HEARING DECISION

JUDGEMENT

Name: Sui Lun Alan LI and Donald Clyde STRATTON

Rank: Police Constable

Badge Number: 9755 and 9445

Case Number: 22/2012 and 23/2012

Hearing Date: 2015.05.12

Hearing Officer: HON. Colin L. CAMPBELL, Q.C.

Prosecutor: Stockwoods

Defence Counsel:
Or Representative Ms. J. MULCAHY

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

POLICE CONSTABLE SUI LUN ALAN LI (#9755) - REASONS FOR DECISION

POLICE CONSTABLE DONALD CLYDE STRATTON (9445) - REASONS FOR DECISION

INTRODUCTION

1. The weekend of June 26-27, 2010, remains memorable to many in Toronto, not just for the hosting of the G-20 summit held in the city but as well for the destruction and violence that occurred that weekend, particularly on Saturday, June 26, 2010.

2. Police Constable Sui Lun Alan Li is alleged on Sunday, June 27, 2010, to have committed misconduct contrary to section 80 (1)(a) of the *Police Services Act* (the "*PSA*") and the Regulations thereunder, in particular section 2 (1)(g)(i) of the Code of Conduct of Ontario Regulation 2.68 (10), by making an unlawful or unnecessary arrest of Vincent Bolduc (hereinafter "V.B.") for Breach of the Peace without the requisite grounds and without good and sufficient cause.

3. On the second charge, P.C. Li together with Police Constable Donald Clyde Stratton are charged under section 80 (1)(a) of the *PSA* and the Regulations thereunder, that in connection with the arrest of V.B. on June 27, 2010, they each used profane, abusive or insulting language and were abusive and uncivil towards V.B., telling him "he would be raped if he went to jail."

4. The undersigned was designated as hearing officer under section 66 of and following the *PSA* this matter has taken inordinate time for completion, including delivery of this Decision through no fault of the Officers or any Counsel.

5. The original timetable had to be adjusted as the complainant and the witnesses originally

scheduled in support were either not willing or available within a reasonable time to attend a hearing in Toronto and given the nature of the evidence, video link was impractical.

6. Given the timetable of all concerned, the hearing was not completed until February 2015 having commenced in June 2014. Preparation of these reasons, given the passage of time, necessitated a complete review of the audio transcript of the hearing.

7. In order to put the conduct of the subject officers in context, it is necessary to review the events of June 26, 2010, in which they were directly involved. Many of the facts are not contested and indeed are either confirmed by the evidence of V.B. or contemporaneous photographs.

EVIDENCE – COUNT 1

8. P.C.s Li and Stratton both are experienced police officers and in the course of their duties on Saturday, June 26, 2010, witnessed scenes of vandalism, attack and destruction of property, including the torching of police vehicles. V.B. acknowledged the rioting and vandalism on the Saturday but testified that neither he nor those accompanying him took any part.

9. Indeed, the officer's police vehicle was destroyed during the June 26, 2010, rioting near King and Bay streets which necessitated a replacement vehicle for further duties on June 27, 2010.

10. On June 27, 2010, the officers' day started at 8:00 p.m. having completed the previous shift at midnight. They were given a morning briefing by senior officers of what they might expect during the day. They were told that Saturday might well be a test and that intelligence said Sunday might see the main event in the Yorkville area and they could expect worse from the Black Block (These were believed to be the people who had infiltrated the protests on Saturday which resulted in the violence).

11. Both officers were attached as members of the Toronto Police Service to the Anti-Violence Intervention Strategy ("TAVIS") to what was designated as Blue Team. The teams respond to high risk situations. Prior to the G-20 meeting, they had received two days of specific training for problems that might be encountered during the summit.

12. At the morning briefing on June 27, 2010, P.C. Li testified that they were told that many groups were expected to rendezvous in Yorkville and that the tactic was to travel together in groups with black clothing that could be changed into being carried in backpacks.

