very aggressively, knees in the back. The handcuffs were so tight that – and whatever. And I was just picked up. I just remember, like, just being hucked around like I was a rag doll. Thrown up against my car. One of them was pushing my head up against the car and about --”

Q: “You're making a hand (INDISCERNIBLE)—“

A: “—three times, wham-wham-wham, like this with my head went up against the car.”

Q: “Yes?”

A: “And I'm standing there like this. I have don't know how I did – how I stayed awake. Okay? And that's what happened. And then from then on, I don't remember really much of anything because, like, I was like a walking – I don't know. It was like I was half unconscious and half there, half not there. And so I don't remember anything except for the violence and when I was thrown in the back car. I couldn't even sit against the seat because my handcuffs were so tight.” [Page 109, lines 27-41]

[21] I found the testimony of each of the police witnesses regarding the events surrounding and following Maskell's arrest was vague. I made note of four particular omissions.

[22] First, neither Comeau or Goldenberg, the primary officers responsible for Maskell's arrest, ever mentioned, unsolicited, the fact that after Maskell was handcuffed and brought to his feet, that he was put up against his vehicle. It was only after being specifically questioned by the Crown, or on cross-examination by Defence, that either officer made mention of that fact. Second, none of the three officers remembered seeing Maskell's head make contact with the side of his vehicle as the officers propped him up against the vehicle to conduct a pat-down search. When specifically asked on either direct or cross-examination, about Maskell's head being struck against the side of the vehicle, the following responses were received:

“I don't recall anything like that.” [Comeau: page 24, lines 24-25];

“Not that I recall.” [Goldenberg: page 47, lines 11-12];

“I don't recall, no. I don't –“ [Weins: page 100, lines 31-33].

[23] The third notable gap in the three officers' observations, related to there being blood on Maskell's vehicle. None of the officers noticed the substantial amount of blood on the side of the vehicle, that was readily visible in Exhibit #5, photograph #4.

[24] The fourth noticeable omission in the testimony of all three officers related to the T-shirt Maskell was wearing at the time of his arrest, photos of which were tendered as part of Exhibit #5. When the three officers were asked specifically if they remembered seeing blood on Maskell's shirt their responses were similar:

"I don't remember that." [Comeau, page 27, lines 21-23];

"It's entirely possible, but I don't have any specific recollection." [Comeau, page 27, lines 38-39];

"Not that I recall." [Goldenberg, page 84, lines 7-12]; and

"I don't know. I don't remember." [Weins, page 104, lines 6-11].

[25] I will return to those omissions shortly.

#### **D) The Evidence Concerning the Section 254(3) Breath Demand**

[26] Goldenberg was the officer who arrested Maskell and made the s. 254(3) C.C. breath demand. Goldenberg testified that Maskell stumbled as he walked from where the pat-down search was conducted at the side of Maskell's vehicle, to the police vehicle. He further testified that there was nothing noteworthy or remarkable about Maskell's ability to walk from the police vehicle into police headquarters, although he confirmed he had a firm grip on Maskell as they made this journey.

[27] Goldenberg testified that when arresting Maskell in the back of the police vehicle for driving while suspended, he "started to observe" other indicia of impairment from Maskell such as glossy eyes, and a mild smell of alcohol. Goldenberg also testified that Maskell had very slurred speech, and that while sitting in the back of the police vehicle he fell forward similar to someone falling asleep.

[28] Goldenberg testified that he made his first s. 254(3) demand at the scene and that Maskell indicated that he would not comply. A second demand was made at police headquarters at 0313 hours; Goldenberg said Maskell again declined to provide a breath sample. Maskell was then escorted into the breathalyzer room, where he once again refused to provide a breath sample.

[29] When Maskell testified about these matters, he confirmed his memory of the events was sketchy:

A: "Yeah. In the police car, and there's a space there. And I remember bleeding all over my shirt, and basically that was it. I don't remember the ride there, I don't remember how we walked into the police station, and my memory was in and out from then on.

