



TORONTO POLICE SERVICE DISCIPLINE HEARING

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

AND IN THE MATTER OF THE

THE TORONTO POLICE SERVICE

AND PUBLIC COMPLAINANTS

B.A.

M.M.

Y.B.

AND CONSTABLE ADAM LOURENCO (99971)

Charges: 1) Unlawful or Unnecessary Arrest
2) Discreditable Conduct
3) Discreditable Conduct

AND CONSTABLE SCHARNIL PAIS (9706)

Charges: 1) Unlawful or Unnecessary Arrest

HEARING DECISION

Hearing Officer: Inspector Richard Hegedus (Ret'd)
Toronto Police Service

Prosecutor: Superintendent Domenic Sinopoli
Toronto Police Service

Defence Counsel: Mr. Lawrence Gridin (for Constable Lourenco)
Ms. Joanne Mulcahy (for Constable Pais)

Counsel for Public Complainants: Mr. Jeff Carolin (for B.A., M.M., Y.B.)

Case Numbers: 27/2014 & 28/2014

Hearing Dates: 2017.08.08, 10, 11, 14, 15, 16, 17, 18
2017.09.18, 19, 20
2017.12.19
2018.06.19, 20, 21
2018.10.09, 10, 11, 12, 15
2018.11.23
2019.11.20

Decision Date: 2020.12.14

Written Reasons Date: 2021.01.15

Hearing Decision

Constable Adam Constable Lourenco (99971) and Constable Scharnil Pais (9706)

DATE: 2021.01.13

REFERENCE: 27/2014 & 28/2014

Inspector Richard Hegedus (Ret'd): Before commencing my decision in this matter, I wish to thank Mr. Lawrence Gridin and Ms. Joanne Mulcahy defence counsel, Mr. Jeff Carolin, counsel for the public complainants, and Superintendent Domenic Sinopoli, the Service prosecutor, for their arguments and exhibits tendered, all of which have assisted me in reaching my decision.

Summary of Notices of Hearing

On August 8, 2017, Constable Adam Lourenco (99971) pleaded not guilty to one count of making an Unlawful or Unnecessary Arrest and two counts of Discreditable Conduct. Constable Scharnil Pais (9706) pleaded not guilty to one count of making an Unlawful or Unnecessary Arrest.

The Notices of Hearing (NOH) are summarized as follows.

Notice of Hearing - Count One - Constable Lourenco

YOU ARE ALLEGED TO HAVE COMMITTED MISCONDUCT IN THAT YOU DID WITHOUT GOOD AND SUFFICIENT CAUSE MAKE AN UNLAWFUL OR UNNECESSARY ARREST, contrary to section 2(l)(g)(i) of the Schedule Code of Conduct of Ontario Regulation 268/10 and therefore, contrary to section 80(l)(a) of the Police Services Act, R.S.O.1990, as amended.

Statement of Particulars – Count One - Constable Lourenco

Being a member of the Toronto Police Service attached to the Toronto Anti-Violence Intervention Strategy (TAVIS) unit, you were assigned to uniform duties. On Monday, November 21, 2011, you were on duty and assigned to the 32 Division area with your escort officer, Police Constable Scharnil PAIS (9706).

You were conducting general patrol in the Neptune Drive area, in the city of Toronto. You had contact with the complainants, Mr. B.A., [REDACTED] Mr. M.M. and Mr. Y.B.

You unlawfully arrested Mr. B.A., [REDACTED], Mr. M.M. and Mr. Y.B. for Assaulting a Peace Officer which resulted in their continued detention.

In so doing, you committed misconduct in that you did without good and sufficient cause make an unlawful or unnecessary arrest.

Notice of Hearing - Count Two - Constable Lourenco

YOU ARE FURTHER ALLEGED TO HAVE COMMITTED MISCONDUCT IN THAT YOU DID ACT IN A DISORDERLY MANNER OR IN A MANNER PREJUDICIAL TO DISCIPLINE OR LIKELY TO BRING DISCREDIT UPON THE REPUTATION OF THE POLICE FORCE, contrary to Section 2(l)(a)(xi) of the Schedule Code of Conduct of Ontario Regulation 268/10 and therefore, contrary to Section 80(l)(a) of the Police Services Act, R.S.O. 1990, as amended.

Statement of Particulars – Count Two - Constable Lourenco

Being a member of the Toronto Police Service attached to the Toronto Anti-Violence Intervention Strategy (TAVIS) unit, you were assigned to uniform duties.

On Monday, November 21, 2011, you were on duty and assigned to the 32 Division area with your escort officer. Police Constable Scharnil PAIS (9706).

You were conducting general patrol in the Neptune Drive area, in the city of Toronto. You had contact with the complainants, [REDACTED] Mr. M.M. and Mr. Y.B..

During this contact you used force that was unreasonable on [REDACTED] Mr. M.M. and Mr. Y.B. by pointing your firearm at them.

In so doing, you committed misconduct in that you did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Toronto Police Service.

Notice of Hearing - Count Three - Constable Lourenco

YOU ARE FURTHER ALLEGED TO HAVE COMMITTED MISCONDUCT IN THAT YOU DID ACT IN A DISORDERLY MANNER OR IN A MANNER PREJUDICIAL TO DISCIPLINE OR LIKELY TO BRING DISCREDIT UPON THE REPUTATION OF THE POLICE FORCE, contrary to Section 2(l)(a)(xi) of the Schedule Code of Conduct of Ontario Regulation 268/10 and therefore, contrary to Section 80(l)(a) of the Police Services Act, R.S.O. 1990, as amended.

Statement of Particulars – Count Three - Constable Lourenco

Being a member of the Toronto Police Service attached to the Toronto Anti-Violence Intervention Strategy (TAVIS) unit, you were assigned to uniform duties. On Monday, November 21, 2011, you were on duty and assigned to the 32 Division area with your escort officer, Police Constable Scharnil PAIS (9706).

You were conducting general patrol in the Neptune Drive area, in the city of Toronto. You had contact with the complainant Mr. B.A..

During this contact you used force that was unreasonable on Mr. B.A. by punching him.

In so doing, you committed misconduct in that you did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Toronto Police Service.

Notice of Hearing - Count One - Constable Pais

YOU ARE ALLEGED TO HAVE COMMITTED MISCONDUCT IN THAT YOU DID WITHOUT GOOD AND SUFFICIENT CAUSE MAKE AN UNLAWFUL OR UNNECESSARY ARREST, contrary to Section 2(l)(g)(i) of the Schedule Code of Conduct of Ontario Regulation 268/10 and therefore, contrary to Section 80(l)(a) of the Police Services Act, R.S.O.1990, as amended.

Statement of Particulars – Count One - Constable Pais

Being a member of the Toronto Police Service attached to the Toronto Anti-Violence Intervention Strategy (TAVIS) unit, you were assigned to uniform duties. On Monday, November 21, 2011, you were on duty and assigned to the 32 Division area with your escort officer. Police Constable Adam LOURENCO (99971).

You were conducting general patrol in the Neptune Drive area, in the city of Toronto. You had contact with the complainants Mr. B.A., [REDACTED] Mr. M.M. and Mr. Y.B.

You unlawfully arrested Mr. B.A., [REDACTED] Mr. M.M. and Mr. Y.B. for Assaulting a Peace Officer which resulted in their continued detention.

In so doing, you committed misconduct in that you did without good and sufficient cause make an unlawful or unnecessary arrest.

Decision

After an examination of the testimony of the witnesses, the exhibits, and consideration of the submissions of the prosecutor, defence counsel, and counsel for the public complainants, I make the following findings in relation to Constable Adam Constable Lourenco (99971) and Constable Scharnil Pais (9706)

Case 27/2014 – Constable Lourenco

Count One - Guilty in respect of Y.B. and M.M.

Count Two - Not Guilty

Count Three - Guilty

Case 28/2014 – Constable Pais

Count One -Guilty in respect of Y.B. and M.M.

Background

1. On November 21, 2011, Constable Adam Lourenco (99971) and Constable Scharnil Pais (9706) of the Toronto Police Service (TPS) were assigned to the TAVIS unit and were performing their duties together in a uniform capacity. They were patrolling the 32 Division area. At approximately 6:15 p.m., they were at 135 -155 Neptune Drive, a Toronto Community Housing Corporation (TCHC) property, in the City of Toronto and had an interaction with the public complainants. All of the public complainants were arrested and charged criminally. Those charges were later resolved in court.
2. A public complaint was made to the Office of the Independent Review Director (OIPRD) more than six months after the occurrence. As described in the *PSA* ss. 83(17), the OIPRD sought permission from the Board for a delay in service of the Notices of Hearing (NOH). That was granted and the NOHs were first served upon the officers in September 2014.
3. Prior to the commencement of a hearing, this matter was the subject of a pre-hearing motion filed by the Ontario Human Rights Commission. The decision in that motion was released by the first Hearing Officer in this matter, Superintendent Peter Lennox Retired (Ret'd) on June 30, 2016.
4. I was assigned as the Hearing Officer in this matter shortly before November 2016.

5. A second pre-hearing motion was filed by the defence in December 2016. I released the decision for that motion on March 3, 2017. An application for judicial review of that decision was sought by defence counsel and the Divisional Court released its decision on June 22, 2017.
6. This hearing commenced in the Tribunal on August 8, 2017. Constable Lourenco was represented by Mr. Lawrence Gridin and Constable Pais was represented by Ms. Joanne Mulcahy. Three public complainants, namely B.A., M.M., and Y.B. were represented by Mr. Jeff Carolin.
7. There was originally a fourth public complainant, [REDACTED], but prior to the commencement of testimony, [REDACTED] sought consent from the OIPRD to withdraw his complaint under ss. 75(1) of the *PSA*. That consent was granted and his name was removed from all NOHs. The matter then proceeded with three public complainants, namely, B.A., Y.B., and M.M. In order to differentiate the public complainants in certain areas of this decision, reference to [REDACTED] is still included when applicable.
8. All of the public complainants were young persons at the time of the event and a court-ordered publication ban precluded them from being named. Youth records obtained through the OIPRD were made exhibits and continue to be protected by the Youth Criminal Justice Act (YCJA) (Exhibit 4).
9. The hearing itself proceeded with testimony on August 10, 2017. A total of seven witnesses including Constable Pais provided testimony during the hearing. The hearing itself took place over approximately 22 days through 2017, 2018, and 2019.
10. During the course of the hearing, two interlocutory motions were filed by defence. The first one was brought in December 2017 and heard over five days in 2017 and 2018 (Exhibit 40). I released my decision on the motion to the parties on June 1, 2018, with written reasons to follow, in order to allow the hearing to move forward. I released my written reasons on February 4, 2020. The second motion was brought in November 2018 and heard over two days. I released my decision on that motion on August 29, 2019.
11. Final reply submissions in this matter concluded on November 20, 2019.
12. In order to address the issues raised during this hearing, I have divided this decision into three main sections that deal with the allegations contained in the NOHs and other issues. This occurrence took place over a short time span and though the events are interwoven, the isolation of the separate sections allows them to be analysed individually. The main events that required examination were;

Section 1 - Initial contact between the parties and Trespass to Property Act (*TPA*) investigation – Page 8

Section 2 - Arrest of B.A. for Assault Peace Officer and use of force against B.A. by punching – Page 47

Section 3 - Arrests of Y.B. and M.M. for Assault Peace Officer and use of force against them by pointing a firearm – Page 77

13. I addressed issues of witness credibility/reliability in this decision both where relevant to a specific issue and also when they did not coincide with allegations in the NOHs.

Section 1 - Initial contact between the parties and *TPA* investigation

Examination-in-Chief of B.A. by Prosecutor

14. B.A. was the first prosecution witness. During examination-in-chief by the prosecutor, B.A. testified that on the date of the occurrence, he was 15 years of age and had lived for 6 years at 145 Neptune Drive, a City of Toronto housing property.

15. Three evenings a week, B.A. and the other public complainants attended a tutoring and mentoring program called Pathways to Education (*Pathways*). He had also previously attended a program through the Ontario Justice Education Network (*OJEN*) where lawyers and volunteers taught him about his rights when being questioned by police. He had learned that by asking if one was under arrest or detention, one could determine if one was free to go.

16. At *OJEN* the participants were told to be respectful and polite when questioned by police. *OJEN* taught them that police could not search them randomly. On one occasion, they went to a Toronto court and conducted a mock trial. A Black judge assisted them throughout that day and gave them advice.

17. On November 21, 2011, B.A. had been at home playing video games with [REDACTED], M.M., and Y.B. At about 5:54 p.m. they all left the residence to attend *Pathways* at a nearby school. B.A. came out of his building with [REDACTED], Y.B., and M.M. They were walking along a path and were not loitering or engaged in any criminal activity. There were other unknown people in the area who also left the building at the same time.

18. Once outside, an unmarked black van drove up in an aggressive manner and stopped in the middle of the parking lot. Someone called out from the vehicle and his group stopped. He saw it was the police. Constable Lourenco came to the front of their group and Constable Pais went behind them. B.A. felt a little uncomfortable.

**Section 1 - Initial contact between the parties and
TPA investigation continued**

19. Constable Lourenco did the talking and told them there had been a robbery in the area and that they fit the description. B.A. spoke on behalf of the group and told him they had just came from his mom's house and she could confirm that.
20. B.A. testified that the conversation was hostile at the beginning because Constable Lourenco was being aggressive and because of his body language. Constable Lourenco asked for identification.
21. B.A. asked Constable Lourenco if he was under arrest. Constable Lourenco said no. B.A. asked him if he could go. Constable Lourenco was not responsive. B.A. took a step away and Constable Lourenco grabbed him and pushed him backwards. He began searching him and isolated him from the group, calling him names like *'bitch'* and *'smartass'*.
22. B.A. testified he did not swear at, or insult the officers during the original interaction. He was never cautioned that if he failed to produce identification he could be arrested. He had never received a trespass notice prohibiting him from being on the Neptune property. He was never told that he was under arrest for failing to identify himself under the *TPA*. He was never told that if he did not produce his name or identification, that he would be asked to leave the property. Neither Constable Lourenco nor Constable Pais asked him to call his mom or made any attempt to do so.
23. B.A. said that everything he did was in keeping with what he had been taught through *OJEN*. He asked if he was under arrest, he was respectful, polite, and did not curse. No one associated to *OJEN* had ever told them that when approached by police that they could tell an officer to *'go fuck themselves.'* He asked simple questions and he believed that Constable Lourenco took that as him being 'smart' with him. Constable Lourenco was not receptive to him but was aggressive and was not being reasonable.

Examination of B.A. by Mr. Carolin

24. During examination by Mr. Carolin, B.A. testified that he presently attended York University and was majoring in English. He also worked at an insurance adjusting firm. He was 6'2" tall and weighed 160 pounds at the time of his testimony but when he was 15 years old, he was shorter and weighed less. He self-identified as Black.

25. When B.A. had asked if he was under arrest, Constable Lourenco just looked at him, appeared baffled, and said no. He asked if he was free to go and Constable Lourenco was not responsive. As soon as B.A. took a step away, Constable Lourenco proceeded to attack him. Constable Lourenco had said nothing to him about trespassing.
26. B.A. described his previous encounters with police, including being arrested for having marihuana and for shoplifting where he had not been charged. He said he had previously been stopped by police on over 50 other occasions and had been asked where he or his group was headed. None of those interactions had ever been physical, or problematic. This was the one interaction that was aggressive and hostile. He had previous coaches who were police officers and who volunteered their time. His football coach at the time his team won two city championships was a White police officer. When stopped by police it had never been a situation where it was he against the police. He was not against the police. All he did on the date was demonstrate and exercise his rights.
27. B.A. did not know what the descriptions were for the robbery suspects but assumed that Constable Lourenco thought all Black people looked the same. B.A. said that in 2011 the makeup of the Neptune buildings was mostly a Black majority. There was a small Asian minority.

Cross-examination of B.A. by Mr. Gridin

28. In cross-examination by Mr. Gridin, B.A. testified that after walking out of the building, a black van he did not recognize drove up aggressively and stopped quickly in the middle of the parking lot. Someone in the van yelled, trying to get their attention. He did not realize they were police officers until they came out. [REDACTED] stopped and then they all stopped after the two uniform officers got out of the van. Constable Lourenco and Constable Pais approached aggressively. B.A. could tell that Constable Lourenco was aggressive by his body language. He looked angry and not friendly. It was different from previous police encounters because he had not been boxed in before.
29. B.A. had spoken first and asked why they were being stopped. Constable Lourenco said there was a robbery in the area and he fit the description. Constable Lourenco did not ask any questions about where they lived and Constable Pais never said a word.
30. B.A. agreed that he knew his rights and had learned from *OJEN* that he did not have to talk to police if he was not under arrest. He knew that if officers were to ask him basic questions, he should answer. The officers did ask for identification but he did not have any. The officers were not satisfied with the answer he gave so he told them that he lived in the building and they could ask his mom.

Section 1 - Initial contact between the parties and TPA investigation continued

31. B.A. asked if he was under arrest and Constable Lourenco said no. As soon as Constable Lourenco said, he was not under arrest and he got no response to his asking if he was free to go, B.A. assumed that he was free to go. Right after that, he took a step. When he made the motion to continue to *Pathways*, that is when Constable Lourenco grabbed him and B.A. started saying that he was not doing anything wrong. Constable Lourenco isolated B.A. away from the group by pushing him backwards.

Examination-in-Chief of Y.B. by Prosecutor

32. During examination-in-chief, Y.B. testified that he was 15 years old in November 2011 and had lived at 135 Neptune Drive his whole life. On that date, he was leaving B.A.'s house with [REDACTED], B.A., and M.M, going to *Pathways* at the school across the street. He went for tutoring and for mentoring.

33. The group had been standing on the walkway in front of 155 Neptune Drive for approximately 10-15 seconds when an unmarked police van approached. From the window, he heard a voice telling them to stop. The officers got out of the car as if it was urgent. They came over and talked to the group. It was a regular thing to be stopped in his neighbourhood and be asked for identification.

34. Constable Lourenco asked for identification. Y.B. said he had none. They asked why they were being stopped and Constable Lourenco said there was a robbery in the area. The group told him that B.A.'s mom could confirm they had been at his house playing video games. Constable Lourenco said he did not care and asked for his identification again and his name. At first, all of them were having a conversation with Constable Lourenco. Later it was just B.A. Constable Lourenco was in front of them and Constable Pais came behind them. Y.B., M.M., and [REDACTED] were talking to Constable Pais who was continuing to ask for identification.

35. Y.B. did not attempt to leave because he thought they had to stay until told they could leave. They were not told they were under arrest or were being detained. He could not remember being told any other reason for being stopped. He provided his name but could not remember if he was asked about his address.

36. B.A. and Constable Lourenco exchanged a word or two and then they went off to the side. Y.B. did not know what was said between them. He heard Constable Lourenco say 'you're

going to jail tonight. The next thing he knew, B.A. was being pushed. Y.B. did not see B.A. do anything and did not lose sight of him.

37. Y.B. said he had never been prohibited from being on the Neptune property. Before they were stopped that evening, they were not loitering and were not engaged in a prohibited activity. Y.B. was never cautioned that he could be arrested if he failed to provide identification. He was not directed by the officers to leave the premises. Nobody told him he could be asked to leave if he failed to identify himself. He did not know if anyone else was told that.

Examination of Y.B. by Mr. Carolin

38. During examination by Mr. Carolin, Y.B. testified that he presently worked as a sheet metal apprentice doing HVAC work. He was 6'2" tall, 135 lbs and was roughly the same height and weight when he was 15 years old. He self-identified as Black.

39. Y.B. said the officers were trying to draw their attention before even parking their car or getting out. They stopped in the middle of the parking lot like there was an emergency. Usually in his community, police would park, approach, start with a hello, ask their names, and have a conversation. He estimated that he had been stopped by police approximately 30 to 40 times in the past and he had never been arrested before.

40. Before B.A. was punched, one officer was in front of them and one was behind. This told him they were being watched in case someone tried to run. Constable Lourenco was asking for identification as he walked towards them and his body language let you know he was in control. He agreed that Constable Lourenco was 'regular aggressive for a cop' and nothing else. Y.B. felt that he could not just walk away and felt that he had to give identification.

41. Y.B. testified that B.A. did not give Constable Lourenco attitude. Y.B. did not hear B.A. make any threats. He did not remember what words were exchanged other than Constable Lourenco telling B.A. he was going to jail.

Cross-examination of Y.B. by Mr. Gridin

42. In cross-examination by Mr. Gridin, Y.B. agreed the initial approach of the officers was not angry. He remembered the first thing he heard was '*let me see some identification*' or something along those lines. He said he did not have any identification and they were coming from B.A.'s house. He offered to get his mom to confirm that. Constable Lourenco asked for his name. He remembered giving his first name, but did not think he got to a birth date.

**Section 1 - Initial contact between the parties and
TPA investigation continued**

43. At one point, Y.B. heard Constable Lourenco say '*you're going to jail tonight*'. He never heard anything else as B.A. was being pushed and agreed that he did not hear what was being said between B.A. and Constable Lourenco.
44. Mr. Gridin cross-examined Y.B. on the areas of Y.B.'s OIPRD statement in regards to the issue of him saying he was arrested for trespassing. Y.B. said he did not hear anything about trespassing when Constable Lourenco walked up. He explained that when he was being released from custody at the police station, his family first told him that he had been arrested for trespassing but later officers told them he had been arrested for Assaulting a Peace Officer. The first time he remembered hearing about trespassing is when he heard about it from his mother. When he came out of custody, she asked him how he was arrested for trespassing in his own neighbourhood. Y.B. clarified to Mr. Gridin that he never said in the OIPRD interview that the officer in the parking lot had told him he had been charged with trespassing.

Cross-Examination of Y.B. by Ms. Mulcahy

45. In cross-examination by Ms. Mulcahy, Y.B. agreed that the police were seeking identification. He said he didn't have any and at some point he may have mentioned his first name but didn't think he got to the point of giving his surname and address,
46. Y.B. agreed he could not tell everything that happened with B.A. because he was giving some attention to Constable Pais. There were many people were talking and Constable Pais was continuing to try to get information in a calm and polite way.
47. Y.B. agreed there were some things he did not remember. He agreed the incident happened quickly and was sometimes a blur and sometimes chaotic.

Examination-in-Chief of M.M. by Prosecutor

48. During examination-in-chief, M.M. testified that he was 16 years of age on the incident date. He was a university student going into his fourth year studying Information Technology and Business.
49. On the date of the event, he had lived at 135 Neptune Drive, Toronto, since 1999 with his mom and sister. At approximately 6:00 p.m., he and his friends left B.A.'s residence after playing video games. They were going to the *Pathways* program through *OJEN* for

underprivileged youth. *OJEN* taught youth about their rights, provided a law book and taught them how to treat a situation. At that time, he wanted to be a police officer.

50. Less than a minute after leaving the building, M.M. heard shouting from an unmarked Dodge vehicle. He did not know whom it was and kept moving but then saw uniforms and he stopped. He saw two officers come out of the vehicle. An officer asked where they were going and they told them. Constable Lourenco asked where they lived and they pointed it out. B.A. told the officer he could ask his mom and they could show him.

51. Constable Lourenco and B.A. were talking. B.A. asked if he was under arrest and Constable Lourenco said no. B.A. tried to leave and Constable Lourenco came towards him and held him. He did not know what Constable Lourenco was trying to do. Constable Lourenco was acting in a more dominant manner and Constable Pais did not really say anything.

52. M.M. said that B.A. was expressing his rights that he learned in *OJEN* and from a judge. M.M. said that *OJEN* taught them about their rights in a situation with an officer. M.M. said that lawyers had come to their community and in one case, they went to a court. A Black judge had told them that they could express their rights when stopped by police and they were allowed to leave unless they were being detained. There had been no vulgar language from the judge.

53. M.M. testified that he was never cautioned by either officer that if he failed to produce identification, he would be arrested. They were never cautioned that they would be asked to leave or be arrested if they did not produce their names or addresses. He had never received notice under the *TPA* banning him from the property.

54. They were not loitering and were not engaged in a prohibited activity. He was never involved in criminal activity, did not have any prior charges, and had never been arrested in his life. M.M. said that when police came around his neighbourhood before they were really polite, stated their names, and were looking for criminals. He estimated he had been carded approximately 50-60 times in his life.

Examination of M.M. by Mr. Carolin

55. During examination by Mr. Carolin, M.M. said that Constable Lourenco was angry, specifically with B.A. who was expressing his rights. Constable Lourenco got physical and more authoritative.

56. B.A. talked in a clear tone and was adamant about whether he was being detained or he was not. He asked Constable Lourenco if he could leave but M.M. did not know what

Constable Lourenco said. B.A. tried to move forward to leave and that is when the physical altercation took place. He did not remember hearing B.A. swear or raise his voice. M.M. said that the judge at the court had never told them they could tell a police officer to *'fuck off'*.

Section 1 - Initial contact between the parties and TPA investigation continued

Cross-Examination of M.M. by Mr. Gridin

57. In cross-examination by Mr. Gridin, M.M. agreed that this interaction with police was not friendly like others he had previously been involved in. He said that since that date, he had only been stopped by police one time.
58. M.M. said he did not recall the first words said by anyone on that date. He did not remember Constable Pais saying anything. He agreed that Constable Lourenco said something like *'you guys live here?'* He could not recall being asked for their names, and did not remember them telling their names.
59. In further cross-examination, M.M. provided almost no substantive answers, saying that he did not remember or did not recall to almost all questions asked of him. Even when he had provided a response earlier, he replied that he could not remember many of the previous questions that had been asked of him. He said that he had no memory problems.

Re-Examination of M.M. by Prosecutor

60. During re-examination by the prosecutor, when asked further questions about his previous testimony, M.M. said that he did not recall what he had said the day before.

Examination-in-Chief of Fazil Bacchus by Prosecutor

61. During examination-in-chief, Fazil Bacchus testified that he was a Special Constable with the TCHC and had been with them for the past 21 years. His duties consisted of patrolling the housing community, enforcing the TPA and Liquor Licence Act, assisting emergency services and contractors, and any other duties assigned by management.
62. He had been assigned to the Neptune complex for a number of years and had previously responded to calls there starting in 2009. His involvement in this event was on November 24, 2011 when he had been working the 4:00 p.m. to 2:00 a.m. shift. He received a telephone request from Detective Constable Beveridge Ret'd (retired) of 32 Division to

download surveillance video from November 21, 2011. He proceeded to the Neptune complex, searched the cameras facing the parking lot, found the incident, and downloaded the video onto a compact disc. He proceeded to 32 Division and gave the video to Detective Constable Beveridge (Ret'd). She signed a TCHC request for the footage. She told him the police were investigating a robbery in the vicinity, they had interviewed four youths, and charges were pending. He was not provided with any further details because the event involved young persons. He prepared a report on that date for his supervisors.

63. Mr. Bacchus testified that he had authority to act as an agent of the TCHC regarding the TPA and that authority was also extended to the Toronto Police Service (TPS) at Neptune Drive in the form of an authorization letter (Exhibit 5).

Examination of Fazil Bacchus by Mr. Carolin

64. In cross-examination by Mr. Carolin, Mr. Bacchus confirmed that he wrote his report on his involvement date of November 24, 2011, at 10:53 p.m.

Cross-Examination of Fazil Bacchus by Mr. Gridin

65. In cross-examination by Mr. Gridin, Mr. Bacchus said his first involvement in this matter was when he downloaded the video at Detective Constable Beveridge's (Ret'd) request. He did not make a copy for anybody else. In his recollection, the request was in relation to a robbery investigation, which had not occurred at the Neptune complex.

