



HAMILTON POLICE SERVICE DISCIPLINE HEARING

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

IN THE MATTER OF THE HAMILTON POLICE SERVICE,
CONSTABLE JEFFREY TODORUCK, 607,
AND MR. MACKAY TAGGART, PUBLIC COMPLAINANT

Counts (brief):

Unlawful or Unnecessary Exercise of Authority, O.Reg. 268/10 s 2(1)(g)(i)
Neglect of Duty, O.Reg. 268/10 s 2(1)(c)(i)(A)
Neglect of Duty, O.Reg. 268/10 s 2(1)(c)(i)(A)
Discreditable Conduct, O.Reg. 268/10 s 2(1)(a)(xi)
Discreditable Conduct, O.Reg. 268/10 s 2(1)(a)(xi)

DECISION

Hearing Officer: Superintendent (ret) Peter Lennox

Prosecutor: Mr. Brian Duxbury

Defence Counsel: None (self-represented)

Complainant: Mr. Mackay Taggart

Hearing Dates: March 3-5, 2020

Decision Date: May 31, 2020

DECISION

Constable Jeffrey Todoruck, 607

Finding

For the reasons articulated in the “Analysis and Decision” section, below, Constable Jeffrey Todoruck, 607, is found guilty of:

- Count One: Unlawful or Unnecessary Exercise of Authority
- Count Two: Neglect of Duty
- Count Three: Neglect of Duty
- Count Four: Discreditable Conduct

Constable Todoruck is found not guilty of:

- Count Five: Discreditable Conduct

Summary and Initial Comments

Constable Jeffrey (Jeff) Todoruck, badge number 607, Hamilton Police Service (HPS or the Service), faces one count of Unlawful or Unnecessary Exercise of Authority, two counts of Neglect of Duty, and two counts of Discreditable Conduct, contrary to the *Police Services Act (PSA)*. The five counts are reflected on the Notice of Hearing (NOH) (Exhibit 3).

The investigation of this matter was carried out by the Office of the Independent Police Review Director (OIPRD). This hearing is at the direction of the OIPRD.

The prosecutor (Mr. Duxbury) and the hearing officer (“I” or other first-person pronoun) were appointed when the prosecutor and hearing officer originally in those positions recused themselves. The parties to this matter are the prosecutor, public complainant Mr. Mackay Taggart of Global News, and the respondent officer, Const. Todoruck.

The first appearance with the current officials, by telephone and on the record, took place on December 13, 2019. At that time, hearing dates of March 3, 4, 5, 6 and (if necessary) 9 were set aside. The respondent officer (Constable Todoruck) indicated that he was not represented by counsel and was unsure if he would be so represented at the March hearing.

A second appearance, by telephone and on the record, took place on January 21, 2020. I asked to be updated on whether the respondent officer had counsel and was told that he remained unrepresented. As I did not know if the complainant (Mr. Taggart) was represented, I was anxious to ensure that the duties incumbent on a hearing officer as articulated in Timms-Fryer and Amherstburg Police Service, 2015, were carried out with the parties to ensure everyone understood what was to take place and what their rights were as parties to the hearing.

I described my role as, in part, to ensure that the parties to the hearing knew they had that status, and what that meant in terms of their rights:

- to be represented by counsel,
- to call, examine and cross-examine witnesses,
- to object to evidence given or to make motions (both of which would call for decisions by me), and
- to make submissions on any motions and also at the end of the hearing.

I described my role as hearing and receiving the evidence, considering it, and making decisions on whether the counts faced by the respondent officer have been proven on clear and convincing evidence, and if so, on penalty. I told the parties that my main concern was to ensure procedural fairness to all parties. Questions were invited and a brief discussion took place before the matter was adjourned to March 3, 2020.

The hearing began on March 3 in the Bill Stirrup Media Room at the HPS Central Station, 155 King William Street in Hamilton. The hearing took place over three days, ending on March 5, 2020. Electronic passes are needed to access the area, but the room was effectively made public as those attending the hearing were given unrestricted access by HPS staff. The parties all attended on the first day. Mr. Brian Duxbury was accompanied by colleague counsel Mr. J. Perell. Const. Jeff Todoruck continued to represent himself. Complainant Mr. Mackay Taggart was also unrepresented.

As two of the three parties were unrepresented, I committed to ensuring that if anyone did not understand the proceeding, we would pause for explanations. At several points during the hearing, I gave explanations with respect to procedure and to reinforce the rights of the parties, such as when the respondent officer mentioned that he did not intend to call witnesses or submit evidence.

No exhibits had been submitted, no evidence offered, and no plea taken during the telephone appearances held before the in-person hearing on March 3, 2020, although the respondent officer indicated that he had received the Notice of Hearing (NOH) and understood it. I indicated that my delegation from Chief Eric Girt would be Exhibit One, the prosecutor's designation would be Exhibit Two, and the NOH with particulars would be Exhibit Three.

On consultation with the parties, I made an order excluding witnesses.

I asked the respondent officer to enter a plea, and he pled *not guilty* to all five counts. I read the NOH and particulars of the matter into the record, as follows:

BACKGROUND

On May 16, 2017, a motor vehicle accident claimed the life of a 10 year old girl. A Global News photojournalist (the "Affected Person"), arrived at the location of the accident for the purpose of recording the scene and the events. The Affected Person was subsequently arrested by Constable Jeffrey Todoruck #607 of the Hamilton Police Service.

Upon his arrival, the Affected Person observed another journalist, DR, sitting handcuffed in the back of a police cruiser. The Affected Person approached Constable Todoruck to inquire the reason for DR's arrest. Constable Todoruck told the Affected Person that it was none of his business. The Affected Person contacted the Hamilton Police Service media relations officer who told the Affected Person that he should simply continue to film as he had intended.

COUNT ONE – UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY

After pressing Constable Todoruck for more information about DR, the Affected Person walked away intending to continue his work. Constable Todoruck followed the Affected Person and told him that he was not authorized to be at the location. Constable Todoruck threatened to arrest the Affected Person and told him to put his camera down. Constable Todoruck then forcibly pushed the Affected Person to the ground, used his knee to restrain him and tied the Affected Person's wrists with plastic zip ties. Constable Todoruck pulled the Affected Person off the ground and

placed him in the rear of another police vehicle. Approximately 20 minutes later, the Affected Person was released without charges.

Constable Todoruck made an unlawful or unnecessary arrest of the Affected Person.

COUNT TWO – NEGLECT OF DUTY

Constable Todoruck failed to inform a prisoner, DR, of the reasons for his arrest and/or failed to provide the prisoner with his rights to counsel pursuant to s. 10 of the Charter of Rights and Freedoms.

Constable Todoruck admitted that he did not provide DR with his rights to counsel. Constable Todoruck stated that the process for arrested [sic] DR was time-consuming – two to three minutes for the actual arrest with a further two minutes needed to place DR into the police vehicle. Constable Todoruck was also in the midst of attempting to take a witness statement. Constable Todoruck explained that he had a number of responsibilities that took precedence over providing DR with his rights to counsel.

Shortly after the first arrest, other officers had arrived: Constable Schotel, Acting Sergeant Robinson and an officer from the Halton Regional Police Service.

The Charter of Rights and Freedoms s. 10(b) states: “Everyone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right”. The Supreme Court of Canada, in R. v. Suberu [2009] 2 S.C.R. 460 clearly indicated that, from the moment an individual is detained, the police have the obligation to inform the detainee of his or her right to counsel. The phrase “without delay” in s. 10(b) must

be interpreted as “immediately”. The immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the Charter.

While there may have been some justification for denying DR his rights to counsel at the outset, the arrival of other officers on scene removed the justification for any delay. Constable Todoruck did not ask other officers to either assume custody of DR or to assume the role of taking witness statements. The reading of the rights to counsel for the “Brydges” warning to DR would have required less than a minute. The delay in doing so became unjustifiable following the arrival of other officers.