And I don't remember being read my rights. I do not remember being asked to blow even though I answered. I do not remember answering because I was, like – I remember feeling my face. I remember, like, coming back into reality once in a while and feeling and feeling my nose and saying, Oh, jeez. And I was just in a state of worry. That's what I was – that I was in. So I don't remember a whole lot of whatever. And I'm not saying I wasn't abusive. I might have been, but I don't remember." [Page 110, lines 5-15].

[30] On cross-examination Maskell confirmed that a person's memory does not improve when one drinks, and Maskell confirmed he had been drinking earlier that day. The evidence does not reveal how long prior to this incident that Maskell drank alcohol, only that it was not recent consumption. When Maskell was questioned about the symptoms that Goldenberg earlier described as being indicia of impairment, Maskell's explanation was that while he was no medical doctor, the slurred speech and any possible stumbling or disorientation on his part were classic symptoms of someone who suffered a head injury, referencing similar symptoms displayed by someone receiving a similar type of head injury while playing sports, such as hockey [Pages 162 – 163].

[31] After being processed, Maskell was released on a Promise to Appear and driven home by two officers. Of that, Maskell can only remember that one officer was a male and the other a female, and that the officers did not drop him off outside his building, but escorted him inside the foyer of his apartment. None of the Crown's witnesses were able to provide any insight concerning which officers drove Maskell home, although Goldenberg's testimony confirmed Maskell was driven home by Edmonton Police Service members.

### **E) The Evidence Concerning the Details of the Injuries to Mr. Maskell's Face**

[32] Upon returning home, Maskell looked in the mirror and noted his injuries. Maskell then called back to the police station asking for answers regarding the injuries he sustained. Maskell's family took him to the Royal Alexandra Hospital where he underwent a CT scan and it was determined that Maskell had suffered severe facial trauma.

[33] Maskell was diagnosed with having multiple facial bone fractures predominantly on the right side of his face. Those fractures included a right-side orbital floor fracture; the anterior wall of the right maxillary sinus was displaced 2 mm and the posterolateral wall was displaced by 3 mm. There were additional fractures noted to the sphenoid bone and the right zygomatic arch. There was also a separation of the right frontozygomatic suture. Multiple small comminuted fractures were observed of the nasal bones and the nasal septum was deviated to the right. In lay terms, Maskell's orbital bone was broken, as well as his nose. He had a deviated septum, and the tissues in his cheek were separated from the bone.

[34] Surgery was required to repair the damage to the right zygoma, right maxilla, right orbital floor, and a resuspension of the right cheek tissue. During surgery two titanium plates were permanently inserted in the orbital/cheek area.

[35] The medical records and reports substantiating the above injuries suffered by Maskell were entered as one exhibit and marked as Exhibit #2 in the proceedings. The Crown consented to the admission of these reports without the necessity of calling the surgeon to testify.

[36] Maskell testified that as a result of his injuries he was unable to insert his bottom dentures from the date of his arrest until approximately one month post-surgery, a period of about 5 weeks. As such, Maskell was restricted to a liquid diet. In addition to the pain and suffering he experienced when those injuries were first inflicted, there was also the pain and suffering he endured during his recovery period.

[37] A year later, at the time of his trial, Maskell still experienced numbness in his cheek region, although he confirmed it had improved with time. Maskell testified that his vision had returned to normal, but that in cold weather, the eye that suffered the damage would water continuously.

[38] Entered as Exhibit 5 in these proceedings were eighteen (18) photographs taken by Maskell. A more detailed reference to these photographs will be made later in this judgment.

### **Credibility Findings**

[39] Overall, Maskell's testimony came across as believable. Maskell did not attempt to cover up evidence that was less than complimentary or even detrimental to his case; nor did he exaggerate his injuries to make them appear worse. The following are some examples:

Maskell admitted he may have been belligerent with the police but could not specifically remember;

He admitted he had consumed some alcohol earlier that day;

He admitted that he did not have a clear recollection of all of the evening's events;

He admitted that he blew his nose at the police station in an attempt to clear his air passage and that this would initially cause the nose to bleed again; and

He admitted that if someone had never met him before they might not notice that the right side of his face was now deformed from the facial bones having been pushed in as a result of the injuries sustained at the time of his arrest.