Cross- Examination of Fazil Bacchus by Ms. Mulcahy

66. In cross-examination by Ms. Mulcahy, Mr. Bacchus agreed there was antisocial activity in the Neptune property area, which included drug activity and weapons in general. He recalled there had been a previous murder involving a gun.

Examination-in-Chief of Detective Constable Lynn Beveridge (Ret'd) by Prosecutor

67. Detective Constable Beveridge (Ret'd) testified in chief that she had been a Detective Constable with 32 Division Youth Services on the date of the event. She retired in June 2014 after 32 years of service with the TPS.

68. On November 21, 2011, she was working the 2:00 p.m. to 11:00 p.m. shift with her partner. She received information that four young persons were being brought to 32 Division and that Constable Lourenco and TAVIS officers were involved.

Section 1 - Initial contact between the parties and TPA investigation continued

69. Constable Lourenco advised her that he and Constable Pais had been at Neptune Drive as part of a TAVIS deployment and were conducting general patrol in regards to TPA enforcement. He had observed four males coming out of 135 Neptune drive, had spoken with them, and asked if they lived in the area. He advised the males of the reason the officers were in the area. Constable Lourenco asked B.A. for identification and his response was *'fuck you, I don't have to tell you anything'*. Constable Lourenco took hold of him and placed him under arrest under the TPA. The male spat at Constable Lourenco on the left side of his face just after he placed him under arrest and a struggle ensued.
70. She and her partner spoke with B.A. at 8:05 pm in an investigative room. She asked him if he knew why he was there. All the public complainants were under the belief that they did not have to give information to the police about where they lived because of a program they had attended and they knew their rights. They said they did not have to identify themselves to police if they had done nothing wrong. The purpose of speaking to B.A. was to gather the particulars for the Record of Arrest (ROA) and not to take a statement from him. She had the same conversation with all of the public complainants.

Examination of Detective Constable Beveridge (Ret'd) by Mr. Carolin

71. In examination by Mr. Carolin, she said she remembered that Constable Lourenco was enforcing the TPA. He had seen four males coming out of one building and going into another. They were not engaged in prohibited activities. He spoke with the males and they became belligerent and uncooperative. Constable Lourenco took hold of a male and placed him under arrest under the TPA.
72. She remembered TCHC security showing up at 32 Division and remembered receiving the DVD. She was sure that the call she made to TCHC was not about a robbery and that it had never been an issue.

Examination-in-Chief of Constable Gregory Brown by Prosecutor

73. During examination-in-chief by the prosecutor, Constable Brown testified that he was assigned to TAVIS in October 2011. He had two years of service at the time and was now assigned to 53 Division. On November 21, 2011, he was working the afternoon shift with Constable McQueen. The officers had received information regarding violent crime in 32 Division, specifically, two robberies. The first had occurred at 3549 Bathurst Street and the second 3149 Dufferin Street.

74. During his shift at approximately 6:16 p.m., he heard Constable Lourenco request more cars to 145 Neptune Drive. As they were on route they received information that one person was in custody.
75. Once he arrived at the location, Constable Lourenco and Constable Pais brought a handcuffed person, now known to him as B.A. to his marked scout car. As Constable Lourenco was approaching him he said, *'he's under arrest, I'm gonna put him in your car, get information from the others'*.
76. Constable Brown then went to M.M. because he was nearest and obtained information from him in order to conduct a check. M.M. was not under arrest but under investigative detention at that time. Shortly before leaving the scene, Constable Lourenco told Constable Brown that all of the males were under arrest for Assault Police and Constable Brown advised M.M. of that.
77. Constable McQueen told B.A. his rights to counsel and they transported him to 32 Division. On arrival at 32 Division, there were a number of people ahead of them waiting to get in and while they waited outside, B.A. asked to stretch and said he wanted to tell him something. Constable Brown testified that he allowed B.A. to exit the car and cautioned him again that he did not have to speak with him. B.A. said he had learned from a lawyer program how to talk to police. He said it was a six-week intercommunity program through *OJEN*, and a judge told him he did not have to talk to the police at all. That was in the notes Constable Brown made but he remembered more of the conversation.
78. In his later statement to the OIPRD, Constable Brown had added that B.A. told him that he had learned in his legal program that he didn't have to talk to police at all and so he had the ability to tell police to *'fuck off'*. Constable Brown said that he had the distinct impression that B.A. had told Constable Lourenco and Constable Pais to *'fuck off'* immediately at contact.
79. Constable Brown said he did not write swear words in his memo book at the time because of his inexperience and he was not sure of how much detail to write. He testified that the words *'fuck off'* did not make it into his notes because the utterance was easy to remember.

**Section 1 - Initial contact between the parties and
TPA investigation continued**

Examination of Constable Brown by Mr. Carolin

80. During examination by Mr. Carolin, Constable Brown testified that the TAVIS unit was assigned to where the most recent violent crime had taken place. They were assigned to patrol each division, provide heightened police presence, prevent crime, and watch for suspects. On that date, they had been assigned to 32 Division because of robberies in the area. A briefing took place at 1:00 p.m., conducted by either Constable Lourenco or Constable McQueen in the parade room at TAVIS.
81. He had been briefed about one robbery from November 17, 2011 at 3549 Bathurst, and about another robbery which had taken place at 3119 Dufferin Street on November 17, 2011 but the youths here did not fit the descriptions of the suspects in that occurrence. That robbery occurred approximately 2.4 kilometres away (Exhibit 36).
82. He agreed that part of the TAVIS mandate was to speak with people and to get information from them. TAVIS officers worked many evening shifts and were more likely to speak with young men. They were not more likely to speak with young racialized or Black men. Whom they encountered depended on which community they were in and the demographics of that neighbourhood.
83. During examination by Mr. Carolin, Constable Brown said that B.A. had also told him that the judge said *'tell them to go fuck themselves.'* He did not record that in his notes but it stuck out in his mind.

Cross-examination of Constable Brown by Mr. Gridin

84. In cross-examination by Mr. Gridin, Constable Brown testified that TAVIS was a city-wide initiative and they worked in a different division every day. They were to have a strong officer presence in troubled neighbourhoods that had violent crime and drug activity.
85. During cross-examination by Mr. Gridin, Constable Brown said he had a good recollection of the conversation he had with B.A. because it was unusual. He did not record the conversation verbatim and only recorded a portion in his book. At the time, Constable Brown's understanding was to record things in his notes that he would not have been able to remember in order to refresh his memory. Constable Brown spent time explaining to

B.A. that he should not tell anyone to *'fuck off'*. B.A. responded by saying he knew but he had to try it and was apologetic.

Re-examination of Constable Brown by Prosecutor

86. During re-examination by the prosecutor, Constable Brown clarified that while waiting to enter 32 Division, B.A. had said to him that he had told Constable Lourenco to *'fuck off'*.

Examination-in-Chief of Constable Scharnil Pais by Ms. Mulcahy

87. During examination-in-chief by Ms. Mulcahy, Constable Pais testified that he had been a police officer since May 2007. He had four years of service at the time of this event and had been assigned to TAVIS for approximately one month. He self-identified as a person of colour. He was born in India and came to Canada when he was 15 years old.

88. He said that the mandate of TAVIS was to attend high-crime neighbourhoods as directed by Intelligence or by a divisional request. Their goal was to prevent crime and violence and preserve the peace by their presence. On November 21, 2011, he commenced duty at the TAVIS building and was briefed about two recent robberies in 32 Division but the descriptions of the suspects did not match the public complainants.

89. Constable Pais testified that on that date, Constable Lourenco was driving and they went to 145 Neptune Drive. Constable Lourenco told him that it was a TCHC property and they had *TPA* authority on the property. He also said that the neighbourhood had issues with violence, drugs, weapons, and guns. Their plan was to drive or walk through the complex to enforce the *TPA* and other laws as well.

90. As they drove in Constable Lourenco drew his attention to four individuals. Constable Pais called out to them saying *'hey guys'*. He wanted to talk to them and determine if they were trespassing. He stepped out of the vehicle and called again, *'hey guys can we talk to you'?*

91. ██████ responded, *'what do you want?'* Constable Lourenco approached the other three and Constable Pais approached ██████ and told him they were with TAVIS. He asked if they had any identification. ██████'s response was *'Why? I don't need to.'* Constable Pais told him they were enforcing the *TPA*, and he started to explain it in relation to him identifying himself. Constable Pais could hear Constable Lourenco explaining the *TPA* and asking for identification from the other three.

92. Constable Pais said he had asked [REDACTED] to identify himself and asked if he lived there. Constable Lourenco asked the group of them to identify themselves but they refused to provide their names, addresses, or a piece of identification. Constable Pais did not know who they were or where they lived. B.A. did not mention that he lived there or comment about his mother. If he had mentioned it, Constable Pais would have used that route to ascertain if they lived there.

Section 1 - Initial contact between the parties and TPA investigation continued

93. He and [REDACTED] walked over to the group so they could have one conversation and Constable Pais walked behind them. He could hear one of the group speaking with Constable Lourenco, yelling, and refusing to identify himself. He stood behind them because [REDACTED] was at the curb and there was no room in front.

94. He could hear the conversation escalating between Constable Lourenco and B.A. who yelled '*why do I need to talk to you, why do I need to tell who I am?*' Constable Lourenco explained the requirement for B.A. to identify himself or he would be arrested for trespassing. B.A. said '*fuck this*' to Constable Lourenco. Constable Lourenco told B.A. he was under arrest and grabbed him to arrest him. B.A. immediately yelled '*fuck you*' as he was being grabbed. Constable Pais heard B.A. spitting at Constable Lourenco and saw his head move. Constable Lourenco grabbed B.A. and pushed him and B.A. pulled back.

95. Constable Pais never heard B.A. ask if he was under arrest or Constable Lourenco saying no. None of the public complainants identified themselves and B.A. did not ask to leave or ask if he was free to go.

Cross-examination of Constable Pais by Prosecutor

96. In cross-examination by the prosecutor, Constable Pais said that Constable Lourenco was the Team Leader on that date and had conducted the briefing regarding two robberies.

97. Constable Pais first saw the public complainants when Constable Lourenco drew his attention to them. They were walking on the path to the building. They were the first four people he saw and he did not notice anyone else in the area. The public complainants had done nothing specific to draw his attention. Constable Pais said they stopped the individuals to enforce the TPA because they were in the Neptune complex.

98. Constable Pais described his ability to enforce the *TPA* and the offences under s. 2 of Entering Premises When Prohibited, Engaging in a Prohibited Activity, and Failing to Leave Immediately when Directed. Constable Pais indicated that under s. 9 *TPA*, an occupier could arrest anyone on reasonable grounds if they were believed to be in contravention of s. 2 *TPA*.
99. He and Constable Lourenco stopped the public complainants and asked for identification in order to determine if they had previously been banned from the property, if they lived on the property, or had reason to be there. Constable Pais said his attention was divided between Constable Lourenco, B.A., and the others.
100. Constable Pais said that he and Constable Lourenco had never asked the public complainants to leave the property because it never got to that stage and he did not have an opportunity. They had never observed the complainants engage in any prohibited activity. He acknowledged that it was possible he had told them there had been a couple of robberies in the neighbourhood.

Examination of Constable Pais by Mr. Carolin

101. During examination by Mr. Carolin, Constable Pais testified that the Neptune location had been chosen for patrol because it was a priority neighbourhood. The TAVIS unit conducted more patrols in high crime areas in order to intervene in violence, be visible to prevent crime, protect and build trust with the community, and interact with people. They could intervene by finding out who was on the property, including potential drug dealers or gang members and submit contact cards, which might be of future evidentiary value.
102. During examination by Mr. Carolin, Constable Pais agreed that the complainants were acting normally when he saw them. He had no basis to believe they were trespassing and his goal was to have a conversation with them. Constable Pais testified that if the public complainants refused to identify themselves then they would have been directed to leave. He testified that the public complainants were free to walk away and they were not being detained or being prevented from leaving when he and Constable Lourenco were talking to them. If they had asked if they could leave, it would have been an option he would have explored and he would have asked them where they were going. Constable Pais agreed that at the time of exiting the police vehicle, he had no lawful basis to detain the public complainants but said that he had the basis to detain them when they assaulted Constable Lourenco.
103. Constable Pais said he was forming grounds to believe that the public complainants had entered onto the property when they were prohibited once they refused to identify themselves. When they said they did not have to speak with the officers, and when they

said *'fuck this'*, it gave him reasonable grounds to believe they were on the premises when prohibited. Constable Pais said that he did not hear the public complainants offer to call anyone's mother.

Section 1 - Initial contact between the parties and TPA investigation continued

104. Constable Pais testified that if the address on a person's identification was not listed as a Neptune address, he could ask what they were doing there, ask them to leave, or check their names to find out if they had been 'trespassed' in the past.
105. Constable Pais agreed with Mr. Carolin that he had not made a note about a caution from Constable Lourenco to B.A. that he was about to be arrested. Constable Pais attributed that to him having made poor notes (Exhibit 14). He disagreed with Mr. Carolin that Constable Lourenco had not cautioned B.A.

Cross-examination of Constable Pais by Mr. Gridin

106. In cross-examination by Mr. Gridin, Constable Pais agreed that the police van was approximately 80 metres away from the complainants when they exited the building. He could not see the race of the complainants when he first saw them because of the lighting and the time of night.
107. Constable Pais described Constable Lourenco's body language and demeanour in his approach and conversation as casual (Exhibits 22, 23). He said his intention was to determine if the public complainants had a legitimate reason for being on the property. That was what was expected of him as part of TAVIS. The public complainants were not suspects in anything and none of the questions asked of the complainants were in furtherance of a criminal investigation.
108. Constable Pais agreed that the public complainants were not under detention. B.A. never asked if he was under arrest or free to go and no one told the public complainants they were not free to leave.
109. Constable Pais agreed that Constable Lourenco was being met with hostility, which was unusual. Constable Pais agreed that it was B.A.'s reaction that caused him concern about whether B.A. was legitimately on the property. Constable Lourenco was not saying anything that would justify the hostility. B.A. persisted in his hostility after being warned about the TPA. Constable Pais agreed that the only force Constable Lourenco initially used was to put a hand on B.A. and tell him he was under arrest.

110. Constable Pais agreed that it was Constable Lourenco who initiated the arrest of B.A. under the *TPA* by telling him he was under arrest and by placing a hand on him. Immediately, B.A. spat on Constable Lourenco. Then Constable Pais formed grounds that B.A. had just assaulted Constable Lourenco, but he was not the person who arrested B.A. for assaulting a police officer. Constable Pais agreed that if the public complainants had said that they lived there he might have been satisfied and that might have been the end of the interaction.
111. Constable Pais said he had no doubt about whether B.A. spat at Constable Lourenco and he believed that B.A. had committed a criminal offence.

Re-Examination of Constable Pais by Ms. Mulcahy

112. Constable Pais said he did not arrest B.A. under the *TPA* or for Assault Police. Constable Pais heard Constable Lourenco say he was going to arrest B.A.

Section 1 – Submissions - Initial contact between the parties and *TPA* investigation

Submissions of Mr. Gridin

113. Mr Gridin filed a Book of Authorities (Exhibit 47), Ms. Mulcahy filed Books of Authorities (Exhibits 48, 49), and Mr. Carolin filed Books of Authorities (Exhibits 50, 51).
114. Mr. Gridin indicated that the OIPRD had conducted an independent investigation and decided which complaint allegations would proceed. He submitted that the issues to be determined were if the arrests for Assault Police constituted misconduct, if the punch by Constable Lourenco was misconduct, and whether the drawing of Constable Lourenco's firearm was misconduct but not whether the arrest under the *TPA* was unlawful. He submitted that the tribunal only had jurisdiction to hear the issues contained in the NOHs.
115. Mr. Gridin summarized Constable Lourenco's notes where he had observed the complainants walking from one building to another (Exhibit 12). He approached them, explained TAVIS, and asked the complainants if they lived in the area. His notes were corroborated by M.M. and Y.B. who said he asked for their names and addresses. Constable Lourenco said he asked for identification.
116. Constable Lourenco noted that he was greeted by hostility. B.A. said '*I don't have to tell you shit*'. It was corroborated by Constable Pais who could hear the conversation escalating. He tried to explain the reason for the encounter and the *TPA*, which was

corroborated by Constable Pais. Constable Lourenco said that B.A. was belligerent and was not listening to him which was corroborated by Constable Pais

117. Mr. Gridin said Constable Lourenco was met with a response of *'fuck you, I don't have to tell'*. It was corroborated by Constable Pais who said that B.A. said *'fuck this'*. He submitted that was corroborated by Constable Brown who described his conversation with B.A. during transport. Constable Lourenco explained that he had authority under the *TPA* letter from the TCHC (Exhibit 5) and he wrote that in his notes. Constable Lourenco said he placed his left arm on B.A. and arrested him under the *TPA*. He conveyed that to Detective Constable Beveridge (Ret'd). Constable Pais corroborated the point of spitting which is assaultive behaviour.
118. Mr. Gridin indicated that Constable Lourenco warned B.A. that he could be arrested for failing to identify himself. Mr. Gridin submitted that the *TPA* arrest was lawful but even if it was unlawful, it had no effect on my analysis. When B.A. spat, he committed a fresh assault, and now Constable Lourenco was acting in accordance with his duties.
119. Mr. Gridin submitted that a police officer could arrest a person on private property who was contravening the Act. He submitted that the *TPA* authorization letter gave police the authority as an occupier to control access to the property. It would constrain police powers if they had to conduct surveillance on persons first. When police had the power of an occupier, they could regulate who came and went.
120. Mr. Gridin drew my attention to the case of *Stewart v. Toronto (City) Police Services Board*, 2018 ONSC 2875 (Exhibit 47 Tab 22) to demonstrate that police officers, acting under the authority of a *TPA* letter could place prohibitions on entry. He submitted that Constable Lourenco could impose conditions on entry, requiring that people on the property identify themselves and justify why they were there as a condition of remaining. When B.A. refused and was warned that he could be arrested, he was in breach of a condition of entry.
121. Mr. Gridin drew my attention to *Allen v. Alberta*, (Law Enforcement Review Board) 2013 ABCA 187 (Exhibit 47 Tab 1). That case said that there must be some meaningful level of moral culpability in order to warrant a disciplinary offence, and police officers must often make quick decisions without the ability to get legal advice. Constable Lourenco had to make a decision when B.A. started to walk away from him.
122. Mr. Gridin advised the tribunal that Constable Lourenco's OIPRD statement and notes had already been filed by the prosecution and as such, I was entitled to consider them in terms of evidence and make appropriate findings (Exhibits 11A, 12).

**Section 1 – Submissions - Initial contact
between the parties and TPA investigation continued**

Submissions of Ms. Mulcahy

123. Ms. Mulcahy indicated that the NOH was particularized for Assault Peace Officer. There had been no notice of anything related to the TPA in the NOH. In *Smith v. Murdock*, the Board erred when it found the officer guilty of misconduct that was outside of the NOH.
124. Ms. Mulcahy drew my attention to *R. v. Fountain*, 2015 ONCA 354 (CanLII) (Exhibit 51 Tab 19) to demonstrate that proactive policing can pass *Charter* scrutiny and unlawful detention contrary to the *Charter* didn't equate to misconduct.
125. Ms. Mulcahy submitted that it had not been an unlawful detention as the video showed B.A. walking over easily and there had been room for the public complainants to leave. B.A. testified that he felt free to go after he told he was not under arrest. Constable Lourenco never told him he was not free to go.

Submissions of Prosecutor

126. The prosecutor entered a Book of Authorities (Exhibit 58). He indicated that he took no issue with the officers entering priority neighbourhoods and engaging with people therein. The TPS aim was to bring relief to the community and build bridges but the officers failed to do so on November 21, 2011. The prosecutor noted that this case involved four young males on their own property.
127. The prosecutor submitted that the initial approach and demand for identification was an arbitrary detention and that there was no arrest authority under the TPA for failing to identify oneself. The officers were not well prepared for a young man to exercise his rights. The prosecutor submitted that it made no sense that the public complainants who had attended an OJEN program would tell the officer to *'fuck off'*.
128. The prosecutor submitted that I could not consider the allegations in the NOH without considering everything that led to them otherwise; I would hear evidence in a vacuum and without context. The prosecutor drew my attention to *R. v. Shinkewski*, 2012 SKCA 63 (Exhibit 47 Tab 19) to highlight that a reviewing court must review the cumulative evidence.
129. The prosecutor drew my attention to *R. v. Simpson*, 12 O.R. (3d) 182 (Exhibit 58 Tab B) in regards to the issues of execution of a duty and detention to highlight that without

articulable cause, a detention might not be justified. The prosecutor submitted that there was nothing wrong with the officers asking for names and identification or asking if the public complainants lived there. However, when the complainants refused, the officers' grounds were not strengthened.

130. In *R. v. Grant*, 2009, 2 S.C.R. 353 (Exhibit 58 Tab C) the court discussed psychological constraint and detention. The prosecutor submitted that B.A. had already been detained before he asked if he was under arrest.
131. In this case, Constable Pais took up a position of control and the 15-year-old complainants did not feel they could leave. The prosecutor submitted that the voluntariness ended when the public complainants stopped at an officer's request. The public complainants became the focus of an investigation but there was no nexus between any crime. In *Grant* the court discussed that a detention in the absence of at least reasonable suspicion was considered unlawful and arbitrary.
132. The prosecutor drew my attention to *R. v. Asante-Mensah*, 1996 O.J. No. 1821 (Exhibit 58 Tab I). He submitted that the officers in this case were not in the lawful execution of their duties and had exceeded their authority. The prosecutor noted that the *TPA* provided no power of arrest for failing to identify. The prosecutor submitted that in accordance with the *TPA*, the officers only recourse in this case would have been to ask the public complainants to leave because there was no evidence that B.A. had breached anything.
133. The prosecutor drew my attention to the case of *R. v. Aguirre*, 2006 O.J. No. 5071 (Exhibit 58 Tab D) in regards to requests for identification. That case indicated that asking for identification and speaking with a person are not automatically considered a detention. *Aguirre* also discussed offences and authorities to arrest under the *TPA*.
134. In *R. v. Young*, 2007 ONCJ 4 (Exhibit 58 Tab E), police officers were enforcing the *TPA*. As officers approached a group of persons, the accused fled and was later arrested. The court ruled that when he ran off, the officers had no grounds to believe he had committed an offence. The court relied on *R. v. Storrey* noting that an officer needed both subjective and objective grounds to believe that interference with a person's liberty was justified.
135. In *R. v. Tavernier*, 2013 ONCJ 108 (Exhibit 58 Tab L) an issue was that the criminal charges were subject to whether a lawful Highway Traffic Act (HTA) arrest had occurred when a motorist failed to identify himself. It resulted in findings of not guilty on the criminal charges. The prosecutor submitted that the same preconditions existed in regards to the *TPA* arrest authority.

**Section 1 – Submissions - Initial contact
between the parties and TPA investigation continued**

136. The prosecutor drew my attention to *R. v. Smith*, 2008 ONCJ 492 (Exhibit 58 Tab F) where officers were authorized by the landlord under the TPA. That case spoke to the area of law covered by the TPA in *R. v. Asante-Mensah*, *R. v. Young*, and *R. v. Williams* about officers exceeding their authority.
137. He submitted that the officers were not on the property for a particular reason and there was no reason for them to conclude that a crime was underway. They were only trying to establish if the public complainants lived there in a TPA investigation. In *Smith*, referring to the officers in that case, the court noted:
- 'I find that they used their delegated authority from the Toronto Community Housing Authority in an abusive and arbitrary way.'*
138. In *R. v. Salad*, 2006 ONCJ 76 (Exhibit 58 Tab G) the issue of arbitrary detention was discussed and the court noted there was no clear nexus between Mr. Salad and any criminal activity and that the TPA had been used as a pretext to investigate.
139. The prosecutor brought my attention to *Gentles v. Intelligarde International Incorporated*, 2010 ONCA 797 (Exhibit 58 Tab K) to illustrate that the person involved was told to leave by security guards and if he didn't leave he would be arrested. That avenue was not pursued by Constable Lourenco.
140. The prosecutor drew my attention to *R. v. V. (S.)*, 2005 ONCJ 410 (Exhibit 58 Tab M) in regards to the issue of arbitrary detention. It had similarities regarding it being a high crime area, the positioning of the officers during the encounter and officers acting on a hunch.
141. In *Rose et al. v. Toronto Police Service and Adam Maclsaac and OIPRD*, 2018 OCPC 2 (Exhibit 58 Tab P) the Commission discussed the two criteria to be met to establish misconduct in an arrest. It must be unlawful or unnecessary as well as without good and sufficient cause.
142. In *Wowchuk and Thunder Bay Police Service*, 2013 OCPC CanLII 101391 (Exhibit 51 Tab 27) the Commission discussed the issue of good and sufficient cause and found that the involved officers had no objective reason for making an arrest. The officers did not have reasonable grounds and they could not support that they had good and sufficient cause for their actions.

143. In *Wong and Wall and Toronto Police Service and OIPRD, 2015 OCPC 15* (Exhibit 58 Tab R) a G20 case, the officer was found guilty of making an unlawful arrest. In its decision, the Commission spoke to the requirements for a lawful arrest, the element of good faith, and of good and sufficient cause.
144. The prosecutor brought my attention to *Peel Regional Police Service v. Shockness, (1994 Board of Enquiry)* (Exhibit 47 Tab 4) to note that bad faith need not be proven where a high level of recklessness existed. The prosecutor submitted that Constable Lourenco was reckless regarding the *TPA*. He was duty-bound to know his authority and he made an unlawful arrest.

Submissions of Mr. Carolin

145. Mr. Carolin adopted the submissions of the prosecutor. He indicated that the public complainants who had lived at the location were going to an after-school program. There was nothing remarkable about them. The officers stopped them and in 22 seconds, Constable Lourenco pushed B.A. away from the group. Constable Lourenco wanted to identify B.A. who insisted on his rights. He submitted that Constable Lourenco overreacted. He was the one who lost his temper when the youths challenged him and he was surprised and escalated it further.
146. Mr. Carolin submitted that on August 8, 2017, when the hearing began, the prosecutor could have entered the transcript of Constable Lourenco's interview (Exhibits 11, 12) and the hearing could have stopped there. On the basis of Constable Lourenco's own evidence, he was guilty of misconduct.
147. Mr. Carolin submitted that Constable Lourenco was outside the execution of his duties because the arrest under the *TPA* was unlawful and was not for a recognized offence. B.A. was not told he was under arrest for the *TPA*. He submitted that arbitrary detention, *Charter* breaches, and racial discrimination had been established on Constable Lourenco's evidence. He submitted that the tribunal must still consider all of the actions of the officers to determine if there was misconduct and look at the whole interaction. The tribunal could not pretend that all other conduct did not happen or was rendered lawful. When considering the unlawful arrest count for B.A., the tribunal needed to determine if Constable Lourenco was in the execution of his duties. The finding had to be limited to the NOH but Mr. Carolin submitted that the alleged unlawfulness on the part of Constable Lourenco was relevant as to whether the arrest of B.A. for Assault Police was lawful. Mr. Carolin submitted that Constable Pais saw what occurred and had a responsibility.

