

**IN THE MATTER OF POLICE SERVICES ACT
R.S.O. 1990, C.P. 15, as amended:**

Sergeant Douglas Rose (#3478)

AND

Sergeant Michael Ferry (#2943)

DECISION

1. The events in question occurred on June 27, 2010 during the G20 Summit in Toronto. Sergeant Michael Ferry (#2943) (“Ferry”) and Douglas Rose (#3478) (“Rose”) are each charged with misconduct in arresting Ryan Mitchell (“Mitchell”) and Lisa Walter (“Walter”) without having the requisite grounds to do so, thereby making an unlawful or unnecessary arrest.
2. Ferry and Rose are each further charged that in arresting Mitchell they used unreasonable force and thus unnecessary force, without lawful excuse.
3. The foregoing allegations are contrary to Section 2(1)(g)(i) and (ii) respectively, of the Schedule Code of Conduct of the Ontario Regulation 268/10 and therefore contrary to Section 80(1)(a) of *The Police Services Act*, R.S.O. 1990 as amended.
4. Rose is further charged that in dealing with Walter he was abusive and uncivil towards her and in doing so committed misconduct in using profane, abusive or insulting language, contrary to Section 2(1)(a)(v) of the said Code of Conduct and said Section 80(1)(a).

OVERVIEW

5. On June 27th, 2010 during the course of the G20 Summit (“G20”), Rose and Ferry of the Toronto Police Service (“TPS”) were on duty and part of the police teams tasked to safeguard and patrol the area of St. Thomas Street and Bloor Street in Toronto. Rose arrived on scene at around 11:30 a.m. Approximately 10 – 15 civilians were under arrest at that time and were sitting against a wall at the south-east corner of the intersection. The area was busy with about 20 police officers, and both pedestrian and vehicular traffic. Ferry arrived at about 12:50 p.m.
6. Rose testified that, in order to keep control of the area and detainees he established a “perimeter” on the road, and was attempting to keep people from breaching that perimeter.
7. Mitchell and Walter were civilians who were part of the Harbord Alternative Media Centre (“AMC”) during the G20. The AMC essentially comprised a number of amateur journalists and academics who had an interest in covering portions of the G20. Members of the AMC per se had no official accreditation as media, but Walter had official G20 Alternative Media Accreditation.
8. Between 12:00 and 12:30 p.m. Mitchell and Walter separately learned that some of their fellow AMC members were being detained at Bloor and St. Thomas. Mitchell attended the area with a friend, Elijah Horwatt, and they met with Walter upon arrival. They observed a number of their friends and acquaintances being detained.
9. While Rose was attending to an injured individual in custody in the backseat of a police cruiser, Walter approached, identified herself as a person in the media, advised that she wanted to speak with the detainee and actually began to speak to him. Rose told her to leave the area and go back to the sidewalk. Over the next few minutes, as she attempted to

communicate with a detainee and asked Rose information about the arrests. Rose had two further interactions with Walter, in which he again advised her to leave and go back to the sidewalk.

10. What then happened is the subject of much conflicting evidence. Mitchell's version is that he was walking away as directed by Ferry but in response to arrest threats said "Get off it" to the officers, triggering his violent arrest.
11. Rose testified that he saw Ferry interacting with Mitchell whose body language appeared aggressive. As Rose approached, Mitchell said to Ferry "if we take Yorkville it will be expensive." Ferry tried to grab Mitchell, but Mitchell broke free and began to run away. Ferry pursued Mitchell and Rose pursued to assist Ferry.
12. Ferry testified he warned Mitchell several times to leave the area where officers were processing arrested individuals. He warned Mitchell to leave the area or he would be arrested. Following abusive language from Mitchell and the statement "if we take Yorkville it will be expensive", Ferry attempted to arrest Mitchell but he pulled away. Ferry gave chase and arrested Mitchell.
13. Walter was with Mitchell as they both began to leave the area – walking according to her. She filmed Ferry and Rose effecting Mitchell's arrest. She was standing at least 6 – 7 feet away, and was aggressively telling the officers to stop hurting Mitchell. Rose then ordered another officer to arrest Walter.

Principal Witnesses

14. Mitchell is a Ph.D. student at York University, as he was at the time of the G20. He teaches at Humber College and at York University. As part of an independent study

- project at York, he was involved in setting up the AMC. This was a space for practising journalism, in relation to the G20, that was not affiliated with mainstream media. He has no criminal convictions on his record, and with the exception of June 27, 2010, has never been arrested.
15. Walter is a visual artist, an educator with the labour movement, an advocate for the mentally ill, and a freelance journalist. She suffers from mental illness but on her evidence was stable and improving at the time of the arrests. This was the first time she had ever been arrested in her life. Prior to the G20, Walter had had experience dealing with the police, and the Toronto Police Service in particular, as part of her work as a union staffer with OPSEU during provincial government strikes. In that work, she had had “very positive” experiences dealing with the TPS, whose officers she described as “very professional” in those interactions. She had never had a problem with the police before June, 2010.
 16. Elijah Horwatt (“Horwatt”) is a Ph.D. student at York, and a film programmer for the Toronto International Film Festival and the Hot Docs documentary film festival. He and Mitchell were involved in setting up the Harbord AMC as part of their studies. Horwatt has never been arrested in his life.
 17. All the prosecution witnesses were accredited by the Harbord AMC. The Harbord AMC had a vetting process and issued identification badges to those who were allowed to use its facilities.
 18. Walter was accredited not only by the Harbord AMC but also by the RCMP, after a security check, for the official G20 Alternative Media Centre.

19. Rose and Ferry are each 26 year veterans of the Toronto Police Service. Each has no discipline record.

Before the Events in Question

20. The previous day, June 26, 2010 had seen widespread violent protests in the Toronto downtown core. Police were surrounded and attacked, police vehicles burned or otherwise destroyed and many properties damaged and stores looted. It was an unprecedented and tumultuous day.
21. Rose had been at King Street West and Bay Street the previous day and was directly involved when police were attacked. He testified that he had a lot of questions about what had happened and that he was going to do what he needed to do to prevent events like those from happening again.
22. Ferry testified that he and the TPS were embarrassed by what had happened at King and Bay on Saturday, June 26, 2010, and that he wasn't going to let his safety be compromised again; if he saw something he could take action on, he would.
23. Staff Sergeant Reed ("Reed") testified that he briefed officers on the morning of Sunday, June 27, 2010. He told them that the information was that protesters planned to "damage the high end shops" in Yorkville and that "we were gonna do everything we could to make sure that that didn't happen." To accomplish this, Reed suggested to his officers that they might make arrests for breach of peace to "put um the potential problems uh out of the way" and use "any tool that we could use to prevent anybody from causing damage." These suggestions may have played a role in the arrests of Mitchel and Walter. Reed

admitted that he delivered this briefing without referring to the *Criminal Code* section creating the power to arrest for breach of the peace.

24. Nevertheless, Reed agreed that he expected officers effecting arrests for breach of the peace would specify the bases for the arrest and set out the grounds for the arrest accurately and completely, so that the arrest could be properly justified if it were ever challenged. He admitted that he did not intend officers to arrest people who were merely protesters or who merely questioned why other people were being arrested.

Events at Bloor and St. Thomas

25. On Sunday, June 27, 2010, Mitchell and Horwatt were at the Christie subway station when Horwatt heard that something was happening with AMC members at Bay and Bloor. The two travelled separately to Bloor Street and St. Thomas Street. Horwatt arrived first. When Mitchell arrived, Walter was there as well. Walter was filming the events.
26. Walter testified that, on June 27, 2010, she learned by telephone that some colleagues of hers had fallen out of contact and she decided to go to the Bloor and St. Thomas area to see what had happened.

Police Presence at Bloor and St. Thomas

27. Mitchell testified that there were 15-24 police officers on the scene, so it was "clamped down", well under control. There was no demonstration going on and no violence.
28. Walter testified that, when she arrived, she saw people in handcuffs lined up along the wall on the south-east corner of St. Thomas and Bloor. There were 20-30 police officers. There was no demonstration going on; there was no violent interaction and the scene looked very

- calm. There was no "fray". The officers were laughing from time to time and looking very casual.
29. Horwatt testified that there was no demonstration going on, no violence, at least four police cars and at least ten officers on the scene.
 30. Rose acknowledged that there were 15-20 police officers at Bloor and St. Thomas and numerous police cars, compared to only 11 arrested people. The arrested people were handcuffed "to the rear" (i.e. with their arms behind them), which is a comparatively severe restraint. In viewing Exhibit 6.2 (a video of the scene at the relevant time) he agreed that there was no shouting, no fighting, no hostile crowd, no demonstrations going on in the background, no confrontations, and that the scene was calm and the police were in control.
 31. Ferry testified that when he arrived at Bloor and St. Thomas there were between 15 and 20 police officers on scene, compared to only 12-15 arrestees. When shown Exhibit 6.2 between 10:14 and 11:20, he admitted that there was no protest going on and that the situation was well in hand.
 32. PC Montis testified that the sum total of the intelligence she had received about Yorkville was that there might be "protestors" in Yorkville. On the morning of June 27, 2010, Yorkville was calm and quiet, with no ongoing protests. Further, she acknowledged that Bloor and St. Thomas isn't part of Yorkville.
 33. Exhibit 6.2 shows ten arrested people, handcuffed to the rear, and significantly more police officers, before Walter and Mitchell are arrested. Both before and after those arrests, the police officers on the scene appear quite relaxed.
 34. In the photograph marked as Exhibit 21, taken after Mitchell and Walter were arrested, at least 12 police officers are visible.