[40] By contrast, I found some of the testimony of the police officers unbelievable. Exhibit



#5, photographs #5 and #6 depicted photographs of the T-shirt Maskell was wearing when he was arrested. That T-shirt was not dark-coloured, nor did it have any graphic-design embossed on it, such that blood stains might blend in with the colour or design of the T-shirt. The T-shirt Maskell was wearing appeared to be a new, or meticulously laundered, stark-white T-shirt with no design or embossing. The blood stains, as evidenced in photographs #5 and #6 were as obvious as the nose on a person's face. Photograph 5 of this Exhibit showed the front of Maskell's T-shirt and revealed not simply droplets of blood or a light splattering, but depicted two areas that would be better described as saturated in blood.

[41] In addition, Maskell testified that after the front of his T-shirt became covered in blood, he turned it around and continued to bleed on the back. Photograph #6 shows the back of Maskell's T-shirt with more blood stains. Albeit not as saturated as the front, the blood stains on the back of the T-shirt were nonetheless noticeable. In spite of that, none of the police officers could recall seeing any blood on Maskell's T-shirt.

[42] Additionally, in relation to the incident that occurred beside Maskell's vehicle after he was handcuffed and raised to his feet, only Weins made any mention of this incident when providing his uninterrupted version of the events in direct examination. Comeau only referenced this event in cross-examination. Goldenberg only mentions it after being specifically questioned by the Crown. However, none of the officers remembered Maskell's head making contact with the vehicle.

[43] Maskell and his daughter went to the impound lot and took a number of photographs of Maskell's vehicle. These photos were entered as Exhibit #5, photographs 1 through 4. The first three photographs show the inside of the vehicle and reveal that there was no blood on the interior of this vehicle, confirming Maskell was not bleeding prior to being extracted by Goldenberg. Photograph #4 shows the exterior driver's side of the vehicle. Maskell alleges this was the area against which he was thrown like a "rag doll" and onto which his head was smashed three times by the police. The picture shows a significant amount of bloodstains running down the side of the vehicle.

[44] When the officers were asked whether they noticed blood on the vehicle, their responses were as follows:

Comeau:

Q: "Okay. Did you notice blood on the car?"

A: "I don't recall."

[Page 25, lines 16-17]

[45] Goldenberg's testimony on cross-examination was internally inconsistent:

Q: "Okay. Did you see him bleeding on the car?"

A: "His nose was bleeding."

Q: "On the car?"

A: "Yes, it was."

[Page 70, lines 11-15].

Q: "Did you notice the blood on the vehicle after you were through with him searching?"

A: "I did not, no."

[Page 70, lines 32-33].

[46] Weins, the officer responsible for seizing the vehicle, testified to the following:

Q: "Did you notice the bloodstains on the vehicle when they had him up against the car?"

A: "No. Nor was I looking."

[Page 103, lines 25-27].

[47] For officers who are trained to be observant I find their evidence not only disturbing, but unbelievable. Their inability to recall events related to Maskell's injuries was not credible and something that I would describe as a circle of silence.

[48] Both Comeau and Goldenberg, while positioned outside Maskell's vehicle, could describe the position of Maskell's hand as he allegedly reached for the gear shift in what they described as an attempt to flee. However, neither Comeau nor Goldenberg, who were involved in conducting a pat-down search of Maskell at the side of his vehicle, could recall whether Maskell's head made contact with the vehicle.

[49] Comeau and Goldenberg could both provide details regarding indicia of impairment such as slurred speech, glossy eyes, mild smell of alcohol and lack of coordination, but, by contrast to that, had no recollection of seeing any blood on Maskell's vehicle nor did they recall seeing the significant blood stains on Maskell's T-shirt.

[50] Whereas all three officers noted incriminating evidence against Maskell, none of them had any recollection of how Maskell sustained the significant facial injuries he did, none remembered seeing any blood on the vehicle, and even more unbelievable, none recalled seeing any blood on Maskell's T-shirt. I found those failures to recall, to be selective memory that reinforced my concerns regarding the truthfulness of their testimony.