**Section 1 – Submissions - Initial contact
between the parties and TPA investigation continued**

148. The context in this matter was that the public complainants had lived there for a lengthy time, were going to an after-school program, and were walking on the sidewalk. They were headed out of the complex. There was no evidence of trespassing or criminal activity. They had been to an OJEN program and learned about their rights accurately. Mr. Carolin submitted that if the officers' concern was enforcing the *TPA* then they should have waited and observed the actions of the public complainants. They were leaving and there would not have been a trespassing issue. The public complainants felt as if they could not leave. B.A. tried to leave and was grabbed. The public complainants all testified to being stopped about a robbery. Constable Pais said that if a robbery had been mentioned he would have mentioned it to ██████ and he agreed that the youths might have heard something about robberies.
149. One of the areas discussed in *Grant* was psychological detention and the test of whether a reasonable person would conclude they were not free to go. Mr. Carolin submitted that Constable Pais' evidence was not clear on whether the public complainants were free to go. Once B.A. was grabbed, that was evidence they were not free to go.
150. Mr. Carolin indicated that a person needed to be told why they were under arrest and submitted that Constable Pais had described an unlawful action. He submitted that even if there was a *TPA* offence for failing to identify an officer should not jump right to an arrest but start with a caution or a Provincial Offences Ticket (POT). Mr. Carolin submitted that even if the Tribunal did not consider anything else, there was an unlawful arrest because failing to identify is not an offence under the *TPA*. Mr. Carolin submitted that arbitrary detention in the context of racial profiling had brought this to the point of arrest. The officers' actions were unlawful in the moments leading up to the arrest and he submitted that the *TPA* stop was a pretext. *Peart v. Peel Regional Police Service, 2006 CanLII 37566 (ONCA) (Exhibit 51 Tab 20)* addressed the issue of racial profiling and the police using a pretext for a stop. In *Salad*, the court found that the *TPA* was used as a pretext to continue investigating.
151. Mr. Carolin was not submitting that there was conscious racial discrimination by Constable Lourenco and he indicated that there was no evidence of that. However, he submitted that I could take notice of the circumstances and the evidence presented to me. He submitted that the background social facts and anti-Black racism should be used as a backdrop to inform fact-finding. He submitted that the tribunal should look at whether detention was arbitrary because of racial profiling. Mr. Carolin asked the tribunal to find both. The officers came in looking for unlawful conduct and Constable Lourenco directed

Constable Pais' attention to the youths as they emerged. Mr. Carolin acknowledged that it was unclear if they could at first see the race of the complainants but it became clear they were Black when they were stopped.

**Section 1 – Submissions - Initial contact
between the parties and TPA investigation continued**

152. The matter of *Brown v. Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ONCA) (Exhibit 50 Tab 3) discussed arbitrary detention. Mr. Carolin conceded that there were public safety concerns at the Neptune property but police
153. Mr. Carolin brought a number of cases to my attention to demonstrate that an arrest was unlawful if the officer was not in the execution of his or her duties. The court in *R. v. Alato*, 2008 ONCJ 659 (CanLII) (Exhibit 50 Tab 15) indicated that because a detention was unlawful and in violation of the *Charter*, the officer was not acting in the lawful execution of his or her duties. Similar findings were made by the court in *R. v. Pelletier*, [1999] O.J. No. 3738 (ONCA) (Exhibit 50 Tab 14), *Elliott v. King and Durham Regional Police Service*, 2006 OCPC 13 (CanLII) (Exhibit 50 Tab 9), and *R. v. Plummer* 2006 CanLII 38165 (ONCA) (Exhibit 37) which also discussed being outside the lawful execution of duties.
154. Mr. Carolin drew my attention to *R. v. G.T.*, 2013 ONSC 6472 (Exhibit 47 Tab 13) and submitted that Constable Pais was not skillfully pressed in his OIPRD interview and that Constable Pais' cross-examination had more weight than his OIPRD interview. Mr. Carolin indicated that the account from Constable Pais was very different from Constable Lourenco. In Constable Pais notes from that night, there was no caution to B.A. about trespassing (Exhibit 14). He submitted that Constable Lourenco's account was the outlier and Constable Pais' evidence corroborated the public complainants' account.
155. In regards to the element of good faith, Mr. Carolin submitted that at best it was recklessness on the part of Constable Pais. If one officer was out of line, the other officer could not just go along with it. Mr. Carolin submitted that Constable Pais had a responsibility because he saw what Constable Lourenco did but he failed to act.

Reply Submissions Mr. Gridin

156. Mr. Gridin submitted there was a different dynamic in *Grant* who was alone and surrounded by multiple officers. Here the officers were outnumbered. The public complainants were not blocked and could have continued on their way. He submitted they were not detained during the initial interaction and that the conversation did not constitute detention or misconduct.

Reply Submissions of Ms. Mulcahy

157. Ms. Mulcahy indicated that the burden of proof and the presumption of innocence never shifted. She noted that Constable Pais was in a different position than Constable Lourenco. Constable Pais only had contact with B.A. after he was handcuffed. Ms. Mulcahy submitted that nothing in the NOH said that Constable Pais should be responsible for Constable Lourenco's actions. It was clear from all the evidence that Constable Pais had no idea what Constable Lourenco was going to do. Constable Pais said he heard Constable Lourenco say that B.A. was under arrest under the *TPA* and he had no notice thereof. Constable Pais was defending himself, not Constable Lourenco.
158. Ms. Mulcahy disagreed that it was an unlawful detention. She submitted that it could be seen on the video (Exhibit 9) that B.A. walked over easily and there was lots of room for the group to leave. B.A. testified that he felt free to go after he was told he was not under arrest.
159. Ms. Mulcahy submitted that the officers were legitimately on TCHC property and had to speak with people. Constable Pais testified that they asked for identification to see if the public complainants lived on the property, which was consistent with the case of *R. v. Reid*, (2011) O.J. No. 6317 (SC) (Exhibit 49 Tab 44).

Analysis and Decision - Section 1 – Initial contact between the parties and TPA investigation

160. The burden of proof is on the prosecution to establish on clear and convincing evidence if either Constable Lourenco or Constable Pais are guilty of misconduct. As the prosecutor and defence counsel pointed out, I am bound by the 'four corners' of the NOH and I do not make misconduct-related findings beyond that scope. This was a *PSA* hearing and findings of misconduct could only be made in relation to those alleged in the NOHs, which were prepared after an investigation by the OIPRD.
161. In order to understand the evidence, the circumstances of the entire event needed to be examined as a whole. If the testimony in the hearing had been limited only to the events alleged in the NOHs, there would have been no context to what was presented. As was seen throughout the hearing, all parties relied on the evidence of pre and post-arrest events. As was discussed by the court in *Shinkewski*;

'a reviewing court must view the evidence available to an arresting officer cumulatively, not in piecemeal fashion.

and further

'the standard must be interpreted contextually having regard for the circumstances in their entirety, including the timing involved, the events leading up to the arrest both immediate and over time, and the dynamics at play in the arrest.'

162. I allowed much leeway for all parties to present fulsome evidence and to make comprehensive submissions and arguments. I wanted to ensure that none was disadvantaged in arguing their cases. Much of what was not related to the allegations contained in the NOHs is not addressed in this decision other than what was necessary to provide context. I considered all of the evidence presented during the hearing and addressed that which was relevant to my analysis.
163. I begin with the events that led to the encounter and the initial actions of the involved persons. The substantive events took place during a short period of time but I find it is helpful to differentiate the specific areas that require analysis even though each was part of a continuous sequence of events.
164. The initial stop of the public complainants was the starting point for this encounter and I will first deal with issues of racial profiling and detention. I acknowledge that systemic racism exists in every area of our society. That has also been acknowledged by our institutions and in our laws. Systemic racism undermines public trust and erodes the faith people have in those institutions, including our police services. It is unacceptable and cannot have a place in our diverse communities, certainly not in policing.
165. Many submissions were made by Mr. Carolin that alleged the officers had engaged in racial profiling. They were based in part on the actions of Constable Lourenco and Constable Pais singling out the public complainants to be investigated and also on previous encounters that the public complainants had with other police officers. He submitted that the tribunal needed to take a broad look at the evidence from which I may or may not draw an inference that racial profiling was one of the things that was motivating the stop that ultimately made it unlawful. Counsel had invited me to find that the actions of the officers were motivated in part by racial profiling or bias but acknowledged that my role here was to determine if misconduct as alleged in the NOHs had been proven.
166. The prosecutor had submitted that there had been unlawful arrests for Assault Police but he was not advancing allegations of racial profiling. He had submitted that if I found that the *TPA* arrest was unlawful and precipitated the arrests for Assault Police, then I had to find that Constable Lourenco and Constable Pais had unlawfully arrested the public

complainants. Everything that flowed from the *TPA* arrest was unlawful and was within the ‘four corners’ of the NOHs.

**Analysis and Decision - Section 1 –
Initial contact between the parties and TPA investigation Continued**

167. Ms. Mulcahy had reminded the tribunal that no allegations of racial profiling had been made after an investigation by the OIPRD and this was not an inquiry into racial profiling or whether racism was a factor in this case. She submitted that there had been no indication of anything in that regard heard in the evidence. No notice had been provided to the officers about anything related to a racial issue though that option had been available to the OIPRD through the *PSA* Code of Conduct. She submitted it would be fundamentally unfair to require the officers to respond to allegations of racial profiling, or conscious or unconscious bias.

168. In *Brown*, the court discussed racial profiling and noted;

‘A racial profiling claim could rarely be proved by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.’

169. As the court discussed in *Peart*, there are a variety of indicators that can assist a trier of fact in determining if racial profiling could be inferred in a particular case. The court also noted;

‘Those indicators, sometimes referred to as “social” facts however, cannot dictate the findings that a trier of fact will make in any given case.’

and further

‘Findings of adjudicative facts cannot be preordained by evidence that is intended to provide the appropriate social context in which to assess the evidence and make findings of the relevant adjudicative facts.’

170. In *Golumb and College of Physicians and Surgeons of Ontario* (1976) 12 O.R. (2d) 73 (Exhibit 21) the court noted;

‘But the charge must allege conduct which if proved could amount to professional misconduct and it must give the person charged reasonable notice of the

allegations that are made against him so that he may fully and adequately defend himself'.

171. I concur with Ms. Mulcahy that the allegations in the NOH's were the reason for this hearing. As she noted, the OIPRD did not order a hearing into Discreditable Conduct based on race and the officers were not defending a charge of racial bias. A charge must allege conduct, that if proven, could amount to professional misconduct and it must give the person charged reasonable notice so that he or she may defend himself or herself. She also noted that the offence of Unlawful Detention had been added to the *PSA Code of Conduct* after these charges were laid. It was not an offence in 2011 and had been added after the carding debate in 2014/15.
172. My role is to determine if misconduct as alleged in the NOHs occurred, however, the Tribunal cannot ignore the issue of racial profiling. In order to examine that I allowed testimony related to the circumstances of the public complainants prior to this event. The three public complainants described their previous encounters with police officers and contrasted them with this one. B.A. said that all of his previous encounters with police officers occurred in a friendly or in a joking manner and he had no concerns with police conduct previously. Some of his previous encounters with police officers involved participating in sports activities, being coached, specific investigations and detentions, and others for which details were not provided. B.A. said that all his past experiences with police officers were positive but he described this particular encounter as different from the others. M.M. and Y.B. both also said they had been stopped by the police a number of times in the past but without specific details. I do not make any finding in relation to the previous times the public complainants had encounters with police officers and I also do not rely on the public complainants' previous encounters with police to make an inference that there was racial profiling in this case.
173. Mr. Carolin had asked witnesses questions about police being more likely to stop young Black men but the questions put to those witnesses did not shed any light on whether there was anything in this or any previous encounters which was indicative of racial profiling. I felt the response to that question by Constable Brown was the most reasonable. He responded to the effect of; that the persons who police officers encountered in any given neighbourhood was reflected by the demographics of that particular neighbourhood. Evidence presented demonstrated that the TAVIS unit was deployed throughout the entire city.

Analysis and Decision - Section 1 –
Initial contact between the parties and TPA investigation Continued

174. I could not infer from the evidence that the race of the public complainants influenced the actions of Constable Lourenco or Constable Pais. I do however find that the initial action of the officers in stopping the public complainants was random and was not based on any observable actions by the public complainants or in response to any specific complaint.
175. It would be speculation to say why in particular the public complainants attracted the attention of Constable Lourenco and Constable Pais. Were factors such as their age, race, gender, clothing, location, time of day, or none of those, present in deciding whether to engage with them? Based on the testimony, they were the first persons the officers saw upon arriving at the location and as Constable Pais indicated, he could not determine the race of the public complainants when he first saw them. It would also be speculation to say that any of those factors contributed to a conscious or unconscious racial bias on the part of the officers.
176. I considered the submissions of all parties in regards to racial bias and racial profiling but in an examination of all the evidence, I cannot say the actions of the officers were influenced by the race of the public complainants. In this case, racial bias was not alleged in the NOHs but I also I did not find any indications of racially biased actions on the part of any of the parties.
177. I now turn to the issue of detention. In *R. v. Fountain*, 2015 ONCA 354 (CanLII) (Exhibit 51 Tab 19) TAVIS officers called two passing males over to their car and checked to see if they had outstanding warrants. The court considered that action a detention. In *R. v. Reid* 2019 ONCA 32 (Exhibit 66), the court indicated that the state needed to be able to justify a detention on appropriate grounds.
178. The court in *Aguirre* indicated that asking for identification and speaking with a person was not automatically considered a detention. As noted in that case,
- '[W]hether a police-citizen encounter gives rise to a detention must be a fact specific and context-sensitive inquiry'... 'in some cases, the precise moment when detention arises is by no means easy to ascertain'*
179. In *R. v. L.B.*, (2007) 227 C.C.C. (3d) 70 (ONCA) (Exhibit 49 Tab 41) the court referenced *R. v. Mann* which noted;

“the police cannot be said to ‘detain’, within the meaning of s.9 and s.10 of the Charter every suspect they stop for identification or even interview.” Accordingly, not every conversation with the police is a detention. There must be something more: a deprivation of liberty.’

180. In *Simpson*, the court indicated that in deciding if interference with an individual’s liberty was authorized, that police officers must have been acting in accordance with their duties and an officer required some articulable cause for that detention to be justified. The court noted that;

‘the existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation.’

181. In *Salad* the issue of detention was discussed and the court noted that;

‘Detention under the Charter means something more than being “delayed” or “kept waiting” by the police; it requires a significant physical or psychological restraint on the liberty of the subject’

and further

‘...the moment at which an investigation turns into a legal detention may not always be easy to pinpoint’.

182. In *Grant* the court discussed psychological constraint and detention and noted that detention may be effected where a person acquiesces and reasonably believes they have no choice but to do so. In this case, the public complainants stopped voluntarily when Constable Pais called out to them. After questions were asked of them, B.A. then acted on what he had learned at OJEN. The prosecutor submitted that B.A. had already been detained before he asked if he was under arrest but it cannot be said that B.A. reasonably believed that he had no choice but to acquiesce and remain. It was evident that the public complainants had differing perceptions. Y.B. said it felt as if he had to remain and answer the questions of the officers while B.A. felt he was free to leave. I find that the public complainants were not detained initially. However, detention clearly arose when Constable Lourenco took hold of B.A. In this case, unlawful detention was not alleged in the NOHs and I make no finding of misconduct in that regard.

Analysis and Decision - Section 1 –
Initial contact between the parties and TPA investigation Continued

183. Mr. Gridin had submitted that the determinations to be made were if the arrests for Assault Police, the punch by Constable Lourenco or the drawing of his gun were misconduct, not if the *TPA* arrest was unlawful. That was not particularized in the NOH. The prosecutor had submitted that if I found that the *TPA* arrest was unlawful then Constable Lourenco and Constable Pais unlawfully arrested the complainants for Assault Police.
184. In order for me to determine if the arrest of B.A. for Assault Police was lawful, it was necessary to examine what led to it and if the officers were in the execution of their duties. That analysis could not be excluded. If the original *TPA* arrest was unlawful then the arrest for Assault Police and any force that followed might also be unlawful.
185. The *PSA* ss. 42 (1) and (3) lists the duties of a police officer which include preventing crimes and other offences (Exhibit 52). In the case before me, the officers were allowed to speak with and briefly detain the public complainants in order to determine if they had authorization to be on the property.
186. As part of their role with TAVIS, Constable Lourenco and Constable Pais were in a division where they had been directed to be on the evening of November 21, 2011. They had a received a briefing about two robberies in that same division and were watching out for those suspects. One of their duties was to patrol TCHC properties and they were at a property known to have a higher rate of violent crime than the city in general. They had authorization to enforce the *TPA* in relation to that property. None of those things was arbitrary. The actions of the officers in stopping the public complainants to have a conversation regarding the *TPA* was in keeping with their duties. At the same time, the stopping of the four youths was random and was not based on anything specific that the officers had observed.
187. In order to help ensure the safety of residents at the Neptune Drive property, the TPS had been granted authority to act as an agent of the TCHC to enforce the *TPA* through a Trespass Authorization Letter dated April 26, 2011 (Exhibit 5). In the Trespass to Property Act, RSO 1990, c T. 21 (Exhibit 51 Tab 32) the relevant sections are as follows:

Definitions

1(1) *In this Act,*

“occupier” includes,

- (a) a person who is in physical possession of premises, or*
- (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises*

even if there is more than one occupier of the same premises

Trespass an offence

2 (1) Every person who is not acting under a right or authority conferred by law and who,

- (a) Without the express permission of the occupier, the proof of which rests upon the defendant*
 - (i) enters on premises when entry is prohibited under this Act,*
 - (ii) engages in an activity on premises when the activity is prohibited under this Act; or*
- (b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier, is guilty of an offence...*

Prohibition of Entry

3 (1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,

- (b) that is enclosed in a manner that indicates the occupiers intention to keep persons off the premises or to keep animals on the premises*

Implied permission to use approach to door

(2) There is a presumption that access for lawful purposes to the door of a building on premises by a means apparently provided and used for the purpose of access is not prohibited.

Arrest without warrant on premises

9 (1) A police officer, or the occupier of the premises, or a person authorized by the occupier may arrest without warrant any person he or she believes on

reasonable and probable grounds to be on the premises in contravention of section 2.

**Analysis and Decision - Section 1 –
Initial contact between the parties and TPA investigation Continued**

188. The officers were authorized to enforce the *TPA* in relation to the property but B.A., Y.B., and M.M. were long-time residents of the property and they had express permission to be there. As residents they had a right and authority conferred by law. They had the same authority under the *TPA* as the involved police officers.
189. There was no notice or barrier indicating that entry to the Neptune Drive property was prohibited. There was nothing to prevent the general public from accessing the property for the purpose of approaching a door. There was nothing to lead the officers to believe that the public complainants had gained access without authorization, and they were not engaged in any suspicious or prohibited activity. The public complainants were not trespassing, though the officers could not know that without investigating.
190. Mr. Gridin had submitted that a homeowner had the power to control access to their property and when the TCHC gave police the power of an occupier, the police could also regulate who came and went. He had submitted that Constable Lourenco could impose conditions on entry and require that people on the property identify themselves and justify why they were there as a condition of remaining.
191. In this case, the public complainants were also occupiers. I note that a homeowner would likely have a better idea of who was allowed on their own property than the police. In a case of persons not known to them, the police would first have to investigate to determine if someone was lawfully on a property. It would be unreasonable for the police to stop all persons and ask for identification to ascertain whether they were allowed to be there. In this case, there was no ongoing safety concern that could justify the police placing a condition on entry because of a duty to protect the general public as in the case *Stewart v. Toronto (City) Police Services Board*. In that case, Mr. Stewart was told that by the police that he had to submit to a backpack search as a condition of entering a public park because of an ongoing public safety concern during the G20 protests. He refused and deliberately tried to breach a police line. The issue of placing a condition on entry is not analogous to this matter.
192. In the matter of their authority under the *TPA*, the officers were authorized to act, not required to conduct access control. The Neptune property had multiple apartments and the public was invited to access the property without restriction. Though there are

occasions where persons might have to justify their presence there to police officers, those officers must act reasonably when making that determination.

193. Constable Pais testified that they were there to enforce the *TPA*. He agreed that he called over the first four people he saw and stopped the public complainants because they were on the Neptune property. Because the stop was random, the officers needed to exercise all due care in their investigation.
194. There were some areas of B.A.'s testimony, which indicated a perception of events that was different from others' perceptions. B.A. said that almost everything the officers did had been aggressive. He testified that the police van had driven aggressively, parked aggressively, and Constable Lourenco approached aggressively. It can be seen on the video that the van's speed into the parking lot appeared in keeping with what was normal for a parking lot and it did not appear to be operated in a manner out of the ordinary other than it was not parked in a designated parking spot. The same can be said for the officers, as their approach on foot appeared casual (Exhibits 9, 10).
195. When it was suggested to him by counsel in cross-examination that the van driver slammed on the brakes, Y.B. disagreed and said that the driver pressed the brakes. When cross-examined regarding the issue of officer aggressiveness, Y.B. testified that Constable Lourenco was just 'regular aggressive for a cop', nothing else. Y.B. said Constable Lourenco's body language let you know he was in control. Both Y.B. and B.A. used the term aggressive but Y.B. was objective in how he described it. Y.B. did not try to add detail or make Constable Lourenco's actions sound more significant than what could be seen on the video. The views of a particular person are subjective. I do not discount B.A.'s perceptions and the events did become aggressive in a short period of time.
196. I found that Y.B. was the most credible of all of the public complainants. In his testimony he made concessions when appropriate, he did not appear to exaggerate or to bolster his evidence, even when it appeared there was opportunity for him to do so. He fairly indicated he did not know something if it was not within his knowledge and he did not appear to speculate. The explanations he provided when he was asked to clarify issues or apparent contradictions in his statements and testimony were reasonable and made sense.
197. There were some inconsistencies in the testimony of B.A. and his earlier OIPRD statement. B.A. had testified that Constable Lourenco did not ask about where the public complainants lived and never asked about his address. In his previous OIPRD statement, he had said that the officers had asked where he lived. B.A. acknowledged that was

different from what he had originally testified to. In another example, B.A. had testified that it was only he and Constable Lourenco who were talking. Y.B. testified that all of them were initially talking with Constable Lourenco and later it was just B.A. talking with him. M.M. said they were all talking and they gave their names. B.A. had testified that was false and that his friends were not saying anything. Those were minor areas of reliability or issues with the ability of each public complainant to hear certain parts of the conversation.

Analysis and Decision - Section 1 –
Initial contact between the parties and TPA investigation Continued

198. I had significant concerns with the quality of M.M.'s evidence and with his overall credibility as a witness. During examination-in-chief, he appeared to be a cooperative witness but he became uncooperative, evasive, and provided obtuse responses during cross-examination by Mr. Gridin and Ms. Mulcahy and also in later re-examination. He had provided detailed responses during examination-in-chief but during cross-examination, he said he could not remember what he had said the day before, however, he also testified during cross-examination that he had no memory problems. On a number of occasions when he did provide direct answers, he contradicted those answers later. Almost every single answer he provided in cross-examination was that he did not recall, even when questions were asked of him about his own answers that he provided earlier that day or the day before.
199. As an example of what should have been a simple response to a clear question in cross-examination, M.M. viewed a screen shot photo from the video (Exhibit 10, Clip 1) where he and the other public complainants were seated on the curb and he was asked about the location of the police van in that photo (Exhibit 35). He testified that he did not know if it was the same police van because he did not see the Dodge logo on it. This was despite he himself being visible in that screen shot and him having viewed the video it was taken from earlier during his testimony. That section of the video was again played again for M.M. who only then agreed that the van in video was the same van as in the screenshot. This was but one example that he was deliberately not being forthright during cross-examination. I did not find M.M. to be a credible witness and I cannot rely on most of his testimony unless it was corroborated by the clearest of evidence.
200. Constable Pais had testified that during the initial interaction he was forming grounds that the public complainants did not live there and had entered the property when prohibited. He said the public complainants were not providing identification, were asking why they had to identify themselves, and were saying they did not have to speak with the officers using aggressive or elevated voices.

201. For the most part Constable Pais was a credible witness who testified with patience despite a lengthy cross-examination by the prosecutor and examination by counsel for the public complainants. He did not appear to embellish or exaggerate, acknowledged when he did not know something, and did not appear to fill in blanks. There were times that he conceded an issue without hesitation but other instances where he would not make a concession that should have been relatively straightforward.
202. During examination by Mr. Carolin, Constable Pais had agreed that there was a difference between saying something and yelling it in reference to the public complainants' statements. Then he said it was possible that he had written 'saying' in his notes when he meant 'yelling'. Then he said he used the word 'saying' and didn't know if he deliberately avoided using the word 'yelling' (Exhibit 14). Then he explained that B.A.'s voice was elevated but not to the top of his lungs. He further could not provide clear responses when asked about the differences between being uncooperative and hostile. Sometimes he did not want to make simple concessions or agree with Mr. Carolin over clear issues, and engaged in unnecessary verbal sparring.
203. Based on the testimony of Constable Pais, I am not satisfied that the initial responses by B.A. to Constable Lourenco were hostile though in a very short time period, the situation escalated and changed from a conversation to a physical altercation.
204. However, whether B.A. was aggressive or hostile with the officers, did not give Constable Pais grounds to believe that the public complainants had entered onto the property when prohibited. If the public complainants did not cooperate, the officers' grounds were not strengthened. There could be many reasons for non-residents being legitimately on the property for example; visiting, making a delivery, canvassing, or being lost, whether they were cooperative with police or not.
205. In *Gentles v. Intelligarde International Incorporated*, security guards arrested an apartment building tenant under the *TPA* for refusing to leave his property when directed to do so. The court indicated:

'The Intelligarde respondents' counsel concedes, as he must, that while security guards have the right to ask questions, tenants have the right to refuse to answer them.

and further

'Moreover, that a person's refusal to answer is expressed in a belligerent and vulgar manner, does not provide a basis for reasonably believing he is not a resident.'

Analysis and Decision - Section 1 –
Initial contact between the parties and TPA investigation Continued

206. Constable Brown provided much testimony but most was not directly related to the issues before me. He had testified that after the events, while waiting to enter 32 Division, B.A. had told him he did not have to talk to police at all. His notes corroborated the testimony of B.A. in a number of details. In his later statement to the OIPRD he said that B.A. had told Constable Lourenco to *'fuck'off* among other things. That was not in his notes and was unsupported. Whether his later repetition of the conversation with B.A. was accurate when he was interviewed by the OIPRD does not have a bearing on this decision.
207. Constable Lourenco's notes recorded that B.A. told him *'fuck you'*. Constable Pais testified that B.A. said *'fuck this'* to Constable Lourenco. Despite the public complainants testifying that they did not swear at any time, in a portion of the audio recording of the police radio transmissions, someone saying *'what the fuck'* could be heard in the background (Exhibit 27). As was discussed by the court in *Gentles v. Intelligarde International Incorporated*, whether B.A. swore at Constable Lourenco at some point does not change the analysis of the issue.
208. At most, if the officers had not been satisfied that the public complainants belonged there, the only potential recourse the officers had under the *Act* was to direct them to leave because the public complainants had not committed any offences against the *TPA*. Constable Lourenco did not make other efforts to determine if the public complainants lived there, he did not direct them to leave the property, and he did not give them the opportunity to leave. If they had failed to leave after being directed to do so, the power of arrest might have been available, but not before.
209. My concerns with Constable Lourenco's credibility in this area are in regards to his actions themselves. The original stop was random and not for any observed offence or suspicious behaviour. A conversation between the parties or a proper investigation should have then taken place. A review of the video of the first contact between Constable Lourenco and B.A. demonstrated that it was less than 30 seconds from when he first approached B.A. to when he took hold of him (Exhibits 9, 10). In that limited time a *TPA* investigation, including explaining their purpose, asking for identification and the names of the public complainants, recording that information, conducting records checks, providing the opportunity to prove their residence, cautioning the public complainants, or ordering them

to leave, could hardly have taken place. As was testified to by all of the public complainants, they offered that the officers could speak to the mother of B.A. to confirm they had just left his residence. That did not happen. Constable Lourenco was not content to let B.A. leave even though there was nothing specific that B.A. did to give rise to a concern on Constable Lourenco's part that he was a trespasser. Mere words or attitudes are not enough to increase any grounds. Constable Lourenco's actions demonstrated that he sought to exert control over the public complainants and he escalated the situation unnecessarily. There was a lack of reasonableness in his actions and scant opportunity for the public complainants to comply with an investigation. Constable Lourenco's notes alleged an immediate aggressiveness on the part of B.A. but I find Constable Pais' notes and version of events to be more believable and the notes of Constable Lourenco unrealistic in that regard.