COUNT THREE – NEGLECT OF DUTY

Constable Todoruck failed to inform a prisoner, the Affected Person, of the reasons for his arrest and/or failed to provide the prisoner with his rights to counsel pursuant to s. 10 of the Charter of Rights and Freedoms.

At the time the Affected Person was arrested, other officers were also on the scene. There was no justification on the part of Constable Todoruck not to provide the Affected Person with his rights to counsel.

COUNT FOUR – DISCREDITABLE CONDUCT

Constable Todoruck left a prisoner, DR, unattended in the rear of a police vehicle contrary to the policies and procedures of the Hamilton Police Service.

Hamilton Police Service Policies and Procedure 7.11 entitled Prisoners – Search of Persons / Care and Control states in policy B.2.1.3 that “under no circumstances shall a prisoner(s) be left unattended in a police vehicle”.

COUNT FIVE – DISCREDITABLE CONDUCT

Constable Todoruck left a prisoner, the Affected Person, unattended in the rear of a police vehicle contrary to the policies and procedures of the Hamilton Police Service.

Hamilton Police Service Policies and Procedure 7.11 entitled Prisoners – Search of Persons / Care and Control states in policy B.2.1.3 that “under no circumstances shall a prisoner(s) be left unattended in a police vehicle.

Prosecution – Initial Submissions

The prosecutor began by drawing my attention to the Hamilton Police Service’s media relations policy (Exhibit 9, Tab 4), which makes it the policy of the HPS to cooperate fully and impartially with members of the news media, as the media play a crucial role in information dissemination and community attitudes toward the police. The relationship between police and media is sensitive because of the urgent circumstances in which police and media interact. He said that the policy is at the core of this hearing, as it sets out how the officer treated, and how he should have treated, two members of the media.

The respondent officer, Const. Todoruck, was first on scene of a collision on May 16, 2017, at which a young girl lost her life. At the scene, Const. Todoruck engaged with and then arrested Jeremy Cohn, a Global News cameraman, for

obstructing the police, taking him to the ground and handcuffing him with zip ties after a brief encounter. At the time, Mr. Cohn was wearing a coat with the logo of the news media and had a camera and tripod, indicating clearly that he was a member of the media. The prosecutor reminded me that this arrest is at the base of the event and suggested that everything needs to be considered through the lens of policy. He said that the issue for Count One is whether that arrest was unlawful or unnecessary based on the grounds (whether the officer was, indeed, obstructed) or basis for that arrest and on the HPS media policy, and whether the arrest was necessary in the circumstances, even in difficult circumstances. He suggested that the respondent may have been frustrated or angry following the arrest of Mr. David Ritchie, another journalist, earlier in the evening.

He went through the other four counts, asking me to consider whether Mr. Ritchie, the first party arrested, was read his rights in a timely way (Count Two), whether Mr. Cohn was read his rights at all (Count Three), and whether both arrested parties were left unattended for too long (Counts Four and Five). He asked me to consider whether the final two brought discredit on the HPS. He asked me to consider that even in chaotic circumstances, officers must have the presence of mind to remember the importance of their relationship with the media.

Finally, he outlined the witnesses he intended to call, and video evidence he intended to introduce as the hearing progressed.

Defence – Initial Submissions

The respondent officer began by outlining circumstances and occurrences that had occurred prior to the hearing (such as his dissatisfaction with his earlier counsel on a conference call), but on an objection from the prosecutor I asked him to restrict his comments to what the Tribunal needed to hear for him to

defend himself against the five counts he faced. I repeated my offer to stop proceedings if procedural or other questions arose and gave the respondent as much latitude as I could considering his lack of legal representation and responded to the objections of the prosecutor on a case-by-case basis.

As this finding continues, I will not note every objection, but will simply not report on anything that was excluded by an objection that was sustained.

The respondent indicated that he had wanted the matter to proceed more expeditiously than it has, that he had cooperated with the Office of the Independent Police Review Director (OIPRD) from the outset, and that he did not want to delay matters further, remembering that the incident surrounding the events in question had claimed the life of a young girl. He expressed concern that the family would be re-traumatized by the reporting of the hearing.

He expressed scepticism that the videos that were to be introduced in evidence were the only recordings in existence. He stated the belief that the entire incident was documented through audio and visual recordings.

He stated that this case is not a matter of the HPS or Jeff Todoruck against the media, but rather a matter of three members of the media (later identified as such) who were defiant and argumentative against a HPS member in the course of his duty, and suggested that their actions were more consistent with criminals or activists than with respected members of the media.

The respondent stated that he did not know the three men were members of the media, never having met any of them before. He also expressed concern that the three knew each other on a personal level, and that he had seen them together at subsequent events.

Const. Todoruck stated that he did not know the three were members of the media at the time of the event and had not met them before that time.

He referred to the complaint document (later introduced as Exhibit 12). He drew my attention to the comment that the men had a good relationship with the HPS media officer prior to May 16, 2017. He read excerpts from the complaint to the effect that the HPS had not communicated with Global News or Mr. Cohn about the investigation at the time of the complaint [June 2, 2017], and that it is incumbent on the OIPRD and the HPS to “investigate the arrest of journalists thoroughly and expediently” to send a clear signal that incidents such as the arrest of Mr. Cohn “are unacceptable and will not be tolerated”. The respondent felt that this is an indication that the motivation for the complaint was frustration, and suggestive that members of the media are entitled to special consideration. He surmised that as the complainant, Mr. Mackay Taggart, was not present at the scene, the complaint was derived from information provided by third parties. He felt that Mr. Taggart, given his position, should have been aware of police policies and procedures, and especially that police do not provide information about ongoing investigations to the media or anyone else.

The respondent underscored that at no time did any of the three men identify themselves as members of the media, and if they had, they would not have been afforded special treatment.

He acknowledged that members of the emergency services and other people were around the scene and indicated that he had no knowledge of when other officers arrived at the scene given his duties there. He said that he was unable to control the movements of other people at the scene as his time and attention were drawn to the three men by their behaviour. He said that if his only duty at the time had been control of the scene, he would have erected crime-scene tape and not allowed anyone to enter without authority.

He said that both of the arrested males were given clear direction to leave the area and given multiple opportunities to comply with that direction. They were told that if they failed to comply with the direction that they would have been arrested for “obstruct police”. He said that this is a clear case of “obstruct police” for both men who were arrested that day. He stated further that both men were arrested for failing to follow direction combined with repeated attempts to disrupt his investigation and preventing him from performing his duties.

He made comments about a subsequent matter involving a complaint by Mr. Andrew Collins that was disproved by video evidence, and asked me to exclude evidence given by Mr. Collins, including the video marked Exhibit 5, as he had been proven to be a non-credible witness.

The respondent provided some background on this matter, including the timing of the OIPRD investigation, and said that eight counts against him had been reduced to five. He pointed out that Counts Two and Four are related to David Ritchie, who appeared in criminal court on the charges following his arrest, accepting responsibility for the matter and settling it with a peace bond. He also stated that Mr. Ritchie did not cooperate with the OIPRD investigation [though the materials from which the respondent was reading were not offered as evidence], and suggested that Mr. Ritchie had “authorized” the video entered as Exhibit 6 [the video taken by Mr. Collins] in this matter. He asked that I exclude Exhibit 6 unless Mr. Ritchie could be called to testify about the video, particularly as Mr. Ritchie is present and available to be called.

The respondent also asked that Counts Two and Four be withdrawn, as they relate to Mr. Ritchie and he has admitted his wrongdoings in criminal court.