[51] The evidence revealed that the force applied to Maskell's head and body was significant enough to cause multiple facial fractures requiring surgery and the insertion of metal plates, multiple small fractures to the nose bones, a deviated septum, and the inability for Maskell to insert his bottom dentures for approximately one month following surgery. Maskell's testimony is that the force used was so violent he had difficulty remaining conscious. His testimony substantiated that the violence he endured and the injuries he sustained resulted in him becoming dazed, disoriented, and experiencing partial memory loss. Maskell conceded to not having a complete memory of all the events. Maskell testified the lack of memory was due to the injuries. Maskell's testimony was credible. Where there were inconsistencies between Maskell's

testimony and the officers' testimony, I accept the testimony of Maskell.

### **Proof of the Offences**

[52] Turning now to whether the Crown has proven beyond a reasonable doubt the offences as charged.

[53] A demand for a breath sample under s. 254(3) C.C. is lawful only if the demanding officer has "reasonable grounds" to believe that the person to whom the demand is made has, within the preceding three hours, operated a motor vehicle while his ability to do so was impaired by alcohol.

[54] In *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, the Supreme Court of Canada discussed the grounds necessary for a breath demand and reaffirmed its decision in *Bernshaw*, [1995] 1 S.C.R. 254, which made it clear that "reasonable grounds" requires both a subjective and an objective component. At para. 49 of *Bernshaw*, Sopinka J. states:

*"The Criminal Code provides that where a police officer believes on reasonable and probable grounds that a person has committed an offence pursuant to s. 253 of the Code, the police officer may demand a breathalyzer. The existence of reasonable and probable grounds entails both an objective and a subjective component. That is, s. 254(3) of the Code requires that a police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief."*

[55] A driving pattern can be an important factor weighing on the issue of reasonable grounds to demand a breath sample. However, a driving pattern alone will usually be insufficient to justify a breath demand, as both impaired persons and those not impaired can drive erratically.

[56] In this case there was no driving pattern. Goldenberg testified that the indicia of impairment that he relied upon to form his reasonable and probable grounds were noted after placing Maskell in the back of the police vehicle. This was moments after Maskell had suffered severe facial injuries. The indicia of impairment relied on by Goldenberg to form his reasonable and probable grounds were described as follows: Maskell stumbled when walking to the police vehicle; glossy eyes; mild smell of alcohol; falling forward while sitting, similar to someone falling asleep; and slurred speech. While it is important that a court look at the totality of the evidence, and to guard against analyzing indicia of impairment in isolation of each other, it is also important to note the surrounding circumstances when the officer made the observations, the timing of the observations, and what notations were made by the police regarding the observations.

[57] In order to secure a conviction for impaired operation of a motor vehicle pursuant to s. 253(a) C.C., the Crown must prove all elements of the offence beyond a reasonable doubt. In

these circumstances where there was no suggestion of the use of drugs, section 253(a) requires that the Crown prove that Maskell's ability to operate a motor vehicle was impaired **as the result of alcohol consumption**.

[58] To secure a conviction for refusing to provide a breath sample, the Crown must prove beyond a reasonable doubt that the demand was lawful and that the accused refused. A demand for a breath sample under s. 254(3) *C.C.* is lawful only if the demanding officer had "reasonable grounds" to believe that the person to whom the demand was made had, within the preceding three hours, operated a motor vehicle while his **ability to do so was impaired by alcohol**.

[59] Even if I had found Goldenberg's testimony credible, the Crown still did not meet the necessary burden of proof. While subjectively Goldenberg may have believed he had reasonable grounds to make a demand, objectively the grounds were lacking. Given the circumstances of the arrest, the subsequent injuries sustained by Maskell, and the timing of when Goldenberg's observations were noted, the Crown has not proved that Goldenberg had objectively reasonable grounds to believe the indicia he observed were as a result of alcohol consumption.