35. Given the problems that arose the previous day, and wanting to prevent any similar issues, Rose decided to set up a perimeter on the west side of St. Thomas and north side of Bloor. The demarcation for the perimeter was at the curb. The idea was for people to remain off the street, though Rose was not there the entire time and could not be sure if people were occasionally walking through. Rose instructed civilians not to “go past this area” and not to “step onto the road”. This is corroborated by Horwatt, who testified that there was a mantra by the police officers on the scene of “do not step on the road, you will be arrested...” The police were “quite adamant about not touching the street.” He testified that although he did not see Walter disobey that order, if she did so it would be “very provocative under those circumstances.”
36. According to Rose, the main reason he set up this perimeter was for officer safety. Overall, it was a busy street and slightly overwhelming situation.
37. Rose admitted that pedestrians were allowed to walk through the area, past the alleged "perimeter". The video marked as Exhibit 6.7 confirms this. Pedestrians were walking within a few feet of the police officers, and the officers weren't concerned about pedestrians getting close to arrested people until after Adam MacIsaac (“MacIsaac”) was arrested.
38. In fact, both before and after Mitchell and Walter were arrested, there was a hot dog vendor on the south-east corner of Bloor and St. Thomas, near the arrested persons, deep within the "perimeter". Rose admitted that the vendor did a "brisk business with the police officers that were there". The vendor was not ordered to leave or move away from the arrested people, even though items on his cart (hot grill, tongs) posed obvious dangers if hostile people could access them. The prosecution argues that the presence of the hot dog

vendor shows that Rose's purported "safety concerns" in respect of Mitchell and Walter were exaggerations, if not outright fabrications. There were clearly no such concerns in respect of the much more dangerous items in the hot dog cart, or if there were, they were outweighed by the officers' desire to have a reliable source of hot dogs within a close proximity.

39. Whether the "perimeter" was a reasonably necessary facility or not, and whether or not it was rigidly enforced at every minute, it is relevant only in the context of the interaction between the complainants and the officers.

Interaction between the Officers and the Complainants

40. Although the evidence is somewhat conflicting in reference to Walter's early interaction with Rose, the differences are for the most part insignificant.
41. When Walter arrived on the scene she saw an acquaintance, MacIsaac sitting in the rear of a police cruiser. He was under arrest and needed medical attention. Walter attempted to communicate with MacIsaac but Rose intervened preventing her from doing so. Nothing was untoward at this point; Rose directed Walter to go to the sidewalk on the west side of St. Thomas Street ("the perimeter"). She did so.
42. Walter had seen another friend, Amy Miller, who was under arrest in the group of arrestees. Walter returned to the middle of the street, called out to Amy and when confronted by Rose, asked why these persons were under arrest, identifying herself as a member of the Media. Rose responded by telling Walter to contact Corporate Communications. Walter retreated to the sidewalk and attempted to do so by cellphone,

without success. She then returned to the middle of St. Thomas Street and again asked Rose for the information.

43. It was around this time that Walter claims an officer, who she initially said was Rose, started using "vulgar language" toward her. She alleged that he referred to her as a "fucking dyke" and as a "bitch" among other things. This officer was not wearing his name tag, and as a result of his demeanor toward her she asked for his name and badge number which he refused to give.
44. According to Rose, he never made those, nor any of the offensive comments alleged by Walter. Rose maintained he would never call a member of the public such names as a "cunt" or "douchebag". Not to mention that given the extent of the videotaping happening, he would fully expect any such comments might very well be caught on tape.
45. Rose testified that he had his name tag and epaulettes (with his badge number) on the entire time, as corroborated by other witness officers as well as Horwatt – who testified that he was able to visually identify Rose later on by his name on his uniform – and by any videos or pictures of Rose taken that day. When pressed in cross-examination, Walter ultimately admitted it may not have been Rose who said those words at that time.
46. Mitchell testified that he never addressed passers-by at the scene and he never observed Walter do so. In particular, Mitchell never tried to "rile up the crowd". Similarly, Walter never attempted to "rile up" the people who were under arrest. Walter was "assertive" and "critical" of police actions, but she was neither "boisterous" nor "anti-police". Mitchell testified that he never swore at the police, in particularly never used the term "fucking pig", and never gave anybody "the finger". He never said, "If we take Yorkville, it will be

- expensive". His girlfriend worked at a store in Yorkville and he never would have said that. He never said, "This is shit and you are in the middle".
47. Walter testified that she never "addressed the crowd" at Bloor and St. Thomas and never tried to "rile up" passersby or the arrested people; she had no reason to do so. Neither did Mitchell act aggressively, act in a threatening way, or try to "rile up" the crowd. Walter never saw Mitchell give Ferry the finger or say "fucking pig"; Mitchell never said, "If we take Yorkville it's going to be expensive" and never said, "This is shit and you're in the middle of it". Walter testified that she never said "you bastards, you deserve what you got yesterday".
48. Horwatt never heard Walter or Mitchell address civilians on the street. He denied that they had tried to "rile up the crowd" or arrested persons, and in fact did not think that there was a crowd there at all. Their body language was not aggressive, and they never used obscenities.
49. Rose said that he did not see Mitchell interfering with police while they were dealing with arrested people, or pestering police, and he would have been watching out for people doing that. Similarly, he would have noticed if Mitchell had been "inciting" or "riling up" the crowd, and he didn't notice that. Rose didn't hear Mitchell yell obscenities, and, in particular, didn't hear him say "fucking pig"; he admitted that, had someone said that, given the events of the previous day, it would have stood out in his mind. He never saw Mitchell give Ferry "the finger". Rose admitted that his notes were incorrect when they stated that Mitchell was "yelling obscenities" and that Mitchell was "communicating with people under arrest".

50. Ferry testified that he was concerned about Walter because he saw a lawyer's number written on her arm and she was wearing a media pass. He claimed that she said, "You bastards, you deserve what you got yesterday". His response was to tell her that she was committing a criminal offence - "obstruct police". His intention was to "put handcuffs on her" if she did not leave.
51. Ferry claims that Ryan Mitchell started to say, "This is not a police state" over and over, getting into a "back and forth" on the subject with Ferry. He had not made this allegation prior to the hearing.
52. Ferry testified he had three distinct interactions with Walter. Ferry approached Walter after witnessing her behaviour, and asked her to leave the scene. Walter backed up a few feet, returned shortly after, and continued to engage with the detainees once again. Ferry re-approached Walter and asked her again to leave the area. Walter responded by telling him that she was a member of the media and began demanding the badge numbers of police officers who were present at the scene.
53. Walter breached the order to vacate the premises a third time, by once again returning to the scene. Ferry testified that he had to physically stand in front of Walter to ensure that she did not interfere once again with the detainees. It is at this point that she stated to him, "You bastards deserve what you got yesterday." Ferry interpreted that comment as a direct reference to the events that had occurred the day before. Ferry responded by cautioning Walter for 'Obstruct Police' and Walter responded by demanding badge numbers, swearing, and raising her voice in a perceived attempt to rile up the crowd. It is at this point that Ferry notices Mitchell.

54. Ferry testified that he witnessed Mitchell on multiple occasions go into the area where other officers were processing the arrested individuals. Ferry warned Mitchell a further time to leave the area. Mitchell responded with repeated statements of, “this is not a police state” and “we do not have to go”. He also gave Ferry ‘the finger’ and called him a “fucking pig”. Mitchell eventually began walking away. He turned back to Ferry and said, “if we take Yorkville it is going to be expensive.” Upon hearing that, Ferry decided to arrest Mitchell for breach of the peace.

The Arrest of Ryan Mitchell

55. One of the issues in this matter is whether both Ferry and Rose arrested Mitchell, or whether Ferry alone arrested him, with Rose assisting.
56. Rose testified that he looked up the road and saw Ferry on the southwest corner of St. Thomas and Bloor interacting with Mitchell. It appeared to Rose from their body language that Ferry was giving Mitchell some direction, and that Mitchell was not obeying. Rose could not hear what was being said. Ferry appeared to need help, so Rose attended to assist.
57. As Rose approached, Mitchell states “if we take Yorkville it’ll be expensive.” At this time, Ferry tried to grab Mitchell’s right arm, Mitchell spun away and ran west down Bloor Street. Ferry ran after Mitchell, and Rose ran after Ferry. Ferry caught up to Mitchell, grabbed him in almost a hug. Rose caught up to them about two seconds later and grabbed hold of Mitchell as well. All three went to the ground, and Mitchell was ultimately handcuffed. Rose states that Ferry was the arresting officer and Rose was the assisting officer.