He stated that while there were civilian witnesses who could have corroborated his version of events, he has not called them as he did not wish “to re-traumatize anyone for the sole purpose of my defence”. He indicated that he was looking

forward to the hearing as it will present facts that were previously presented to the public “in an inaccurate manner”.

He referred to Mr. Cohn as never having been cooperative. He said that he moved from being “passively resistant” to being “actively resistant” according to the Ontario Use-of-Force Model which, he said, justified soft to hard physical control and intermediate weapons. He repeated that we should not proceed on the second count as it pertains to Mr. Ritchie. With respect to the third count, the respondent said that Mr. Cohn was warned prior to his arrest, and that he did not have time even to learn his name, let alone read his rights to counsel, prior to his release.

With respect to the fourth count, the respondent said that Mr. Ritchie was never left alone in the cruiser, and then said that the longest period he was alone was during the arrest of Mr. Cohn, who was arrested in part to ensure Mr. Ritchie’s safety, and that took precedence over leaving him alone for two minutes.

With respect to the fifth count, the custody of Mr. Cohn was given over to A/Sgt. Robinson, and Mr. Cohn was therefore never unattended.

Finally, he took issue with the prosecutor’s suggestion that he was frustrated or angered. He acknowledged that he may have been frustrated, but not angry, as he was focused on his job and his tasks but was distracted from those tasks, and the arrests were a result of this distraction and his inability to perform his duties.

The prosecutor had no response to the respondent’s opening statement.

Complainant – Initial Submissions

The complainant, Mr. Taggart, declined to make an initial submission.

Prosecution Witnesses

Evidence of Mr. Jeremy Cohn

Examination in Chief

In responses to questions from the prosecutor, Mr. Cohn told the Tribunal that he appeared in response to a summons. He graduated from Humber College's journalism print and broadcast program in 2011 and has worked as a cameraman and journalist since that time. He focuses on breaking news, including the crime beat and severe weather. He typically works in the Toronto area but covers substantial stories in Hamilton six to eight times a year. He became aware of the HPS media-relations policy after the OIPRD investigation, and understands that it mandates a working relationship day-to-day between the police and the media, including access to scenes as long as there is no danger or interference with investigations. Police officers are not to obstruct on-scene reporting.

He is aware of the HPS media relations office that includes one sworn officer and one civilian corporate-communications manager, and has enjoyed, for the most part, a very strong working relationship with the police.

Mr. Cohn testified that his understanding of the protocol related to a crime scene is that if media show up to a fresh, active situation with no perimeter, it is the responsibility of media to stay out of the way, and of the police to ensure media have a designated spot from which to record. If a perimeter is set up, media remain outside it.

On May 16, 2017, Mr. Cohn became aware of the collision on Evans Road in Hamilton through a radio scanner while on Highway 407 in Peel Region. He contacted his assignment desk and responded to the scene, arriving shortly after 7:00 p.m. On arrival, he was wearing a bright blue spring jacket with “Global News” and the company logo on the left chest area.

The prosecutor directed Mr. Cohn’s attention to Exhibit Four, which is a 54” by 29” Google Maps photograph showing Evans Road running north from Dundas Street East (Highway 5) in Hamilton. It depicts a Pioneer Energy property on the north-west corner of the intersection and a series of structures to the north on both sides of the road. There is a set of community mailboxes on the north side of the Pioneer property, and a grassed area north of the mailboxes. A purple tent-like structure is opposite the lawn on the east side of the road. Moving north, there are two houses on opposite sides of Evans Avenue, and the one on the east side seems to be under construction. The accident scene was just below the north edge of the photograph, north of the houses. On reviewing the evidence, I used the scale on the lower-right corner of the photograph to determine that the collision scene was approximately 100-120 metres north of the north side of the intersection, but this is an estimate on my part. The south end of the lawn is about 40 metres north of the north side of the intersection, or 60-80 metres south of the collision site.

Mr. Cohn provided an orientation of the scene similar to the one above without the measurements. He parked at the Pioneer property among other vehicles, gathered his camera gear and set up about 10 metres north of the parking lot on Evans Road. His gear consisted of a medium backpack with camera accessories and lenses, two cellular phones that double as cameras, and a five-foot tripod that had a professional camera with a zoom lens mounted on the top.

From his vantage on Evans Road, he noticed emergency and civilian vehicles to the north, and estimated that the collision scene was about 200 feet to the north of his location. He was aware that the victim had been taken from the scene to hospital. He noticed a police car about a third of the way toward the scene.

He was interrupted in his attempt to take video images by hearing his name called from the back of the police car. He approached the car and observed Mr. David Ritchie in the back seat. The window was open a few inches, and Mr. Cohn asked Mr. Ritchie, who looked pale and “shaky”, what was going on, and Mr. Ritchie told him that he had been arrested and that the officer had stolen his camera. He also said that his arms were sore from handcuffs.

Part way through the exchange, a police officer, identified as Const. Todoruck, approached from the passenger side of the car. Mr. Cohn asked if he knew why Mr. Ritchie had been arrested, but the officer just told Mr. Cohn that the road was closed and that there was a serious investigation ongoing. He would answer no more questions. He refused to provide his name and badge number to Mr. Cohn.

Mr. Cohn backed away to the west side of the roadway, about 15 feet from the cruiser. He still had a view of the scene, and of the police car containing Mr. Ritchie. He obtained a telephone number for Const. Steve Welton, then the HPS media-relations officer.

Mr. Cohn telephoned and spoke to Const. Welton, who was not aware of the incident and was off duty. Mr. Cohn told the officer about the arrest of Mr. Ritchie, and Const. Welton asked for directions to the scene. Const. Welton told Mr. Cohn that he was on his way, and advised him to stay calm and to do his job to document the scene. Const. Welton asked for

the officer's badge number and if there was a perimeter established, and asked Mr. Cohn to document that there was no crime-scene tape in his videos.

Mr. Cohn indicated that a video was available of the exchange in which Const. Todoruck refused to identify himself.

After speaking with Const. Welton, Mr. Cohn began to document the scene and to gather video images, shooting north with his zoom lens toward the collision scene. He saw about ten or fifteen people and a number of civilian and emergency vehicles close to the scene. A van was facing south with obvious front-end damage, and Mr. Cohn assumed that this was the vehicle that had struck the child. The van was near the driveway at the top of the photograph (Exhibit 4).

About five minutes later, he was telephoned by Const. Welton again and asked for more information. Mr. Cohn told the officer that Const. Todoruck was away from the vehicle near the collision scene. Const. Welton asked if Mr. Ritchie were OK physically, and if he could speak to him on Mr. Cohn's speaker-phone. Mr. Cohn walked about ten feet toward the police car and held up his phone at arm's length so Mr. Ritchie and Const. Welton could converse. Mr. Cohn also informed Const. Welton that there was no crime-scene tape up and that he was shooting video while they were on the phone.

At this point Mr. Cohn observed Const. Todoruck walking southbound toward him toward Mr. Cohn and the police car. He appeared angry and was red in the face, and was walking quickly but not running. Mr. Cohn thought it best at that point to gather his equipment and leave until things settled down, but Const. Todoruck told Mr. Cohn that he had asked him to

leave and grabbed Mr. Cohn's right shoulder. Const. Todoruck told Mr. Cohn to put the camera down and told him that he was under arrest.

The prosecutor asked Mr. Cohn if he was preventing Const. Todoruck from his activities. Mr. Cohn replied that he was not.

Mr. Cohn said that he remained calm, said "OK" and was compliant with the officer. Mr. Cohn was told to put the camera down, and Const. Todoruck led him by the arm toward the lawn north of the gas station. Mr. Cohn described himself as "shocked" and decided to comply with instructions. He had the camera slung under his arm. When they reached the grass, Const. Todoruck forced Mr. Cohn to the ground, and Mr. Cohn, still wearing a backpack, felt the officer's knee on his left lower back. The camera fell to the ground and stopped recording, and the officer removed the camera equipment from Mr. Cohn and restrained his hands behind his back, eventually securing them with plastic zip-ties.