13. The officers were instructed to stop and investigate everyone who resembled Black Block participants and to not let Sunday be a repeat of the events of Saturday. With those instructions, the officers proceeded to the Bloor and St. Thomas area of Yorkville in their newly acquired vehicle.

14. When the officers attended the Yorkville scene, they met numerous other officers and were told to investigate a group of 10 to 12 people who were already detained. This included V.B. and P.C. Li was assigned to interview him.

15. Immediately following the instruction to investigate, P.C. Li approached V.B. and noticed a strong smell, something like vinegar. P.C. Li was aware from training that one of the tactics of the Black Block protesters was to use liquid as a propellant.

16. V.B. co-operated when P.C. Li asked whether he could look in his backpack. P.C. Li found goggles, a surgical mask, a black T-shirt, change of pants, a black hoddie, and a bandanna, all of which were items that were consistent with those used by violent protesters.

17. Nearby to where V.B. and the 10 to 12 others with him who had been detained, there was a commotion and interaction between a cameraman and other police officers. P.C. Li testified that there was communication between members of the V.B. group to support those who were interacting with police. Also, there was discussion between members of the V.B. group in French. The officers being concerned with safety advised the group members to speak in English in which to P.C. Li, it was apparent they were all proficient.

18. Following the commotion with the other officers and the cameraman, P.C. Li received instructions that those in the V.B. group were "arrestable." He then followed a more formal search of the backpack of V.B. and his group which revealed a phone number on the arm of V.B. and others with

the only explanation being given by them that it came from someone who advised them to be in contact with if there were problems with the police.

19. In addition to the items previously identified, there were stickers in the backpack with the words "fuck capitalism", together with a map (V.B. didn't have one but some of the others of his group did) titled "carte de resistance" with some locations marked thereon, presumably being rendezvous points.

20. V.B. was told he was under arrest for Breach of Peace. He was advised of his rights and did not seek the assistance of a lawyer. V.B. was then handcuffed with plastic wrist restraints and the contents of his backpack inventoried.

21. P.C. Li testified that he did not receive satisfactory responses to a number of questions to V.B. apart from being told that the group travelled from Montréal to attend G-20 protests and the denial of any intent to be involved in any violent activity.

22. P.C. Li stated that given his interaction with V.B., all the material in his backpack and the lack of definitive responses that he concluded that V.B. represented a danger to the peace and the potential for violent protest if not arrested.

23. When cross-examined, P.C. Li confirmed his belief that he had reasonable grounds for arrest based on the material in V.B.'s backpack and belief that V.B. would commit a Breach of Peace if let go.

EVIDENCE OF V.B.

24. V.B., in his evidence, testified that he and his friends had traveled from Montréal two days before June 27, 2010, by bus which was provided free by an organization with the acronym CLAC which he described as the "Convergence des Lutes Anti-Capitaliste." V.B. described himself as a sometime actor in Montréal and in 2010 was in his mid-30s and had traveled with younger friends to attend the G-20 demonstration but denied any intent to engage in any actual involvement in any violence on Saturday the 26th as he and his friends wandered the downtown streets of Toronto.

25. His evidence was that on the morning of June 27, 2010, he and his group had walked from the downtown business corridor where they had stayed in a center overnight and walked to Bloor and St. Thomas streets where they had been told they would meet a bus that would take them back to Montréal (presumably but not stated, this bus was associated with the same group with whom they had traveled on June 25, 2010).

26. There was no evidence of the presence of a bus during the several hours V.B. was detained at Bloor and St. Thomas or precisely where they were to meet a bus at all.

27. V.B. testified that he fully co-operated when P.C. Li asked if he could look at the contents of his backpack but denied the statement attributed to him by P.C. Li that he was on his way to a protest.

28. V.B. acknowledged during this contact a nearby commotion and shouting when a cameraman had arrived and was arrested but denied any participation by himself and others in that confrontation. It was shortly after that incident that, in his view, the attitude of the officers working changed to be more aggressive.

29. Prior to that activity, V.B.'s evidence was that his interaction with both P.C.s had been peaceful and professional but following that interaction they were aggressive with various questions and a thorough searching of his backpack.