210. Constable Pais had demonstrated a clear understanding of the *TPA* and described his authorities under that *Act*. He testified that if the public complainants had refused to identify themselves they would have been directed to leave. Constable Pais said that he and Constable Lourenco had never asked the public complainants to leave the property because it never got to that stage and he had not had an opportunity. However, B.A. took the initiative to leave on his own accord. At the point when Constable Lourenco took hold of B.A., he was no longer acting in accordance with the *TPA* and was no longer in the execution of his duties. Constable Pais did not take any steps to intervene knowing that B.A. was being arrested for an offence that did not exist.

211. In *Allen v. Alberta (Law Enforcement Review Board)*, the Board noted;

'While police discipline may not require a full level of mens rea, and negligence may in some instances amount to a disciplinary offence, there must be some meaningful level of moral culpability in order to warrant disciplinary penalties.'

and further

'The officer's conduct must be analysed as a whole, in context, having regard to all the sources defining acceptable police conduct.'

212. In *Shockness*, the Board noted;

'A technical breach of the law made in good faith would not be found by any reasonable person in the community to bring discredit upon that officer's police force. At the same time, bad faith need not be proven in every case either, as in many cases recklessness, or a high level of negligence may be sufficient.'

Analysis and Decision - Section 1 –
Initial contact between the parties and TPA investigation Continued

213. In *Tavernier*, an officer arrested a motorist under the *HTA* but the arrest was not in keeping with the legislation and was found to be unlawful. The court indicated that in the absence of a lawful arrest, the officer would not have been engaged in the execution of his duty and the motorist was entitled to resist that arrest.

214. In *Plummer*, which involved a *HTA* stop, an officer arrested a motorist for failing to provide his driver's licence and the motorist resisted arrest. In that case, by attempting to arrest the appellant without legal authority, the court found that the officer had unlawfully assaulted the motorist because the officer was not in the execution of his duty. The offence of assaulting an officer was not made out. The court noted;

'If an arrest is unlawful, the officer is not in the execution of his or her duty and the citizen is entitled to resist the arrest.'

215. Similarly, in *Elliott v. King and Durham Regional Police Service*, the Commission discussed that if a police officer was not in the execution of his or her duties, then any arrest they made was considered to be unlawful.

216. Mr. Gridin had submitted that Constable Lourenco needed to make a quick decision when B.A. started to walk away. I ask myself, why would that be the case? This was only an investigation into potential trespassing. It was not as if Constable Lourenco had to make a quick decision because B.A. had committed an offence, was escaping custody, or evidence was about to be lost.

217. Constable Lourenco's notes indicated that he arrested B.A. for Fail to Identify (Exhibit 12). They did not indicate that he cautioned B.A. for failing to identify himself. B.A. said that Constable Lourenco did not caution him. Constable Pais agreed there was no mention of a caution from Constable Lourenco in his own notes but attributed that to his poor notetaking (Exhibit 14). Constable Pais testified that Constable Lourenco told B.A. he would be arrested for trespassing and took hold of him though that was not a formal caution, however, it is a moot point because there was no offence for which B.A. could be arrested.

218. In *Smith*, officers had been authorized by a landlord under the *TPA*. In this case, Constable Lourenco and Constable Pais were performing their duties under the *TPA* but did not have a duty to act to prevent B.A. from leaving. In *Smith*, referring to the officers in that case the court noted:

'I find that they used their delegated authority from the Toronto Community Housing Authority in an abusive and arbitrary way.'

219. In *Asante-Mensah*, during a discussion of the issue of making an arrest for trespassing, the court quoted from a 1987 Ontario Ministry of the Attorney General's paper titled *This land is whose land?* which noted;

'An arrest is a grave imposition on another person's liberty and should only be attempted if other options prove ineffective. Further, an arrest attempt may lead to a further confrontation more serious than the initial offence of trespass, and should be exercised with caution. Excessive force or improper use of the arrest power may leave the occupier, or a designated agent, open to both criminal charges or civil liability.'

220. In *Young*, police officers were enforcing the *TPA* in relation to persons loitering on a Toronto Housing Authority property. As officers approached a group of persons, the accused fled and was later arrested. The court ruled that when he ran off, the officers had no grounds to believe that he had committed an offence. The court relied on *Storrey* in that in order for police detention to be justified, an officer needed both subjective and objective grounds to believe that interference with a person's liberty was justified.

221. In this case, Constable Lourenco exceeded his authority when he initially took hold of B.A. The *TPA* has no power of arrest for failing to identify oneself and there was no evidence to establish that there was good and sufficient cause for Constable Lourenco to arrest B.A. under the *TPA*. As such, that initial arrest was unlawful. Constable Lourenco was no longer acting in the execution of his duties and B.A. was allowed to resist that arrest. However, an allegation of an unlawful arrest under the *TPA* is not present in the NOHs and as such; I make no finding of misconduct in that regard.

Section 2 - Arrest of B.A. for Assault Peace Officer and use of force against B.A. by punching

Section 2 addresses the following areas of the NOHs.

Count One - Constable Lourenco

without good and sufficient cause made an unlawful or unnecessary arrest of B.A.

Count Three - Constable Lourenco

used force that was unreasonable on B.A. by punching him.

Count One - Constable Pais

without good and sufficient cause made an unlawful or unnecessary arrest of B.A.

Examination-in-Chief of B.A. by Prosecutor

222. During examination-in-chief, B.A. testified that when he asked Constable Lourenco if he was under arrest and Constable Lourenco replied no, B.A. then asked him if he could go but Constable Lourenco did not respond. B.A took a step away and Constable Lourenco grabbed him and pushed him backwards.
223. Constable Lourenco started to search him, isolated him away from the group, calling him names, and punching his midsection. He also gave him a hard 'shot' (punch) to the head, which knocked B.A. down. Constable Lourenco grabbed his shirt, holding him with one hand, and searching him with the other.
224. B.A. asked why he was being searched. Constable Lourenco cut his thumb on his own belt and showed it to him saying that B.A. had just assaulted a police officer and then wiped the blood on B.A.'s back. [REDACTED] and Y.B. were about 2 meters away. He saw Y.B. and [REDACTED] approach to separate him from Constable Lourenco. They were yelling 'stop, why are you hitting?' [REDACTED] yelled 'why are you doing this?'
225. As they approached him, Constable Lourenco pulled out his gun, pointed it them and said 'do not move I will fucking shoot you guys' and told B.A. he would kill him as well. M.M. was the furthest away and sat down. Constable Pais stepped in and told them all to sit down. B.A. gave up speaking. Constable Lourenco put his gun back in his holster. Everyone else sat down. They first appealed to Constable Pais but he was not interested in helping.
226. Constable Lourenco called for back up. He was kneeing B.A. in his back and told him he was going to jail. Back up arrived in minutes. Constable Lourenco picked him up, took him to a squad car, and slammed the car door on his legs. B.A. was taken to the police station. B.A. testified that he did not spit on anyone and he did not make any threats.
227. B.A. testified that when going to the station he appealed to the Black officer who was transporting him and told him that Constable Lourenco had cut himself and he tried to get him to believe him. He told the officer about how the situation happened because he had some sort of trust in him from a Black kid to a Black officer so he tried to appeal to him. He told the officer the story of everything that had just happened and about OJEN and what he had learned but did not describe his injuries. The whole trip he never stopped talking.

**Section 2 - Arrest of B.A. for Assault Peace Officer
and use of force against B.A. by punching continued**

228. B.A. said that the officer told him that he should not have done what he did. He gave him advice, such as when the police asked him to do something, just do it. The officer said the stuff B.A. learned at OJEN was not going to work in real life and he was not looking into the claims B.A. was making.

Examination of B.A. by Mr. Carolin

229. During examination by Mr. Carolin, B.A said that when he asked if he was under arrest, Constable Lourenco just looked at him, appeared baffled, and said no. Constable Lourenco had said nothing to B.A. about trespassing.

230. B.A. described his injuries as having sore ribs from the knees of Constable Lourenco and bleeding cuts to the inside of his mouth due to the brackets of his braces being broken. He also had some cuts from his face being scraped on the ground.

231. He subsequently went to the orthodontist to get his brackets repaired. After a week or two, he also went to a doctor to get his ribs checked out.

Cross-examination of B.A. by Mr. Gridin

232. In cross-examination by Mr. Gridin, B.A. testified that the only step he took was when he started in motion. When he made the motion to go is when Constable Lourenco grabbed him and B.A. started saying that he was not doing anything wrong. B.A. disagreed that Constable Lourenco had told him he was under arrest for Assault.

233. Constable Lourenco isolated B.A. away from the group by pushing him backwards. B.A. was backpedalling and Constable Lourenco began searching him immediately by going in his pockets. Constable Lourenco caused a rip in his vest (Exhibit 19). B.A. had both hands clenched in fists at his chest area where Constable Lourenco was holding him.

234. B.A. said he received a couple of very quick punches to his midsection. He was not offering any physical resistance. He was not told he was under arrest. He was not sure how many punches he got to his midsection. It was more than one and less than 10 but he was not sure. Constable Lourenco was holding him with one hand and punching with the other.

235. Constable Lourenco rolled him onto his stomach, kneed him in the back, and rubbed his face on the concrete. He felt his head being pushed against the ground and from side to side. He had dust and dirt on his face but no scrapes. That was occurring as he was being handcuffed and he gave up his hands. Constable Lourenco asked if the handcuffs were tight. B.A. said yes and then Constable Lourenco made them tighter.
236. B.A. said that he did not swear at Constable Lourenco. He told the OIPRD he did not swear and that none of his group were rude or swearing. After the gun was pointed, everyone was scared.
237. B.A. described the punch to his head as a 'haymaker'. It knocked him down and caused a cut lip. It broke a bracket in his braces and it was swinging around on the wire. It hurt and the metal was cutting up the inside of his mouth. He said he attended his orthodontist shortly afterward for a repair. B.A. then acknowledged that he had not attended the office for a repair after reviewing correspondence from his orthodontist's office.
238. As Constable Lourenco was isolating B.A., his friends started asking what was going on. When Constable Lourenco started hitting B.A., he saw Y.B and [REDACTED] start coming. M.M. was backpedalling. Everyone was yelling '*stop, what you doing?*'
239. [REDACTED] was the most vocal. The group was yelling '*don't touch him*', '*why are you doing this*', '*don't touch my brother*'. Constable Lourenco pulled out his gun. *He said 'do not move I will fucking shoot you.'* As soon as he pointed the gun at everyone in the group, they started backpedalling. Constable Pais was telling them to sit down. Eventually he pointed it at B.A. then put it back in its holster.
240. During cross-examination by Mr. Gridin, B.A. said that Constable Lourenco stood over him, went to something on his belt, and cut his thumb deliberately. He showed B.A. his thumb and said '*look you just assaulted a police officer*'. B.A. could see blood flowing and the cut was fresh. Then he handcuffed him. During the handcuffing Constable Lourenco kneed him twice then pressed his knee into his back.
241. The only time Constable Pais spoke was after Constable Lourenco pulled out his gun and he told them to sit down. He looked reluctant or hesitant.
242. B.A. agreed that his friends were yelling and that [REDACTED] and Y.B. got past Constable Pais and advanced to Constable Lourenco. He pulled out his gun, pointed it in the direction of the others and then pointed it at him also. B.A. disagreed that Constable Pais assisted Constable Lourenco in handcuffing him. He disagreed that he was resisting during the

handcuffing but agreed that during the cuffing he twisted his neck and looked back and saw blood was wiped on him.

Section 2 - Arrest of B.A. for Assault Peace Officer and use of force against B.A. by punching continued

243. B.A. agreed with Mr. Gridin's suggestion that the sequence of events was that Constable Lourenco put away his gun, deliberately cut himself, showed him the cut, came down to where he was, rolled him onto his stomach, gave him knee strikes, and rubbed his face into the concrete. B.A. saw Constable Lourenco wipe his thumb on the back of his vest at the point when he was handcuffed. Constable Lourenco then got up and called for backup. At that point, he was angry and yelling on the radio, something along the lines of an officer was hurt.

244. B.A. said he first learned what he was arrested for when he was brought into the station. He was read rights from the wall and it was the first time anyone told him he could call a lawyer. B.A. said he was taken to a holding cell. He also asked to use the phone and he was not allowed to. B.A. said he asked to speak to a lawyer multiple times and received no answer but later while in custody, he got a call from a lawyer. He asked to use the washroom but was not allowed to until he got to court the next day. When shown photographs of him in the cell at 33 Division overnight where a toilet was visible in the background, he acknowledged that claim was not true (Exhibits 28, 29).

Cross-Examination of B.A. by Ms. Mulcahy

245. During cross-examination by Ms. Mulcahy, B.A. said that Constable Pais did not arrest him and he had no interaction with Constable Pais that night. Constable Pais did nothing aggressive, and was not rude or disrespectful.

Examination-in-Chief of Y.B. by Prosecutor

246. During examination-in-chief by the prosecutor, Y.B. said that B.A. and Constable Lourenco exchanged a word or two and then they were off to the side. He did not know what was said between them. He heard Constable Lourenco say '*you're going to jail tonight*'. The next thing he knew, B.A. was being pushed. Y.B. did not see B.A. spit or do anything and did not lose sight of him.

247. Constable Lourenco pushed B.A. up against the fence, gave him a few punches and then B.A. was on the ground. He saw B.A. being kned in his rib or gut area by Constable Lourenco while he was on the floor. Y.B. said he was screaming and was in shock, He did not know what was going on. He kept asking '*what are you doing?*' Y.B. said he did

not know what M.M. or B.A. said but he remembered [REDACTED] saying *'that's my brother, that's my brother'*. He walked towards Constable Lourenco when B.A. was on the floor but did not remember doing so. Constable Lourenco got up, took out his firearm and pointed it at him. From the point when the gun was in his face, everything was a blur. He put his hands up and was told to sit down or get down by Constable Pais. Y.B. and his friends had no weapons. He did not swear at or insult officers.

248. B.A. was handcuffed by Constable Lourenco as he was on the floor. Y.B. said he had no injuries and he did not see any blood that night. He could not remember what he was told he was under arrest for and he could not remember if anything was read to him at the station. They were all charged with Assaulting a Police Officer.

Examination of Y.B. by Mr. Carolin

249. During examination by Mr. Carolin, Y.B. testified that Constable Lourenco was asking for identification as he walked towards them and that made the encounter different. Y.B. felt that he could not just walk away and felt that he had to give identification.

250. B.A. did not give Constable Lourenco attitude. Y.B. did not hear B.A. make any threats and did not see B.A. spit. He remembered B.A. being punched in his torso three or four times at most.

251. Constable Lourenco gave B.A. a knee strike when he was on the floor, right after he was handcuffed.

252. He did not remember what words were exchanged other than Constable Lourenco telling B.A. that he was going to jail that night. He remembered Constable Lourenco showed his thumb and saying *'assault police officer'*. It was directed to B.A. and he had the impression that B.A. was being arrested. He did not see any blood. Y.B did not think he was being arrested.

Cross-examination of Y.B. by Mr. Gridin

253. In cross-examination by Mr. Gridin, Y.B. said he heard Constable Lourenco say *'you're going to jail tonight'* and nothing else as B.A. was getting pushed. Y.B agreed that he did not hear what was being said between B.A. and Constable Lourenco.

**Section 2 - Arrest of B.A. for Assault Peace Officer
and use of force against B.A. by punching continued**

254. Y.B. said he was 100% sure that when Constable Lourenco said that B.A. assaulted a police officer, it was not at the point he was against fence. Constable Lourenco was throwing punches when B.A. was against the fence, a couple of shots to B.A.'s torso. He had a clear view, was watching the entire interaction from the push until B.A. was down on the ground and he believed there were punches from both hands. From what he remembered there were three punches to B.A.'s abdomen.
255. Mr. Gridin cross-examined Y.B. on the contents of his OIPRD interview transcript as compared to his testimony in the hearing. Y.B. agreed that what he said to the OIPRD was different from what he said in testimony and he realized the order of what happened was wrong after watching the video. Y.B. acknowledged that B.A. had not been in handcuffs when Y.B. advanced on Constable Lourenco (Exhibit 9, Clip 1).
256. Y.B. agreed that he and [REDACTED] had advanced on Constable Lourenco from behind. Y.B. and [REDACTED] got past Constable Pais. He did not remember reaching out but the video showed him reaching out.
257. Y.B. agreed that he did not hear Constable Lourenco call anyone a *'bitch'* or *'wannabe thug'*. He agreed that Constable Lourenco never said *'I'll shoot you'*, or *'kill you'*. He agreed he did not hear anything about tightening or loosening cuffs. Y.B. believed that everyone was talking at once and he agreed it was chaotic.

Cross-Examination of Y.B. by Ms. Mulcahy

258. During cross-examination by Ms. Mulcahy, Y.B. agreed that he could not know everything that happened with B.A. because he was giving some attention to Constable Pais. Many people were talking and Constable Pais was continuing to try to get information in a calm and polite way.
259. Y.B. acknowledged that he was wrong when he said that B.A. was already in cuffs when he approached Constable Lourenco and he agreed his memory and the video might not be hand in hand. Y.B. agreed that [REDACTED] shouted *'that's my brother'* sometime during the event. He agreed he might not have a memory about other things.

Examination-in-Chief of M.M. by Prosecutor

260. During examination-in-chief by the prosecutor, M.M. testified that B.A. asked if he was under arrest and Constable Lourenco said no. Constable Lourenco went up to B.A. and started holding him. He did not know what Constable Lourenco was trying to do and he was acting very aggressive. He believed that Constable Lourenco then punched B.A. on the lower abdomen and once in the face. That is when he, Y.B. and ██████ asked him to stop what he was doing.
261. M.M. said that B.A. was expressing his rights as he learned in *OJEN* and from a judge. He asked if he was allowed to leave or if he was being arrested. B.A. tried to leave and Constable Lourenco came towards him and held him. He believed that Constable Lourenco punched B.A. twice in the ribs and then once in the face.
262. B.A. landed on the ground. M.M., ██████, and Y.B. told Constable Lourenco to stop because he was punching B.A. M.M. did not get near Constable Lourenco and did not touch Constable Lourenco or Constable Pais; He did not remember when B.A. was handcuffed. M.M. did not see anyone spit on Constable Lourenco at any time. M.M. said he was arrested for Assault Peace Officer but was not told that at the scene.

Examination of M.M. by Mr. Carolin

263. During examination by Mr. Carolin, M.M. agreed he saw Constable Lourenco punch B.A. twice in the body and once in the face or head and identified that on the video (Exhibit 9, Clip 1). M.M. said Constable Lourenco kneed B.A. while he was on the ground. He did not remember if B.A. was in handcuffs.

Cross Examination of M.M. by Mr. Gridin

264. In cross-examination, Mr. Gridin asked M.M. a series of questions about the event. M.M. replied that he did not recall to almost all of them. He replied that he could not remember many of the questions that he had been asked earlier.
265. Mr. Gridin asked M.M. about his testimony a day earlier where M.M. had said that Constable Lourenco delivered two punches to B.A.'s lower abdomen and one to his face. M.M. replied that he might have said that but clarified that he had been pointing out what was occurring on the video as it was being played to him. M.M. further answered that he did not recall to almost all questions asked of him, which had required an answer from his memory.

Cross-Examination M.M .by Ms. Mulcahy

266. M.M. also did not provide clear answers to most of Ms. Mulcahy's questions. During questioning about the transcript of his OIPRD interview M.M. answered most of Ms. Mulcahy's questions by saying he did not recall and sometimes he only acknowledged that she had read the interview transcript correctly but not that he adopted the statements he had previously made during that interview.

**Section 2 - Arrest of B.A. for Assault Peace Officer
and use of force against B.A. by punching continued**

Examination-in-Chief of Detective Constable Beveridge (Ret'd) by Prosecutor

267. During examination-in-chief by the prosecutor, Detective Constable Beveridge (Ret'd) testified that on November 21, 2011, she was working the 2:00 p.m. to 11:00 p.m. shift with her partner. At 6:46 p.m., she received information that four young persons were being brought to 32 Division and that Constable Lourenco and TAVIS officers were involved. At 7:15 p.m., she and her partner attended the Criminal Investigation Bureau (CIB) and spoke with Constable Lourenco who advised her that he and Constable Pais had been at Neptune Drive as part of a TAVIS deployment and were conducting general patrol in regards to TPA enforcement. He had observed four males coming out of 135 Neptune drive, walking towards 125 Neptune Drive. He spoke with the males and asked if they lived in the area. Constable Lourenco asked B.A. for identification and his response was *'fuck you, I don't have to tell you anything'*. Constable Lourenco took hold of the male and placed him under arrest under the TPA. The male spat on the left side of Constable Lourenco's face right after he placed him under arrest and a struggle ensued.

268. Constable Lourenco told her he heard males in the background yell *'yo, don't touch my bro'*. Three males ran towards him and for his safety, he drew his firearm and ordered the males to the ground. His escort took two and the other went to the ground. He broadcast an 'Assist PC' over the radio and numerous units arrived. When B.A. was still on the ground, B.A. said *'I'm gonna fucking kill you guys.'* That is end of the synopsis she was given.

269. She learned that Constable Lourenco had a minor injury on his right thumb and photos were taken of it by a Scenes of Crime Officer (SOCO). The cut was relatively minor and she did not remember him telling her how he got the injury.

270. She consulted with the Detective in regards to the other three males. The information she had was that the other three were rushing at Constable Lourenco and they made the

decision that they would be charged with Assault Police. She based her grounds to lay charges on the statement of Constable Lourenco.

271. She remembered later watching the video with her partner and she could see the altercation. It looked like two males continued towards Constable Lourenco and it was clear that the remaining male sat down. They e-mailed a recommendation to the Crown that M.M.'s part was relatively minor and asked that the charge against him be withdrawn.
272. Detective Constable Beveridge indicated that the basis for the Assault Police charge was the statement of Constable Lourenco that B.A. spit on him. The basis for the charges against the other three males was his articulation how he felt when he could hear the other three males in the background saying '*yo don't touch my bro*' and he saw three rush at him in an assaultive, aggressive manner. He told her that he was in the middle of arresting one person and when he looked up, he saw them coming towards him. He feared for his safety and he drew his firearm.

Cross-Examination of Detective Constable Beveridge by Mr. Gridin

273. In cross-examination by Mr. Gridin, Detective Constable Beveridge (Ret'd) agreed she cleared the charges with a supervisor and Constable Lourenco didn't direct her as to what charges to lay or who was to be detained. Regarding the charge against B.A., at the time she had no doubt that, the arrests were lawful but she had no access to the video. Constable Lourenco never made any accusations or allegations about the injury to his thumb.

Examination-in-Chief of Constable Pais by Ms. Mulcahy

274. During examination-in-chief by Ms. Mulcahy, Constable Pais testified that he heard Constable Lourenco request identification from the public complainants and they all refused. Constable Pais stood behind them. He could hear the conversation escalating between Constable Lourenco and B.A who yelled '*why do I need to talk to you, why do I need to tell who I am?*' Constable Pais said he never heard anyone say they could contact a family member and none had given their names. He would have written names down if they had been given.
275. Constable Lourenco was explaining the requirement to identify himself and told B.A. he would be arrested under the *TPA*. B.A. said '*fuck this*'. Constable Lourenco grabbed him to arrest him under the *TPA* and B.A. immediately yelled '*fuck you*'. Constable Pais heard B.A. spitting at Constable Lourenco and saw his head move. His hands were still in his pockets as Constable Lourenco was pushing him back and struggling to control him.

276. Constable Lourenco told B.A. he was under arrest and told him to give him his hands. B.A. was pulling back and Constable Lourenco was trying to gain control of him.

Section 2 - Arrest of B.A. for Assault Peace Officer and use of force against B.A. by punching continued

277. The other three males had turned around and were facing Constable Pais. [REDACTED] started to walk towards Constable Lourenco. Constable Pais told him to stop and not interfere because B.A. was being arrested. The public complainants were protesting the arrest by swearing.

278. He could still hear Constable Lourenco struggling and repeating to B.A. *'put your hands behind your back'*. Constable Pais rushed to help Constable Lourenco handcuff B.A. who was refusing to roll over and give up his hands. He assisted Constable Lourenco in getting B.A.'s hands behind his back and handcuffing him. Constable Lourenco arrested B.A. He did not see Constable Lourenco scrape B.A.'s face on the concrete and said that did not happen.

279. Constable Pais followed Constable Lourenco to the scout car and B.A. was still swearing and resisting. Constable Lourenco had to force B.A. to the scout car and pushed him against it because he was still resisting. He did a pat down search and placed him in the scout car. He remembered there being difficulty in getting B.A. into the car because it was a tight fit. He remembered Constable Lourenco trying to close the door and B.A.'s foot was in the way. He pulled his foot inside and he closed the door. At the station, he had no dealings with any of the public complainants.

280. He was aware that Constable Lourenco had cut his right thumb. He did not see Constable Lourenco cut himself and he did not hear Constable Lourenco say that B.A. had just assaulted a police officer. Constable Pais did not see Constable Lourenco purposely wipe blood on B.A.

281. Constable Pais said he never heard B.A. ask if he was under arrest or Constable Lourenco saying no. He never heard B.A. ask if he was free to go. Constable Pais did not hear Constable Lourenco call B.A. a *'bitch'*, *'thug'*, or *'wannabe'*. Constable Pais did not hear Constable Lourenco say on drawing his firearm, *'don't move I'll fucking shoot you guys, I'll fucking kill you'*. Constable Pais did not see B.A. being kneed multiple times after being handcuffed and after B.A. was in handcuffs there was no physical force used on him. Constable Pais said he did not arrest B.A., Constable Lourenco did.

Cross-Examination of Constable Pais by Prosecutor

282. In cross-examination by the prosecutor, Constable Pais testified that Constable Lourenco told B.A. he was under arrest and grabbed hold of him. The moment he grabbed him, B.A. immediately said *'fuck you'* and spit at Constable Lourenco. He saw B.A.'s head jerk forward and heard the sound of spitting but did not see it. He heard Constable Lourenco say *'gimme your hands'*. It happened quickly and they separated from the group.
283. At one point, he saw Constable Lourenco strike B.A. but did not recall exactly when he saw it. Constable Pais saw one punch to B.A.'s mid-section or torso. Constable Pais said he did not remember who handcuffed B.A.