Mr. Cohn identified another member of the media who was documenting the situation (later identified as Mr. Andrew Collins taking a cell-phone video). He also noticed various items falling from Const. Todoruck's uniform. Const. Todoruck let Mr. Cohn up, and Mr. Cohn asked Mr. Collins to care for his equipment and not to post anything on social media. Mr. Cohn also asked Mr. Collins to telephone Mr. Cohn's manager.

Const. Todoruck walked Mr. Cohn around for a short while and eventually placed him in a second police cruiser about 50 metres farther north, toward the collision scene. Mr. Cohn indicated that Const. Todoruck, who appeared to be confused and angry, did not read Mr. Cohn his rights or inform him of the reason for the arrest before placing him in the second police car, later identified as the sergeant's vehicle.

Mr. Cohn said that he was in the second cruiser for 20-30 minutes before he was spoken to by another officer, later learned to be Acting Sergeant Matthew Robinson. They spoke for two or three minutes, and A/Sgt. Robinson told him that he was unaware of why Mr. Cohn had been arrested, but he would return in a few minutes. He also asked if Mr. Cohn were OK.

The prosecutor asked if Const. Todoruck ever read Mr. Cohn his rights. Mr. Cohn replied that he did not, and that he never understood why he was arrested.

A/Sgt. Robinson returned to his police vehicle after about 10 minutes, and Mr. Cohn told him that it was a serious matter that two journalists had been arrested. A/Sgt. Robinson released Mr. Cohn unconditionally and told Mr. Cohn that he was welcome to continue doing his job. He also invited him to speak to his superiors, who were on route to the scene.

A/Sgt. Robinson was unable to release the zip-ties with his knife, and borrowed scissors from a nearby Emergency Medical Services (EMS) crew to cut them away.

After his release, Mr. Cohn spent about 90 minutes to two hours on the scene. He retrieved his equipment from Mr. Collins, phoned management at Global News and continued to gather images for the nightly news.

During that time, HPS media-relations officer Const. Welton arrived and asked to speak to Mr. Cohn in his car. Mr. Cohn was not asked by the prosecutor to provide details of that conversation.

Mr. Cohn had no further contact with Const. Todoruck until the officer was preparing to drive away from the scene, some time later. Const. Todoruck

aimed his vehicle's spotlight at media members taking images from the passenger side of the car, which Mr. Cohn interpreted as an attempt to prevent video recording.

The prosecutor returned the testimony to the time of the arrest, and underscored a number of details as recorded above. He also asked Mr. Cohn about the effect the arrest has had on him. Mr. Cohn replied that he initially received positive reinforcement from colleagues, friends, police officers and other emergency-services officials, and after that subsided, he felt that the event had had a profound impact on him. He interacts regularly with police officers in his work, and found himself nervous when approached on scenes by police officers. He retains his positive relations with the police, but is now reluctant to cover stories in Hamilton. He also reported issues with sleep patterns and a lack of interest in continuing to do his job, a contrast to his attitude of "nothing but praise" for it prior to his arrest.

Again responding to the prosecutor's questions, Mr. Cohn indicated that this was the first time he had encountered journalists being arrested and, thinking the scene had subsided following the victim's removal to hospital, he was not expecting to encounter problems that night. His intention was to take videos from a distance of a scene that, in his judgement, was subdued compared to others he had encountered where there were still suspects or victims on the scene. He did not intend to speak to witnesses or family members. He has experienced heated scenes among police officers when they are caught up in the moment, and there have been a few times where officers have apologized for asking media to move unnecessarily, but he never encountered an angry, distracted officer as he perceived Const. Todoruck to be at the scene of this occurrence.

The prosecutor then asked Mr. Cohn to guide the Tribunal through the videos of these events that had been offered in evidence.

He first introduced the images that had been caught by the broadcast camera, and assured the Tribunal that they appear in the order in which they were recorded. Mr. Cohn said that the video is the one that had been submitted to Global News for that night's news broadcast, and that there had been no deletions from it. It is about five minutes long.

The video was played in its entirety, and then played again with pauses for commentary by Mr. Cohn. As background, Mr. Cohn described his practice of not recording constantly, but of taking videos about ten seconds in length, based on what he believes to be useful for news broadcasts.

Mr. Cohn said that the video was taken from a spot adjacent to the grassy area north of the Pioneer station. Voices are heard on the video, and while phrases can be heard, it is difficult to determine any actual conversation. In the video, commentated by Mr. Cohn, a minivan is seen on the left side of the roadway well north of the camera, partially on the roadway. A number of emergency and civilian vehicles are seen near the van. Constable Todoruck is seen walking away from the camera.

The second scene was intended to show that there was no crime-scene tape, as Const. Welton had asked. Shortly thereafter, A/Sgt. Robinson is seen drawing police tape across the road, from west to east. Mr. Cohn indicated that this happened about halfway between the collision scene and where he was standing. Mr. Cohn said that this was shot between his two telephone calls with Const. Welton.

Mr. Cohn said that while he had been asked to leave the roadway by Const. Todoruck, he remained where he was as he saw 10-15 apparent civilians walking around the scene. He was concerned about why media were being kept back when they were typically allowed to be where other civilians were.

Const. Todoruck is seen speaking to A/Sgt. Robinson, and they are joined by a second constable who drove southbound and joined them. He subsequently turned his vehicle around and drove away, northbound on Evans Road after A/Sgt. Robinson and Const. Todoruck have left the frame.

Const. Welton calls again, and Mr. Cohn explains that the tape had gone up, and the media were well behind the tape.

Although this is not seen on camera, Const. Todoruck is heard saying "I've asked you to get out of here". Mr. Cohn immediately says, "Don't touch me!" loudly, and then Const. Todoruck is heard saying "You're under arrest". Mr. Cohn replies "OK" immediately. As Const. Todoruck began to speak, the video moves wildly as if being moved quickly in different directions, showing sky and greenery. Const. Todoruck repeats "You're under arrest" twice more, and Mr. Cohn replies, "All right". Const. Todoruck directs Mr. Cohn to put the camera down, and says, "I've asked you to stay away from him". Mr. Cohn replies, "No problem". Mr. Cohn states that he is on the phone with an officer, and Const. Todoruck tells Mr. Cohn to put his hands behind his back. More words are said to the same effect, and then the image switches to video images apparently taken after Mr. Cohn's release. Mr. Cohn remembers the site of the arrest as being near a brown utility box west of the roadway and just north of the gas station lot (visible in the video), and underscores that he was never more than ten feet ahead of the police SUV containing Mr. Ritchie.

The first image post-arrest shows Const. Todoruck speaking with A/S/Sgt. Zafirides between the camera and the collision scene.

At that point, crime-scene tape is seen across the street to the north and south of the collision scene, and a third strand crosses the street closer to the camera's position, south of the two other tapes.

Several more images are seen shot northbound along Evans Road, some showing Const. Todoruck in dialogue with A/S/Sgt. Zafirides, and finally there is an image of A/Sgt. Robinson releasing Mr. Ritchie on the roadway. [Note that when I reviewed the video after the hearing, I noticed the rank insignia of a staff sergeant as well as sergeants' chevrons on the releasing officer, and believe that the image portrays A/S/Sgt. Zafirides.]

The prosecutor then turned to the cellular phone video taken by Mr. Cohn, viewed in its entirety first and then, as before, narrated by Mr. Cohn, who introduced the video as having been taken before he had the commercial camera ready. This video is short, at 16 seconds, and shows Const. Todoruck walking away from the camera toward the driver's door of the police SUV, stating "It's not your business". Mr. Cohn replies, "It actually is". Const. Todoruck opens the driver's door, states "You've been talking to people, so you've lost your window privileges now". Mr. Cohn asks, "Can I grab your badge number, please?" Const. Todoruck replies to the effect that he has a serious investigation and "It's got nothing to do with you", puts on his forage cap and walks away as the video ends.