58. While Mitchell's account of his arrest differed on many points from Rose's, Ferry agreed that he was the arresting officer, and Rose was assisting. Mitchell said Ferry arrested him and was assisted by Rose. In addition, the arrest sheet listed Ferry as the arresting officer, with no mention of Rose.
59. Once Mitchell was on the ground, Rose placed one knee on the small of Mitchell's back and one knee further up Mitchell's back in order to handcuff him. This is standard technique taught at the Police College, and one that Rose has been using for 26 years. As Rose was trying to handcuff him, Mitchell was tensing his arms. Rose used no other force.
60. Once Mitchell was handcuffed he was brought to his feet and Rose took him to the wall with the other detainees. Rose left Mitchell there and had no further contact with him.
61. Ferry testified that he attempted to arrest Mitchell by grabbing his upper right shoulder. Mitchell pulled away and began running westbound on Bloor Street. Ferry caught up to him and took him to the ground in order to effect the arrest. According to Ferry, Mitchell failed to comply with the demands – he was actively resisting arrest and a struggle ensued. Upon bringing Mitchell to the ground, Ferry put Mitchell in a headlock in order to control Mitchell's movements. On multiple occasions Ferry attempted to let go of the headlock to reach for his handcuff pouch so that he could handcuff Mitchell. Each time, Ferry released the headlock Mitchell would attempt to bite Ferry's hand. Ferry repeatedly instructed Mitchell to not bite him, however Mitchell would not comply. Rose assisted Ferry and placed Mitchell in handcuffs, at which point Ferry immediately released the headlock.

62. Mitchell testified that, in the moments before the arrest Horwatt suggested that the three should return to the Harbord AMC, but Walter wanted to stay, and Mitchell decided to stay with her, for her safety. A police officer told Walter and him to leave and stop filming. Mitchell identified this officer as Sgt. Ferry. They began to walk away, westbound on the south side of Bloor Street. Ferry repeated his command to leave. He and Walter continued to walk away and paused at the doorway of 101 Bloor Street West. Ferry told them to leave or he would arrest them for breach of the peace; Mitchell responded by making a dismissive motion with his hand, as if swatting a fly, and said "Get off it". Mitchell estimated that Ferry was 40-50 feet behind them when he made this remark.
63. Walter testified that she conferred with Horwatt and Mitchell and it was decided that Horwatt would leave and Mitchell would remain. They returned to the middle of St. Thomas. After being ordered to leave by Rose, they walked west. A police officer ordered them to leave entirely, and cross Bloor Street, but they could not do so immediately because of roadwork barriers and landscaping tree cages; they had to walk further west before they could cross the street.
64. Horwatt testified that he left Mitchell and Walter and crossed to the north side of the street, making his way around the construction barriers running along Bloor Street. It was from that point that he witnessed the Mitchell and Walter arrests, filming both.
65. Mitchell testified that, in response to Mitchell's gesture and remark "get off it", Ferry said "That's breach of the peace" and commanded him to get down on the ground. Mitchell, confused, started moving to his knees. When he was midway down, Ferry took him in a headlock and put him to the ground. Mitchell testified that, when he was on the ground,

- Ferry began to choke him, livid and screaming as he did so. Mitchell was compliant and did not struggle. Nevertheless, Ferry screamed "Stop fighting me you fuck". Mitchell referred to the video taken by Horwatt showing Ferry screaming this while Mitchell is lying face down on the ground with his legs still. Ferry choked Mitchell for approximately 30 seconds. Mitchell testified that, while he was being choked by Ferry, another officer approached and kneeled on Mitchell's back. This second officer called Mitchell a "little cocksucker" while pulling Mitchell's free arm up; then he said, "I'm going to love shoving this baton up your ass". While Mitchell did not see the officer's face at that moment, he saw the second officer later and, on that basis, identified him in the hearing as Rose. The only two officers there at the time were Ferry and Rose. Mitchell also recognized Rose's voice from the video exhibit as the voice that had made the earlier remarks to him. Mitchell weighed 170 pounds and stands 5 feet 8 inches tall. Rose denied saying these things.
66. Walter testified that, while she and Mitchell were leaving on the officers' orders, Mitchell said, "Get off it", and then she heard someone yell, "Get him - that man is under arrest". She testified that officers ran at Mitchell and pushed him to the ground, one of whom was Rose. Their momentum pushed him to the ground while he was standing upright. The officers handled Mitchell "extremely roughly if not violently". One of them was Ferry.
67. Horwatt testified that he heard Mitchell say "get off it" and saw him make a dismissive downward sweeping gesture with his right hand, as Mitchell was walking west. He heard shouts as two officers ran without warning towards Mitchell and pushed him down. Horwatt began filming as soon as he could, and the resulting footage was

introduced in the hearing as Exhibit 6.1. As the police officers ran towards Mitchell, Horwatt described Mitchell as a "deer in the headlights", standing still. He had not been running and had not started to run. The officers used the weight of their bodies to push Mitchell to the ground.

The Arrest of Lisa Walter

68. Walter was approximately seven to ten feet away from Mitchell as the officers were on top of him. She never approached them more closely and never came into physical contact with Mitchell or with the officers during the arrest. She admitted that she felt angry and frustrated but did not behave aggressively. She never said, "You bastards, you deserve what you got yesterday", and never heard Mitchell say, "If we take Yorkville, it will be expensive". She had received training on how to deal with police, including instructions never to interfere with an arrest, and information about what the consequences could be, including a charge of obstruct police. She spoke loudly and repeatedly to the officers, asking them to stop hurting Mitchell as she filmed the arrest. Walter testified that in response to this, Rose turned to her and yelled at her "get out of here" and that she was obstructing police. She responded by saying: "I'm nowhere close to you," and "I'm not doing anything except watching you hurt this man unnecessarily." Rose warned her several times.
69. Then Rose ordered the other officers to arrest her, saying, "Grab that woman, she's under arrest." An unknown number of officers rushed her and knocked her to the ground. Her right arm was pinned underneath her body as she fell. Officers grabbed her left arm and pulled it behind her back, shouting at her to pull her right arm out. She was handcuffed.

70. Rose claims that Walter committed the criminal offence of obstruct police. He said he was distracted so as to cause him to drop a pair of handcuffs. Rose also suggested that Walter had committed the criminal offence of causing a disturbance under s. 175 of the *Criminal Code*. He acknowledged that Walter never made physical contact, never initiated physical contact, and never even attempted it; she never interfered physically with the arrest.
71. Ferry admitted that Exhibit 6.1 shows that Walter was not being physically aggressive before she was arrested, and that she was standing still, not approaching the officers arresting Mitchell. He admitted that she never had any physical contact with him, nor with Rose, nor did she threaten to have any such contact.
72. PC Montis assisted in the arrest of Walter. She implied that Walter was not aggressive when she was arrested, testifying rather that she “could have become aggressive”. She testified that Walter was six or seven feet away from the arrest of Mitchell. She alleged that Walter was “intercepting” or “interfering with the arrest”, but, when asked, explained this: “somebody behind you asking you questions or yelling at you or you know saying things um it’s – that’s what I – that’s – ther – she’s interfering um with them effecting the arrest.” According to PC Montis, there was no physical contact, nor did Walter attempt to have physical contact with Rose.
73. Montis alleged that after Walter was arrested, she was “going ballistic” but later withdrew that allegation upon reviewing Exhibit 6.2. According to PC Montis, who was directing traffic nearby, Walter’s shouting before she was arrested was enough to attract her attention and cause Montis to leave her duty to check on the safety of Rose and Ferry.
74. Rose testified that he had very serious safety concerns while Walter was so close by as Mitchell was arrested. He had his back to Walter, he had a number of weapons exposed on

his belt, and he was occupied trying to control the arrestee. He did not know Walter and could not know what she might be capable of in those circumstances. Montis testified that she too was uncomfortable with how close Walter was to Rose in that situation.

75. Rose testified that during these interactions, Walter was a potential threat and that there was a very real possibility that she could jump in. Allegedly, Walter was an impediment to Rose assisting in the arrest.
76. In Rose's stated opinion, at this point he could have arrested Walter for obstructing a peace officer – a serious criminal offence. He further alleged she was arrestable for causing a disturbance, an offence which in and of itself is a breach of the peace. This opinion was shared by Officer Montis.
77. Rose testified that he decided not to charge Walter with a criminal offence, but rather have her arrested for breach of the peace. He thought the problem was best solved just getting her out of the area.