30. There is no issue with respect to the contents of the backpack which included a surgical mask, a bandanna, goggles, stickers, hoodie, and a phone number written on V.B.'s arm. He stated that on the black T-shirt was a picture of a well-known man, it was that of a Québec comedian and actor and that the various leaflets that were in his backpack, "critical of capitalism", has been handed to him by others during their trip.

31. V.B. was asked in testimony " did you have a water bottle? " and answered initially "I did have a water bottle - probably, yeah." He acknowledged that P.C. Li had noted and complained of a strong smell coming from his backpack but denied having any other liquid then water in it.

32. Following the confrontation with other police and the cameraman, V.B. said that the officers were told by a superior to "arrest everyone with a number on their arm." Following that, he and the others were told by P.C. Li they were under arrest. All of those detained had a phone number written on their arms of someone they could call if arrested.

33. During cross examination, V.B. described his activities on June 26. 2010, and denied they were in any way in aid of violent demonstration. He acknowledged that the contents of his backpack were worthy of police attention given the violence of the day before but stated that all of the contents were legitimate parts of peaceful demonstration given the probability that police might use tear gas and other tactics.

34. The remainder of the clothing was, in his view, simply a change of clothing and not intended to hide his identity. As to the stickers, pamphlets, map and the phone number on his arm, his evidence was that this all came from others who were associated with peaceful demonstration.

35. P.C. Li is charged with not having good and sufficient cause thereby making an unlawful and unnecessary arrest of V.B.

36. The legal burden on the prosecution is to establish the charge under the *PSA* on "clear and convincing evidence" [section 84 (1)].

37. The prosecution argues that from the time of his first interaction with V.B., P.C. Li had formed an intent to arrest V.B. and therefore his decision cannot be supported by way of reference to the material as later found in the backpack.

38. There is always difficulty in rendering a decision on oral evidence given over four years after the events in question. I did have the assistance, in some part, from the contemporaneous notes of P.C. Li and the interview transcripts of both V.B. and P.C. Li given some two years after the event.

39. Counsel for the prosecution urges that I make findings of credibility against P.C. Li and P.C.

Stratton on several points:

1. That the decision to arrest was made prior to any search and therefore the backpack contents are not admissible with respect to the reasonableness of arrest;

2. That the "carte de resistance" mentioned by P.C. Li was not actually found on V.B.;

3. The general point that the officers have a direct interest in rebutting V.B.'s allegations whereas V.B. had no self interest in testimony that might be considered false.

40. Four years had elapsed between the events of June 27, 2010, and the giving of evidence. The interview transcripts taken in 2011 and 2012 of all three witnesses did not go into the detail that was covered during the hearing.

41. On the central issue of credibility, namely V.B. asserting that the officers became confrontational and aggressive once the arrests were made, the video evidence which covered much of the timeframe between arrest and transfer to the holding area appears to be nothing more than a slow somewhat subdued process and not what V.B. described.

42. As noted above, the minor evidentiary differences on discharge are understandable and do not go to the question of the reasonability of arrest.

43. In addition, I have had the transcript of evidence of V.B. at the hearing, together with the video of some of the events on June 27, 2010, and the audio of the evidence of P.C. Li given at the hearing.

44. I have concluded that on the charge of unwarranted arrest, there is really very little difference in the evidence of V.B. and of P.C. Li in their testimony which confirms that found on the video discs that were marked as exhibits. In argument, counsel for the prosecution suggested that there were inconsistencies in the evidence of both police officers as to precisely when the decision to arrest was made such that I should infer the decision was made before the search.

45. I do not find any inconsistencies or any more than would be expected given the passage of time between the events and their testimony. As noted above. I am satisfied that the evidence, including that of V.B., is consistent with P.C. Li being aware of at least much of the contents of the backpack of V.B. prior to his arrest.

46. In a discipline proceeding, there is an onus to establish on the prosecution "clear and convincing evidence" that the decision to arrest was without reasonable grounds. A decision on that issue involves not only consideration of the subjective evidence of P.C. Li and V.B. but also the objective evidence from the surrounding circumstances.