Mr. Cohn stated that Mr. Ritchie was in the back of that police SUV. The background shows the collision scene with civilians on the street, and no yellow crime-scene tape up at that point. Mr. Cohn interpreted Const. Todoruck's actions as being in response to his speaking to Mr. Ritchie.

He wanted the officer's badge number so his superiors could follow up, and commented that his journalistic interest at that point switched from the collision to the arrest of Mr. Ritchie, and he took the cell-phone video as he wanted to record that story as it developed.

Cross-Examination

Mr. Cohn was then cross-examined by Const. Todoruck, as the self-represented respondent officer. Some questions were asked repeatedly, but I have not recorded repeated questions here. Some information is not chronological with respect to the cross-examination; I have chosen to try to report it more chronologically for clarity in this document. The conduct of the cross-examination often returned repeatedly to subjects, and reproducing that here would be unduly confusing.

The respondent began by clarifying that Mr. Cohn was employed by Global News on the day of the incident. He is no longer so employed, and when asked Mr. Cohn said that it was the subject of a grievance he had filed, but while the grievance is connected with the events of that day, they are not relevant to the matter at hand and therefore not worth sharing.

Mr. Cohn has been to hundreds of incident scenes, covering breaking news and weather. His duties mostly focus on the crime beat, but he takes assignments as they are offered to him. He seldom appears on camera, and he replied in the negative when the respondent asked if he would have seen him on newscasts or if he had had dealings with the respondent prior to that day.

His purpose for being on scene was to cover the serious events that had taken place.

Mr. Cohn admitted that he was not aware of the HPS media policy prior to that day, and said that he had obtained the phone number for media-relations officer Welton from Mr. Collins. He took videos and made calls on his work phone that day; he did not use his personal phone and is no longer in possession of his work phone. He took the 16-second video and no other videos on that work phone. When the respondent suggested that Mr. Cohn had recorded him when Mr. Ritchie was in the back of his police SUV, Mr. Cohn replied that he had not, and did not remember telling the respondent that he was recording him, but was holding out the phone so Const. Welton could speak to Mr. Ritchie.

Mr. Cohn did not recognize Const. Welton's car that day, but had a conversation with him for about ten minutes in Const. Welton's vehicle. That conversation was to the effect that Const. Welton asked him if he and Mr. Ritchie were OK, and that the incidents of the evening upset him and was the final straw motivating him to leave the police service for a career change.

Mr. Cohn estimated that he arrived at the scene shortly after 7:00 p.m., and agreed with the respondent that the time of his arrest was 7:20 or 7:30 p.m., or about 20 minutes after his arrival. During those 20 minutes, he interacted with Mr. Ritchie in the police vehicle, with Const. Todoruck and others on the scene, and attempted to secure videos and photographs of the scene for that evening's newscast. He also notified staff at Global News about Mr. Ritchie's arrest. When asked if taking the videos was his primary duty, Mr. Cohn replied that it would have been had it not been for Mr. Ritchie's arrest.

In response to the respondent's questions, Mr. Cohn repeated that he had learned of the incident by listening to scanners, of which he has several,

some personally owned and some provided by the company, and through a phone call from Mr. Ritchie. He did not necessarily remember everything that transpired in detail, but he had no issues with his memory. He parked at the Pioneer gas station, but did not have any concerns about the propriety of that even though he did not make a purchase at the store.

The respondent asked Mr. Cohn about the significance of his police vehicle, parked on an angle facing north, and Mr. Cohn said that he felt it was there to impede only vehicular traffic.

In response to questions about his cameras, Mr. Cohn described his broadcast camera, and said that at the time of his arrest he was holding his cell phone which was connected to Const. Welton, and taking video with the broadcast camera. He was not recording with the cellular phone. He expected Const. Welton to arrive at the scene as he thought he was on call despite the fact that he did not know about the HPS media-relations policy, as the policy is an internal document. During the first conversation with Const. Welton, he was instructed to ask for the arresting officer's badge number, to document the scene, to do his journalistic job and to give him directions to the scene, but he could not remember if Const. Welton had told him to obey the directions of officers at the scene, though it was his practice to follow such directions.

Again in response to questions, Mr. Cohn repeated in somewhat greater detail his evidence about being called from the rear of the police vehicle by Mr. Ritchie, speaking to him on two occasions, and facilitating his telephone conversation with Const. Welton. During one of those conversations, Mr. Ritchie commented that the officer had stolen his camera, and Mr. Cohn had the impression that Mr. Ritchie was in some degree of medical distress.

The respondent asked Mr. Cohn why he had not asked him for information about the collision, and Mr. Cohn responded that his focus had changed from the collision to the arrest of Mr. Ritchie, and that he would not have asked Const. Todoruck such questions as he was not a media-relations officer.

The respondent asked why Mr. Cohn walked north of his police vehicle if his camera had a zoom lens. Mr. Cohn replied that he only walked 10-15 feet north of the car to secure an unobstructed angle for his camera.

Mr. Cohn conceded that he had never actually told Const. Todoruck that he was a member of the media. He described the dimensions and make of his camera, and said that there was no corporate logo on it.

He was operating the broadcast camera and using the telephone simultaneously when he was arrested, and he was unsure of what happened with the broadcast camera or how it was moved during the arrest. Mr. Collins was also taking a video during the arrest.

Mr. Cohn testified that Const. Todoruck had asked him to leave the scene three times, that he was concerned about his broadcast camera during the arrest as it fell when he did, and that Const. Todoruck had asked him if it was OK if Mr. Collins cared for his equipment following the arrest. The respondent asked if Mr. Cohn agreed that he took him to the side of the road, on grass rather than pavement, to ensure his safety; Mr. Cohn replied that he did not know what was on the officer's mind at that point.

Mr. Cohn complained to A/Sgt. Robinson that the zip ties were too tight, but that was not an issue as he was promised that the issue would be resolved quickly, and it was.

When questioned about why he yelled “Don’t touch me!” when Const. Todoruck touched his shoulder, he replied that he did not know he was being arrested and he was securing his camera to leave the scene due to concerns about the officer’s demeanour. Mr. Cohn called the exclamation a natural reaction to being touched unexpectedly, and Const. Todoruck had not told him he was under arrest at that point. Mr. Cohn said that he cooperated fully after being told he was under arrest, partly out of fear that Const. Todoruck’s state of mind could lead to Mr. Cohn being attacked, even though Mr. Collins was recording the incident.

The respondent asked if Mr. Cohn had injuries as a result of the arrest, and he replied that he had a sore right knee and high blood pressure, and was assessed at the scene but took no treatment. The respondent showed Mr. Cohn three pictures, two of a wrist and one of a shoulder (Exhibits 11, 12 and 13), but Mr. Cohn said that the pictures did not portray him. He commented that he believed that the effect had been more psychological. When asked if the police had arranged for him to be assessed, Mr. Cohn replied that he did not know who asked for the assessment.

The respondent returned several times to question why there was not more video, and Mr. Cohn clarified that the nature of his craft is to speak to bystanders to get an idea of what is transpiring. His job is not to record constantly, but rather to obtain useful video clips for news broadcasts. He took additional video following his release as the video taken prior to his arrest was insufficient.

Mr. Cohn testified that he was aware of the requirement to be read rights as a Canadian citizen and after witnessing many arrests. He had never been arrested himself before that day. He was concerned about the arrest of journalists as such occurrences are very rare. He remains concerned to

this day, and avoids working in Hamilton for fear of police retribution as this matter is not yet fully dealt with.