Post-Arrest Detention and Lack of Charges

78. Mitchell was detained for eight hours. He was never charged with any offence.
79. Walter was taken to the temporary detention centre and held there for thirteen hours. She was never charged with any offence.
80. Rose acknowledged that he had a duty to lay charges when he saw an offence committed, subject to some discretion. He explained why he did not charge Walter for those alleged offences by testifying that, in order to do so, he would have had to leave the scene and go in person to the Prisoner Processing Centre ("PPC"). However, he acknowledged that he understood that the procedure was that information on the HOT sheet would be used by

- detectives at the PPC to determine whether to lay charges. He admitted that people could be charged based on the HOT sheet alone.
81. Ferry suggested in his testimony that an arrested person escaping from lawful custody and running away “wasn’t that significant”. Yet he said that if somebody tried to bite him and escaped lawful custody, he would lay charges.
82. Ferry also expressed the view that Mitchell committed obstruct police by not “providing me his details after the arrest ...”
83. Staff Sgt. Reed acknowledged that the HOT sheet was to inform officers at the PPC about the reasons for the arrest, and, in particular, whether criminal charges should be laid against an arrested person. This implies that Rose and/or Ferry could have laid criminal charges in this case without personally attending at the PPC.
84. It was Detective Constable Gough’s evidence that obstructing a police officer, resisting arrest and assaulting police, are all serious criminal offences. He also testified that the HOT sheets were intended to set out accurately what arrested persons had done so that investigators at the PPC could decide whether to charge them.

Alleged Discreditable Conduct by Rose

85. Mitchell testified that, after the arrest, Ferry dealt with him and Rose dealt with Walter.
86. Walter recounted an alleged encounter with Rose that occurred before the arrests. She described Rose as “very troubled by my presence”, “hostile”, and “verbally abusive”: he referred to her as a “bitch” and a “fucking dyke”. Rose denies the offensive language.

87. Walter alleges that, after the arrest, Rose (as well as another officer or other officers) called Walter “mister” or “Sir”, he did this “constantly”. An officer can be heard in the video marked as Exhibit 6.2 calling Walter “Sir” repeatedly.
88. Rose called her a “fucking dyke”, a “douche bag”, and a “cunt”. Rose flipped through Walter’s calendar book, and read in a mocking voice a poem by Margaret Atwood that he found inside. He also found a note in the calendar regarding a medical appointment and made a mocking comment about that. He also found a note about Mental Health Awareness Week and said, “Oh – that just confirms it. She’s a just a crazy bitch.”
89. Despite some attempt in cross-examination to suggest to her that it was actually another officer who made these remarks, Walter held firm that Rose had made them, but that another officer had made similar remarks immediately after her arrest. Rose stood out in her memory “because his barrage of slurs was sustained and memorable and it happened.”
90. While Rose was searching Walter’s belongings, she told him that he had been a bully in high school. He responded that she was “the bitch in school that couldn’t get laid.”
91. Montis testified that she never heard Rose use slurs towards Walter, and that if he had said “something completely inappropriate, I would have remembered that.” She denies knowing who said “sir sir sir”.
92. Detective Constable Gough testified it was he who said the “sir, sir, sir, sir” comments to Walter, and said he had actually mistaken her for a man.
93. On the other hand, once Walter was arrested, Montis walked her to the wall where the detainees were being kept. Rose and Montis’s evidence was that Rose had no more dealings with Walter other than to take the HOT team picture with her (the arrest picture).

In total, Rose had approximately 30 seconds contact with Walter following her arrest. He had no contact with her in between her arrest and the HOT team picture.

94. Walter initially testified that Rose and Montis were the two officers who walked her to the detainee wall. She claims that she had very unpleasant interactions with Rose at this point. Among other things, she alleged that Rose called her “sir” when she was at the detainee wall, as well as calling her a “fucking dyke” and a “cunt”. After watching video 6.2, Walter testified that she believed it was Rose saying “sir, sir, sir” to her.
95. After Montis arrested Walter and brought her to the wall, she left Walter with PC Gough and other officers for a short time and walked back to Rose to check whether further assistance was required. Gough testified that it was he who (accidentally) called Walter “sir”. He testified he is the officer that can be heard in video 6.2 saying “sir, sir, sir”. Walter was very upset with PC Gough. While PC Montis was speaking with Rose, PC Gough approached asked her to deal with Walter. PC Montis re-attended to Walter and remained with her until Walter was transported from the scene.
96. Rose testified he made absolutely no rude comments to Walter at any time. He said none of the offensive comments alleged by her. The evidence of Officer Montis was that she with Walter almost the entire time after her arrest – except between the time she left to speak with Rose to when Gough asked Montis take over again. The only time Montis was not standing with Walter following her arrest, Montis was with Rose, some distance away. Thus, on this evidence, Rose did not have any contact with Walter from the time PC Montis had Walter in her custody, to the time Walter is put in the wagon, other than when he is taking the HOT picture and dealing with her property.

97. According to Gough, Montis and Ferry, none heard Rose make any rude comments. Officer Montis testified that if Rose had made any of the homophobic and sexist comments alleged, as a woman, it would have stuck out in her mind and she would undoubtedly remember it. It would have also stuck out in her mind because it would have been completely inconsistent with her dealings with Rose. She never heard any such comments from Rose, nor any rude or offensive comments at all. If she had, she would have a “crystal clear” memory of it.

Use of Force Model

98. Staff Sergeant Stockfish (“Stockfish”) testified concerning the Use of Force Model. Rose accepted that the Use of Force Model does not justify officers’ actions and that it does not provide specific response options appropriate to a situation. Ferry agreed that the model does not justify the use of force, nor does it prescribe specific response options. Stockfish agreed: “By no means is it there to justify an officer’s actions.” (“It’s there to help uh assist in the articulation and the explanation of – of situations that occur.”)
99. Stockfish pointed out that the “21 foot rule” pertained to a subject with an edged weapon, and that it’s not a hard and fast rule – the rule being a guide to indicate the minimum safe distance between subject and officer.
100. Stockfish suggested that, if officers are arresting someone and there is a third party present who was “uncontrolled” and “unknown”, they should remain aware, not become complacent, and call for backup if the situation was starting to “escalate”. He also suggested verbal commands or a hand gesture. He did not suggest that the third party should be arrested.

101. Stockfish gave no evidence about chokeholds. He testified that use of force training did not instruct on specific headlocks.
102. Stockfish testified that everything he had said about the use of force in the course of an arrest presumed that the arrest was lawful. Finally, he testified that it is not always necessary that the arrested person be taken to the ground.

Assessment of Credibility

103. Reid J. in *Pitts and Director of Family Benefits Branch of the Ministry of Community and Social Services* [1985] O.J. No. 2578 referred to various factors to consider when assessing credibility:
- i. whether the witness seemed honest and if there is any reason why the witness would not be telling the truth;
 - ii. whether the witness has an interest in the outcome of the matter;
 - iii. whether the witness was able to make accurate and complete observations about events while also considering the circumstances surrounding any opportunity to make those observations and the witness' condition at that time;
 - iv. whether the witness had a good memory including any reason which may cause the witness to specifically remember details about issues to which they attested;
 - v. whether any inability to recall or remember certain events seemed genuine or simply an excuse to avoid answering questions;
 - vi. whether the witness seemed to be reporting to you what he or she saw or heard, or simply putting together an account based on information obtained from other sources – i.e. media or other sources – rather than personal observation;
 - vii. whether the witness' testimony seemed reasonable and consistent as he or she gave it as well as whether or not that testimony was similar or different to what other witnesses said about the same events;
 - viii. whether any inconsistencies in the witness' evidence make the main points of the testimony more or less believable and reliable; and in the event of inconsistency – whether it relates to a significant or minor detail and if that inconsistency is the result of a modified answer or information that the witness previously failed to mention and whether any explanation makes sense; and

- ix. the witness' manner when he or she testified.

The Standard of Proof

104. The debate continues concerning the correct standard of proof in *Police Services Act* discipline cases.
105. The prosecution argues that in the 2008 case of *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 SCR 41, the Supreme Court definitively confirmed that, in all civil cases, there is only one standard of proof, namely, proof on a balance of probabilities. In doing so, it rejected the view that professional discipline cases should attract any elevated standard as had long been viewed as appropriate in Ontario. Thus, in a hearing pursuant to the *Police Services Act*, the Chief (or the Chief's delegate) must simply scrutinize the evidence with care to determine "whether it is more likely than not" than an alleged event occurred.
106. *The Police Services Act* makes several references to "clear and convincing evidence" for a finding of misconduct. It is argued that those references must be understood in light of the Supreme Court's decision in *McDougall*. There, the Court:
- a. Included "professional discipline" cases in the category of "civil Case" (para 26);
 - b. Referred to the view in Ontario that professional discipline cases required "clear and convincing evidence" (para 31);
 - c. Referred to the view that "clear and convincing evidence" is actually a standard of proof, somehow higher than proof on a balance of probabilities (para 39);
 - d. Rejected that view, holding that proof on a balance of probabilities is only the standard of proof for all civil cases (implicitly including professional discipline cases)(paras 40 and 49);
 - e. Explained that using an intermediate standard of proof was unworkable; in particular, "the only way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred" (para 44, emphasis added); and
 - f. Explained that "clear and convincing" must be understood as meaning that evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities standard (para 46).