47. Section 84 of the *PSA* requires "clear and convincing evidence" with respect to the offense alleged. In the recent decision of the Supreme Court of Canada in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, the question before the Court involved issue estoppel as between a disciplinary proceeding and a later civil action and in that context, the standard of proof in a police discipline case.

48. The following paragraph supports the proposition advanced by the defense before me that more than balance of probabilities is required to make out a case of misconduct against a police officer under the *PSA*.

> [60] In our view, this analysis is flawed. It cannot necessarily be said that issue estoppel "works both ways" here. 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.

49. I accept that clear and convincing evidence involves more than just balance of probabilities.

REASONABLE AND PROBABLE GROUNDS

50. In addressing the issue as to whether P.C. Li had "good and sufficient cause" to arrest under section 80 (1)(a) of the *PSA*, it is necessary to find whether or not P.C. Li had "reasonable and probable grounds" to believe that a breach of the peace was about to take place or was imminent.

51. The following passage from the Alberta Court of Appeal in *Allen v. Alberta (Law Enforcement Review Board* [2013] A.J. No. 553 (ABCA) assessed the ingredients necessary for an officer's determination of reasonable and probable grounds:

> 26 The expression "reasonable and probable grounds" has a technical meaning, which does not just depend on the separate meaning of "reasonable" on the one hand, and "probable" on the other. The Supreme Court of Canada has now confirmed that there is no meaningful difference between "reasonable" grounds, and "reasonable and probable" grounds: ***R. v Loewen***, 2011 SCC 21 at par. 5, [2011] 2 SCR 167, affm'g 2010 ABCA 255, 490 AR 72, 32 Alta LR (5th) 203. "In this context 'reasonable' relates to legitimate expectations that a fact exists, without being able to say that it is 'more likely than not'": ***R. v Loewen***, 2010 ABCA 255 at para. 18; ***R. v Phung***, 2013 ABCA 63 at paras. 8-11, 542 AR 392.
>
> 27 In ***R. v Storrey***, [1990] 1 SCR 241 at pp. 250-1 the Court summarized the law as follows:
>
> > In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.
> >
> > Under this test the arresting officer must subjectively believe he has grounds, and that subjective belief must be objectively justifiable: ***Tomie-Gallant v Ontario (Police Services Board Inquiry)***(1996), 139 DLR (4th) 149 at para. 57(a), 92 OAC 363 (Div Ct). "Reasonable and probable grounds" therefore explores whether the arresting officer's subjective belief that there was a probability (beyond mere suspicion) that he would find further evidence was reasonable, even if it was not demonstrably statistically probable,

> and even if a reviewing court or tribunal (with the benefit of hindsight and careful reflection) might not agree.

52. In *Brown v. Durham Regional Police Force* (1998), 131 CCC (3d) 1 (Ont CA), Doherty J.A. emphasized the need for a fact specific inquiry:

> 75. Neither the power to arrest in anticipation of the commission of an indictable offence nor the power to arrest for an apprehended breach of the peace is meant as a mechanism whereby the police can control and monitor on an ongoing basis the comings and goings of those they regard as dangerous and prone to criminal activity.
>
> 76. In deciding whether the ancillary power doctrine justifies these detentions, I adhere to the fact-specific inquiry required by that doctrine. The police purpose behind the detentions, the nature of the liberty interest interfered with, the extent of the interference, and the need to employ the impugned means to effectively perform a duty placed upon the police must all be taken into account.

53. One of the decisions referred to in oral argument by counsel for P.C. Li is titled *Figueiras v. Toronto Police Services Board et al.*, 2014 ONSC 2142, which decision was reversed by the Court of Appeal for Ontario with reasons dated March 30, 2015, at 2015 ONCA 208. Further written submissions have been made by counsel dealing with the Court of Appeal decision.