The respondent had Mr. Cohn review again the video he had taken with the broadcast camera. There was some confusion about who the police officers were in the distance in the images, which were taken from adjacent to the grassy area north of the gas station. The conversation was indistinct, and Mr. Cohn did not know who uttered the profanities that can be heard from time to time. Mr. Cohn did not know if there was a time-stamp on the video, which was taken to document the scene and the absence of yellow crime-scene tape, as requested by Const. Welton. He reiterated that the video was unedited and in chronological order. He also offered that the camera was on without his knowledge during the arrest.

When the respondent suggested that he suspected that the video had been edited as the lighting conditions did not seem to reflect the approaching dusk, Mr. Cohn explained that cameras can adjust for lighting conditions. He reiterated that the video appears as it was shot, as it was submitted electronically to the news network and as it was submitted to the OIPRD.

Turning to the 16-second video shot with Mr. Cohn's cellular phone, Mr. Cohn reiterated that it was taken prior to his arrest. The respondent pointed out that the name and badge number were visible on his uniform, but Mr. Cohn said that he was not close enough to notice it, and the badge was obscured by the officer's microphone cord. (This was corroborated by the video image). Mr. Cohn also testified that he did not notice those elements of the uniform, but wanted the information as he knew his management team would follow up and would be concerned by an officer's failure to identify himself. The respondent asked if Mr. Cohn had told him that he was recording him, and Mr. Cohn replied that he did not

recall what he did or did not tell him at the time. The respondent pointed out other ways, such as the car number and the subsequent reports, that could have been used to identify who he was.

When questioned about his knowledge of media-relations officers generally and Const. Welton specifically, Mr. Cohn replied that they facilitate interviews and access to scenes, and any other issues involving the police service. They do not tell journalists how to do their jobs or what to film, but may provide access or advice in that area.

The respondent asked questions about the incident with Const. Todoruck's searchlight as he left the scene, and Mr. Cohn described a scenario where he believed that the officer was trying to impede attempts to video him by journalists on the right side of his police car. There were police officers on the left side of the car. Mr. Cohn disagreed that video and still camera lights were capable of blinding a person.

The complainant, Mr. Taggart, declined the opportunity to cross-examine Mr. Cohn.

Re-Examination

The prosecutor returned to the broadcast camera video, cued to the point of the arrest. He pointed out that we are looking up the street to the accident scene when the camera goes awry and asked if there were any gaps in the images at that point, when Const. Todoruck's voice is heard. Mr. Cohn testified that there were no gaps.

The prosecutor asked Mr. Cohn to clarify whether he was recording continuously in the 20 minutes prior to his arrest or in the 1.5 hours after, and Mr. Cohn replied that he was not.

Evidence of Mr. Andrew Collins

Examination in Chief

Mr. Collins responded to the prosecutor's initial questions by stating that he appeared at the hearing on the compulsion of a summons. He is a graduate of Sheridan College, and is now a freelance photojournalist working for national television stations in Toronto. He has done this work full-time since graduating from college around 2010.

On May 16, 2017, he was working nights on contract to Global News. He was at home sleeping when he was contacted by Mr. Jeremy Cohn about the collision incident, and as he lived at the time less than one kilometre from the scene, he attended the scene in his car, parking at the Pioneer lot near the mailboxes. He was aware from Mr. Cohn of Mr. Ritchie's arrest, and arrived at the scene before 7:00 p.m. He met briefly with Mr. Cohn, and noticed Mr. Ritchie in the back of a police vehicle parked near the purple tent (on the east side of Evans Road opposite the grassy area).

As he could do nothing to help Mr. Ritchie, he continued with journalistic duties by walking north to the lot of the house under construction on the east side of the roadway. He noticed people milling about, and that there was no demarcation on the scene to indicate where the scene or important evidence may have been. He saw the minivan apparently involved in the incident on the west shoulder, facing south, near the opposite driveway,

and identified it as a red Astro van. He remained at that location for a few minutes, standing with residents and taking photographs.

He heard a scream, "Don't touch me!" from the area to the south where some cars were parked, and saw Mr. Cohn being arrested. He also noticed then that police crime-scene tape had been secured across hydro poles near the scene of the collision.

Remaining outside the police tape, he walked down to where the arrest was taking place and took video of the incident. He started recording when the officer was positioned on Mr. Cohn's back, securing his wrists with zip ties. He described the officer as flustered, and noticed that his radio had fallen off his belt and he was hatless. He described the officer as sort of dragging Mr. Cohn to his feet as Mr. Cohn had "grounded himself", following which he offered no resistance whatever. The officer put Mr. Cohn's property in his care, including sunglasses, camera and other materials. Mr. Cohn asked him to contact his boss at Global. Mr. Collins continued to record from what he called a safe distance.

After the arrest, Mr. Collins' perception was that Const. Todoruck walked Mr. Cohn "aimlessly" up the street, apparently looking for a cruiser to lodge him. Mr. Ritchie was still in the rear of the other police vehicle as Const. Todoruck walked Mr. Cohn north on the roadway.

Mr. Collins described Const. Todoruck's demeanour as aggressive, irrational and heated, and said that he had never seen such behaviour on a scene before. Mr. Collins said that he engaged with Const. Todoruck during the recording in a manner he described as "heated". He said that he never got close enough to cause the officer to have any safety concerns.

Mr. Collins returned to the construction property following the arrest and had an interaction with Const. Todoruck there. He said that the officer tried to “trespass” him from the yard (and on the video we see Const. Todoruck telling Mr. Collins that he is on private property and telling him to leave).

The prosecutor asked how long Mr. Cohn was in the police car, and Mr. Collins was not sure, but said it was less than an hour. He said that Mr. Ritchie was released at about 9:00 p.m., having been in the car since about 6:40 p.m.

The prosecutor turned to the video that had been taken by Mr. Collins on his iPhone. Mr. Collins said that he made the video and that it has not been deleted or altered. All the original footage was submitted to the OIPRD. The Tribunal saw the video in its entirety first, and then it was played a second time and stopped so Mr. Collins could answer the prosecutor’s questions.

The video starts with Const. Todoruck securing zip-ties to Mr. Cohn’s wrists and pulling him upright by the left arm. The words and graphic of Global News are clearly visible on Mr. Cohn’s jacket as he rises. They are immediately north of the Canada Post community mailboxes located on the north edge of the gas station parking lot. Const. Todoruck tells Mr. Collins to get out of his face as he’s busy right now, and Mr. Collins replies that “I can’t. Sorry”. Mr. Cohn asks Mr. Collins not to Tweet as Const. Todoruck retrieves his radio and asks Mr. Collins to deal with his property. Const. Todoruck confirms that it is acceptable to Mr. Cohn that Mr. Collins take care of his property and is seen to turn two cellular phones over to Mr. Collins.

As Const. Todoruck leads Mr. Cohn onto the roadway and turns north, Const. Todoruck says to Mr. Collins, "The road is closed; I need you off this road". Mr. Collins replies that it is not, as it is away from the police tape. The two argue about whether the road is closed, and Mr. Collins says, "Are you going to arrest me too? That's three for three, buddy". Mr. Collins asks, "Where's your staff sergeant?", and gets no reply as Const. Todoruck continues to lead Mr. Cohn northbound on Evans Road.

They pass a second police vehicle, and Const. Todoruck repeats, "The road is closed. I've asked you three times now to get off the road." His voice raises in anger as Mr. Collins denies this. "That tape doesn't mean anything," says Const. Todoruck. "You want to stand here and argue with me? The road is closed. I need you to go back there now".

As this exchange is taking place, Const. Todoruck turns Mr. Cohn around and walks back southbound on Evans Road.