107. Accordingly, the prosecution submits, references to “clear and convincing evidence” in the *Police Services Act* do not establish a separate standard of proof. That language does not create an alternative way of finding factual conclusions in a civil case; rather, it is simply statutory recognition of the fact that “evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test”.
108. Recently, a majority of the Supreme Court in a 4-3 decision referred to “clear and convincing” as a higher standard of proof. The issue was whether a result in a *Police Services Act* hearing binds the complainant in a subsequent civil trial. The majority remarked:

[60]...As the Court of Appeal recognized, because the *PSA* requires that misconduct by a police officer be “proved on clear and convincing evidence” (s.64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where the balance of probabilities – a lower standard of proof – would apply. However, this cannot be said in the case of an acquittal. The prosecutor’s failure to prove the charges by “clear and convincing evidence” does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted. Indeed, in *Porter*, at para. 11, the court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer’s decision “was determined by a high standard of proof and might have been different if it had been decided based on the lower civil “standard”. Thus, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner’s civil action. (emphasis added)

109. The prosecution notes that the majority does not cite *McDougall*, nor provide any reason for its apparent departure from the very clear rule announced in that case. The best view, therefore, is that *McDougall* remains the law and the contrary remarks of the majority in *Penner* are simply *per incuriam*.

110. It is my view that the applicable standard is higher than a balance of probabilities. The Supreme Court in *Penner* directly addressed the question of the applicable standard in the context of the *Police Services Act* provision. On the other hand, the Court in *McDougall* was considering whether a higher standard of proof applied at common law in civil cases where sexual assault was alleged. The Court held there was no higher standard – rather the standard of proof at common law was on a balance of probabilities. Here however, there is a statutory provision which creates a higher standard, as confirmed by *Penner*. It is that standard I apply to the evidence.

ANALYSIS

Credibility of the Witnesses

111. Mitchell and Horwatt were and are graduate students. They were working on a graduate school independent study project. They are thoughtful, careful people with an intellectual bent, and testified as such. Despite the sustained and aggressive cross-examination that they endured, they were unshaken in their testimony, made reasonable concessions, and testified throughout in a calm and measured way.
112. Walter is a published journalist, an artist, and an advocate. She was acting as a journalist at Bloor and St. Thomas, trying to ascertain why her colleagues had been arrested. She was pursuing this by taking video footage. At the hearing, she also testified in a calm and measured way, but at times displayed understandable distress at the suggestions being put to her in cross-examination. She, too, made reasonable concessions but was unshaken as to the important parts of her account.

113. Horwatt testified that defence suggestions of how Walter behaved were “very out of character” for her, and that similar suggestions of how Mitchell behaved were “out of character” and “not representative ofthe way Ryan has behaved in my knowing him.”
114. The defence suggests that Horwatt became an “advocate”. I disagree. If anything, he erred on the side of caution and fairness as he gave his evidence. On numerous occasions he qualified or declined to assert a fact if he was not confident.
115. I am satisfied that none of the prosecution witnesses have an interest or bias in these proceedings. There is no evidence to support such a finding in the cases of Mitchell and Horwatt. The only relevant evidence concerning Walter is the fact that she has sued the police in a civil action. She was reluctant to do so but was persuaded by her lawyer to do so. The action is unresolved some four and a half years after the events – clearly she is not vigorously pursuing it. I am satisfied that she is not motivated by self interest in this matter.
116. By contrast, the subject officers have a great deal to lose in this proceeding and have a significant interest to exaggerate or even fabricate evidence to avoid discipline.
117. The witness officers, while not themselves directly interested in the outcome, have a significant interest in defending the conduct of their fellow officers and of police during the G20 in general.

Alleged Collusion between Prosecution Witnesses

118. Defence has suggested that complainants colluded with each other. Walter denied speaking to Mitchell about their evidence; they were given clear instructions not to. Walter did not read Horwatt's will-state.
119. It is noteworthy that Mitchell never received disclosure – he only received the OIPRD report, which summarized complaints and interviews. He did not receive a copy of his own interview transcript.
120. If the complainants truly colluded with each other and Horwatt, one would expect there to be a suspicious lack of inconsistencies:
- a. Mitchell said that two officers arrested him and Walter says it was four. (In fact, both were true – it was two at the outset and four were involved later on.)
 - b. Mitchell said he started to lower himself to the ground before he was taken down, and Walter said that he was standing upright and pushed to the ground by the momentum of the officers; Horwatt gave a similar account to Walter, also disagreeing on this point with Mitchell.
 - c. Horwatt testified that Ferry's screaming in Exhibit 6.1 could have been "stop biting me" or "stop fighting me", whereas Mitchell was sure that it was "fighting", not "biting"; Walter agreed with Mitchell, not Horwatt.
 - d. Horwatt very fairly acknowledged that he could not say with absolute certainty whether Mitchell resisted arrest. If they had colluded, or even if Horwatt had been biased, he would have denied that Mitchell was resisting. In my view, this concession of Horwatt amply demonstrates his lack of bias.
121. Minor inconsistencies are inevitable when several people independently observe the same events. Such minor inconsistencies may tend to support the credibility of the witnesses.
122. The prosecution witnesses are intelligent people. If they had colluded with each other, they would have done so competently. Although the prosecution witnesses may have discussed

the events in question, I am satisfied that each testified as to his or her own independent observation and recollection.

Ms. Walter's Mental Illness

123. There is no evidence that Walter's mental illness interfered with her ability to give an accurate account of the events that day. On the other hand, she made what I describe as the unremarkable and commonplace errors in observation that witnesses routinely make – for example, her saying she spoke to Maclsaac through the patrol car window when it is a fixed window; and that she said 4 officers arrested Mitchell (indeed there were four officers present eventually).

Sergeant Rose Credibility

124. There were significant inconsistencies between Rose's testimony in chief and his notes on the one hand and his OIPRD interview on the other. He sought to explain the former by calling the notes "sub-standard". He sought to explain the latter by blaming the OIPRD investigators for the "minimalistic approach they took to the questioning".
125. In his notes, Rose had written that Mitchell *was* "yelling obscenities"; but in his testimony he indicated this had not occurred.

MR. GOVER: ...my point is that this was a convenient thing to put in your notes, but it's simply not what happened, correct?

SGT. ROSE: No sir

126. Further, Rose wrote in his notes that he approached Mitchell with Ferry. His evidence was different - i.e. that Ferry was already dealing with Mitchell when Rose approached. This is

a significant difference in the context of Rose's position that he was merely assisting Rose in Mitchell's arrest. It casts significant doubt on his credibility.

127. These inconsistencies raise doubts about his testimony when he claimed that Mitchell said, "If we take Yorkville, it will be very expensive."
128. When Rose was being cross-examined by Ferry's counsel, Mr. Barry's questions are for the most part fairly described as "softball". Rose tended to agree with Barry's suggestions in leading questions. That may be said to be unsurprising, but in so doing Rose directly contradicted evidence he had given earlier. This is especially egregious considering that the subject of the questions was of significance in describing Mitchell's behaviour before his arrest.

MR. GOVER: Right. And, and I suggest to you, simply, that he didn't do it. Isn't that right, sir? He didn't try to rile up or incite the crowd, did he?

SGT. ROSE: According to my uh-the first time I had contact with Mr. Mitchell was when Sergeant Ferry was speaking to him, so uh I didn't uh, I didn't notice him specifically before that. [this is directly contrary to his evidence that he saw Mitchell earlier shouting obscenities.]

...

MR. BARRY: And that he was attempting to rile up the crowd by his gestures, actions, and behaviour?

SGT. ROSE: Yes sir.

...

MR. GOVER: There were no demonstrations going on in the background while this was occurring, were there?

SGT. ROSE: No.

...

MR. BARRY: And, and you saw several protest-protestors coming and going on the west side of St. Thomas and Bloor right?

SGT. ROSE: Yes.

129. This testimony does not support a finding that Rose's testimony was reliable or truthful on important aspects when weighed against the evidence of Mitchell.

Sergeant Ferry's Credibility

130. Ferry's demeanour did not inspire confidence in his credibility. He was combative, evasive, he failed to answer questions, and he made speeches.
131. Ferry committed errors and apparent fabrications in his evidence:
- a. When shown Exhibit 6.2 between 10:14 and 11:20, he admitted that there was no protest going on and that the situation was well in hand. However, he said that this portion of the video was "absolutely not" taken before Mitchell and Walter were arrested. This evidence was incorrect: the entire wall on the east side of St. Thomas can be seen at 11:20 and thereafter in Exhibit 6.2, and Mitchell and Walter are not among the arrestees.
 - b. He claimed that Mitchell said "this is not a police state" over and over, getting into a "back and forth" on the subject with Ferry. This is something that Ferry has never said before, either in his notes or his OIPRD interview. Rose never heard these alleged comments, which he certainly would have. Ferry's counsel never put it to Mitchell in cross-examination.
132. A disturbing example of Ferry's willingness to say anything, however absurd, to defend against the allegations is his sworn evidence that an arrested person escaping from lawful custody and running away "wasn't that significant".