[60] The indicia noted by Goldenberg could also have been as a result of the head injuries Maskell had just sustained. The only indicia positively connected with alcohol consumption, was the mild smell of alcohol. The mild smell of alcohol, on its own, is insufficient to establish reasonable and probable grounds. Since the Crown has been unable to prove beyond a reasonable doubt that Maskell's ability to operate a motor vehicle was impaired by alcohol, I find Maskell not guilty of the s. 253(1)(a) offence. Since the Crown has been unable to prove beyond a reasonable doubt that Goldenberg had an objective basis for making a s. 254(3) breath demand, Maskell had a lawful right to refuse. As such, I find Maskell not guilty of refusing to provide a breath sample.

[61] The only remaining *Criminal Code* charge is driving while disqualified. There is no doubt that Maskell was driving and there is no doubt that at the time of this incident, Maskell was subject to a Court-ordered driving prohibition for a *Criminal Code* conviction. As such, Maskell would be guilty of this offence. The issue I must address is whether the police treatment of the accused offended the *Charter of Rights and Freedoms* ("*Charter*"), and if so, the appropriate remedy.

## **Charter Considerations**

### **A) The Law**

[62] Defense is arguing that Maskell's rights under sections 7 and 12 of the *Charter* were breached and thus the appropriate remedy is a stay of proceedings pursuant to s. 24(1) of the *Charter*.

[63] Section 7 of the *Charter* states:

*“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”*

[64] In *R. v. Tran* 2010 ONCA 471 at para. 48 (“*Tran*”) the Ontario Court of Appeal ruled that s. 7 of the *Charter* “provides citizens with a right to be secure against arbitrary force, especially physical violence, by state actors”.

[65] Section 12 of the *Charter* deals with the degree to which the state may treat or punish an individual and provides that:

*“Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”*

[66] At the time of stopping the vehicle and at the time of extracting Maskell from the car, the detention was premised on information received via the police computer that the registered owner of the motor vehicle was a suspended driver. The evidence of both Goldenberg and Comeau was that they were unaware whether the driving suspension was a criminal driving prohibition or a provincial suspension. Goldenberg and Comeau testified that they had reasonable belief that the registered owner and the driver were one and the same person. I find, at the time of the stop, this was nothing more than a reasonable suspicion.

[67] Section 495(1) *C.C.* allows the police to arrest Maskell, without a warrant, for driving while suspended or prohibited.

[68] Sections 25 and 26 of the *C.C.* establish parameters for the amount of force that an officer can use when effecting an arrest:

[69] Section 25(1) *C.C.* reads:

*“Every one who is required or authorized by law to do anything in the administration or enforcement of the law*

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

*is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose”.* [Emphasis added].

[70] Section 26 *C.C.* reads:

*“Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.”*

[71] As stated by the Supreme Court of Canada in *R. v. Nasogaluak*, 2010 SCC 6 (“*Nasogaluak*”) at para 32:

*“While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.”*

### **B) Applying the Facts of this Case**

[72] Upon noting the registered owner came back as a suspended driver, the police activated their lights. I find that Maskell immediately complied by pulling over and stopping. The incredulous testimony of the officers whose memories all failed them on material facts, only strengthened the circle of silence that I found existed amongst them, and undermined their testimony that Maskell ever even reached for the gear shift. I accept Maskell’s testimony that he was reaching towards the gear shift to turn off the ignition as requested to do by the police - the ignition switch which was located only centimetres in front of the gear shift on the same steering column.

[73] Maskell conceded that initially he may have been belligerent with police. However, there was no evidence that upon being removed from the vehicle that Maskell ever resisted, that he was ever uncooperative, nor that he treated the officers disrespectfully, and I so find. I also find that at no time did Maskell represent a physical threat to Goldenberg. In addition, upon being removed from the vehicle, thrown to the ground, and then placed in handcuffs in the presence of four police officers, when there was no risk of flight, I find that Maskell was put up against the side of his vehicle and had his head smashed face-first against the car.

[74] The force used by Goldenberg to extract Maskell from the vehicle was excessive, as was the force used by the officers when they put Maskell up against the side of his vehicle. As a result of the excessive force used, Maskell suffered severe facial trauma. The medical reports tendered as Exhibit #2 support this finding. These were not trivial, minor, injuries, but were severe and permanent.