There is a break in the video, and the second scene shows Const. Todoruck continuing to walk Mr. Cohn on the roadway. He repeats that the road is closed once again. Then, he says to Mr. Collins, "This is private property. Get off the property". Mr. Collins agrees that it is private property, but no one lives there as the house burned down. Const. Todoruck repeats his direction for Mr. Collins to get off the property.

A third scene shows Const. Todoruck standing by an open police-car door as Emergency Medical Services (EMS) personnel tend to Mr. Ritchie. No words are heard.

The fourth and final scene shows Const. Todoruck sitting in a police vehicle from the perspective of the right side of the vehicle. Const.

Todoruck is seen to aim the vehicle's spotlight in the direction of the camera, and then drives away.

The total length of the video shows as one minute and 54 seconds.

In response to the prosecutor, Mr. Collins describes the scene of the arrest as directly north of the gas station parking lot. Mr. Collins is recording facing south toward the gas-station lot. He clarified the observations in the paragraphs above. He added that the location of the burned-out house is on the east side of the roadway just south of the incident scene. It is seen on the aerial photograph (Exhibit 4) as on the opposite side of the road from the scene.

Mr. Collins continued that he saw Const. Todoruck approach Halton Regional Police (HRP) officers on the scene, and those officers asked him to move along so they would not have to deal with the situation.

With respect to the fourth scene in his video, Mr. Collins said that there were three or four media members trying to get pictures of Const. Todoruck in his car, "and that's when he blinded us all with the spotlight" before the officer drove away.

When the prosecutor asked what Mr. Collins made of the shining of the spotlight, Mr. Collins replied that he had never seen an officer purposely aim a spotlight at the public or the media before. When asked how he compares the behaviour he saw to other experiences, he replied that he thought the officer was agitated. He acknowledged that he did not know if the behaviour was typical of the officer, but that it was "totally out of the ordinary".

Cross-Examination

Mr. Collins was then cross-examined by Const. Todoruck, as the self-represented respondent officer. As with the cross-examination of Mr. Cohn, some questions were repeated and non-chronological, and I have written the summary of the cross-examination in a way to reduce repetition and promote clarity.

The respondent began by clarifying Mr. Collins' occupation and his presence in the Tribunal. Mr. Collins is a freelance photojournalist, who makes his living by selling images to TV and print media across Canada, or contracts with media outlets. He chose to work freelance after completing a journalism program, and said that no special accreditation is required to work freelance.

Mr. Collins appeared at the Tribunal under compulsion of a summons, and understood that he would face sanctions if he did not comply with the subpoena. He also indicated that he wanted to see the matter concluded and justice done, and that he did not take this matter personally. He acknowledged that he, Mr. Cohn and Mr. Ritchie are personal friends.

Mr. Collins indicated that he arrived at the scene before 7:00 p.m. after being awakened by a call from Mr. Cohn and viewing tweets from the HPS, and parked on the gas station lot just to the west of the community mailbox. He arrived quickly (between two and five minutes) after driving the short distance from his home. Later, he said that this was a normal way for him to learn about newsworthy items, as are his scanners, which are effective as EMS radios are not encrypted.

In answer to questions, he felt it appropriate to park there even though he did not ask permission and did no business at the gas station. He was not

interfering with the mailboxes as he parked where other vehicles were. He felt that it was a public area. He also responded that he had no issues with his memory or his vision, and that he was driving an unmarked Global News vehicle, which was common due to his working relationship with Global at the time. He had a broadcast camera in the trunk of the vehicle, but left it there during his time at the scene. He used only his iPhone to take video images at the scene, and retained ownership of those images as he was not working for anyone at that time of the day. The video images were captured on the phone's internal memory, and he has replaced that phone in the years since the incident and no longer has access to it or any other images that might have been stored on it.

Later in his testimony, Mr. Collins acknowledged that he would have appeared as a regular citizen to Const. Todoruck, as he was not wearing anything to distinguish him as a member of the media.

There were no marked media vehicles at the scene, but a police car was parked a short distance north of the gas station lot near the purple tent (which was across from the grassy area north of the gas station lot, as seen in Exhibit 4). A second police vehicle was seen farther north at the scene, and it drove toward Dundas Street with its emergency lights activated. There was no ambulance at the scene when he arrived.

There was police crime-scene tape across the roadway of Evans Road, but it was well to the north, near the burnt-out house. He did not notice other tape at that time, but considered it normal as, in his experience, crime-scene tape is erected at 80% of scenes of serious incidents.

Again in response to questions from the respondent, he indicated that he had no issues with his memory.

Mr. Cohn had told him of the incident and of Mr. Ritchie's arrest, though he did not know why Mr. Ritchie had been arrested. He saw Mr. Ritchie in the rear of the police car on his arrival, and took photographs but no video at that point, as Mr. Cohn was taking video images. He took no video images at the scene other than those contained in Exhibit 8.

The respondent suggested that Mr. Collins had told him he was recording him at other times, but Mr. Collins denied that. He acknowledged that he did not capture Mr. Cohn's arrest, but only began recording when Mr. Cohn was on the ground immediately afterward. He had heard the exchange between Const. Todoruck and Mr. Cohn and the words, "You're under arrest" when he was about two properties, or about 100 feet, away to the north. He saw Const. Todoruck with his hands on Mr. Cohn, and approached the arrest scene on foot, through a ditch, around a fire truck and across private property toward the scene, without passing behind the crime-scene tape, near the red Astro van, or through where he saw civilians milling around near the collision scene.

The respondent expressed doubt that Mr. Collins could have travelled a distance of about 115 feet in time to begin recording when he did, and spent some time demonstrating walking speed in the tribunal room, suggesting that it would have been miraculous for Mr. Collins to have traversed the distance in time to record the images, as he felt it would have taken a minute to walk that distance. Mr. Collins said that he was not an expert and just repeated that he traversed the distance and started recording when he arrived at the arrest scene on the lawn to the north of the gas station. The respondent also suggested that as fire trucks are always left running, Mr. Collins could not have heard the arrest taking place over the sound of the engine.

The respondent took issue with Mr. Collins' use of the word "dragging" to describe him lifting Mr. Cohn to his feet and walking him along the roadway. Mr. Collins said that he would describe the action as "pulled", "yanked" or "dragged", rather than as helping him to his feet as is Mr. Collins' usual perception of such actions.

Mr. Collins said that the video he took with his iPhone, less than two minutes in length, was the only video he took at the scene. He also took still photographs of the collision scene (his original purpose for attending the scene) that he posted on the HPS Twitter page. He did not feel that the video of the arrest would be of interest to the news media, as it was not initially a newsworthy event, and as he was freelancing at the time, the images were under his control. He did not take video of other police officers that day. He has viewed the video several times since with the OIPRD and the prosecutor.

The discussion turned to the actions immediately following the arrest. The respondent focused on Mr. Collins' earlier statement that Mr. Cohn had "grounded himself", and he clarified that to mean that Mr. Cohn went to the ground with Const. Todoruck pushing him. He took the position that there was no need to take Mr. Cohn to the ground, but that Mr. Cohn had offered no resistance when he was subdued by the officer.

The respondent took issue with Mr. Collins' language to the effect that he dragged Mr. Cohn up and down the street, as, to him, "dragging" means pulling along the ground by pulling, walking, or moving. Mr. Collins said that Const. Todoruck dragged him up and down the street as shown in the video (Exhibit 8), but he couldn't remember how many times they moved up and down Evans Road, but that he had moved back and forth near the fire truck and citizens on the scene.

The questions turned to the heated interaction between Const. Todoruck and Mr. Collins on the video. The respondent asked Mr. Collins if he felt that he had acted appropriately, and Mr. Collins acknowledged that his “three-for-three” comment may not have been warranted, but that he was justified in recording the incident, and that everything he said, tone notwithstanding, was factual.