Findings of Fact

133. The general environment at Bloor and St. Thomas around noon on Sunday, June 27, 2010 was not in dispute. There were approximately 10 - 12 arrested persons lined up along the shop wall on the south-east corner of Bloor and St. Thomas. They were handcuffed to the rear. There were approximately 15 -20 police officers. There was no shouting, no fighting, no violence; the scene was calm and police were in control.
134. There was no formal police perimeter, but Rose established an informal perimeter on the west sidewalk. Pedestrians were allowed to walk past the arrested people. There was a hot dog vendor at the end of the line of arrestees, who was never asked to leave, and who, indeed, did a “brisk business” with the police officers.
135. Walter arrived on the scene at around the same time as Horwatt. Walter recognized Amy Miller, and talked to her very briefly. She also spoke to MacIsaac through the window of a police car. Rose told her to back off, and she complied. Later, Walter tried to call to Amy Miller from the middle of St. Thomas, but Ms. Miller did not respond.
136. Together, Horwatt and Walter watched the scene from the south-west side of St. Thomas. Mitchell had not yet arrived. The two were watching the scene, not yelling or moving around, and Walter was videotaping.
137. Mitchell arrived and called “Amy” to Amy Miller and “Adam” to Adam MacIsaac, simply to let them know they had been seen.
138. Mitchell and Walter never addressed passers-by at the scene and, notably did not try to “rile up” the arrestees or anyone in the vicinity. Mitchell never swore at the police or said “fucking pig” to Ferry; he never gave anyone “the finger”. He never said, “This is shit and you are in the middle”. Walter never said “You bastards, you deserve what you got

yesterday”. I note that the complainants and Horwatt were unanimous on these issues. Also, Ferry is the only police officer who allegedly observed much if not all of this behaviour which, had it occurred, would have been dramatic and noteworthy to the many other officers on the scene.

139. Horwatt decided to return to the Harbord AMC and Mitchel and Walter decided to stay. As events had transpired, Walter was ordered to go to the sidewalk at the west side of St. Thomas Street after her attempt to talk to Maclsaac. She returned to mid-street to ask Rose about the reason for the arrests. When she was told to return to the sidewalk and contact the communications office, she did so but was unable to get information. She once again returned to the middle of St. Thomas Street and engaged Rose again. Clearly he was becoming annoyed with her and emphatically ordered her back. She had been filming throughout.
140. Mitchell was present or close-by throughout these exchanges and he too was ordered by Ferry to go to the sidewalk.
141. The evidence of Rose is that he heard Mitchell say “if we take Yorkville it will be expensive” and saw Ferry grab Mitchell’s arm, whereupon Mitchell bolted westward on the south side of Bloor Street with Ferry in pursuit. Rose joined the pursuit and the arrest of Mitchell.
142. Ferry’s evidence is of the same effect except he says Mitchell gave him “the finger” and called him a “fucking pig”. I accept Horwatt’s evidence that such language is out of character for Mitchell and Mitchell’s denial that he used such language. Neither officer mentioned the alleged flight in their notes or in their OIPRD interview. The Ferry version of the event does not make sense in the context of what followed. Mitchell was not

- charged with escaping custody or resisting arrest – the very serious criminal activity alleged by Ferry.
143. I accept Mitchell’s version of the event, as corroborated in its essence by Walter and Horwatt. Mitchell and Walter were ordered to go to the north side of Bloor Street. They could not go directly because of the construction barriers on Bloor Street. They complied with Ferry’s direction by walking west on the south side of Bloor Street. Ferry ordered them to get out of the area entirely or face arrest for breach of the peace. Mitchell responded with a dismissive wave of his hand and uttered the words “get off it” as he walked westward. Ferry and Rose then charged after him and the arrest was effected.
144. Ferry’s further evidence does not make sense in the context of the subsequent lack of criminal charges against Mitchell. Ferry claims that Mitchell was biting him as he held him in a head lock. He is shouting “stop biting me” during the arrest. I conclude this was a mere ruse. No one, not even Rose, who was kneeling on Mitchell’s back, could see the alleged biting. Mitchell was being choked by Ferry, Mitchell’s neck being in the crook of Ferry’s arm. Mitchell could not have bitten Ferry in that position. Ferry says Mitchell was struggling – in effect resisting arrest – something Mitchell had been trained not to do. Yet Mitchell was not charged with assaulting a police officer or resisting arrest.
145. Furthermore, when Ferry allegedly reported the biting to officer colleagues after the arrest, he did not say “he was biting me”, rather, “he tried to bite me” – in my view a statement that was all part of the ruse.
146. Gough testified in cross examination that he saw Mitchell biting Ferry. I find it preposterous that such was the case when Gough’s evidence to this effect was not lead in

- chief – if he had indeed witnessed someone biting a fellow police officer it would have been a significant piece of corroborative evidence which would have been lead in chief.
147. I also note that Ferry made no mention of the alleged biting in his OIPRD interview.
148. Mitchell did not resist arrest, in fact he immediately co-operated. Any minor struggling on his part is attributed to his discomfort at being forced to the ground face down on a concrete sidewalk, in a choke hold by Ferry while Rose had both his knees and consequent almost full 240 pounds of weight on Mitchell's back (Mitchell weighs about 170 pounds).
149. I reject the evidence of Rose and Ferry that Mitchell made the Yorkville remark. Mitchell's girlfriend works in Yorkville. Mitchell is and was a graduate student, not one who could be said to be an anarchist. He went to the area to investigate the reported arrest of colleagues.
150. In any event, Rose admitted that the Yorkville remark did not constitute a breach of the peace, was not a criminal offence, and did not give him grounds to believe that Mitchell had committed a criminal offence. And Ferry testified that he had already decided to arrest Mitchell before this alleged remark was made.
151. The prosecution argues that both Sgts. Rose and Ferry arrested Mitchell. Rose's evidence in his OIPRD interview should be preferred in this regard to his testimony at the hearing. Rose's OIPRD evidence was given in a more spontaneous and less calculated way than his evidence at the hearing. The prosecution says that between then and now, Rose realized that, if he is found to have been the "assisting officer" only, he will escape disciplinary responsibilities for the arrest.
152. Rose told the OIPRD that *both he and Sgt Ferry* decided to arrest Mitchell:

ROSE: And uh, it looked like uh Sergeant FERRY might have needed somebody to come over. And I came over and essentially this guy says, as I kind of join it...uh I hope – I – he says uh, if we take Yorkville – if we take Yorkville it will be very expensive. I mean that’s obviously not the first interaction with him.

ROSE: But I- or a first time I saw them, but they were kind of there the whole time.

ROSE: Making themself’ – their presence known. So at that...

ROSE: ...point, we made the decision to arrest them.

ROSE: Arrest time for sh’-like Mike and I moved onto him, but she ended up uh, she was right there yellin’ and screamin.’”

153. The OIPRD interview should also be preferred because it is consistent with Rose’s own notes. There, Rose wrote: “Myself and Sgt. Ferry approach the male and he states that ‘If we take Yorkville it will be very expensive’. Arrest male tkn [taken] to ground.” When taken to this passage in his notes, he said:

MR. GOVER: And you indicate in your notes that you and Sergeant Ferry arrested Ryan Mitchell, correct?

SGT. ROSE: That’s what it says there sir.

154. Rose acknowledged in cross-examination that he did not explicitly state in his OIPRD interview that Ferry decided to arrest Mitchell, and that he (Rose) had nothing to do with that decision. Rose said that the questioning in the interview did not get into that kind of detail.
155. With respect to Rose’s notes; Rose claimed his notes were deficient as he did not anticipate this matter would lead to any court proceedings

156. However, the arrest sheet listed Ferry as the arresting officer for Mitchell. Both Rose and Ferry were unequivocal in their testimony that Ferry was the officer who arrested Mitchell, and Rose was assisting. Ferry was consistent in his OIPRD interview.
157. Mitchell himself provides some corroboration for the defence position, testifying that Rose merely assisted Ferry in his arrest:

MR. BARRY: Sergeant Rose helped with your arrest right?

MR. MITCHELL: Uh it was mostly Ferry but Rose did assist

...

MR. BRAUTI: And at the time that you go to the ground, Officer Rose is not there yet?

MR. MITCHELL: No.