54. The issue in *Figueiras* involved targeted demonstrators during Sunday of the G-20 summit who were required to submit to a search of their belongings before proceeding beyond the checkpoint at the intersection of King and University. Mr. Figueiras refused and in his court action sought declaratory relief with respect to breach of Charter rights.

55. As noted in the defence submission, there is a significant factual difference between the circumstances of *Figueiras* and this case. The Court of Appeal in *Figueiras* did not agree with the Applications judge that there was an imminent threat to the peace at the time of the requested search.

56. Unlike the factual foundation for the Court of Appeals' decision in *Figueiras* that "there were no indications that any breach of the peace was ongoing or imminent in the area of King and University", the same cannot be said at the Bloor and St. Thomas intersection on Sunday, June 27, 2010.

57. The uncontradicted evidence in this case even supported with acknowledgement by V.B. was that the police officers present did believe there was a planned violent protest for that area on that date.

58. Doherty J.A. in *Brown v. Durham* adopted by the Court of Appeal in *Figueiras* dealt with the threat of harm as follows:

> 73. A breach of the peace does not include any and all conduct which right thinking members of the community would regard as offensive, disturbing, or even vaguely threatening. A breach of the peace contemplates an act or actions which result in actual or threatened harm to someone. [FN13] Actions which amount to a breach of the peace may or may not be unlawful standing alone. Thus, in *Percy v. D.P.P.* (1994), [1995] 3 All E.R. 124 (Eng. Q.B.) at 131, Collins J. observed.
>
> > The conduct in question does not itself have to be disorderly or a breach of the criminal law. It is sufficient if its natural consequence would, if persisted in, be to provoke others to violence, and so some actual danger to the peace is established.
>
> 74. Two features of the common law power to arrest or detain to prevent an apprehended breach of the peace merit emphasis. The apprehended breach must be imminent and the risk that the breach will occur must be substantial. The mere possibility of some unspecified breach at some unknown point in time will not suffice. The features of the power to arrest or detain to avoid a breach of the peace place that power on the same footing as the statutory power to arrest in anticipation of the commission of an indictable offence. That is not to say that the two powers are coextensive. Many indictable offences do not involve a breach of the peace and, as indicated above, conduct resulting in an apprehended breach of the peace need not involve the commission of any offence. Both powers are, however, rooted in the recognition that intervention is needed to avoid the harm which is likely to flow in the immediate future if no intervention is made. To properly invoke either power, the police officer must have reasonable grounds for believing that the anticipated conduct, be it breach of the peace or the commission of an indictable offence, will likely occur if the person is not if the person is not detained.

59. The second distinguishing feature of *Figueiras* is the nature of the charge, since the Court relief sought dealt with a claim for declaration of breach of a Charter right when Mr. Figueiras was to be subject to a search.

60. The case before me deals with whether or not P.C. Li had reasonable and probable grounds for common-law arrest based on his belief that a breach of peace was imminent.

61. Support for the above test is found in *Allen v. Alberta* at para. 31 where the Court of Appeal for

Alberta said:

> 31. The real question was whether the Presenting Officer had proven on a balance of probabilities that the search was unreasonable. That involved proving that it was objectively unreasonable for Detective Allen to believe that the search was a reasonable thing to do. The objective component of the test is not that it is probable that drugs, weapons or other evidence will be found, but rather that it is objectively reasonable to go looking.

62. I conclude that the things discovered in the first search were integral to and were found prior to the decision by P.C. Li to arrest when he was first told that the group was arrestable.

63. I am satisfied that the evidence available to P.C. Li met the test for concern regarding any imminent breach necessary for common-law arrest.

64. Much of the analysis by the Court of Appeal in *Figueiras* involved consideration of what has been referred to as the Waterfield test taken from the English case of R. v. Waterfield, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.C.A.).

65. In summary, the Waterfield test for the exercise of common-law police powers involves:

1. A determination that the police action was within the general scope of police duty; and

2. The police action was reasonably necessary for the carrying out of the particular duty in the particular circumstances.