Examination of Constable Pais by Mr. Carolin

284. In examination by Mr. Carolin, Constable Pais agreed that his authority as a police officer was being challenged immediately when the public complainants continued to refuse to identify themselves. He disagreed that Constable Lourenco overreacted.
285. In an examination by Mr. Carolin about his notes, Constable Pais agreed that he made no note of Constable Lourenco cautioning B.A. that he was about to be arrested. He attributed that to him having made poor notes and he disagreed that Constable Lourenco had not cautioned B.A. (Exhibit 14).
286. He agreed there was nothing in his notes of Constable Lourenco saying at a separate time that B.A. was under arrest for Assault Police. All he wrote was 'escort taking hold of male for arrest'. Constable Pais said he heard the words Assault Police but he did not know exactly when.
287. Constable Pais agreed that he didn't write down the knee strike that he believed he saw when Constable Lourenco was trying to roll B.A. over when they were trying to handcuff him. He thought it was an appropriate use of force to place weight on a person's back or lower back to gain control of the person. He believed that the force was warranted to try to control B.A. who was resisting.
288. Constable Pais testified that Constable Lourenco made the arrest, not him. He said that the person who had determined he wanted to make the arrest was the one who was arresting and one person typically made an arrest.

**Section 2 – Submissions - Arrest of B.A.
For Assault Peace Officer and use of force
against B.A. by punching continued**

Cross-examination of Constable Pais by Mr. Gridin

289. During cross-examination by Mr. Gridin, Constable Pais agreed that it was Constable Lourenco who initiated the arrest of B.A. under the *TPA*, by telling him he was under arrest and placing a hand on him. B.A. then immediately spit on Constable Lourenco. Constable Pais formed grounds that B.A. had just assaulted Constable Lourenco. He agreed that the only force Constable Lourenco initially used was to put a hand on B.A. and tell him he was under arrest.
290. Constable Pais agreed that he went over and assisted Constable Lourenco with the arrest process of B.A. and placing him in handcuffs. It was clear to him that the arrest had already been made and he assisted in that arrest.
291. Constable Pais indicated that he had no doubt about whether B.A. spit at Constable Lourenco. Constable Pais did not believe that B.A. was acting in self-defence but had committed a criminal offence.
292. Constable Pais agreed with Mr. Gridin that according to the TPS Use of Force procedure, the use of non-assaultive physical force was considered active resistance and spitting was considered assaultive behaviour (Exhibit 15). Constable Pais agreed it was appropriate to use force when someone was actively resisting. B.A. had been told multiple times that he was under arrest and Constable Lourenco had to use force to gain control. Constable Pais did not see Constable Lourenco punch B.A. in the head and he did not see any unnecessary force. Constable Pais was certain that B.A. was not in handcuffs when he went over and B.A. was not struck after he was in handcuffs.

Submissions by Mr. Gridin

293. Mr. Gridin discussed the standard of proof of clear and convincing evidence and noted that the prosecution must prove the arrest was unlawful or unnecessary and also the absence of good and sufficient cause. He submitted that an arrest might be unlawful and not in the execution of an officer's duties but that did not mean it amounted to misconduct. There had to be an element of wilfulness. Mr. Gridin had submitted that B.A. spitting constituted good and sufficient cause for the arrest. I agree with his submission that it was a key question as to whether it took place.

294. Mr. Gridin drew my attention to *R. v. Rojas*, [2008] 3 S.C.R. 111 (Exhibit 47 Tab 18) where the court discussed the admissibility of mixed inculpatory/exculpatory statements. In this instance, Constable Lourenco needed to rely on his inculpatory statement as to why he acted as he did. Mr. Gridin indicated that the Tribunal had to look at his entire statement, including both the inculpatory and exculpatory portions.
295. In *R. v. G.T.*, 2013 ONSC 6472 (Exhibit 47 Tab 13) the court discussed the presumption of innocence and the examination of an exculpatory statement made by the accused. In this case, Constable Lourenco was subjected to a compelled interview with the OIPRD, which formed the NOHs (Exhibits 11, 11a).
296. In *R. v. Lynch*, [1988] O.J. 1086 (C.A.) (Exhibit 47 Tab 15) the court discussed the considerations to be given to an exculpatory statement that was introduced by the Crown. It became evidence both for and against the accused. *R. v. Choucair*, 2011 NWTTC 13 (Exhibit 47 Tab 9) provided one judge's guidelines on how to approach an exculpatory statement of the accused which was filed by the prosecution and why it should be accepted as true. In this case, Constable Lourenco was honest that he used force.
297. In his statement, Constable Lourenco said he placed his left arm on B.A. and arrested him under *the TPA*. He conveyed that to Detective Constable Beveridge (Ret'd). Mr. Gridin submitted that he was corroborated by Constable Pais on the key point of spitting which is assaultive behaviour. Constable Lourenco said he struck B.A. once in his left side. B.A. doubled over and he made the arrest. Constable Lourenco wrote about the punch and gave that information to Detective Constable Beveridge (Ret'd).
298. Mr. Gridin submitted that the *TPA* arrest was lawful but even if unlawful; it did not affect the analysis. When B.A. spit, he committed a fresh assault and Constable Lourenco was then acting within his duties. Mr. Gridin submitted that one does have the right to resist an unlawful arrest but the force used by an arrestee could renew grounds and an officer's actions could become lawful. If the force used by the arrestee was not in furtherance of escaping then it was an assault.
299. *R. v. Allen*, 2015 ONSC 2594 (Exhibit 47 Tab 5) spoke to the need to examine what an arrestee did in regards to the issue of use of force in self-defence to resist an unlawful arrest. *R. v. Barrow*, 2011 ONCA 239 (Exhibit 47 Tab 6) demonstrated that even if execution of duties was suspended, it could be regained by the conduct of a defendant. *R. v. Blackwood*, [2009] O.J. No. 5393 (S.C.J.) (Exhibit 47 Tab 7) demonstrated that as soon as offensive conduct was engaged in by the arrested person, it was not defensive anymore but became an assault. In the matter of *Young*, the court said the officers were

not justified in the initial pursuit, but when the accused pushed past the officer he committed an assault and the officers had fresh grounds to arrest.

**Section 2 – Submissions - Arrest of B.A.
For Assault Peace Officer and use of force
against B.A. by punching continued**

300. An issue in R. v. E.B.K., 2002 YKYC 6 (Exhibit 47 Tab 12) was if spitting could be seen as self-defence. The court noted there were rare circumstances in which spitting could be seen to be seen as self-defence such as when an accused was not yet fully restrained. The court noted it could not be out of anger or frustration. Mr. Gridin submitted that there were numerous options available to B.A. All that had happened was a hand was placed on him. He could have pulled away or run. As soon as B.A. spit on Constable Lourenco's face, it was a renewed assault. In those circumstances, it was offensive, not defensive and it was not a valid resistance to an unlawful arrest by Constable Lourenco.
301. Mr. Gridin drew my attention to the United States case of Smith v. Freland, 954 F.2d 343 (1992) (Exhibit 47 Tab 21) which dealt with allegations of excessive force and an examination of reasonableness. R. v. DaCosta, 2015 ONSC 1586 (Exhibit 47 Tab 11) discussed the judicial review of the use of force by a police officer. In TPS v. Adams et al., 2018 ONCPC 8 (Exhibit 47 Tab 24) the Hearing Officer discussed active resistance and the use of force.
302. Mr. Gridin submitted that a punch was reasonable in the circumstances and I had to put myself in Constable Lourenco shoes at the time, not ask myself if I would do the same thing. B.A. was resisting arrest and the force was used to effect the arrest. It was in keeping with the of Use of Force procedure (Exhibit 15). Mr. Gridin submitted the points in the NOHs had not been proven.

Submissions of Ms. Mulcahy

303. Ms. Mulcahy submitted that Constable Pais did not arrest B.A. The only area that was not clear was his memo book notes. He noted 'attend first male and assist with arrest re. cuffing.' Ms. Mulcahy submitted that assisting Constable Lourenco with an arrest did not make him an arresting officer.
304. Ms. Mulcahy also said that Y.B. had testified he heard Constable Lourenco saying '*this is Assault Police*' when B.A. was arrested and submitted it was consistent with Constable Lourenco's position he was spit upon. In Y.B.'s OIPRD interview, he also said he heard '*Assault Police*'.

305. Ms. Mulcahy drew my attention to *R. v. Debot*, (1986) 30 C.C.C. (3d) 207 (ONCA) (Exhibit 49 Tab 38) and *R. v. Debot*, (1989) 52 C.C.C. (3d) 193 (SCC) (Exhibit 49 Tab 39) where the court indicated that a police officer may arrest a person at the direction or request of a superior or fellow officer. The superior would have the responsibility and Constable Pais was entitled to assume that Constable Lourenco had reasonable grounds.
306. In *Smith v. Murdock*, (1987) 25 O.A.C. 246 (Div. Ct.) (Exhibit 48 Tab 6) the Board erred in finding the officer guilty of misconduct other than what was alleged in the NOH. *Wang and Toronto Police Service*, 2015 (Exhibit 48 Tab 7) noted that the NOH must be drafted to be specific to the misconduct alleged.
307. Ms. Mulcahy submitted that it would be unrealistic if Constable Pais had to ask Constable Lourenco to explain what his grounds were. He could not be expected to think if Constable Lourenco's original arrest was unlawful or ask Constable Lourenco if he was in the execution of his duties. He could not be held liable for responding and assisting. She submitted that in regards to Constable Pais, an unlawful arrest of B.A. had not been proven.

Submissions of Prosecutor

308. During his submissions, the prosecutor drew my attention to *Mancini v. Courage and Niagara Regional Police*, 2004 OCPC 9 (Exhibit 58 Tab M) where the concept of discreditable conduct was described. In *Lalande and Ottawa Police Service*, 1988 OCPC 6676 (Exhibit 58 Tab N) the Commission discussed that not all parts of the NOH needed to be proven in order for a finding of Discreditable Conduct to be made.
309. The prosecutor acknowledged that he must establish that the arrests were unlawful or unnecessary and were without good and sufficient cause. He agreed that I was bound by the NOHs and he would not ask for findings that were not particularized. In *Wowchuk and Thunder Bay Police Service*, 2013 OCPC CanLII 101391 (Exhibit 51 Tab 27), the Commission discussed the issues of reasonable grounds, unnecessary arrest, and good and sufficient cause.
310. The prosecutor indicated that the allegation of spitting relied on Constable Lourenco's notes, his statement, and a partial statement from Constable Pais. Constable Pais said he saw B.A.'s head cock back and heard spitting but he could not say where spit landed. The prosecutor submitted that the video might be the best evidence available. It showed Constable Lourenco grabbing B.A. and pushing him backwards. The prosecutor submitted the video did not show B.A.'s head cocking back, spitting, or Constable

Lourenco wiping his face. The prosecutor submitted it was for the tribunal to decide if there was a punch to the head and a knee drop. Discrepancies could not be argued in relation to the video.

**Section 2 – Submissions - Arrest of B.A.
For Assault Peace Officer and use of force
against B.A. by punching continued**

311. There was unmoved evidence from B.A. and M.M. that a spit did not take place. B.A. testified he never spit and never saw anyone spit. Y.B. said he did not know if it had occurred. The prosecutor submitted that if I believed that a spit had occurred, it was a reasonable and defensive act because the officers were in the wrong.
312. In *R. v. E.B.K.*, a person slapped and then spit in the face of an officer during an unlawful arrest. The court noted that in rare circumstances spitting could be seen to be seen as self-defence. The prosecutor submitted that if I found that a spit in the face was no more than an assault, B.A. had the right to do so to defend himself. However, the prosecutor was not suggesting that B.A. spit at Constable Lourenco.
313. The prosecutor submitted that I could not split the officers. There was evidence on the record that they both arrested each and every complainant. The prosecutor indicated that Constable Pais observed the events that led up to the arrest of B.A., participated in it, and submitted that if Constable Lourenco had no grounds to arrest B.A., then Constable Pais had no grounds.
314. In *Rose, Ferry, and Toronto Police Service and Mitchell*, 2016 OCPC 84144 (Exhibit 58 Tab Q) an issue that the Commission had to decide was which officer made the arrest and which officer assisted in the arrest where there was more than one officer involved in an arrest.
315. The prosecutor noted that in *Adams*, discretionary strikes were justified because of active resistance on the part of a large male during an active riot. In this case, the active resistance of B.A. was only of not putting his arms in front. The prosecutor submitted that the punch by Constable Lourenco was excessive. His reaction was not consistent with reasonable use of force
316. The prosecutor submitted that misconduct had been made out on clear and convincing evidence because Constable Lourenco had without good and sufficient cause, made an unlawful arrest and had used unnecessary force.

Submissions of Mr. Carolin

317. Mr. Carolin adopted the submissions of the prosecutor and asked whether Constable Lourenco was in the execution of his duties or had violated the *Charter*? He acknowledged that the tribunal could not find Constable Lourenco guilty of something outside of the NOH. In *Wang*, other conduct had emerged which could have been discreditable but it had not been fair to make a finding on that.
318. Mr. Carolin submitted that Constable Brown did not corroborate Constable Lourenco but was consistent with B.A. who told him about OJEN and not having to talk to the police. Mr. Carolin drew my attention to the testimony of Constable Brown who said that B.A. told him a judge said he could tell the police that they could '*fuck themselves*'. Mr. Carolin submitted that it was impossible that a judge would tell that to B.A.
319. In *Seguin and Wallace and Toronto Police Service*, 2016 OCPC 2 (CanLII) (Exhibit 50 Tab 8) the Commission criticized the tribunal for a deficient analysis because it had not determined if all the elements of offence had been established.
320. The cases of *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208 (CanLII) (Exhibit 51 Tab 28), *Wilson v. Ontario Provincial Police*, 2006 OCPC 11 (CanLII) (Exhibit 51 Tab 29), and *Wilson v. Ontario (Provincial Police Service)*, 2008 No. 4019 (ON Div. Ct.) (Exhibit 51 Tab 30) demonstrated that officers could not rely on CC s. 25(1) if they did not have statutory authority for their actions. If the arrest was unlawful then any force used was improper.
321. In the cases *R. v. DaCosta*, *Smith v. Freland*, *R. v. Pompeo*, 2014 BCCA 317 (Exhibit 47 Tab 16), *Berntt v. Vancouver (City)*, 1999 BCCA 345 (Exhibit 47 Tab 2), *TPS v. Adams et al* *TPS v. Adams et al.*, *Shaw and McGuigan*, and *Brown v. Haldimand Norfolk Regional Police Force*, OCCPS 87-16 (Exhibit 47 Tab 3), the officers were acting lawfully and the question was whether the force used had been excessive. Here the question was whether any force was reasonable.
322. In *Brown v. Haldimand Norfolk Regional Police Force*, OCCPS 87-16 (Exhibit 47 Tab 3) an issue to be determined was whether force went beyond what was allowed. Mr. Carolin submitted that in regards to the cases provided by Mr. Gridin, none was applicable because some force was allowed in them. He submitted that no force was allowed in this matter.
323. Mr. Carolin submitted that on his own evidence, Constable Lourenco was not allowed to use any force and I could accept from Constable Lourenco's notes that he punched B.A. Factually, there was a punch to B.A.'s head. He agreed that there were disputed facts,

including what was said, B.A.'s demeanour, and a spit. He submitted that I could decide every disputed fact was in favour of Constable Lourenco, but still find him guilty on his own evidence.

324. Mr. Carolin submitted that Constable Lourenco punched B.A. in the moment of trying to effect the arrest and any force he used to effect that arrest was unlawful. Once the arrest for Assault Police was unlawful, Constable Lourenco was not effecting a lawful arrest but was punching a civilian unlawfully. Mr. Carolin submitted that the misconduct had been clearly made out.

Reply Submissions of Mr. Gridin

325. Mr. Gridin addressed the prosecutor's submission that there was no spit because there was no wipe to Constable Lourenco's face. He submitted I would have to make a finding that Constable Lourenco fabricated spitting. Regarding wiping his face, the legal problem is that I would have to take great care in drawing conclusions on expected human behaviour. I could not infer spitting did not happen because there was no face wipe. During his OIPRD interview, Constable Lourenco said he washed his face at the station (Exhibit 11a). Mr. Gridin submitted that even if Constable Lourenco were outside the execution of his duties, it would still be an arrest for Assault.

Analysis and Decision – Section 2 – Arrest of B.A. for Assault Peace Officer and use of force against B.A. by punching

326. The next areas to be examined are the issues relevant to the arrest of B.A. and the use of force against him. The areas of the NOHs that allege misconduct are;

Count One - Constable Lourenco

without good and sufficient cause made an unlawful or unnecessary arrest of B.A. for Assaulting a Peace Officer

Count Three - Constable Lourenco

used force that was unreasonable on Mr. B.A. by punching him

Count One - Constable Pais

without good and sufficient cause made an unlawful or unnecessary arrest of B.A. for Assaulting a Peace Officer

327. Differences between the testimonies of witnesses who were present at the same event are often normal. Witnesses can understand things differently based on factors such as

their focus on a specific event or person, where they are positioned, their opportunity for observation, their perception, and past experiences. One witness may be confused or frightened by an event and a second witness, placed in the same circumstance, may understand what was happening and take it in stride. Similarities in testimony can be the result of witnesses accurately reporting what they had seen and also as a result of a witness having discussions with another and using those discussions, intentionally or unintentionally, to fill in a gap in memory. Witness testimony must be examined to determine if it is in harmony with the surrounding evidence. One of the challenges in this hearing was in reviewing the differing versions of the testimony of witnesses and comparing them to each other. The perception of one might be subjectively different from another. Sometimes those differences were inconsequential and sometimes they indicated that there were concerns with reliability or credibility.

328. In *Pitts and Director of Family Benefits Branch of Ministry of Community and Social Services*, 51 O.R. 1985 (Exhibit 58 Tab A) the court provided a number of factors to be considered in relation to weighing the testimony of a witness. The court also noted:

'With respect to the testimony of any witness, you can believe all that the witness has said, part of it, or you may reject it entirely. Discrepancies in a witness' testimony, or between his testimony and that of others, do not necessarily mean that the witness should be discredited.'

329. During witness testimony and as described in the NOHs, the terms Assault Police and Assault Peace Officer were both used. They are used interchangeably throughout this decision and refer to the same thing. The starting point for this area of analysis begins where Constable Lourenco initially took hold of B.A under the *TPA*. At that point, he was not engaged in the lawful execution of his duties. B.A. was allowed to resist the arrest of himself provided that the force he used was no more than necessary.

330. In order to make a finding of misconduct, all of the elements of the offence need to be established. In *Seguin and Wallace and Toronto Police Service*, and also in *Rose et al. v. Toronto Police Service and Adam Maclsaac and OIPRD*, 2018 OCPC 2 (Exhibit 58 Tab P), the Commission indicated that an analysis was required, of whether an arrest was unlawful or unnecessary, and whether it was made without good and sufficient cause.

331. I will first address the issue of the arrest of B.A. by Constable Lourenco. It was alleged by Constable Lourenco that B.A. spit on him and that was the reason he arrested B.A. for Assault Peace Officer. There were a number of questions to consider in that regard. I first ask myself, did B.A. spit on Constable Lourenco? If so, would it have constituted an unlawful assault or was it in self-defence to prevent the unlawful arrest of himself? Did

B.A. spit but without it contacting Constable Lourenco? Finally, if B.A. did not spit on Constable Lourenco then Constable Lourenco did not have grounds to arrest him for Assault Peace Officer.

**Analysis and Decision – Section 2 –
Arrest of B.A. for Assault Peace Officer and
use of force against B.A. by punching continued**

332. If an officer made an unlawful arrest, the arrestee was entitled to use reasonable force to prevent it as discussed in *Tavernier* and *Plummer*. Mr. Gridin had acknowledged that but had also submitted that even if the *TPA* arrest had been unlawful, a spit constituted a fresh assault and Constable Lourenco was then acting within his duties. The prosecutor had submitted that there had been an unlawful arrest to begin with and everything that followed from that, including the arrest for Assault Police was also unlawful and B.A. had the right to defend himself.
333. In *Blackwood*, the court discussed the issue of resisting an unlawful detention. Despite the finding that the officer had initially unlawfully detained the accused, the force used by the accused to resist it went beyond what was reasonable. His actions were found to be offensive, not defensive.
334. In *Allen*, a police officer was not in the execution of his duties when he attempted to arrest a person. That person was then allowed to use force to resist. However, the force he used was not reasonable and was more than what was necessary to prevent the arrest of himself. As such, the accused's actions were not for the purpose of escape, but for the purpose of assaulting the officer.
335. In *Barrow*, the arresting officer was called to a shelter to remove an unwanted person. She was found not to have been in the execution of her duties when she took hold of the accused and the accused was entitled to use reasonable force to resist. However, when the accused took hold of the officer's firearm it went beyond the force required for self-defence. The officer was then acting in the execution of her duties when she arrested the accused for attempting to disarm her. That case demonstrated that even if the officer was not initially in the execution of her duties, it could be regained by the conduct of the accused.
336. Constable Pais had testified that he heard the initial conversation and the public complainants refusing to identify themselves. Constable Lourenco explained the requirement to identify and he told B.A. he would be arrested under the *TPA*. B.A. said 'fuck this'. Constable Lourenco grabbed him to arrest him under the *TPA* and B.A.

immediately yelled *'fuck you'*. Constable Pais said he heard B.A. spitting at Constable Lourenco and saw his head move.

337. B.A. had testified that he did not spit on anyone. Y.B. testified that he did not see B.A. spit and he did not lose sight of him. M.M. testified that he did not see anyone spit on Constable Lourenco at any time and never saw Constable Lourenco wipe his face.
338. Detective Constable Beveridge (Ret'd) had testified that Constable Lourenco advised her that the male spit on the left side of his face right after he placed him under arrest and that was the basis for the Assault Police charge. Though I find that Detective Constable Beveridge (Ret'd) was a credible witness, her grounds to lay charges were based on what Constable Lourenco described to her on the date of the arrests, not on any independent evidence.
339. Under very limited conditions, a spit might be considered acceptable force used to resist an unlawful arrest. In *R. v. E.B.K.*, an issue was whether spitting at a police officer could be considered reasonable force against an unlawful arrest. In that case, a police officer arrested a person for being intoxicated in a public place but the officer was not in the execution of his duties when he did so. The accused slapped and spit on the officer. The court indicated that the slap and the struggle could be considered reasonable force to resist an unlawful arrest but spitting could rarely be seen to be so and any force used must be engaged to resist the arrest. The court indicated that spitting could only be accepted as reasonable force used in resisting an unlawful arrest if the accused was not yet fully subdued, it was integral to resisting the arrest, and no other reasonable force could be used.
340. In this case, at the point of the alleged spit, B.A. was not yet subdued. If a spit occurred at that point it would have been integral to resisting the arrest of himself and was not after the fact. However, B.A. was not yet in custody and still had other alternatives in resisting the arrest of himself. If B.A. had spit on Constable Lourenco, it would not have met the criteria the court described in *R. v. E.B.K.* as being reasonable force to resist an unlawful arrest. As discussed in *Allen* and *Blackwood*, it would have been force not for the purpose of escape or defence but for the purpose of assaulting the officer.
341. In *Rojas*, the court discussed mixed statements of an accused. It indicated that it was often difficult to determine which parts of a statement were inculpatory and which were exculpatory and so the entire statement of the accused needed to be considered. The court, in discussing a mixed statement indicated that the inculpatory portions were likely true while the exculpatory portions, or excuses, did not necessarily carry the same weight but may create a reasonable doubt to which the accused was entitled. In *Lynch*, the court

discussed the considerations to be given to an exculpatory statement that was introduced by the Crown. The statement became evidence both for and against the accused and it was open for the jury to consider them as proof of the facts contained therein.

**Analysis and Decision – Section 2 –
Arrest of B.A. for Assault Peace Officer and
use of force against B.A. by punching continued**

342. In this case, Constable Lourenco's notes and statement contained both inculpatory and exculpatory portions. I will deal with the areas that alleged that B.A. spit on him and consider them as his reason or justification, or as noted in *Rojas*, excuse, for arresting B.A. for Assault Police. In this case that allegation would be somewhat analogous to an exculpatory statement but the issue that needed to be examined in Constable Lourenco's notes and statement was not a denial that he had committed an offence but an allegation that a complainant had committed an offence, namely a spit, which provided reason for an arrest.
343. In *R. v. G.T.*, the court referenced *R. v. W. (D.)* in relation to the weight to be given to an exculpatory out-of-court statement made by an accused person that had been tendered by the Crown in evidence. If the evidentiary weight to be accorded to it was dependent upon the credibility of the accused, the following questions needed to be considered by the court.

'In other words: (1) If I believe the exculpatory statement of the accused that that he did not commit this offence then I must find him not guilty: (2) Even if I do not believe the exculpatory statement of the accused, if his denial of the offence leaves me with a reasonable doubt as to his guilt, I must find him not guilty: (3) Even if the exculpatory statement of the accused does not leave me with any reasonable doubt as to his guilt, I may only properly find him guilty of the alleged offence if based on the evidence I do accept, I am satisfied beyond a reasonable doubt of his guilt regarding the offence.'

344. It is the third point in *R. v. G.T.* that has bearing here. The evidence provided in relation to a spit was not clear and convincing from either side. The only direct allegation of being spit upon was from Constable Lourenco's notes and OIPRD statement (Exhibits 12, 11A). It was not corroborated other than indirectly by Constable Pais who testified he only saw B.A.'s head move and heard the sound of spitting. After chief and cross-examination, he could not say that he actually saw B.A. spit but later in his testimony, he added, without being able to support it, that he was sure that B.A. spit at Constable Lourenco. Detective Constable Beveridge (Ret'd) only received information regarding spitting from Constable Lourenco and not through any independent evidence. B.A. testified he did not spit and

the other public complainants testified that they did not see B.A. spit. The video was not of assistance on this issue because of the positioning of B.A. and Constable Lourenco (Exhibit 9, Clip 1). It was not realistic that B.A., who previously had many positive or neutral interactions with police officers, who was on his way to an OJEN mentoring program, and who had participated in a mock trial at court under the instruction of a judge, would spit on Constable Lourenco, however that is only one consideration. I may only properly find Constable Lourenco guilty of the particular involving the arrest of B.A. if, based on the evidence that I do accept, that I am satisfied on clear and convincing evidence that B.A. did not spit on him.

345. In an examination of the events from the outset, Constable Lourenco acted unreasonably in his *TPA* investigation when no suspicious activity had taken place and no offence had been observed by the officers. Rather than investigating thoroughly, Constable Lourenco told B.A. that he had to identify himself but that was not correct. B.A. lawfully attempted to leave but Constable Lourenco would not allow him to do so despite not being under arrest or formal detention. He immediately took hold of B.A. and arrested him without good and sufficient cause under the *TPA*. That unlawful arrest and detention occurred in less than 30 seconds of their first contact, which hardly allowed time for any investigation. Based on the manner in which Constable Lourenco conducted himself, I am not satisfied by his notes and statement that he was spit upon.

346. Regarding B.A., some portions of his testimony had a bearing on the overall quality of his evidence and I sometimes had difficulty accepting it at face value. I am also not satisfied that I could accept the testimony of B.A. without corroboration on this issue. B.A. denied having spit on Constable Lourenco but in light of his overall evidence, I found I could not rely on his denial. To decide that issue in favour of either party would be based on a weighing of credibility between B.A. and Constable Lourenco and would still not be determinative of that issue on clear and convincing evidence. I will speak at a further point about the quality of B.A.'s evidence.

347. I now deal with the issue of Constable Lourenco punching B.A. as alleged in Count Three. In *Adams*, the Hearing Officer discussed active resistance and the use of force. A review of that case demonstrated that the accused was not only resisting the arrest of himself, but was also assaultive. Approximately five officers were attempting to arrest the accused who was holding his arms beneath him and refusing to be handcuffed. It was also alleged he tried to bite an officer. In that case, the Commission upheld the decision of the Hearing Officer, that given the active resistance and assaultive behaviour of the person who the officers arrested, that distractionary strikes by the officers were justified.