MR. BRAUTI: Um it's only after uh Sergeant Ferry has said Breach of Peace, he's [taken] physical control of you that Sergeant Rose shows up after the fact

MR. MITCHELL: Yes

158. Considering the foregoing, and given my findings of fact on the sequence of events leading up to the arrest of Mitchell, I conclude that Ferry was the arresting officer, with Rose assisting.
159. Ferry, in the moments before the arrest, accused Mitchell of a breach of the peace. Ferry was the principal actor among the police.
160. However, on his own evidence, Rose was in the immediate vicinity of the events leading to Ferry's action in arresting Mitchell. Indeed he was so close to be able to immediately assist Ferry. Rose saw what happened leading up to Ferry making his move. On my findings, he neither saw nor heard anything in Mitchell's conduct which justified an arrest.

161. The defence argues that assisting officers do not require independent grounds to make an arrest:

Frequently, in modern times, the particular police officer making an arrest or conducting a search is not the only officer concerned in the investigation out of which the search or arrest arose. It seems to me to be unrealistic and incompatible with effective law enforcement and crime prevention, when a police officer is requested by a superior or fellow officer to arrest or search a person suspected of the commission of a crime and to be fleeing from the scene, to require that police officer to obtain from his or her superior or fellow officer sufficient information about the underlying facts to enable him or her to form an independent judgement that there are reasonable grounds upon which to arrest or search the suspect. A dangerous offender might escape in the interval if this were required. *R. v. Debot* [1986], O.J. No. 994 (ONCA)

162. Thus, argues the defence, a police officer is permitted to assist other officers in arresting an individual without first inquiring as to the grounds.

163. The defence provides the following example: if an officer were driving and observed a fellow officer struggling to arrest an individual, that officer can provide assistance without first stopping and asking the reasons and grounds for the arrest. Rose testified that in such circumstances there is an assumption that the grounds are there, and if the grounds are not there then the arresting officer is responsible.

164. This brings into play section 25 of the *Criminal Code*:

(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person;

(b) as a peace officer or public officer;

(c) in aid of a peace officer or public officer, or

(d) virtue of his office,

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

Idem

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

165. The prosecution correctly analyses the application of the section.
166. Subsection 25(1) has broad application. It applies to a person who acts “in the administration or enforcement of the law...in aid of a peace officer or public officer”. By contrast, s. 25(2) applies in limited circumstances, only where a person is “required or authorized by law to execute a process or to carry out a sentence”. No-one in this case was executing a process or carrying out a sentence, much less required or authorized to do so. An arrest without warrant is not “process” – “process” is an arrest warrant or other means of compelling the attendance of a witness or accused, such as a summons.
167. Second, even if s. 25(2) applies, it also requires Rose to have had reasonable grounds to believe that the arrest was lawful. Subsections 25(1) and 25(2) are therefore substantially similar in this regard. *R. v. Devereaux* (1996) 112 CCC (3d) 243 makes this very point. In *Devereaux*, the Newfoundland Court of Appeal wrote:

[39] Under s. 25(2) the emphasis is on the question of good faith that takes into account an honest belief – an honest belief that the actions and course of conduct is legal: “required or authorized by law”. Both subs. (1) and (2) of s. 25 presuppose a reasonableness test or requirement. Subsection (1) provides in part that an individual in question is justified in doing what he is required or authorized to do “if he acts on reasonable grounds”. The acts of the person therefore, must meet the reasonableness standard. I have already discussed the degree of force aspect. Subsection (2) is the situation where the legal authority to act, the law, subsequently turns out to be defective and the justification defence exists only

where “the person acts in good faith”. The honest belief in the legality of the conduct must also be founded on reasonable grounds. (emphasis added)

168. Mitchell had committed no offence, and even if he had said “if we take Yorkville it will be expensive”, this statement and his conduct was not a breach of the peace.
169. What happened here was that Ferry lost his temper, after Mitchell and Walter had caused inconvenience and annoyance to the officers and when Mitchell dismissed Ferry and said “get off it”. Rose joined Ferry in the take-down.

Arrest of Walter

170. After Mitchell was taken to the ground, Walter stood approximately 7 to 10 feet away, videotaping the arrest. Rose shouted at her to “get out of here”; she spoke assertively, telling him that she was nowhere close to him and that she was doing nothing but watching them hurt Mitchell. When Walter did not follow his repeated directions, he responded by ordering her arrest for breach of the peace.
171. During the arrest of Mitchell, Rose dropped a pair of handcuffs and quickly picked them back up. One cannot reasonably conclude that Walter distracted Rose to the point of causing him to drop the handcuffs.
172. Walter had in fact received instructions never to interfere with the police and knew the consequences could include a charge of obstruct police. Accordingly, she never physically interfered with Mitchell’s arrest, never made physical contact with the officers, and never tried to do so.

Breach of the Peace

173. Walter was arrested and detained for breach of the peace. In my view, she was arrestable for obstructing a peace officer but Rose used his discretion determining that a breach of the peace arrest was the most effective means of dealing with the situation.
174. Section 31 of the *Criminal Code* provides police officers arrest powers for breach of the peace:

Arrest for breach of peace

31. (1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.

Giving person in charge

(2) Every peace officer is justified in receiving into custody any person who is given into his charge as having been a party to a breach of the peace by one who has, or who on reasonable grounds the peace officer believes has, witnessed the breach of the peace.

This section does not create an offence of breach of the peace. Rather, it simply provides peace officers with the power to arrest individuals without a warrant where a breach of the peace is committed.

175. Varying definitions have been given by the courts for what constitutes a breach of the peace. One such definition is that a breach of the peace is an act or actions which result in actual or threatened harm to someone. They are incorrect to suggest that this is the only definition however. In many instances it has been defined in a broader way, not necessarily requiring harm or threatened harm, but being made out where public alarm or

an excitement is caused – generally, situations where public tranquility, peace or order or disturbed.

176. The Ontario S.C.J. case of *R. v. Gosai* [2002] O.J. No. 359 provides a breakdown of the various definitions assigned to breach of the peace:

“A breach of the peace occurs where there is an actual assault, public alarm, or an excitement caused. A mere annoyance or insult to an individual, stopping short of actual personal violence, is not a breach of the peace. An essential ingredient is something in the nature of a riot, tumult or actual violence. The core notion of a breach of the peace is a violent disruption or disturbance of the public tranquility, peace or order: *Frey v. Fedoruk* (1950), 97 C.C.C. 1 (S.C.C.) It has also been described as “unacceptable conduct that unduly disrupts and violates public peace and good order,” without any emphasis on any particular crime: *R. v. Stone* (1985) 22 C.C.C. (3d) 249 (Nfld. S.C.), (approved in *R. v. S. (S.)*[(1998), 138 C.C.C. (3d) 430 (Nfld. C.A.)].”

177. Certainly it appears that a common factor present in breaches of the peace is situations in which police officers are attempting to control a crowd – for instance “situations where crowd control is an issue and where some member of the crowd decides to be openly confrontational with police officers trying to disperse an unruly crowd.”
178. Verhoeven J. of the British Columbia Supreme Court recently provided a very good analysis of the issue and case law in *Ludlow v. Victoria City*, a case which has some factual similarities to the present case. The judge found a lawful arrest for breach of the peace where the plaintiff repeatedly interjected and interfered with the police as they were speaking with a hotel clerk and trying to diffuse a confrontation between him and the plaintiff’s husband. The plaintiff would found to be a least a bit intoxicated, loud, belligerent, and profane. She was repeatedly warned to desist, and go back to her room or she would be arrested, but did not comply.

179. The prosecution takes the position that the existence of grounds for other offences, for instance causing a disturbance or obstructing a peace officer, cannot play into the analysis of an arrest for breach of the peace. I disagree. While not every offence in the *Criminal Code* will constitute a breach of the peace, the defence argues that it is well established that, causing a disturbance generally does.
180. In the view I take on the question of Walter obstructing police, it is not necessary to consider the alleged offence by Walter of causing a disturbance.
181. The offence of obstructing a peace officer is set out in s. 129 of the *Criminal Code*.

129. Every one who

(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

...

is guilty of

(d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(e) an offence punishable on summary conviction.

The elements of this offence as follows:

- a. that there was an obstructing of the officer;
- b. the obstruction affected the officer in the execution of the duty that he was then executing; and
- c. that the person obstructing did so willfully.