66. I accept as did the Court of Appeal in *Figueiras* the principles that inform the balancing required under the Waterfield Test adopted in *Brown v. Durham*:

> [120] In *Brown*, Doherty J.A. framed the principles that inform the final balancing required under *Waterfield* in a preventive policing context, at p. 251:
>
> > The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police.... The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from

> the perspective of crime control and public safety. We want to be safe, but we need to be free.

67. In my view, the distinguishing facts of this case compared to those in *Figueiras* are:

1. There was police intelligence communication to P.C. Li that "Black Block" protesters were planning a violent demonstration in the area to which P.C. Li was assigned and where he found V.B.;

2. The complainant had in his backpack all of the equipment that was expected to be found on those planning violent demonstration; and

3. P.C. Li believed that without arrest there was the likelihood of the group, which included V.B., being involved in violent confrontation; and

4. The belief of P.C. Li with respect to the potential for breach of peace on the part of V.B. was formed when he first smelled what he believed to be vinegar and asked to see the contents of V.B.'s backpack, which was before P.C. Li was advised that the group was arrestable.

68. It is recognized both by the Court of Appeal in *Figueiras* and numerous other decisions that follow *Waterfield* that analysis of individual situations must be contextual.

69. Counsel on behalf of P.C. Li urges in her written submission that I should adopt the test from *Brown v. Durham* and make the following findings:

1. That the arrest of V.B. was in furtherance of the police duty to keep the peace;

2. That the arrest of V.B. was rationally connected to the risk sought to be managed, mainly the risk that the peace would be breached and that the purpose of the arrest was to prevent a breach of peace from occurring; and

3. That the arrest of V.B. was an effective means of materially reducing likelihood of that risk

of breach occurring.

70. The above findings submitted meet the test of *Brown v. Durham* that the apprehended breach of the peace must be imminent, that the risk that the breach of the peace will occur must be substantial and that the police officer must have reasonable grounds for believing that the anticipated conduct, be it a breach of peace, will likely occur if the person is not detained.

71. In my view, the factual differences between *Figueiras* and the case at hand do govern the result. I accept the finding urged in paragraph 69 above.

72. I conclude that P.C. Li was entitled to rely on the general intelligence given to him and others at the commencement of their morning shift on Sunday, June 27, 2010, and again when he arrived at Bloor and St. Thomas about specific potential for violent protest.

73. I also find P.C. Li was entitled to conclude once he smelled what he believed to be vinegar and saw what was in V.B.'s backpack when first searched given the intelligence and information conveyed by other officers that the breach of peace was likely if people were released. I conclude that his judgment in the circumstances was reasonable. Even if in error, it was none the less reasonable.

74. Police officers like P.C. Li have to make judgment calls based on their experience, knowledge and information from others.

75. In this case, given the events from the day before, intelligence conveyed to him and his observations of V.B.'s backpack, I conclude that he had reasonable grounds for arrest.

76. The fact that no violent demonstration did take place cannot aid the proposition of the prosecution that a breach of peace was imminent

77. Who can say at this distance what might have happened without police presence at the place

and time and without the action that was taken. While it might now be said with the benefit of hindsight that V.B. would not likely have been involved in violent protest if let go, that was far from clear at the time of arrest.

78. This case like *Figueiras* places a burden on individual officers such as P.C. Li who are told by superiors that individuals are "arrestable". The circumstances facing all of the officers were unprecedented throughout the chain of command.

79. P.C. Li had the specific experience of June 26, 2010, the general intelligence and specific instructions on June 27, 2010, as well as his own observations made prior to the arrests taking place.

80. Even if it can be said that some of P.C. Li's factual conclusions were with the benefit of hindsight in error, I am satisfied on all of the evidence they were nonetheless in the circumstances reasonable.

81. As did the Application Judge in *Figueiras*, confirmed by the Court of Appeal and here supported by stronger facts, I conclude that the threat was imminent if those detained were all let go and there was reasonable belief that the risk was of a substantial breach of peace.

82. The onus of the prosecution to establish on clear and convincing evidence that the arrest was unreasonable has not been met.