Analysis and Decision – Section 2 –

Arrest of B.A. for Assault Peace Officer and use of force against B.A. by punching continued

348. Constable Lourenco noted that he struck B.A. on his left side with his fist immediately after the alleged spit, then pushed him back and attempted to continue to effect the arrest (Exhibit 12). In his interview with the OIPRD, in summary, Constable Lourenco said he pulled B.A. away from the group. He told him again that he was under arrest, and the male was resisting. He was not listening to Constable Lourenco's commands and was not giving up his hands. Constable Lourenco then struck the male on his left side with his right fist (Exhibit 11a). A review of the video after he had isolated him from the group appeared however, to show two strikes, one to B.A.'s body, and one higher to the area of his head and B.A. fell to the ground (Exhibit 9, Clip 1). That supported B.A.'s testimony regarding a punch to the face. The video did not demonstrate that the resistance used by B.A. was such that strikes were appropriate. They occurred approximately 25 seconds after Constable Lourenco started to push B.A. away from the group. Other than not providing his hands and pulling back, there was no greater resistance. I find that Constable Lourenco was cavalier in his actions, which did not demonstrate good faith. Rather than telling B.A. to leave the property in the first instance, Constable Lourenco's notes, statement, and actions indicated his intention to continue to affect the arrest of B.A. whose resistance at that point did not warrant being struck.

349. In *Mancini v. Courage and Niagara Regional Police* the Commission described what constituted discreditable conduct;

'The concept of discreditable conduct covers a wide range of potential behaviors. The test to be applied is primarily an objective one. The conduct in question must be measured against the reasonable expectations of the community.'

and further

'It is not necessary to establish actual discredit. As the Commission noted in Silverman and Ontario Provincial Police, (1997), 3 O.P.R.1181 (O.C.C.P.S.) at 1187 The measure used to determine whether or not conduct is discreditable is the extent of the potential damage to the reputation and image of the service should the action become public knowledge.'

350. This event did become public knowledge and was the subject of widespread media coverage including print and the video of the event. It had the potential to damage the reputation and image of the Service in the eyes of the public as evidenced by the testimony heard. Constable Lourenco's actions, when viewed objectively from the

position of a reasonable person, did not meet the reasonable expectations of the community. When Constable Lourenco struck B.A. in those circumstances, it rose to the level of Discreditable Conduct. As such, I find that the particulars in Count Three involving Constable Lourenco have been proven.

351. Returning to the arrest of B.A., the testimony that he provided during examination-in-chief was clear but issues arose during cross-examination. In assessing the quality of B.A.'s evidence, I noted that some areas were influenced by his perception of events but there were others that demonstrated unreliability, exaggeration, and lack of credibility. Only some of that testimony was directly related to the issues to be determined but it caused me concern with the overall quality of his evidence. I found I could not accept some of it at face value and as such, clear support or corroboration was required. I am cautious that if a portion of B.A.'s testimony could not be supported, then the weight I place upon it must be examined. I will deal together with the areas of his testimony that were directly and indirectly related to the allegations in NOHs.
352. B.A. had made some allegations in the tribunal that he had not made to the OIPRD. He had testified that Constable Lourenco punched him in the face with all his might with a type of boxing punch which knocked him down. He said that it was a damaging blow and it caused injuries, cut his lip, and broke a bracket on his braces. Constable Lourenco punching B.A.'s face with sufficient force to damage his braces would likely have been significant to B.A., which should have merited mention in his OIPRD interview. During cross-examination, B.A. agreed that he did not tell the OIPRD that he had been punched in the head, only in the stomach and ribs. Y.B. had testified that he had a clear view of all punches and testified to seeing B.A. punched in the torso but did not remember a punch above the shoulder. Constable Brown had testified that there had been blood near B.A.'s mouth.
353. B.A. had testified that he went to his orthodontist to have his braces repaired a week after the event. He then qualified that the breakage consisted of a dislodged bracket. He testified that the orthodontist repaired his braces and glued his brackets back on however; correspondence provided by the orthodontist's office did not support that. It listed appointment dates for regular check-ups and for breakage repairs but none took place shortly after the events. The first e-mail listed dates that B.A. attended for breakage repairs between 2010 and 2012. The closest in time to this event was a repair date over six months later on June 12, 2012 (Exhibit 32). The second e-mail provided dates of all the appointments that B.A. attended after November 21, 2011. The soonest after the occurrence was January 26, 2012, some two months after the event. That e-mail indicated that all brackets were intact on that date and there was no indication that a repair had been made (Exhibit 33). The correspondence contradicted B.A.'s assertion

that he had repairs done to his braces a week after the event. After further cross-examination by Mr. Gridin on the contents of the e-mails, B.A. agreed he first went to his orthodontist on January 26, 2012 and agreed that there had been no issues with his brackets as noted in the second e-mail.

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Arrest of B.A. for Assault Peace Officer and
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354. While I accept that the inside of B.A.'s mouth may have been cut during this encounter, and that he had been struck in the facial area causing a cut to his mouth, I am not satisfied that he was struck hard enough to necessitate a subsequent repair to his braces. I found his testimony, that he attended his orthodontist for a subsequent repair to his braces as a result of the punch to his head, was not credible.
355. I noticed that B.A.'s perception of events was sometimes focused towards one view rather than conceding there might be another explanation. For example, B.A. had testified that Constable Lourenco intentionally cut himself in order to put the blame on him. In chief, B.A. testified that Constable Lourenco had shown him his cut thumb and told him that was Assault Police. During cross-examination, B.A. indicated that he was not told what he had been arrested for until booking and disagreed that Constable Lourenco told him he was under arrest for Trespass and Assault Police. The charges originally laid against B.A. were not for Constable Lourenco's cut thumb and that was not an allegation in Constable Lourenco's notes or statement. Though Constable Lourenco did sustain a cut to his thumb, there was no indication that it was deliberately self-inflicted. It seemed to be a perception issue in that it appeared Constable Lourenco had showed B.A. his cut thumb and B.A. also heard Assault Police at some point, but the allegation of a deliberate act of cutting his thumb to blame B.A. was not supported.
356. In his statement to the OIPRD, B.A. had said that when he was arrested he was face down on the hard ground but provided no further information about it. In the Tribunal, he testified that Constable Lourenco had deliberately rubbed his face on the ground. I accept that during his arrest while he was being held face down on the ground, his face rubbed on the ground, but not that Constable Lourenco had deliberately done so. I find this to be an exaggeration. B.A. also testified in chief that Constable Lourenco said '*Don't move I'll fucking shoot you*' and said to him '*I'll kill you*' as well. The comment '*I'll kill you*' was a new allegation not in his OIPRD statement. In cross-examination, when he was shown his interview transcript, he would not concede that Constable Lourenco did not say '*I'll kill you*' but he tried to give it a different character by saying that he took the threat to shoot him as a threat to end his life. I found this to be an issue of credibility.

357. B.A. testified that when he was put in the scout car, the door was slammed on his legs. He disagreed in cross-examination that the door contacted his legs with minimal force. A review of the video showed B.A. was seated in the car but his legs were not yet inside. Constable Lourenco attempted to close the door by pushing it but B.A.'s legs were in the way (Exhibit 9, Clip 2). The door did contact and was blocked by B.A.'s legs before they were pulled in but it did not appear to have been deliberately slammed on them. It appeared to be B.A.'s perception of the event though it would be an exaggeration to say the door was slammed against his legs.
358. B.A. had testified that he was not given his rights. Constable Brown testified that his partner advised B.A. of his rights while in the scout car but B.A. indicated that she did not do so. As I could see in the booking video from 32 Division, the officer who paraded him advised the Officer in Charge that B.A.'s rights had been read to him and B.A. did not disagree (Exhibit 31). Rights to counsel were then read to B.A. and he agreed that he understood them. B.A. testified that while in the interview room at 32 Division, the Detective did not give him his rights before she spoke to him but it is clear that they had previously been read to him when he was booked in. He further testified that a lawyer had called him and spoke to him while he was in custody and that was noted in his Record of Arrest from November 21, 2011 (Exhibit 8). When he was lodged at 33 Division, on video he informed the Officer in Charge that he had already spoken to a lawyer (Exhibit 31). Based on his testimony I found that his assertion of not being given his rights was not reliable and was contradicted in more than one instance.
359. B.A. had testified that when he had been subject to a custodial search, an officer made inappropriate comments to him. He testified in cross-examination as to the specific comments. However, he had earlier told Mr. Carolin during pre-hearing preparation that he did not remember what those comments were. B.A. agreed under cross-examination that he had not been truthful to his own counsel. He put his own counsel in a difficult position of having to notify the parties that during witness preparation, B.A. had not been forthright with him. I note that B.A. had not been under oath when speaking to his own counsel and he disclosed the alleged comments when directed to do so in the tribunal, however, I find that had some bearing on his credibility.
360. B.A. had testified that he had not been allowed to use the washroom the entire time he spent in police custody and did not get to do so until he got to court the next morning. During cross-examination, it was demonstrated through cell video screenshots that he had a toilet in his cell when he arrived at 33 Division for overnight lodging (Exhibits 28, 29). During cross-examination, B.A. acknowledged that the allegation he had made was false. While I accept that he may have had a memory of not having the opportunity to use the washroom for a length of time while the case was being processed in a busy CIB, I

did not find it reasonable that he would have had been denied the opportunity to use the washroom if he had asked to do so. I found his testimony that he did not have access to a toilet until he got to court was not credible.

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Arrest of B.A. for Assault Peace Officer and
use of force against B.A. by punching continued**

361. All of those concerns with his testimony affected my ability to accept his testimony that he did not spit at Constable Lourenco. That testimony was not supported, other than indirectly by Y.B. I have already discussed the quality of M.M.'s evidence. Because I do not accept, B.A.'s unsupported testimony in that regard, I am not satisfied on clear and convincing evidence in relation to whether a spit occurred or not.
362. When Y.B. was asked about sections of the video, he testified that he could not remember what was happening at particular points. Even though he had opportunities to fill in gaps in his memory, I did not find that he speculated or embellished. He did not create a narrative based on what he saw on the video and did not use it to augment his testimony. He was clear in his answers as to when he could or could not remember a detail. Y.B. agreed in cross-examination that he didn't hear Constable Lourenco swear or call anyone names such as 'bitch' or 'wannabe thug' even though that testimony was not supportive of B.A. He had the opportunity to embellish because the video had no audio, but he did not do so. As an example, when asked about how B.A. came to be on the ground at one section of the video, he replied that if he answered, his answer would be based on what he saw on the video and not on his memory. He also readily conceded his errors. For example, Y.B. had testified that he saw B.A. being kneed in his gut before he was handcuffed. He conceded that he was incorrect when shown the video during cross-examination in that it occurred after the handcuffing. I found I could accept Y.B.'s testimony.
363. I will now deal with the allegation in the NOH that Constable Pais arrested B.A. Ms. Mulcahy had argued that Constable Pais did not arrest B.A. and only assisted Constable Lourenco in making the arrest and there had been no interaction with B.A. until he assisted with the handcuffing. She had indicated that the NOH alleged that Constable Pais had unlawfully arrested B.A., not that he unlawfully assisted.
364. *Wang* discussed that the NOH must have been drafted to be specific to the misconduct alleged. In *Wang*, the NOH contained vague allegations, which could not support a finding of misconduct, and the only specific point in that NOH could not support a finding of guilt based on the evidence in that case. In this case, there are four separate NOHs and the

allegations contained therein contained sufficient detail to allow findings based on the evidence presented.

365. In *Debot*, the court indicated that a police officer may arrest a person at the direction or request of a superior or fellow officer. Provided the officer making the request had the requisite grounds, the arresting officer did not have to have sufficient information about the facts to allow him to make an independent judgement that there were reasonable grounds. Ms. Mulcahy had submitted that it would be unrealistic if Constable Pais had to ask Constable Lourenco to explain what his grounds were and his duty to assist did not make him vicariously responsible for the actions of Constable Lourenco.
366. In this matter, the circumstances involving Constable Pais participating in the arrest of B.A. were different from what was discussed in *Debot*. Constable Pais did not act on a request to arrest in the same manner as in *Debot*, or come upon the scene after the fact. Constable Pais was present from the outset and saw the events as they unfolded. He testified as to the circumstances of Constable Lourenco taking hold of B.A. He was as such aware that B.A. had been arrested unlawfully. I accept Ms. Mulcahy's submission that Constable Pais must be treated separately from Constable Lourenco and that he had no idea of what Constable Lourenco was going to do but I disagree that he could not be expected to question if Constable Lourenco was in the execution of his duties.
367. In *Rose, Ferry, and Toronto Police Service and Mitchell*, the second officer involved in an arrest argued that he was entitled to rely upon the principles in *Debot*, in that he did not require independent grounds to arrest. On appeal, the Commission upheld the decision of the original Hearing Officer, in that because the second arresting officer saw the circumstances leading to the arrest and he did not see anything that justified that arrest, the second arresting officer was not entitled to rely on *Debot*. In this situation, the principles in *Debot* were also not applicable.
368. There was evidence here that both officers arrested B.A. Constable Lourenco's arrest was self-evident. He initiated it and saw it to completion. Constable Pais testified that he assisted Constable Lourenco in getting B.A.'s hands behind his back and handcuffing him and it was clear to him the arrest had already been made. He testified that Constable Lourenco made the arrest, and that typically one person made the arrest and one person was present for the arrest.

**Analysis and Decision – Section 2 –
Arrest of B.A. for Assault Peace Officer and
use of force against B.A. by punching continued**

369. I disagree with that characterization in this case. Constable Pais was not just present for the arrest of B.A. He was present from the point where they engaged the public complainants in conversation to where the arrest of B.A. began. The arrest was still ongoing when Constable Pais joined in. Constable Pais was in a position to see and hear what was occurring. During the struggle between Constable Lourenco and B.A., Constable Pais took part in preventing the remaining public complainants from interfering, which helped to facilitate the arrest. B.A. was not yet under control when Constable Pais and Constable Lourenco together applied force to restrain and handcuff him, took him into custody, and continued the detention. All those actions formed part of the arrest. Constable Pais did not assist with an arrest that had already been made. Though he did not utter the words, Constable Pais was one of a pair of officers who arrested B.A. I find that the arrest of B.A. started from the moment Constable Lourenco first took hold of him and continued until he and Constable Pais together subdued and handcuffed him. Though their actions were different in particular respects, both officers made the arrest.

370. Despite both officers having made the arrest of B.A., based on the foregoing analysis for this area, the particular in Count One for Constable Lourenco, specifically in relation to the unlawful arrest of B.A. for Assault Peace Officer has not been made out. By extension, the particular in Count One for Constable Pais in relation to B.A. has not been made out as the totality of the evidence in relation to the issue of a spit was not clear and convincing. The particulars in Count Three for Constable Lourenco have been proven and I find Constable Lourenco guilty on Count Three.

**Section 3 - Arrests of Y.B. and M.M.
for Assault Peace Officer and use of force
against them by pointing a firearm**

Section 3 addresses the following areas of the NOHs.

Count One - Constable Pais

without good and sufficient cause made an unlawful or unnecessary arrest of M.M. and Y.B. for Assaulting a Peace Officer

Count One - Constable Lourenco

without good and sufficient cause made an unlawful or unnecessary arrest of M.M. and Y.B. for Assaulting a Peace Officer

Count Two - Constable Lourenco

used force that was unreasonable on M.M. and Y.B. by pointing his firearm at them.

Examination-in-Chief of B.A. by Prosecutor

371. During examination-in-chief, B.A. testified that his group stopped after being called by someone in a vehicle. He saw it was the police. Constable Lourenco did the talking and Constable Pais did not say much. After Constable Lourenco isolated him from the group he ended up down on the ground. B.A. said he saw Y.B. and ██████ approach Constable Lourenco to separate them. They were yelling 'stop, why are you hitting?' ██████ started yelling, 'why are you doing this?'
372. As the other public complainants approached him, Constable Lourenco pulled out his gun, pointed it them and said 'don't move I'll fucking shoot you guys' and told B.A. he would kill him as well. At the moment that Constable Lourenco drew his gun, B.A. was not handcuffed. M.M. was the furthest away and sat down. Constable Pais stepped in and told them all to sit down. B.A. gave up speaking. Constable Lourenco put his gun back in his holster.
373. While this was happening, Constable Pais turned his back and stopped looking. B.A.'s friends were not talking and Constable Pais never said a word. They first appealed to Constable Pais but he was not interested in helping. ██████ and everyone else sat down.

Examination of B.A. by Mr. Carolin

374. B.A. said that it did not seem like Constable Pais was in control of the situation and was a bystander. He did not act aggressive to anyone and did not yell. He told everyone to sit down.

Cross-examination of B.A. by Mr. Gridin

375. During cross-examination by Mr. Gridin, B.A. testified that Constable Lourenco isolated him away from the group by pushing him backwards. At the same time Y.B, M.M., and ██████ started asking what he was doing and why he was touching him. When Constable Lourenco started hitting him, Y.B. and ██████ approached Constable Lourenco to separate them. M.M. was backpedalling. Everyone was yelling 'stop, what you doing?' ██████ was the most vocal. The group was yelling 'don't touch him', 'why are you doing this', 'don't touch my brother'. Constable Lourenco pulled out his gun and they backed off. He said 'don't move I'll fucking shoot you.' As soon as he pointed the gun at everyone in the group, they started backpedalling.

**Section 3 - Arrests of Y.B. and M.M.
for Assault Peace Officer and use of force
against them by pointing a firearm continued**

376. Constable Pais was telling them to sit down. Eventually Constable Lourenco pointed the gun at B.A. then put it back in its holster. The only time Constable Pais spoke was after Constable Lourenco pulled out his gun and he told them to sit down. He acted as if B.A. was not talking. He looked reluctant or hesitant.

Examination-in-Chief of Y.B. by Prosecutor

377. During examination-in-chief by the prosecutor, Y.B. said that the group had been standing on the walkway in front of 155 Neptune for approximately 10 to 15 seconds after coming out of the building when an unmarked police van approached. Out of the window, he heard a voice tell them to stop. The officers were not parked yet and got out of the car as if it was urgent. They came over and talked to the group.

378. At first, all of them were having conversation with Constable Lourenco. Later it was just B.A. Constable Lourenco was in front of them and Constable Pais came behind them. B.A. and Constable Lourenco exchanged a word or two and then they were off to the side. He did not know what was said between them. He heard Constable Lourenco say *'you're going to jail tonight'*. The next thing he knew, B.A. was being pushed.

379. Y.B. said he was screaming and was in shock. He did not know what was going on. He kept asking *'what are you doing?'* Y.B. said he did not know what M.M. or B.A. said but remembered [REDACTED] saying *'that's my brother, that's my brother'*. He walked towards Constable Lourenco when B.A. was on the floor but did not remember doing so.

380. Constable Lourenco got up, took out his firearm and pointed it at him. From the point when the gun was in his face, everything was a blur. He put his hands up and sat down. He was told to sit down or get down by Constable Pais.

381. All of them were arrested. He could not remember what he was told he was under arrest for. Once back up came, he never had any more interactions with Constable Lourenco or Constable Pais and he was taken to the station.

Examination of Y.B. by Mr. Carolin

382. During examination by Mr. Carolin, Y.B. said that between the punches and the gun being pulled, when Y.B. walked towards B.A. he had no intention of physically intervening. He

was not sure if Constable Lourenco touched him. He did not touch Constable Lourenco. He felt scared and vulnerable when the gun was pointed at him.

Cross-Examination of Y.B. by Mr. Gridin

383. During cross-examination, Y.B. agreed that he and ██████ had advanced on Constable Lourenco from behind and they got past Constable Pais. He did not remember reaching out but acknowledged the video showed him reaching out.

Cross-Examination of Y.B. by counsel Ms. Mulcahy

384. In cross-examination by Ms. Mulcahy, Y.B. agreed that there were some things on the video that he did not remember. He agreed that the incident happened quickly and was sometimes a blur and chaotic. Y.B. agreed that he did not know everything that happened with B.A. because he was giving some attention to Constable Pais. Many people were talking and Constable Pais was continuing to try to get information in a calm and polite way.

385. Y.B. agreed that Constable Pais chased after ██████ who came close enough that Constable Lourenco was able to push him away and he understood why close contact was a concern for the officer. He agreed that he was close and Constable Lourenco had no idea what he was going to do. Y.B. agreed that Constable Pais was trying to move him and ██████ and was making it clear to stay back. He agreed that the gun did not come out until Constable Lourenco contacted ██████ and Constable Lourenco had no idea what they were going to do.

Examination-in-Chief of M.M. by Prosecutor

386. During examination in chief, M.M. testified that he believed Constable Lourenco punched B.A. who landed on the ground. That is when he, Y.B., and ██████ asked him to stop what he was doing. From there Constable Lourenco took out his gun pointed it at them and pointed his gun at B.A. who was lying on the ground. M.M. saw the gun and that is when he started going back with his hands up. He thought he was going to die for no reason. Then Constable Pais pulled ██████ and Y.B. away from Constable Lourenco. Constable Pais told all of them to sit, so they sat. M.M. did not touch Constable Lourenco or Constable Pais. They started asking Constable Pais what they had done wrong but he had no response.

**Section 3 - Arrests of Y.B. and M.M.
for Assault Peace Officer and use of force
against them by pointing a firearm continued**

Examination of M.M. by Mr. Carolin

387. During examination by Mr. Carolin, M.M. said he did not move in Constable Lourenco's direction. He was scared and was moving back. Constable Lourenco told them they were all under arrest and they were going to jail, not to any specific person.

Cross-Examination of M.M. by Mr. Gridin

388. In cross-examination by Mr. Gridin, M.M. was asked a series of questions about the events. He replied that he did not remember or did not recall to almost all questions, even ones he had answered previously.

Cross-Examination M.M.by Ms. Mulcahy

389. During cross-examination by Ms. Mulcahy, M.M. agreed that Constable Pais did not arrest, handcuff, or transport him on that date and that he had no dealings with him at 32 Division. M.M. did not provide many clear answers to questions, often replying that he did not remember.

Examination-in-Chief of Constable Pais by Ms. Mulcahy

390. During examination-in-chief by Ms. Mulcahy, Constable Pais testified that he could hear Constable Lourenco struggling with B.A., telling him he was under arrest, and ordering him to give up his hands. The other three males were yelling and swearing. He was trying to pay attention to both groups. He heard someone yelling, *'that's my brother, yo what the fuck, don't touch my bro, you can't do that.'*

391. Y.B. and ██████ started rushing to Constable Lourenco. Constable Pais got his hand on ██████ but Y.B. had already gotten away from him. He yelled *'stop, get back'*, as he tried to stop them

392. Constable Pais said he was struggling with ██████ and got hold of the back of Y.B.'s jacket as he reached Constable Lourenco, whose back was half turned to them. At the last second Constable Lourenco saw ██████ and pushed him back. Y.B. had his hand outstretched to Constable Lourenco. As Constable Pais got hold of Y.B., Constable Lourenco drew his firearm and yelled *'get back, get on the ground.'* Constable Pais was yelling *'stop, get back'*. He managed to pull Y.B. away and struggled with ██████ to pull

him away. M.M. was right in front of him when he turned around and he tried to herd the public complainants away from Constable Lourenco. It took both hands to push them back while he was telling them to get on the ground. He pushed [REDACTED] down and Y.B. broke free from him. He tried to push [REDACTED] down onto his front and he was yelling at all of them to get down. The public complainants were all swearing. He got [REDACTED] on the ground and told Y.B. to get on the ground. He told M.M. to get on his stomach. He refused to comply but sat down.

393. Constable Pais said he had never seen that in his career before and he was scared. It was a shock to him. He could not imagine anyone would go at an officer especially when they were arresting someone. They were attacking Constable Lourenco and wanted to stop B.A. from being arrested. Their body language and tone was aggressive. Y.B. was bladed sideways in a fighting stance when he went at Constable Lourenco, all while swearing.

394. Ms. Mulcahy had questioned Constable Pais in regards to the entry in his notes from that night;

'tell them to stop and get back, appear going to swarm or assist their friend, pull one of the males down to ground, try to get them to lay on ground in control position' (Exhibit 14).

Constable Pais said that he was trying to describe that three individuals were going to attack or assault Constable Lourenco who was trying to handcuff B.A. and they were trying to stop that arrest.

395. He told the males, *'you guys just went at my partner.'* Constable Lourenco was still struggling with B.A. and telling him to put his hands behind his back. Constable Pais rushed to Constable Lourenco. B.A. was refusing to roll over and give up his hands. Constable Pais assisted Constable Lourenco in getting B.A.'s hands behind his back and handcuffing him.

396. Constable Pais said he believed that he had a good reason to arrest the other public complainants for Assault Police. They went directly at Constable Lourenco and their language indicated their intentions. Constable Pais testified that it was not an option for him to allow the males to rush at Constable Lourenco. He believed that M.M. was part of the attack on Constable Lourenco. In that moment when he turned around M.M. was right there. He believed that it was their intent to stop the arrest and his belief was that they all rushed at Constable Lourenco.

**Section 3 - Arrests of Y.B. and M.M.
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397. After B.A. was handcuffed, Constable Pais walked over to Y.B., [REDACTED], and M.M. and told them they were under arrest for Assaulting a Police Officer. Backup officers were arriving on scene.

Cross-Examination of Constable Pais by Prosecutor

398. During cross-examination by the prosecutor, Constable Pais described Y.B. taking a fighting stance and blading his body which was a common stance when someone was about to engage in a fight. When Y.B. did that, his intentions were to stop Constable Lourenco from arresting B.A.

399. Constable Pais believed that they had all committed an Assault on Constable Lourenco. When he turned around, M.M. was right there and he believed at the time that he had rushed Constable Lourenco as well.

400. Constable Pais agreed that his grounds to arrest all three others for Assault Police were that they rushed at Constable Lourenco, coupled with them yelling, *'yo what the fuck, that's my bro'*. Constable Pais said that if a person accompanied a threat with an act or gesture and he had the belief they could do it, that constituted an assault. He walked over and advised them they were all under arrest for Assault Police after he helped to handcuff B.A. but he did not handcuff them or advise them of their rights at that moment.

401. He told backup officers where the three public complainants were seated. He handcuffed [REDACTED] as soon as it was safe to do so and told him he was under arrest, conducted a pat down search, and handed him to a transporting officer.

402. Constable Pais provided a description of a fighting stance and blading. It consisted of spread legs with one hand forward as a guard. As officers had been taught in their training, when Y.B. did that, his intentions were to stop Constable Lourenco from arresting B.A. When Constable Pais ordered them to get down and roll over, they were not yet under arrest but had been detained and were not free to leave.

**Section 3 - Arrests of Y.B. and M.M.
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Examination of Constable Pais by Mr. Carolin

403. During examination by Mr. Carolin, Constable Pais disagreed that Y.B. walked to Constable Lourenco but said that he rushed past him. While viewing the video Constable Pais described Y.B. as beginning to blade, his left foot forward, left hand out, and he had taken a stance. Constable Pais said it was a gesture indicating violence when Y.B. reached for Constable Lourenco. He said that from 30 metres away, the video did not capture the same sense as him.
404. Constable Pais said that his belief at that time was that they were all acting as a group and moving together. He believed that M.M. had moved because when he was pushing Y.B. and [REDACTED] and then turned, M.M. was there. Constable Pais agreed his belief had been wrong after viewing the video.