[75] Leaving aside the lawful basis for Goldenberg to make an arrest, if there was a lawful basis for that arrest, I find that the force used exceeded what was justifiable pursuant to s. 25(1) *C.C.* The force used did not meet any of the principles of proportionality, necessity, or reasonableness set out in *Nasogaluak*. The force used was disproportionate, unnecessary and unreasonable. As such, I find that Maskell’s section 7 and 12 *Charter* rights were infringed.

### **Remedy**

[76] Section 24(1) of the *Charter* provides that anyone whose rights or freedoms have been infringed or denied may apply to a court to obtain such remedy as considered appropriate and just in the circumstances. The Defence submits that the appropriate remedy here is a stay of proceedings. This may be granted if two requirements are met:

1. The prejudice caused by the abuse will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
2. No other remedy is reasonably capable of removing that prejudice. (*Regan*, para. 54).

[77] Most often a stay of proceedings is sought to remedy some unfairness to the accused that has resulted from state misconduct. However, a stay of proceedings can be an appropriate remedy even though the *Charter* infringement is not relevant to the proof of the issues raised by the particular charge before the Court. As well, the *Charter* breach, although not connected to an accused's ability to make full answer and defence, is irrelevant when fashioning an appropriate remedy for police abuse of power. Where police use excessive force when making an arrest, that use of force falls into the "residual" category of cases contemplated in *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) where a stay may be warranted. As stated by the Supreme Court of Canada in *R. v. Tobiass*, [1997] 3 S.C.R. 391 ("*Tobiass*") at para. 89:

*This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.*

[78] In *R. v. Regan*, [2002] 1 S.C.R. 297 the S.C.C. discussed times when it would be appropriate to grant a stay in an abuse of process case and stated at para 55:

*"As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the Charter, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system (O'Connor, at para. 73). Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: "[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings" (Tobiass, at para. 90)." When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in "exceptional", "relatively very rare" cases will the past misconduct be "so egregious that the mere fact of going forward in the light of it will be offensive." (Tobiass, at para. 91)*

[79] In *R. v. Tran* 2010 ONCA 471, *Tran* was one of three co-accused charged with a number

of violent robberies of private residences along with two counts of conspiracy to commit robbery. The evidence revealed that Tran had turned himself into the police. After surrendering himself to the authorities, Tran was subjected to a severe beating by the police, when he invoked his right to silence. As a result of the beating Tran suffered permanent injuries from a broken jaw.

[80] The trial judge found Tran not guilty of the substantive charges but guilty of the conspiracy to commit robbery. The trial judge found that Tran's rights protected by sections 7 and 12 of the *Charter* had been breached but refused to stay the charges, and instead found the appropriate remedy was to reduce Tran's sentence.

[81] The Ontario Court of Appeal allowed Tran's conviction appeal and entered a stay of proceedings. Epstein, J. writing for the Court in *Tran* stated at para. 93:

*"Here, while the Charter violations bear the "necessary connection to the sentencing exercise" as contemplated in Nasogaluak and Glykis, to open the door to a sentence reduction as a possible Charter remedy, the nature and degree of the state misconduct demand a remedy that goes beyond an adjustment to the sentence - a remedy that appropriately responds to the damage that misconduct such as this does to the foundation of our system of justice."*

[82] *Tran* is a case that raised similar issues as those raised here. In *Tran* the Court found that only a few Canadian cases have granted a stay as a remedy for police brutality. That statement is comforting. It is to be hoped that police brutality is not a frequent occurrence. It would be hoped that when the unfortunate situation arises where it was determined that the police had used excessive force, that the circumstances surrounding its use, could somehow diminish, although not condone, its severity. Unfortunately, with the facts of this case, such hopes are lost.