CHARGE TWO

83. Both P.C. Li and P.C. Stratton are charged with using profane, abusive or insulting language and being uncivil towards V.B., telling him he would be raped if he went to jail.

84. Unlike the first charge, this one does involve a stark difference in the evidence and the necessary determination of credibility. In his evidence, in chief, V.B. testified that once he was told he was under arrest, the attitude of the officers changed from being friendly to anger and aggressiveness by bullying and making fun of he and the others.

85. The essence of V.B.'s evidence relating to the charge can be found in the following passage in chief:

> MR. BOLDUC: Um. When I was sitting there, no, after that uh we got uh – when we got arrested, when we were waiting to get in line uh to the bu – to the– to the- the trucks, the intimidating become uh less aggressive and more uh in a calm tone but threatening. I told twice Mr. Li that my tie- my tie wraps were too tight. I said it that normal, I've never been arrested, is that normal, it that hurts, he said yeah it's normal. Can you loose them up a little bit, he said no I can't do that. So uh when I was waiting I told again that my wrist were, uh, hurting and um Mr. Stratton said what do you want my uh colleague, Mr. Li, to give you a little massage, maybe you'd like a little msasage on your wrist? Uh and he said um just if you don't a – just don't ask him to do you a message elsewhere, and Mr. Li said no we not do that, and Mr. Stratton said maybe you would like that, would you like that? Referring to uh maybe I would have to get a massage from Mr. Li on another place than my wrists. And them um Mr. uh Stratton asked where I'm was going, I- I said I know there's a temporary prison, is that where you're taking us? He said yeah maybe- maybe the temporary prison is full. Maybe uh we're gonna – they'll get you to a municipal prison I don't know, but you don't wanna go there, you don't wanna go there, as case if you're going there I'm taking care of you and you don't want that. And they started like having a little game of jokes saying are we gonna beat you up, oh no we got nothing to do with that, we're good person, we're not gonna – but maybe you can do that, oh no, we're not, we're not. Like playing funny games of good and bad cop, you know, for a moment. And I said I know you're not gonna do that with a- with a forced smile I said no you're not gonna do that, and Mr. Stratton said no, no, no, no, we're not gonna do that. And – but

> he said but, be careful in prison because black people don't like francophones, don't like French people he said. Um, uh he referred to a case that happened months before, I don't know if it's true, a 16-year old being killed by black people, a couple of blo- blocks from there and she was French, she was francophone. He said they don't like francophones so don't-, don't open your mouth there, if they hear you speak French you're gonna have big trouble. Um, you better not talk, and don't tu – turn, don't turn your back on them, keep your back on you – the wall cause you can gen (sic) catch from behind.
>
> MR. SCHUMANN: What did you understand that to mean?
>
> MR. BOLDUC: Uh I understand that I could get sexually assaulted by this guy, because he – he said – catch from behind like this which is two hand like, you know.

86. In cross-examination. V.B. confirmed that he was aware that in being detained, the police were concerned to avoid the damage and destruction from the day before. He reiterated that the attitude and aggressiveness of the officers changed dramatically immediately following his being arrested.

87. The following interchange puts his evidence in context:

> MS. MULCAHY: And it was clear to you that ah these officers believed that they were justified in arresting you.
>
> MR. BOLDUC: Ah, no. I – I mean ah no – I – I think he was saying that to me more like ah – ah we – we don't arrest people for nothing. You – we – we do it be – if we have reason. You know?
>
> MS. MULCAHY: Okay.

MR. BOLDUC: But I don't know if at that time when he said that to me, he thought that he – he had something to arrest me.

(Pause in proceeding and sound of shuffling paper)

MS. MULCAHY: And when we watch this video, we don't hear you making any complaints on this video...

MR. BOLDUC: No...

MS. MULCAHY: ... do we?

MR. BOLDUC: ...not at all.

MS. MULCAHY: And you've made this allegation that Officer Stratton – today you say ca – ah said to you don't turn your back, you can get catched (sic) from behind.

MR. BOLDUC: Yeah.