182. In explaining the final element, the Court in *R. v. Gunn*, [1997] A.J. No. 44 (C.A.) noted at paragraph 46 that all that is required is that “an accused knows what he or she is doing, intends to do it and is a free agent” given the general intent requirement of the offence. Whether the individual’s conduct constitutes obstruction is a question of fact to be decided in light of all the circumstances of the case. While a mere inconvenience to the police is

- not sufficient to prove an obstruction, neither must it be considered a major inconvenience, nor completely frustrate the efforts of the officers.
183. Knowingly defying the lawful order of a police officer may be sufficient to sustain a conviction of obstructing police. For instance in *R. v. Knowlton* (1973), 21 C.R.N.S. 344 (S.C.C.) the Supreme Court of Canada held that when police officers refused admittance to a cordoned off area of a public street, they were acting in the execution of their duty and therefore the accused's conduct in pushing his way past, despite warnings, amounted to obstruction.
184. *R. v. Wutske*, 2005 ABPC 89 citing *R. v. Westlie*, 2CCC (2d) 315., *R. v. Edmunson*, [1975] BCJ No. 188 is analogous to the present case. There an officer was struggling to arrest an individual while there was a crowd around. Another officer assisted by directing the crowd to move away from the immediate scene of the struggle. The defendant was the only member of the crowd who did not comply.
185. The court found that the request on the part of the assisting officer to have the crowd move away from the altercation was lawful, given the highly volatile nature of what was occurring, and the reasonable prospect that there might be a further breach of the peace. Applying *Knowlton*, the court reasoned that by refusing to obey the officer's directive to back away from the area where the arrest/struggle was taking place amounted to obstruction.
186. It is necessary to consider the conduct of Walter that day prior to the incident of the actual arrest of Walter.
187. The evidence of both Rose and Horwatt is that a perimeter had been set up. Even prior to the Mitchell arrest, both Rose and Walter state that Rose had instructed her several times to

- move back and stay back. Walter would comply momentarily, and then move back on the street and speak with detainees and/or Rose in an attempt to obtain information about the arrests. Walter herself admitted that this was true, and that by doing it, she may have been distracting the officers from their duties.
188. The commotion caused by Walter's shouting was enough to cause Montis, who was directing traffic nearby, to leave her duty and attend that scene to assess it for officer safety.
189. Walter's behaviour during the arrest of Mitchell very clearly distracted Rose and interfered with the arrest of Mitchell as evidenced by his having to continually respond verbally to Walter. Further, it was potentially threatening to Rose as an unknown individual, who was associated with the arrestee, stood close behind him shouting at him, while his weapons were exposed on his belt. He was hard pressed to keep an eye on Walter, and assist in the arrest simultaneously. In my view, it matters not that there was no physical intervention by Walter.
190. The actions of Walter establish grounds for an arrest. At the very least it cannot be said that Rose did not have a good faith belief that grounds existed for the arrest of Walter.
191. In my view, the fact that Walter was not actually charged with a criminal offence does not indicate, in these circumstances, that Rose lacked the belief that the offence had been committed at the time. Rose can be heard clearly on video telling Walter she was obstructing, and then was arrested for causing a disturbance.

Discreditable Conduct by Rose

192. The allegations of discreditable conduct against Rose are based on the evidence of Walter and her claims that both before and after her arrest, Rose made various rude, sexist and homophobic remarks to her. Two questions arise in this context: were the comments actually made, and if so, was it Rose who said them. In dealing with the second of these issues, the inherent frailties of identification evidence must be considered.
193. As noted by Justice Watt in *R. v. Pelletier*, 2012 ONCA 566, a witness may be apparently honest and confident of the identification testimony – nevertheless the witness may be mistaken. This is especially so in cases that involve fleeting glimpses of unfamiliar persons in stressful circumstances.
194. The reasonableness of verdicts based on eyewitness identification are suspect where: the eyewitnesses are strangers; where the circumstances of the identification are not conducive to accuracy; there are no (or otherwise flawed) pre-trial identification procedures; and no other evidence supporting the identification.
195. In the present case, Rose is a stranger to Walter, and their interactions on that day were short and in stressful circumstances. There are many officers in the area, all uniformed. At one point Walter testified she had an interaction with Rose in the middle of the street in which Rose told her she was causing trouble and questioned her motives. When pressed on this, she admitted that she may have confused Rose for Ferry, stating “I believed that I was talking to Sergeant Rose but there was a lot of confusion and there were Officers coming and going.”
196. In addition, there were other aspects of Walter’s evidence related to the reliability of her observation in this respect:

- 1) Walter misidentified the number of officers (4 instead of 2) who arrest Mitchell, despite the fact that she is standing a few feet away.
- 2) Walter identified Rose as one of the officers who took her back to the area of the arrestees, and testified in chief to this effect. Apart from being inconsistent with all other witnesses and the video which shows Rose escort Mitchell to the wall, when confronted in cross examination, Walter admitted that it is not Rose, and that she realized that after first watching the video.
- 3) On video 6.2, an officer can be heard saying “sir sir sir” to Walter. Walter identifies this as being Rose, both in chief, and then again in cross examination. Officer Gough testified that it was in fact he who made this comment. I question Gough’s credibility generally. However, Montis’s evidence, which I do accept is that Rose was not with Walter. When Walter was ultimately pushed on the issue she admitted “Well, I was facing the wall, so if was mistaken, uh, then I was mistaken but I believed it to be ...I do believe it to be Sergeant Rose. He said that to me repeatedly.”
- 4) In her original interview with the OIPRD, Walter identified Rose as having made a number of additional offensive comments, but in cross examination admitted that she had been mistaken and realized later when she watched the video. When cross-examined on the fact that Rose did not make these comments, Walter mentions for the first time that there were multiple officers calling her a “douchebag” and “fucking dyke”, and that perhaps Rose did not say that to her: I was called a douchebag and a fucking fucking dyke but perhaps not....by Sergeant Rose. Prior to this admission, Walter held to her version that it was Rose who said those things to her.
- 5) When cross-examined on the particulars and timing of the various comments Walter was alleging were made to her, she admitted that it was a blur. In response to being questioned about the unknown officers calling her names, she testified:

“I remember at that occasion and then it went on and one so what I mean when I say it was a blur, is exactly what I said a moment ago.
Which is that I can’t say which Officer said what at what

moment, if it wasn't Sergeant Rose I was mistaken. But he did speak to me at length and he did say profane things to me."

- 6) Walter maintains that Rose made some disparaging comments while going through her belongings. She also admits that the "blonde officer" – the only female officer – was present for this. This could only be in reference to PC Montis. Montis' testimony makes it clear that she was with Rose the entire time he was in contact with Walter after she was arrested, but that she absolutely never heard Rose say any such comments.
 - 7) Walter testified a number of times that Rose did not have his nametag on. She claims that as a result she tried to take a picture in order to be able to identify him. At one point she says she is 100% sure he was not wearing his nametag. No other witness saw Rose without his nametag or badge. On the contrary, the video and photograph evidence depicting events shortly before these incidents clearly show Sgt. Rose to be wearing his nametag and epaulets. They are not hidden in any way. The videos do however show other male, white officers not wearing these things.
197. Montis testified that after being directed by Rose to arrest Walter, she did so and escorted her to the area where detainees were being kept. Montis left Walter in the custody of other officers, including Gough, before returning to Rose to check if they needed more assistance. Shortly thereafter, Gough came and asked her to deal with Walter, at which time she returned and stayed with Walter until Walter was transported from the scene. Montis stated clearly that neither Rose nor Ferry had any contact with Walter between the time she left Walter and the time she returned to her. In these circumstances, Rose could not have had any contact with Lisa Walter following her arrest which would not have been heard by Montis. Montis further testified she never heard Rose make any offensive comments at all.

198. This testimony regarding the continuity of Montis' presence with Walter went unchallenged, as did her testimony about not hearing the offensive comments.
199. In the result, although I am satisfied that one or more officers directed abusive and vulgar language at Walter on more than one occasion, the testimony does not establish by clear and convincing evidence that Rose did so.

Rose and Ferry: Excessive force on Mitchell

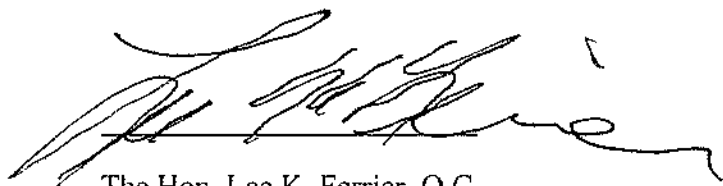
200. Rose helped handcuff Mitchell and kneeled on his back while he was face-down on the sidewalk. Ferry choked Mitchell. Neither of these actions were reasonably necessary even if the arrest had been lawful. Mitchell was "like a deer in the head lights". He was compliant.
201. The arrest of Mitchell was unnecessary. If an arrest is unlawful, then any force employed loses all legal justification and is itself unlawful and, by definition, excessive.
202. Even had the arrest been lawful, the force used was excessive.

CONCLUSION

203. On the basis of the foregoing findings, both Rose and Ferry are guilty of misconduct in arresting Mitchell without having the requisite grounds to do so, thereby making an unlawful arrest.
204. Rose and Ferry are also guilty of misconduct in that, in arresting Mitchell they used unreasonable, unnecessary force, without lawful excuse.

205. The charge against Rose of abusive and uncivil conduct in allegedly using profane, abusive or insulting language against Walter is dismissed.
206. The charges against Rose and Ferry of misconduct in arresting Walter without having the requisite grounds to do so thereby making an unlawful arrest, are in each case dismissed.
207. A date for hearing and oral submissions on penalty may be arranged by counsel.

Dated at Toronto, this 26th day of January, 2015.

A handwritten signature in black ink, appearing to read 'L. K. Ferrier', written over a horizontal line.

The Hon. Lee K. Ferrier, Q.C.