Cross-Examination of Constable Pais by Mr. Gridin

405. During cross-examination by Mr. Gridin, Constable Pais said he formed grounds when the males rushed at Constable Lourenco. Constable Lourenco arrested B.A. and Constable Pais arrested M.M., [REDACTED], and Y.B.
406. Constable Pais disagreed that Y.B. walked to Constable Lourenco and said that he rushed past him. Constable Pais said it was a gesture indicating violence when Y.B. reached for Constable Lourenco. It was Constable Pais' belief at that time they were all acting as a group. He believed that M.M. had moved as well.
407. It was Constable Pais' belief that the three individuals who were swarming Constable Lourenco might be trying to help B.A. escape. Constable Pais had fear and adrenalin and he was not the target of the attack. It was an officer safety issue, a dangerous situation, and there was a possibility that Constable Lourenco could be overpowered. In Constable Pais' opinion, Constable Lourenco drew his firearm out of fear for his safety. He didn't point his firearm at B.A.

Section 3 – Submissions - Arrests of Y.B. and M.M. for Assault Peace Officer and use of force against them by pointing a firearm continued

Submissions of Mr. Gridin

408. In his submissions, Mr. Gridin noted that there was a presumption of innocence and the prosecution had the burden that never shifted. Constable Lourenco had his experience one time and had one chance to record it in his notes. He indicated that the NOH was the focus which required clear and convincing proof of unlawful arrests that were without good and sufficient cause. He submitted that the current standard was clear and convincing evidence.
409. Mr. Gridin indicated that Constable Lourenco looked over his shoulder and saw the individuals coming and he noted that he felt they were going to attack him. He was in a vulnerable position. It happened suddenly and he was not expecting it. Two of the males did rush forward and Constable Lourenco was wrong about M.M. who did not come forward. Constable Lourenco's observations were corroborated by Constable Pais.
410. Constable Lourenco's observations were corroborated by Constable Pais who heard *'don't touch my brother, you can't do that'*. Y.B. said it was a chaotic moment, and agreed they advanced without warning on Constable Lourenco from behind, accompanied by multiple voices. Mr. Gridin submitted that the evidence of Y.B. was consistent with Constable Lourenco's perspective that the males were moving forward with the intention to assault him. Mr. Gridin said that their intention was irrelevant but he asked whether it was reasonable to have that perception.
411. Mr. Gridin submitted that what was said by Constable Lourenco was believable and corroborated. He said he issued the 'police challenge' which was corroborated by Constable Pais. Constable Pais said Constable Lourenco yelled *'get back, get on the ground'*, which was corroborated by Y.B., who could not remember exact words but understood he wanted him to get down. Constable Lourenco said that once the public complainants were under control, the threat was no longer there and he reholstered.
412. In his submissions. Mr. Gridin indicated that B.A. testified Constable Lourenco said *'don't move I'll fucking shoot you guys'* and also that Constable Lourenco said he would kill him. That came up for the first time in the tribunal, was not in his OIPRD interview, and was contradicted by Y.B.

413. Mr. Gridin submitted that the handcuffing happened at the end of the interaction with the assistance of Constable Pais. The only time Constable Lourenco and Constable Pais were together was when they were kneeling over B.A. Constable Lourenco's and Constable Pais' version is they handcuffed B.A. together. The timing of the handcuffing was important in assessing Y.B.'s evidence. Y.B. acknowledged that when he moved to Constable Lourenco, B.A. was not in handcuffs.
414. Mr. Gridin submitted that M.M. was combative, vague, and argumentative about the simplest matters, including his own statement. When asked about what he had testified to in-chief the day before, he testified that he did not recall. Mr. Gridin submitted that he was a terrible witness, he played dumb, and his behaviour on the stand was contemptible.
415. Constable Lourenco said that once the complainants were under control, he reholstered. The threat was no longer there and Mr. Gridin indicated that his gun was out for 10 seconds (Exhibit 9, Clip 1).
416. Mr. Gridin drew my attention to *Shinkewski* regarding the considerations an arresting officer must make. He indicated that Constable Lourenco was using force against B.A., took him to the ground, heard the yelling behind him and suddenly Y.B. and [REDACTED] advanced on him while he was in a vulnerable position. Constable Lourenco abandoned B.A. to deal with an emerging threat, which happened quickly.
417. Mr. Gridin submitted that it was the officer's perception that mattered. Constable Lourenco's perception was that he was suddenly advanced on accompanied by the yelling and swearing. He submitted that Constable Lourenco's use of force was consistent with his training and the TPS Use of Force model (Exhibit 15). The use of force that Constable Lourenco chose had the desired effect and resulted in stopping the advance and there were no injuries.
418. Mr. Gridin submitted that Constable Lourenco's purpose in drawing his gun was to stop a threat, not place the public complainants under arrest. His actions were not synonymous with an arrest. M.M. said he did not know he was being arrested and so he was not submitting to an arrest process.
419. Mr. Gridin submitted that Constable Lourenco did not have to choose the least forceful option as discussed in *DaCosta* where the court noted that the immediate decision of an officer was not to be viewed in hindsight or by what the police might have done differently.

Section 3 – Submissions - Arrests of Y.B. and M.M. for Assault Peace Officer and use of force against them by pointing a firearm continued

420. Regarding unlawful arrests of Y.B. and M.M., an arrest required words being uttered accompanied by touching or submission by the arrestee to the arrest process. He submitted that the evidence was that that B.A. was arrested by Constable Lourenco and the other complainants were arrested by Constable Pais. Constable Lourenco's notes were the only evidence he arrested Y.B. and M.M. and they were ambiguous (Exhibit 12). Mr. Gridin submitted that if Constable Pais told them they were under arrest then Constable Pais made the arrest. If Constable Lourenco came later and told them, he was not the arresting officer because they were already under arrest.
421. Mr. Gridin drew my attention to *Shinkewski* regarding the subjective belief by an officer that must be justifiable from an objective point of view. He submitted that I needed to put myself in Constable Lourenco's position in regards to what he perceived at the time. In *Proulx*, the court discussed self-defence and mistaken perception in regards to an assault.
422. Mr. Gridin submitted that a police officer had to have grounds to believe but was entitled to be mistaken. Y.B. may have had an innocent intention in approaching Constable Lourenco but what was in Y.B.s mind was irrelevant. What mattered was Constable Lourenco's perception. Even if he was wrong, it had to have a reasonable basis.
423. B.A. was actively resisting and his friends were yelling. Constable Lourenco's attention was focused on B.A. Suddenly Y.B. and [REDACTED] advanced on Constable Lourenco who was in a vulnerable position. Constable Pais unsuccessfully ordered them to stop moving forward. Constable Lourenco abandoned B.A. to deal with an emerging threat and had a second to process it and take action. It was reasonable to believe that they wanted to apply force. Though mistaken, it was reasonable to believe that M.M. was advancing. Mr. Gridin submitted that Constable Lourenco had a rational basis for reaching those conclusions and had reasonable grounds.
424. In *Shaw and McGuigan, v. O.P.P.* the Commission indicated that the actions of the officers should be considered in light of the events, as they occurred, not in light of facts learned afterwards. In this case, Constable Pais also arrested M.M. based on his belief that he had advanced on Constable Lourenco even though it was later learned that he did not move towards him. His subjective belief at the time was that he did.
425. Mr. Gridin drew my attention to the case of *Pompeo* to note that I needed to put myself in the position of Constable Lourenco and ask if his perceptions were reasonable when he

decided to strike B.A. and draw his gun. *Berntt v. Vancouver (City)* discussed the notion of mistaken fact and determining reasonable grounds.

Section 3 – Submissions - Arrests of Y.B. and M.M. for Assault Peace Officer and use of force against them by pointing a firearm continued

426. In *Brown v. Haldimand Norfolk Regional Police Force*, the Commission discussed looking at the state of mind of the officer at the time they had to make a decision. The case of *Shockness* discussed how technical violations made in good faith did not necessarily rise to the level of misconduct.
427. Mr. Gridin submitted that I could not just find that the *PSA* was violated but had to look at whether it was done in good faith or with a high level of negligence. He submitted that there was a potential threat that justified Constable Lourenco drawing his firearm. If he had been overpowered, there was a potential for serious injury. There was so little time to decide and as soon as he realized he was out of danger he put the gun away. The action he took stopped the situation. This case required the prosecution to prove unlawfulness as well as lack of good and sufficient cause.

Submissions of Ms. Mulcahy

428. Ms. Mulcahy submitted that it would have constituted neglect if Constable Pais had not stopped the public complainants from reaching Constable Lourenco. Without notice, two of them rushed at his escort who was on the ground, dealing with an accused. Constable Pais stopped the assault in progress and brought the two back. It was not an unlawful exercise of authority.
429. Ms. Mulcahy drew my attention to the case *Allen v. Munro*, (Board of Inquiry – 1994) (Exhibit 48 Tab 1) and *Penner v. Niagara (Regional Police Services Board)*, [2013] S.C.J. No. 19 (Exhibit 48 Tab 2) to discuss the standard of clear and convincing evidence. That was also supported in *Ottawa (City) Police Service v. Ottawa (City) Police Service*, [2016] O.J. No. 2431 (CA) (Exhibit 48 Tab 3) and *Greater Sudbury Police Service*, [2010] O.J. No. 793 (Div. Ct.) (Exhibit 48 Tab 4).
430. Ms. Mulcahy submitted that some evidence of B.A. was consistent with an assault. He said the males were coming to separate him from Constable Lourenco. They were yelling and shouting and put out their hands to stop Constable Lourenco. B.A. acknowledged that M.M. was yelling and had tried to aid him. Y.B. acknowledged that Constable Lourenco had his back to group and Constable Pais was trying to stop any contact

between them and Constable Lourenco. He had grounds to believe it was an Assault by act or gesture and the evidence indicated there was sufficient cause to arrest them.

431. Constable Pais' testimony was relevant to whether he had good and sufficient cause. She submitted that another officer in that position would have the belief that Constable Lourenco was going to be attacked. B.A. had testified that he believed that Y.B. wanted to separate him from Constable Lourenco. Constable Pais believed he had grounds to arrest M.M. If his perceptions were mistaken it did not mean there was an unlawful arrest of M.M. He did not have the luxury of the video and he explained why all three were arrested.
432. Ms. Mulcahy indicated that Constable Pais had a duty to protect and a right to his own safety. She submitted that he did what was expected of him in the situation. If he let it happen it could have been more dangerous. The role of Constable Pais was not to determine whether there was a prima facie case or whether the three he arrested were going to be found guilty.
433. In *Magda and Sheppard*, [1992] (Exhibit 49 Tab 31) the court discussed that it was the belief of the officer in all of the circumstances that was important. In this case, Constable Pais believed M.M. was getting close to Constable Lourenco and his perception was reasonable and honest. She submitted that applied for Constable Lourenco's use of force and Constable Pais' grounds for arrest. They were decisions made in the heat of the moment. In *Pearson and Visconti* (1994 Board of Enquiry) (Exhibit 48 Tab 12) the Board noted that a reasonable but mistaken belief was sufficient to make an arrest.
434. The case of *R. v. Alexson*, (2015) 2015 MBCA 5 (Exhibit 48 Tab 17) noted that the officer's conduct must be measured against the unpredictability of the situation and they were expected to use their discretion and judgement. *R. v. Bush*, (2010) ONCA 554 (Exhibit 48 Tab 21) discussed the subjective and objective components required to form reasonable and probable grounds. Ms. Mulcahy submitted that even if the arrest of M.M. was not warranted, Constable Pais could not be found guilty on the basis of strict liability.
435. *Charlton v. St. Thomas Police Services Board*, 2009 CanLII 25977 (ONSC) (Exhibit 48 Tab 19) noted that a peace officer could arrest a person if they had reasonable grounds to believe the person had committed an indictable offence. Misapprehension was not determinative if it was reasonable at the time of arrest. Ms. Mulcahy indicated that when Detective Constable Beveridge (Ret'd) got the video and saw that M.M. had stayed in place; it did not change the grounds of Constable Pais at the time of the arrest. Ms. Mulcahy submitted that even if I found there were no reasonable grounds, I must also consider whether there was good and sufficient cause to make the arrests.

Section 3 – Submissions - Arrests of Y.B. and M.M. for Assault Peace Officer and use of force against them by pointing a firearm continued

436. Maxwell v. Walmart [2013] A.J. No. 1120 (QB) (Exhibit 49 Tab 33) discussed *Hill v. Wentworth Regional Police Services Board* which noted that the standard of care was that of a reasonable police officer in similar circumstances. The standard is not perfection. In *Golumb and College of Physicians and Surgeons of Ontario*, the court discussed that what happened afterwards in court had no bearing on whether the officer had grounds for arrest in the first instance. The matters of *Storrey* and *Wiles v. Ontario (Police Complaints Commissioner)*, [1997] O.J. No. 6274 (Div. Ct.) (Exhibit 48 Tab 18) made it clear that no prima facie case was required to make an arrest.
437. Ms. Mulcahy drew my attention to the power of arrest in the Criminal Code RSC 1985 s. 495 and submitted that Constable Pais was deemed to be acting lawfully under ss. 495(1) (Exhibit 54).
438. Ms. Mulcahy drew my attention to the definition of Assault is in CC s. 265 (Exhibit 55) and to the CC s. 270 (Exhibit 56). The case of *R. v. Gardner*, [1986] N.B.J. No. 941 (Q.B.) (Exhibit 49 Tab 34) dealt with the offence of Assault by act or gesture. *R. v. Dawydiuk*, (2010) 253 C.C.C. (3d) 493 (BCCA) (Exhibit 49 Tab 35) dealt with the issue of a threat to apply force and Assault by act or gesture. Ms. Mulcahy submitted that Y.B. threatened to apply force and caused Constable Pais to believe he could affect his purpose.
439. In *R. v. Judge*, 1957 O.J. No. 423 (CA) (Exhibit 49 Tab 36) the court discussed the issue of having a common intention and being a party to an offence. Ms. Mulcahy submitted that M.M. was a party to offence and that was communicated to Detective Constable Beveridge (Ret'd).
440. In *R. v. Ing*, [2013] O.J. No. 98 (OCJ) (Exhibit 48 Tab 14) the court discussed that officers are required to act quickly and make decisions on the spot. Their actions should not be viewed in hindsight and courts accept a mistake of fact defence. In *Canton v. Kaija*, 2008 OCCPS (Exhibit 49 Tab 22) an officer lawfully arrested a person who he felt was about to commit an assault. Ms. Mulcahy submitted that Constable Pais came to an opinion on the spot. It required an examination of whether his belief was reasonable at the time.
441. In *Ikemota v. Cota and Ontario Provincial Police*, 2009 OCCPS (Exhibit 48 Tab 13) the Commission discussed subjective belief, reasonable grounds and the reasonable person

test. In *Tomie-Gallant v. Ontario*, [1996] O.J. No. 2863 (Div. Ct.) (Exhibit 48 Tab 16) the Board also discussed reasonable grounds, unnecessary arrest, and the reversal of the burden of proof. Ms. Mulcahy submitted that the analysis also had to consider the officer's duties, discretion, and judgement.

Section 3 – Submissions - Arrests of Y.B. and M.M. for Assault Peace Officer and use of force against them by pointing a firearm continued

442. The Royal Newfoundland Constabulary and Thistle and Mcgrath, (1996 Adjudicator) (Exhibit 49 Tab 26) and Elliott (1995 Board of Enquiry) (Exhibit 49 Tab 28) discussed the officer's good faith and noted that where an officer had exercised their best judgement, the conduct should be viewed in context. *Whitney v. OPP*, [2007] O.J. No. 2668 (Div. Ct.) (Exhibit 49 Tab 29) and *Cole et al.*, 1998 Board of Inquiry (Exhibit 48 Tab 15) recognized that good faith is relevant.
443. Ms. Mulcahy addressed the particulars in the NOH; '*resulted in their continued detention*' and submitted that while Constable Pais did detain Y.B. and M.M., the decision to continue the detention was made by the investigators and Constable Pais was not involved in that decision.
444. Ms. Mulcahy submitted that Constable Pais had subjective and objective grounds to take necessary and lawful action and even if I found that there were no reasonable grounds, the prosecution still had a duty to prove that the arrests were made without good and sufficient cause.
445. Ms. Mulcahy submitted that the public complainants were rushing and yelling with no warning and their language demonstrated their intentions. Constable Pais believed they would use force to release B.A. and thought they were planning to attack Constable Lourenco who was in a vulnerable position. Ms. Mulcahy submitted that the arrests were necessary and lawful. It was consistent with his training in response to an imminent threat. She submitted that the prosecution had failed to prove the arrests were without good and sufficient cause and there had been no clear and convincing evidence of misconduct.

Submissions of Prosecutor

446. The prosecutor drew my attention to TPS Procedure 15-01 Use of Force August 11, 2011 (Exhibit 15) in regards to drawing or pointing a firearm. The procedure and regulation noted that one cannot draw a firearm unless fearing bodily harm or loss of life. He submitted that Constable Lourenco had just as much time to resort to an intermediate

weapon and it was not reasonable to draw and point his firearm. He submitted the proper action would have been to use his intermediate weapons in this situation.

447. The prosecutor submitted that there had been no good cause to arrest the remaining complainants for Assault Police. The prosecutor agreed that Constable Pais had to react but disagreed with what happened afterwards. Grabbing the public complainants did not amount to an arrest but then he arrested them for Assault Police and continued the arrests. The prosecutor submitted that the issue was not stopping the public complainants but arresting them for Assault Police. In *Canton v. Kaija*, the accused was aggressive and displayed assaultive behaviour but was released.
448. The prosecutor addressed the defence submissions regarding the definition of Assault by act or gesture. He submitted that the public complainants only reacted to an unjustified arrest and were simply coming to the aid of their friend. Y.B.'s natural reaction was similar to the matter of *Gentles v. Intelligarde International Incorporated* in a person coming to the aid of his friend.
449. The prosecutor noted that the CC s. 265 (Exhibit 56) and CC s. 270 (Exhibit 56) were dual procedure offences. In keeping with s. 495(2) unless certain criteria were met, a person must be released at the scene (Exhibit 54). Constable Pais and Constable Lourenco continued the detention beyond the scene. He submitted that detention started at the scene and continued from there, not from the station onward. The CC s. 270 requires an officer be in the execution of their duty (Exhibit 56).
450. Addressing *Smith v. Freland*, the prosecutor conceded that Constable Lourenco had to make a split second decision and agreed that Constable Pais had a duty to react when the public complainants approached Constable Lourenco but he submitted that grabbing them did not amount to an arrest. He submitted that after grabbing them, Constable Pais erred by arresting them and then continuing that arrest. He disagreed with the defence that the acts or gestures of the public complainants met the definition of Assault. He submitted that it was only an immediate reaction to an unjustified arrest when the public complainants were trying to come to the aid of their friend.
451. The prosecutor submitted that the public complainants walked over to Constable Lourenco when they saw him strike B.A. The prosecutor submitted that the video didn't show any blading or fighting stance on their part. The only evidence of that was in Constable Pais' testimony. It was not in the officers' notes or their OIPRD statements.
452. The prosecutor addressed the defence submission that an arrest needed words of arrest, and touching or submission to the process. The prosecutor submitted that when

Constable Lourenco pointed his gun and told them to get down, the public complainants had then submitted.

Section 3 – Submissions - Arrests of Y.B. and M.M. for Assault Peace Officer and use of force against them by pointing a firearm continued

453. The prosecutor submitted that the evidence was clear and convincing that pointing the firearm was unreasonable and Discreditable Conduct had been made out. The prosecutor similarly submitted that Constable Lourenco and Constable Pais made unlawful arrests and the misconduct had been made out on clear and convincing evidence. The prosecutor submitted that there was evidence that Constable Lourenco and Constable Pais both arrested each and every complainant.

Submissions of Mr. Carolin

454. Mr. Carolin submitted that reasonable grounds had to be examined from the perspective of a reasonable person and needed to be justifiable from an objective point of view. The assessment of reasonableness needed to be examined for the entire occurrence.

455. Mr. Carolin noted that it was clear in the video that while M.M. was there, he did not move or do anything and therefore it was not a lawful arrest of M.M. Mr. Carolin indicated that the Use of Force procedure regarding drawing a firearm noted that one shall not point it unless one believed there will be loss of life or grievous bodily harm (Exhibit 15). That was not available to Constable Lourenco in this circumstance. Mr. Carolin submitted that Constable Lourenco and Constable Pais reasonably thought that Y.B. was trying to prevent the arrest. Constable Pais did not say he thought that Y.B. was going to kill Constable Lourenco. Mr. Carolin submitted that was why drawing the gun was unreasonable force.

456. Regarding the arrest of Y.B. and M.M. for Assault Police, Constable Lourenco had to be in the performance of his duties and outside of that one could not arrest for Assault Police. Mr. Carolin submitted that it was not an assault when Y.B. moved towards Constable Lourenco. He was allowed to assist B.A. and use force to stop the commission of an offence. As in *Gentles v. Intelligarde International Incorporated*, it was reasonable to conclude that the second male Mr. Francis was not committing an assault but was seeking to prevent an assault by the security guard when he came to Mr. Gentles' aid. In this case, Y.B. was protected by the CC s. 27. He submitted that that Y.B. was walking and was making a placating gesture.

457. Regarding the arrests of Y.B. and M.M., Constable Lourenco noted that he pulled out his firearm and informed the males they were under arrest for Assault Police. Constable Pais conceded he arrested them. Mr. Carolin submitted it was clearly a joint arrest. The case of *Asante-Mensah* noted that physical control was not necessary if acquiescence was achieved.
458. Mr. Carolin indicated that even though the NOH was particularized for all three public complainants, the prosecution did not have to prove all three of them. As in *Sterling and Hamilton- Wentworth Regional Police Service*, 1999 OCPD CanLII 31606 (Exhibit 50 Tab 7) the Commission indicated that only one or more of the points in the NOH had to be proven.
459. Mr. Carolin drew my attention to CC s. 36 and CC s. 37 Preventing Assault (Exhibit 63) from 2011 to note that a person was entitled to use force to defend himself or prevent an assault. He submitted that Y.B. was allowed to use some force to get B.A. away from Constable Lourenco. He drew my attention *R. v. Webers*, 1994 CanLII 7552 (ONSC) (Exhibit 65) where the law allows reasonable use of reasonable force to protect a person from assault.
460. Mr. Carolin submitted that in regards to the allegation of Assault Police for Y.B. and M.M. we could accept Constable Lourenco's account that their behaviour was assaultive, but he was not in the execution of his duties and so he was stripped of CC s. 25 protection. The CC s. 27 (a) said that Y.B. was protected and was allowed under the CC to prevent that arrest and to separate them. (Exhibit 51, Tab 35). Mr. Carolin submitted that Y.B.'s actions were not assaultive since Constable Lourenco was not in execution of his duties. The CC said there had to be a reasonable apprehension of death or grievous bodily harm. There is no evidence that the officers feared death or bodily harm. Y.B. was allowed to use some force to get B.A. away and using a gun was not allowable and was unreasonable.
461. Regarding *R. v. Bengy*, 2015 ONCA 397 (CanLII) (Exhibit 62), the self-defence provisions in the CC were not retroactive. The Tribunal had to rely on the self-defence provisions as they were in Nov 2011. Mr. Carolin submitted that there was nothing in Y.B.'s conduct that could rise to an apprehension of grievous bodily harm as in the 2011 CC s.35 (Exhibit 59) and Constable Lourenco had to show he tried to retreat.
462. Mr. Carolin submitted that the police created the whole situation and the police kept escalating it. It made sense for Constable Pais to pull the public complainants away from Constable Lourenco but there was not good and sufficient cause to arrest them.

Section 3 – Submissions - Arrests of Y.B. and M.M. for Assault Peace Officer and use of force against them by pointing a firearm continued

Reply Submissions of Ms. Mulcahy

463. Ms. Mulcahy submitted that Constable Pais could not walk away when he observed three young men rushing at his escort because he had a duty to act. Y.B. said he understood why Constable Pais was trying to stop them. M.M. was part of the group expressing anger. Constable Pais honestly believed he rushed at Constable Lourenco as well. Constable Pais was reacting to prevent an assault. He was not then becoming complicit in his escort's wrongdoing. Constable Pais prevented them from assaulting Constable Lourenco and he advised them they were under arrest.
464. Constable Pais' notes indicated they were rushing to assist their friend. In his OIPRD statement, he said they were moving to get his partner (Exhibits 14, 13a). Constable Lourenco said in his OIPRD interview they appeared to rush, appeared to be assaultive behaviour (Exhibit 12).
465. Ms. Mulcahy said that Constable Pais had explained his grounds for making the arrests of the three males for Assault Police, which were more than just making an arrest with only good and sufficient cause.
466. I commence this section of the analysis where Constable Lourenco was in the process of struggling with B.A. and his attention was focused there. As far as he was aware at that moment, the other public complainants were with Constable Pais. As he heard voices behind him, he looked up and saw more than one male moving towards him without warning. He could not know what their intentions were. He was entitled to take steps to ensure his own safety and it was not expected that he do nothing.
467. In *Proulx*, the court discussed reasonable and mistaken perceptions. The court noted;
- 'The question that the jury must ask itself is therefore not "was the accused unlawfully assaulted" but rather "did the accused reasonably believe in the circumstances that she was being unlawfully assaulted?'*
468. The case of *Pompeo* pointed out that I needed to put myself in the position of Constable Lourenco and ask if his perceptions were reasonable when he decided to draw his gun. *Pompeo* supported that the court must assess the reasonableness of the police officer's belief that force was necessary on a "subjective-objective basis", consider the matter from the standpoint of the person using the force, and the reasonableness of their belief.

**Analysis and Decision - Section 3 - Arrests of Y.B. and M.M.
for Assault Peace Officer and use of force
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469. *Berntt v. Vancouver (City)* discussed the notion of mistaken fact and reasonable grounds. In determining whether the officer had reasonable grounds, the intention of the injured party could not be a consideration. The court must place itself in the officer's shoes and ask if the officer was lacking, not whether the judge would have acted in the same manner.
470. Constable Lourenco stopped the males from unexpectedly approaching by pointing his firearm at them. I ask myself whether drawing and pointing his firearm was unreasonable in the circumstance. In that moment, he could not know if, there was a potential threat, if the males were armed, or what their intentions were. When the public complainants had then been pulled away by Constable Pais, the potential threat no longer existed and Constable Lourenco reholstered his firearm.
471. The prosecutor had submitted that Constable Lourenco did not use the appropriate force option and failed to engage intermediate weapons. TPS Procedure 15-01, Use of Force, from August 11, 2011 indicated that a member shall not draw a handgun or point a firearm at a person unless there were reasonable grounds to believe that it was necessary to protect against loss of life or serious bodily harm (Exhibit 15).
472. It is arguable whether Constable Lourenco's action was the most appropriate choice in the circumstance but I do not make a decision in hindsight as to what action he should have taken or what might have been a better option. My decision is based on the question of whether pointing a firearm by Constable Lourenco constituted unreasonable force.
473. It was not suggested that Constable Lourenco do nothing when the public complainants unexpectedly advanced on him and it would be unreasonable to suggest that Constable Lourenco was not allowed to take steps to ensure his safety. Based on his perception, Constable Lourenco's action in pointing his firearm to stop the public complainant's approach from behind was justified, even if it might have been beyond what was necessary. His actions at that particular moment were not dependent on whether he was in the lawful execution of his duties but whether there was a reasonable belief that he needed to protect himself. Constable Lourenco had to make a split-second judgement and by pointing his firearm, he helped to stop the advance. Constable Lourenco could not have known what was in the minds of the public complainants or if they intended to inflict bodily harm but his actions were in keeping with his training.