MS. MULCAHY: And ah you're not suggesting that the word rape was used.

MR. BOLDUC: No, not at all.

MS. MULCAHY: And this is – this is something that you're implied.

MR. BOLDUC: That was something ah – ah suggestive.

MS. MULCAHY: I'm going to suggest to you that um what happened is you overheard um, an officer go by and say that we're going to find enough um holding facilities for all of you. And ah at some point you had a quiet conversation with Officer Stratton asking him basically where you're going. Are you going to a jail or are you going to ah a temporary prison.

MR. BOLDUC: Exactly.

MS. MULCAHY: And he assured you that you're going to a prisoner processing centre – a temporary jail.

MR. BOLDUC: He said maybe if the temporary prison is ah full, maybe they'll send you to the – the – like the local prison, you know that regular prison. But I don't think so, maybe yes, maybe not. That's that thing you know, where finally he said probably you'll go to the temporary prison, but if you go to the regular prison and then that thing ah was said about black people.

88. In summary, V.B. complains about the conversation that took place at the time of his arrest when he says he was being made fun of among other things because he was an actor now in his 30s.

89. He complains about another conversation that took place almost two hours later while waiting for the police wagon when he says the police were aggressive and that when he was complaining about the wrist ties being too tight that was when the conversation with the implication of rape took place.

90. The whole interaction between V.B. and his group and a number of officers, including P.C.s Li and Stratton, took place over the space of time that exceeded two hours.

91. During much of that time, there is a video recording with some audio of what was going on.

92. There is nothing in the video to suggest the type of aggressive conduct that V.B. refers to as having commenced immediately after he was told he was arrested.

93. If one were to accept the evidence of what he regarded as abusive conduct took place in the 10 or 15 minutes before he was placed in a transport vehicle, one would have expected corroboration of some kind from some other witnesses.

94. The problem with V.B.'s evidence is that even from his own mouth the charge does not standup because at it's best according to him, the offensive language was at most an implied suggestion that he might be at risk of sexual assault if he were to be placed in a formal prison.

95. Based on the evidence of V.B. alone, there is no basis for the specifics of charge 2 being made out.

96. Prior to the defense being called, a motion was made by counsel for the defence to strike out or provide a directed verdict on charge 2.

97. The motion was not granted, not because I thought it lacked merit but more importantly given the serious nature of the charge in the context of the discipline hearing, I felt was appropriate to hear from the officers.

98. The evidence of both officers could not be more clear. Both said in answer to questions on the specifics of the languages contained in charge 2, " it did not happen."

99. Having heard their evidence as well as reviewed the entire video evidence, I am satisfied there was some interchange between the officers and V.B. and, indeed, others that may have jocularly tried to put V.B. at ease with a clear message that he was not going to prison.

100. There is nothing throughout the time between the arrest and the end of the various videos taken

to suggest abusive conduct by either officer. There is no corroboration either from V.B., himself, or anyone else for what he decided after the event and having talked to others should be the basis of a complaint.

101. I have no doubt that V.B. may have been nervous following arrest but conclude that whatever was said in the minutes leading up to his being transported away, it was not in the language of his complaint or the charge. I accept that it may have been disconcerting and upsetting to V.B. knowing he was going to jail.

102. I accept both the officers' version that the language attributed to them in the wording of the charge did not happen. Whatever was said, I find, was meant to ally not add to V.B.'s fears.

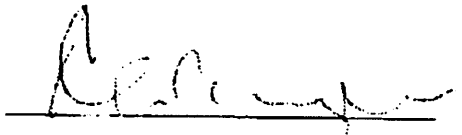
103. The charge against both is dismissed.

ONUS AND STANDARD OF PROOF

104. All of the evidence before me, I am not satisfied that the burden on the prosecution with respect to either charge has been made out on the clear and convincing evidence test.

105. Accordingly both charges will be dismissed.

DATED at the City of Toronto, in the Province of Ontario, this 14 day of May, 2015.



The Hon. Colin L. Campbell, Q.C.