[83] Clark J. of the Ontario Court of Justice in *R. v. Knight*, [2010] O.J. No. 3817; 2010 ONCJ 400 at para. 26 ("*Knight*") reviewed factors that the Courts have considered in deciding whether a stay of proceedings was the appropriate remedy. The following considerations were identified:

1. The need to dispel any notion that the police are above the law in performing their duties;
2. The potential for a positive prospective effect on the police in applying provisions of the *Criminal Code* or otherwise performing police duties;
3. The obligation of the courts to preserve the integrity of the justice system by not allowing their processes to be used in the face of serious police misconduct;
4. The necessity to avoid giving tacit approval of the misconduct in issue; and



5. The absence of an alternative remedy and the importance of providing a remedy that will act as a deterrent against the abuse of police powers.

(see *R. v. Cheddie*, [2006] O.J. No. 1585 (S.C.J.); *R. v. Gladue*, [1993] A.J. No. 1045; *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.))

[84] In the case before this Court, at the time of the initial stop the officers were investigating a possible suspended driver. This was not a violent home invasion robbery as in *Tran*, nor a suspected impaired driver which resulted in a high speed police pursuit as in *Nasogaluak*. This was a case of a routine license plate query which revealed that the registered owner was a suspended driver. Upon the police activating their emergency lights, Maskell immediately complied by pulling over and stopping his vehicle.

[85] While I did find Maskell uttered profanities, I also did find that Maskell did not attempt to flee, nor did he pose any physical threat to the officers. Once Goldenberg extracted Maskell from the vehicle and put him to the ground, Maskell was handcuffed. After the officers placed Maskell in handcuffs, Maskell was propped up against his vehicle. There was no evidence that upon being removed from his vehicle, that Maskell ever resisted the police. And yet, while handcuffed and in the presence of four officers, Maskell continued to be subjected to significant police violence when his head was smashed face-first into his vehicle by the police. As a result of the police brutality that Maskell was subjected to, he suffered severe and permanent injuries. As stated in *Tran* at para. 83:

*“The common law abuse of process doctrine is designed to protect the fundamental principles of justice that underlie the community’s sense of fair play and decency. In R. v. Mack 1988 CanLii 24 (S.C.C.), [1988] 2 S.C.R. 903, the Supreme Court confirmed that the judiciary should resort to a stay when necessary to communicate that it will not condone state conduct that transcends what our society perceives as acceptable. The objective of a stay as a remedy is to maintain public confidence in both the legal and the judicial process.”*

[86] Regardless of the language used, I find the police conduct in this case was “egregious”. It was an abuse of process which if condoned, would undermine the community’s sense of fair play and decency. This was one of those “exceptional” cases, where the police misconduct was so egregious “that the mere fact of going forward in light of it will be offensive” (*Regan*, para. 75; *Tobiass*, para. 91).

[87] In addition to the excessive use of police force, I found the officers’ circle of silence was tantamount to misleading testimony. While not part of the *Charter* breaches themselves, this is a factor to consider, given the need for the Court to dissociate itself from such behaviour.

[88] The Court finds that the public also expects those engaged in law enforcement to respect the rights and freedoms we all enjoy, by acting within the limits of their lawful authority.

[89] This is a case of egregious police conduct - an unwarranted, grave assault causing serious permanent injuries, along with the incredulous testimony of three police witnesses. This is one

of those “clearest of cases” that requires the Court to communicate unequivocally that such conduct will not be tolerated. It is essential for the Court to distance itself from this kind of state misconduct, not to do so would be to leave the impression that it tacitly approves of it. The granting of a stay of proceedings affirms the fundamental values of our society and ensures that the rights under the *Charter* are not, in substance, meaningless.

[90] Based on this analysis, I conclude that the affront to decency and fair play precludes any further investigation of the societal interest in the prosecution of this case. I find the only fit and appropriate remedy is a stay of proceedings pursuant to s. 24(1) of the *Charter*.

Heard on the 14<sup>th</sup> and 15<sup>th</sup> days of March, 2011.

Dated at the City of Edmonton, Alberta this 15<sup>th</sup> day of June, 2011.

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D.M. Groves  
A Judge of the Provincial Court of Alberta

**Appearances:**

J. S. Kennedy  
for the Crown

L.H.L. Nelson  
for the Accused