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474. I also draw upon my own knowledge and experience at this point. I had participated annually in the full mandated TPS in-service training for approximately three decades. As part of the firearms training portion of the program, officers must respond to an immediate and unknown potential threat without having time to assess the nature thereof. In this occurrence, as in the training, Constable Lourenco responded immediately to a perceived threat by drawing his firearm and issuing the police challenge, without having the time to assess what was unfolding. When Constable Pais pulled the public complainants back, there was no longer a potential threat and Constable Lourenco then re-holstered his firearm. Pointing his firearm was a defensive action and was a response available to him. I cannot say that he deliberately used unreasonable force.

475. In *Smith v. Freland*, a police officer fatally shot a fleeing motorist after a pursuit in which the motorist struck the officer's car. The court examined the use of force and said that officers often had to make split-second judgements in rapidly evolving circumstances. The court noted;

'The "reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'

476. In *DaCosta*, the court examined the use of force by a police officer. The court noted that officers have a duty to protect and a right to their own safety and must often must make quick decisions in dangerous situations, which occur suddenly. The court also noted that police actions should not be judged to a standard of perfection in hindsight.

477. Whether the right choice should have been a verbal command, an empty hand technique, or an intermediate use of force option, Constable Lourenco used one that was available to him. I do not find he intentionally selected one that was inappropriate or unlawful. I find that the particulars in Count Two for Constable Lourenco have not been satisfied.

478. I now turn to the arrests of the remaining public complainants. Once the group was again away from Constable Lourenco and under control, any potential threat had ended. I ask myself whether the subsequent arrests of Y.B. and M.M. for Assaulting a Peace Officer constituted misconduct.

479. Preventing the public complainants from contacting Constable Lourenco is a separate issue from arresting them for Assault Peace Officer. There is no doubt that Constable

Pais was required to stop the males from reaching Constable Lourenco. In doing so, he performed his duty and used his authority appropriately. The NOH for Constable Pais does not allege misconduct for that action. The allegations of misconduct relate to the arrests of Y.B. and M.M. for Assaulting a Peace Officer.

480. In *Shinkewski*, the court discussed the standard of 'reasonable grounds to believe'. In brief, an officer must subjectively hold reasonable grounds to believe which must be objectively justifiable. An officer does not have to be able to make a prima facie case for conviction. A reviewing court must consider all of the information available to an arresting officer cumulatively. The standard must be interpreted contextually having regard to the circumstances in their entirety. There needs to be an assessment of the reasonableness of an arrest from the viewpoint of a reasonable person placed in the position of the officer.
481. In *Wong and Wall and Toronto Police Service and OIPRD*, 2015 OCPC 15 (Exhibit 58 Tab R) a G20 case, the Commission addressed the requirements for a lawful arrest, the element of good faith, and the nature of good and sufficient cause. It indicated that an arresting officer must subjectively have reasonable grounds for an arrest that must be justifiable from an objective point of view. A reasonable person must be able to conclude there were reasonable grounds for the arrest. A determination of good and sufficient cause required an analysis of an officer's subjective belief. Acting in good faith or having a subjective belief did not necessarily satisfy the requirement of good and sufficient cause.
482. One of the elements to be considered in the NOHs is that of good and sufficient cause. Even if reasonable grounds did not yet exist, an officer could still have good and sufficient cause to make an arrest. Examples might include; if an officer had insufficient facts in a quickly unfolding situation but had to take immediate action, circumstances where the officer's perception was wrong but they had an honest belief, or an arrest of the wrong person on a limited description while a search was being conducted for a suspect. In those examples, arrests might have been made in good faith and with good and sufficient cause, even if grounds were deficient.
483. I agree with Ms. Mulcahy that Constable Pais had a duty to protect as well as good and sufficient cause to stop the public complainants from contacting Constable Lourenco. His actions were in response to those of the public complainants unexpectedly approaching his partner and he separated them from him. He had indicated that he believed they might commit an offence and as such, he had good and sufficient cause to stop them.
484. In *Canton v. Kaija*, 2008 OCCPS (Exhibit 49 Tab 22) an officer stopped a motorist for a traffic violation. The motorist immediately exited his vehicle and approached the officer

while displaying aggressive behaviour. The officer believed that he was about to be assaulted. He arrested the motorist for being 'about to assault.' Once backup arrived, the arrested party was released from custody and issued a POT for the original traffic violation. In *Ardiles and Toronto Police Service, 2016 OCPC* (Exhibit 49 Tab 23), the officer made an arrest of a person during the G20 events believing he was going to take part in violent protests. After confirming that the arrested person had no weapons, and would likely not have any other involvement, he was released without charge.

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485. I also agree with Ms. Mulcahy's submission that Constable Pais reacted to prevent an offence from occurring. Paraphrased in the CC ss. 495(1), a peace officer may arrest without warrant a person who they believe is about to commit an indictable offence (Exhibit 54). Constable Pais had described his grounds to believe that the public complainants were about to commit an offence. He had noted that he believed that the public complainants were going to swarm Constable Lourenco or assist their friend (Exhibit 14). He testified that he had been trying to describe in his notes that they were going to attack or assault Constable Lourenco or stop the arrest. As such, he was authorized under CC ss. 495(1) to arrest the public complainants to prevent an offence. The actions Constable Pais took to stop the public complainants were expected of him in the circumstances. His belief that they were about to commit an offence was reasonable. He could not know what was in their minds and he was honestly mistaken about M.M. moving forward. However, an arrest for being about to commit an indictable offence, does not lead to a charge. It is a preventative intervention. Once the public complainants had been arrested and stopped, then the next action should have been to release them once there was no longer the potential for an offence to occur. There is a difference between the public complainants being about to commit an offence to them actually having committed one.

486. Paraphrased, a person commits an Assault under the CC ss. 265(1)(b) who threatens by act or gesture to apply force if he causes the other person to believe that he has the ability to affect his purpose (Exhibit 55). *R. v. Gardner, [1986] N.B.J. No. 941 (Q.B.)* (Exhibit 49 Tab 34) dealt with the issue of Assault by act or gesture. The court noted that:

'The offence of assault is committed when a threat is intentionally made to apply force to the person (sic) of another and there is the present ability to carry out that threat.'

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487. In that case, an officer was attempting to keep two opposing groups from coming into contact with each other while they were threatening to move forward. He told them to stay back. Referring to the officer, someone in the crowd said something to the effect of 'Come on, let's get him boys' and the whole group then advanced on the officer. That was found to be a threat directed at the officer. That case referenced *R. v. Horncastle* which noted in part;

'It is sufficient if he threatens to do so and has the present ability to do so. Mens rea lies in the intention to threaten not in the intention to carry out the threat. The offence of assault is committed when a threat is intentionally made to apply force to the person of another and there is the present ability to carry out the threat.'

488. In *Judge*, three accused males were convicted of having committed an Assault by act or gesture. They confronted the victim who had locked himself in his vehicle to escape them. One accused pretended to be armed with a weapon and threatened to burn the complainant and another accused indicated that he would do so also. There was no physical violence in that case but the intention to threaten was deliberate.

489. In *Dawydiuk*, the accused was operating a motor vehicle. He drove onto a sidewalk where there were pedestrians, lurched his vehicle forward towards them, revved his engine, and drove his vehicle towards them. His actions were found to be deliberately threatening. He was convicted of Assault with a Weapon (by act or gesture).

490. Despite the fact that M.M. did not move towards Constable Lourenco, it would not be reasonable to argue that since M.M. did not approach him, that any action taken by the officers in relation to him was automatically considered unlawful. Constable Pais reasonably thought M.M. had moved towards Constable Lourenco but was mistaken in his perceptions. I am satisfied that he acted based on his perception that M.M. had moved towards him. An honest error does not automatically rise to the level of misconduct just because it was technically incorrect. The analysis of any misconduct in the relation to the arrests should be the same for Y.B. and M.M., despite the fact that M.M. did not move forward.

491. The court in *Dawydiuk* also discussed the issue of mens rea and compared acts done to achieve an immediate end as opposed to acts done with a specific motive to achieve an illegal object. The court referenced *The Queen v. George* and noted;

'The former acts may be purely physical products of momentary passion, whereas the latter involve the mental process of forming a specific intent.'

492. In a rapidly changing circumstance without the time to consider what was occurring, the public complainants reacted to what they observed when Constable Lourenco used force on B.A. Constable Lourenco reacted to what he observed when the males approached him unexpectedly. Constable Pais reacted to what he observed in their approach as well as to Constable Lourenco's actions. All of those reactions were understandable however, once the public complainants were stopped and got onto the ground, they could no longer approach Constable Lourenco and did not make any further effort to do so.
493. Constable Pais had testified that body language could be an act or gesture that could constitute an assault. He said he arrested the public complainants for Assault Police, by act or gesture. Though the public complainants unexpectedly approached Constable Lourenco while yelling things such as *'that's my brother, yo what the fuck, don't touch my bro, you can't do that'* in objection to his actions, they did not make deliberate threats coupled with actions as in *Gardner*. They did not make any deliberate threatening gestures or threaten to apply force as in *Dawydiuk* or *Judge*. Y.B. and the other public complainants spontaneously expressed surprise and objected to what they saw occurring between Constable Lourenco and B.A. but I do not find that their actions rose to a level as to constitute a deliberate threat to assault Constable Lourenco. Y.B.'s gestures were limited to moving towards Constable Lourenco with an outstretched arm. When the video is viewed without stopping, it demonstrated Y.B. appeared to walk over in one fluid motion, without stopping to take a challenging or fighting stance (Exhibit 9, Clip 1). I do not find that the public complainants wilfully acted to threaten by act or gesture or had an intention to threaten.
494. Constable Pais had good and sufficient cause to take action to stop the public complainants from contacting Constable Lourenco to prevent the commission of a perceived offence. Once they sat down, they were no longer subjectively about to commit an offence. Their actions did not meet the threshold of deliberately threatening to apply force. A reasonable person standing in the officer's shoes would not conclude that there were objective grounds to believe the public complainants had committed an Assault by act or gesture. Constable Pais testified that after B.A. was handcuffed, he walked over to Y.B., [REDACTED], and M.M. and told them they were under arrest for Assaulting a Police Officer. Those subsequent arrests for Assault Peace Officer, however, were without good and sufficient cause and unnecessary. I find Count One for Constable Pais in relation to Y.B. and M.M. has been proven.

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495. Count One for Constable Lourenco also alleged that he arrested Y.B. and M.M. The same analysis of having good and sufficient cause to stop the public complainants from contacting him is applicable. His notes indicated that he believed the public complainants were going to attack him and potentially assist the male (B.A.) in escaping.
496. Constable Lourenco initiated the arrest process by pointing his firearm at the public complainants and ordering them to get down. Constable Pais assisted in separating them and then he took the further step of arresting them for Assault Peace Officer.
497. Constable Lourenco's notes indicated that he then informed the remaining public complainants that they were under arrest for Assault Police. Mr. Gridin had submitted that Constable Lourenco's notes were ambiguous and that Constable Lourenco was only advising them after the fact of the reason for arrest.
498. In the overall picture, Y.B. and M.M. were arrested by both Constable Pais and Constable Lourenco. Constable Lourenco pointed his firearm at them and told them to get on the ground. They acquiesced and knew they were no longer free to leave. Constable Pais then told them all they were under arrest. I find that it was also Constable Lourenco's intention to arrest the remaining public complainants and he told them they were all under arrest as well. He did not take any steps to release them at the scene and both acted to further detain them. Though the arrests of B.A. and the other public complainants were in differing circumstances and the roles of the officers in the arrests differed, all of the public complainants were ultimately arrested for Assault Peace Officer by Constable Lourenco and Constable Pais. Both officers took steps to ensure that all arrests were completed. They share the responsibility for those arrests.
499. As such, I find that the particulars in Count One for Constable Lourenco in relation to Y.B. and M.M. have been proven. I find that the particulars in Count One for Constable Pais in relation to Y.B. and M.M. have been proven.

Conclusion

500. There was much evidence presented, and much contested, which did not have a bearing on the points to be proved in the NOHs and as such, was not included in this decision. Some of it was not determinative of any issue but provided context and was included. Finally, I have addressed what was relevant to the allegations of misconduct.

501. There were a number of areas that were disputed including what was related to utterances and allegations of 'who said what'. Those included but were not limited to the specific conversations during the initial contact between the officers and the public complainants, the demeanour of B.A. towards the officers, and what was said between B.A. and Constable Lourenco during the arrest, including allegations of threats and swearing by both. Though it was often not clear which version was correct, those issues were peripheral to the central issues in this hearing and did not have an impact on the findings of misconduct.

502. As discussed by the Commission in *Sterling and Hamilton - Wentworth Regional Police Service*, not every point in the NOH needed to be proven for a finding of misconduct to be made. That case noted that the charge against the officer would have been made out if only one or more of the points had been proven. As the Commission noted in *Lalande*;

'It does not logically follow, however, that should one part fail all must fail. Parts of the Charge Sheet allegation were found by the judge to be proved.'

503. As I noted previously, not all particulars of the NOH in Count One for Constable Lourenco and Count One for Constable Pais had been satisfied, namely those involving B.A. However, I found that misconduct had been made out on those particulars in relation to Y.B. and M.M. and in keeping with *Sterling and Hamilton Wentworth Regional Police Service* and *Lalande*; misconduct has been made out on those particulars.

Decision

504. I have carefully considered the testimony of the witnesses, examined the exhibits, and considered the submissions of all counsel and the prosecutor. Based on the evidence presented to me, I conclude there is clear and convincing evidence to substantiate misconduct against Constable Lourenco and Constable Pais. I make the following findings in relation to the NOHs.

Case 27/2014 – Constable Lourenco

Count One - Guilty in respect of Y.B. and M.M.

Count Two - Not Guilty

Count Three - Guilty

Case 28/2014 – Constable Pais

Count One -Guilty in respect of Y.B. and M.M.

This matter is to be returned on a later date for submissions to penalty.

A handwritten signature in black ink, appearing to read "Richard Hegedus". The signature is fluid and cursive, with a large initial "R" and "H".

Richard Hegedus
Inspector (Ret'd)
Hearing Officer

Dated and Released Electronically January 15, 2021

Appendix 'A'
Constable Lourenco (99971) and Constable Pais (9706)
Hearing - List of Exhibits 27/2014 and 28/2014

Hearing Officer Letter of Delegation S. Eley (Exhibit 1)
Hearing Officer Letter of Delegation R. Hegedus (Exhibit 2)
Prosecutor Letter of Designation D. Sinopoli (Exhibit 3)
Order for Production of Records June 23, 2015 (Exhibit 4)
TCHC Trespass Authorization Letter April 26, 2011 (Exhibit 5)
ICAD Event # K130554 November 21, 2011 (Exhibit 6)
Court Information B.A., M.M., Y.B. (Exhibit 7)
CIPS C.E. 2420402 B.A., B.A., M.M., Y.B. (Exhibit 8)
Surveillance Video Neptune Drive Clip 1- Interaction, Clip 2- Scout car (Exhibit 9)
Surveillance Video Neptune Clip 1- Walk by, Clip 2 -Exiting building (Exhibit 10)
OIPRD Interview PC Lourenco (99971) May 21, 2013 (Exhibit 11)
OIPRD Interview Transcript PC Lourenco (99971) May 21, 2013 (Exhibit 11a)
Memo Book Notes PC Lourenco (99971) November 21, 2011 (Exhibit 12)
OIPRD Interview PC Pais (9706) May 13, 2013 (Exhibit 13)
OIPRD Interview Transcript PC Pais (9706) May 13, 2013 (Exhibit 13a)
Memo Book Notes PC Pais (9706) November 21, 2011 (Exhibit 14)
TPS Procedure 15-01 Use of Force August 11, 2011 (Exhibit 15)
Letter from Gordon Fearn OIPRD March 27, 2013 (Exhibit 16)
Hand Drawn Diagram 135,145,155 Neptune Drive area (Exhibit 17)
Google Aerial Photo 135,145,155 Neptune Drive (Exhibit 18)
White Vest (Exhibit 19)
R. v. Brown 2003 CanLII 52142 (ONCA) (Exhibit 20)
Golomb and College of Physicians and Surgeons of Ontario (1976) 12 O.R. (2d) 73
(Exhibit 21)
Screen Capture Neptune Drive 6:15:17 November 21, 2011 (Exhibit 22)
Screen Capture Neptune Drive 6:20:33 November 21, 2011 (Exhibit 23)
Photo 155 Neptune Drive – Exterior Daylight (Exhibit 24)
Photo Ground Floor Balcony Neptune Drive - Exterior Daylight (Exhibit 25)
Screen Capture Neptune Drive 6:16:12 November 21, 2011 (Exhibit 26)
Police Radio Transmissions (Exhibit 27)
Screen Capture 33 Division Cell 01:43:04 November 22, 2011 (Exhibit 28)
Screen Capture 33 Division Cell 09:42:12 November 22, 2011 (Exhibit 29)
Letter from Urban Rez Solutions July 6, 2012 (Exhibit 30)

Appendix 'A' continued
Constable Lourenco (99971) and Constable Pais (9706)
Hearing - List of Exhibits 27/2014 and 28/2014

B.A. Booking Video 33 Division (Exhibit 31)
E-mail Forest Hill Orthodontics December 20, 2012 (Exhibit 32)
E-mail Forest Hill Orthodontics December 07, 2016 (Exhibit 33)
Booking Hall Video M.M. (Exhibit 34)
Screen Capture Parking Lot (Exhibit 35)
Street Map with Distances (Exhibit 36)
R. v. Plummer 2006 CanLII 38165 (ONCA) (Exhibit 37)
Peart v. Peel Regional Police Services, 2006 CanLII 37566 (ONCA) (Exhibit 38)
Google Map 3549 Bathurst Street with Distances (Exhibit 39)
Exhibit # not used (Exhibit 40)
Byrne and Ontario Provincial Police 2007, OCPC (Exhibit 41)
Photo 7308 Ground Floor Balcony Neptune Drive - Exterior Daylight (Exhibit 42)
Photo 7309 Ground Floor Wooden Fence Neptune Drive - Exterior Daylight (Exhibit 43)
Photo – Male Holding Pistol (Exhibit 44)
Photo Walkway/ Ground Floor Balcony Neptune Drive - Exterior Daylight (Exhibit 45)
Photo Walkway Parking and Walkway Neptune Drive - Exterior Daylight (Exhibit 46)

Book of Authorities Constable Lourenco (Exhibit 47)

Allen v. Alberta, (Law Enforcement Review Board) 2013 ABCA 187 (Exhibit 47 Tab 1)
Bernett v. Vancouver (City), 1999 BCCA 345 (Exhibit 47 Tab 2)
Brown v. Haldimand Norfolk Regional Police Force, OCCPS 87-16 (Exhibit 47 Tab 3)
Peel Regional Police Service v. Shockness,(1994 Board of Enquiry) (Exhibit 47 Tab 4)
R. v. Allen, 2015 ONSC 2594 (Exhibit 47 Tab 5)
R. v. Barrow, 2011 ONCA 239 (Exhibit 47 Tab 6)
R. v. Blackwood, [2009] O.J. No. 5393 (S.C.J.) (Exhibit 47 Tab 7)
R. v. C.B., [2003] O.J. No. 11 (ONCA) (Exhibit 47 Tab 8)
R. v. Choucair, 2011 NWTTC 13 (Exhibit 47 Tab 9)
R.v. C.L., [2013] O.J. No. 114 (SCJ) (Exhibit 47 Tab 10)
R. v. DaCosta, 2015 ONSC 1586 (Exhibit 47 Tab 11)

Appendix 'A' continued
Constable Lourenco (99971) and Constable Pais (9706)
Hearing - List of Exhibits 27/2014 and 28/2014

R. v. E.B.K., 2002 YKYC 6 (Exhibit 47 Tab 12)
R. v. G.T., 2013 ONSC 6472 (Exhibit 47 Tab 13)
R. v. J.F., [2003] O.J. No. 3241 (ONCA) (Exhibit 47 Tab 14)
R. v. Lynch, [1988] O.J. 1086 (C.A.) (Exhibit 47 Tab 15)
R. v. Pompeo, 2014 BCCA 317 (Exhibit 47 Tab 16)
R. v. Proulx, [1988] B.C.J. No. 1708 (C.A.) (Exhibit 47 Tab 17)
R. v. Rojas, [2008] 3 S.C.R. 111 (Exhibit 47 Tab 18)
R. v. Shinkewski, 2012 SKCA 63 (Exhibit 47 Tab 19)
Shaw and McGuigan, v. O.P.P., OCCPS 79-09 (Exhibit 47 Tab 20)
Smith v. Freland, 954 F.2d 343 (1992) (Exhibit 47 Tab 21)
Stewart v. Toronto (City) Police Services Board, 2018 ONSC 2875 (Exhibit 47 Tab 22)
TPS v. Adams et al., 2018 ONCPC 8 (Exhibit 47 Tab 23)
TPS v. Adams et al., (2015, TPS Disciplinary Tribunal, Per Cunningham J.) (Exhibit 47 Tab 24)
Cases Relied on by Constable Sharnil Pais (Exhibit 48)
Allen v. Munro, (Board of Inquiry – 1994) (Exhibit 48 Tab 1)
Penner v. Niagara (Regional Police Services Board), [2013] S.C.J. No. 19 (Exhibit 48 Tab 2)
Ottawa (City) Police Service v. Ottawa (City) Police Service, [2016] O.J. No. 2431 (CA) (Exhibit 48 Tab 3)
Greater Sudbury Police Service, [2010] O.J. No. 793 (Div. Ct.) (Exhibit 48 Tab 4)
Golumb and College of Physicians and Surgeons of Ontario, (1976) 12 O.R. (2d) 73 (Exhibit 48 Tab 5)
Smith v. Murdock, (1987) 25 O.A.C. 246 (Div. Ct.) (Exhibit 48 Tab 6)
Wang and Toronto Police Service, 2015 (Exhibit 48 Tab 7)
Katsoulakos v. Assn. of Professional Engineers of Ontario, [2014] O.J. 4430 (Div. Ct.) (Exhibit 48 Tab 8)
Nguyen v. Chartered Professional Accountants of British Columbia, [2018] B.C.J. No. 699 (SC) (Exhibit 48 Tab 9)
Allen v. Alberta, (Law Enforcement Review Board) [2013] A.J. No. 553 (ABCA);
Engel v. Allen [2013] S.C.C.A. No. 347 (SCC) (Exhibit 48 Tab 10)
R. v. Storrey, (1990) 53 C.C.C. (3d) 316 (SCC) (Exhibit 48 Tab 11)
Pearson and Visconti (1994 Board of Enquiry) (Exhibit 48 Tab 12)
Ikemota v. Cota and Ontario Provincial Police, 2009 OCCPS (Exhibit 48 Tab 13)
R. v. Ing, [2013] O.J. No. 98 (OCJ) (Exhibit 48 Tab 14)

Appendix 'A' continued
Constable Lourenco (99971) and Constable Pais (9706)
Hearing - List of Exhibits 27/2014 and 28/2014

Cole et al., 1998 Board of Inquiry (Exhibit 48 Tab 15)
Tomie-Gallant v. Ontario, [1996] O.J. No. 2863 (Div. Ct.) (Exhibit 48 Tab 16)
R. v. Alexson, (2015) 2015 MBCA 5 (Exhibit 48 Tab 17)
Wiles v. Ontario (Police Complaints Commissioner), [1997] O.J. No. 6274 (Div. Ct.)
(Exhibit 48 Tab 18)
Charlton v. St. Thomas Police Services Board, 2009 CanLII 25977 (ONSC) (Exhibit
48 Tab 19)
Li and Toronto Police Service, 2014 (Exhibit 48 Tab 20)
R. v. Bush, (2010) ONCA 554 (Exhibit 48 Tab 21)

Cases Relied on by Constable Sharnil Pais (Exhibit 49)

Canton v. Kaija, 2008 OCCPS (Exhibit 49 Tab 22)
Ardiles and Toronto Police Service, 2016 OCPC (Exhibit 49 Tab 23)
Peel Regional Police Service v. Shockness, (1994 Board of Inquiry) (Exhibit 49 Tab
24)
R.M. and Sergeant C.B. and Constable J.N., (2007 Law Enforcement Review Board)
(Exhibit 49 Tab 25)
The Royal Newfoundland Constabulary and Thistle and Mcgrath, (1996 Adjudicator)
(Exhibit 49 Tab 26)
P.G. and Attorney General of Ontario, (1995) (Exhibit 49 Tab 27)
Elliott (1995 Board of Enquiry) (Exhibit 49 Tab 28)
Whitney v. OPP, [2007] O.J. No. 2668 (Div. Ct.) (Exhibit 49 Tab 29)
Fletcher v. Collins, [1968] O.J. No. 1206 (Div. Ct.) (Exhibit 49 Tab 30)
Magda and Sheppard, [1992] (Exhibit 49 Tab 31)
Hallam v. College of Physicians (1993) 61 O.A.C. 143 (Div. Ct.) (Exhibit 49 Tab 32)
Maxwell v. Walmart [2013] A.J. No. 1120 (QB) (Exhibit 49 Tab 33)
R. v. Gardner, [1986] N.B.J. No. 941 (Q.B.) (Exhibit 49 Tab 34)
R. v. Dawydiuk, (2010) 253 C.C.C. (3d) 493 (BCCA) (Exhibit 49 Tab 35)
R. v. Judge, 1957 O.J. No. 423 (CA) (Exhibit 49 Tab 36)
Rose et al. and Toronto Police Service, (2018) OCPC (Exhibit 49 Tab 37)
R. v. Debot, (1986) 30 C.C.C. (3d) 207 (ONCA) (Exhibit 49 Tab 38)
R. v. Debot, (1989) 52 C.C.C. (3d) 193 (SCC) (Exhibit 49 Tab 39)
R. v. Biron, (1975) 23 C.C.C. (3d) 513 (SCC) (Exhibit 49 Tab 40)
R. v. L.B., (2007) 227 C.C.C. (3d) 70 (ONCA) (Exhibit 49 Tab 41)
R. v. Nesbeth, (2008) 238 C.C.C. (3d) 567 (ONCA) (Exhibit 49 Tab 42)

Appendix 'A' continued
Constable Lourenco (99971) and Constable Pais (9706)
Hearing - List of Exhibits 27/2014 and 28/2014

R. v. Suberu, (2009) 245 C.C.C. (3d) 112 (SCC) (Exhibit 49 Tab 43)
R. v. Reid, (2011) O.J. No. 6317 (SC) (Exhibit 49 Tab 44)
R. v. Nguyen, (2004) B.C.J. No. 2289 (CA) (Exhibit 49 Tab 45)

Book of Authorities of the Complainants Volume 1 of 2 (Exhibit 50)

R. v. S. (R.D.), [1997] 3 SCR 484, 1997 CanLII 324 (SCC) (Exhibit 50 Tab 1)
Abbott v. Toronto Police Services Board, 2009 HRTO 1909 (CanLII) (Exhibit 50 Tab 2)
Brown v. Regional Municipality of Durham Police Service Board, 1998 CanLII 7198 (ONCA) (Exhibit 50 Tab 3)
Wood v. Schaeffer, [2013] 3SCR 1053 SCC 71 (CanLII) (Exhibit 50 Tab 4)
Rose v. Toronto Police Service, 2016 OCPC CanLII 84144 (Exhibit 50 Tab 5)
R. v. Asante-Mensah, [2003] 2 S.C.R. 3 (Exhibit 50 Tab 6)
Sterling and Hamilton Wentworth Regional Police Service, 1999 OCPC CanLII 31606 (Exhibit 50 Tab 7)
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