There was nothing, in his opinion, to designate that the road was closed, and there were civilians milling about on it at that time. Later, he testified that he has arrived at scenes before the police tape has gone up, and that his journalistic moral compass prevents him from interacting with families, crime scenes, etc. His experience tells him where he can and cannot go. If possible and appropriate, he would ask for direction from a police officer, and would follow that direction. Depending on the situation, he might or might not argue with the officer; for example, he would not take direction not to be on private property outside a crime scene. He did not obey the officer’s direction to leave the roadway in this case, as Const. Todoruck did not specify which part of the roadway was closed, and the part of Evans Road on which the dispute took place was not closed off in any way, and was well away from the collision scene.

He gave his perspective that he was doing exactly what other civilians were doing, that there were about 20 people around the scene, and that media can go wherever other members of the public can go. The police tape was the demarcation of the scene of the incident, and he remained behind the tape. Mr. Collins disagreed that the people around the scene would all be residents of Evans Road, and stated that he did not know if any of them could have walked up from the gas station.

The respondent asked if the number of people on scene was the reason that he could ignore the direction to leave, and Mr. Collins replied that his decision was based on the position of the police crime-scene tape.

When asked if he saw any other vehicles on Evans Road south of the scene, he responded that he remembers only one police car travelling south.

Mr. Collins agreed that Const. Todoruck told him that the road was closed, but Mr. Collins said that he interpreted the closure to be that part of Evans Road behind the police tape, as there were vehicles moving on the roadway south of the taped-off scene and the intersection at Dundas Street was not blocked.

After this interaction, also as seen in Exhibit 8, Mr. Collins moved off the roadway near the burnt-out house on the east side of Evans Road. He said that he was three or four feet off the roadway, where media would normally stand. He rejected the respondent's suggestion that he was trespassing, as there was no homeowner there to prohibit entry to the land. He had covered the previous house-fire, and trespassing had not been an issue at that time, either.

The respondent also referred to the video images of Mr. Cohn's arrest, taken by Mr. Collins, to facilitate the cross-examination. In response to questions, Mr. Collins felt that he always maintained a distance from Const. Todoruck in order to not be considered a threat, that the apparent closeness was due to the phone's zoom feature, and that the quality of the sound was a result of the quality of the iPhone. He also kept both hands on the iPhone, which also demonstrated that he was not a threat. He was the only person at the arrest scene other than the officer and Mr. Cohn,

and maintained a consistent distance of about six feet. He felt that the incident was important enough to warrant the video-recording.

Mr. Collins testified that he asked where Const. Todoruck's staff sergeant was because journalists are instructed to speak to the staff sergeant when there is no media relations officer available.

In regard to the scene in the video where Mr. Collins and Const. Todoruck argued about the closure of the road, Mr. Collins pointed out that they were well outside the police tape (which was a substantial distance up the road, past the abandoned property), that he felt justified being on the roadway up to the police tape, and that there were vehicles and people throughout the roadway area. He did not recognize the person at the hood of Const. Todoruck's police vehicle, but presumed that a statement was being taken.

In response to the respondent's questions about Mr. Collins' interactions with Mr. Ritchie in the back of Const. Todoruck's police vehicle, Mr. Collins said that he spoke briefly to Mr. Ritchie to ensure that he was OK. He also heard that Mr. Ritchie was concerned about his camera and that he was having some difficulty breathing. Mr. Ritchie did not tell him why he was under arrest. Mr. Collins could not remember if the window was open or closed. Mr. Cohn was nearby when Mr. Collins walked away. Later, in response to additional questions, Mr. Collins said that he wanted to speak to Mr. Ritchie, even though Mr. Cohn had already done so, due to the unusual nature of the occurrence, and to ensure for himself that Mr. Ritchie was OK.

He stated that he has spoken to arrested parties in police cars before, often to attract their attention for a photograph, and that it is normal practice for photojournalists to do so, but that such dialogue was usually

very brief. He has had longer conversations with arrestees outside of police vehicles, and has never been called to account for doing so by the police.

Mr. Collins testified that he believed that Const. Todoruck had asked Halton Regional Police officers to arrest him because a Halton officer had asked Mr. Collins to move away from the car when Mr. Ritchie was being tended to by EMS, as they said that Const. Todoruck wanted them to arrest him and they didn't want to deal with that. Mr. Collins believed that Const. Todoruck was positioning his body at that time to impede the video-recording of the event.

In the final scene of Mr. Collins' recording, as Const. Todoruck is seen shining his searchlight to the right of his police car toward the camera and then driving away, Mr. Collins testified that he was at the window of the police car with three or four other members of the media, one or two feet from the vehicle. There were only police officers on the left side of the police car. Mr. Collins described himself as "blinded" by the searchlight, though he could not speak to the reactions or perceptions of his colleagues. He said that taking such recordings was normal practice.

The cross-examination concluded with the respondent clarifying that Mr. Collins perceived him to be agitated, that they had never met before the incident, and that there was no reason Const. Todoruck would recognize Mr. Collins from television as he never appears on camera. Only the products of Mr. Collins' work appear in the media.

There was no re-examination by the prosecutor.

Evidence of Detective Constable Matthew Robinson

Examination in Chief

At the start of the second day of the hearing, the prosecutor began the examination in chief of Detective Constable Matthew Robinson, who had been the acting sergeant on the scene of the collision.

Detective Constable Robinson is currently assigned to the HPS Break & Enter, Auto Theft and Robbery (BEAR) unit. He is in his ninth year of police service, and appears at the Tribunal under compulsion of a summons.

Det. Const. Robinson referred to his notes when he testified. I approved this after confirming that there had been no changes, additions or deletions to those notes since they were made.

I will refer to Det. Const. Robinson from this point on as A/Sgt. Robinson to underscore his role and level of responsibility at the scene.

On May 16, 2017, he was working a night shift, and learned about the collision involving a child at about 1844 hrs (6:44 p.m.). He was asked to attend the scene, and was delayed due to traffic problems on the route. As he drove to the scene, he knew that Const. Jeff Todoruck and Const. Carlo Cino were already at the scene and that the situation appeared grim for the child. He became aware of a disturbance on the scene from Const. Cino over the police radio. He noted the tone of Const. Cino's voice, which was tantamount to the tone used by an officer needing assistance. He knew Const. Cino, whom he called a "veteran", well, and was concerned by the tone of his voice. Const. Cino had called for the Halton Regional Police (HRP) to attend the scene due to issues with getting

sufficient HPS officers to attend due to traffic concerns and an ongoing shift change.

Const. Cino told A/Sgt. Robinson that he had asked firefighters to help Const. Todoruck during the incident. When A/Sgt. Robinson arrived at 1905 hrs (7:05 p.m.), Const. Cino, who was leaving the scene, told him that the situation had calmed and that everything was calm and good.

When A/Sgt. Robinson arrived at the scene, the ambulance had left the scene with the victim, and Const. Cino followed the ambulance. A/Sgt. Robinson pulled onto Evans Road northbound from Highway 5 (Dundas Street), and parked behind other emergency vehicles, closer to the scene than Const. Todoruck's vehicle was parked.

A/Sgt. Robinson approached Const. Todoruck. The officer told the acting sergeant that he was taking a statement and that he had shut down that part of the road. A/Sgt. Robinson, aware that there were no other police officers on the scene at that point, awaited the arrival of Constables Baglieri and Schotel, knowing they had been dispatched to attend.

A/Sgt. Robinson then approached the scene of the collision, noticing many people and cars in the area. He tried to establish a scene. He separated witnesses, collected basic identification from people, and put up crime-scene tape to demarcate the scene. He also located the driver involved in the collision.

While doing this, he was contacted by Const. Todoruck, who asked him to come back to where he was, as he had someone under arrest and needed the sergeant's vehicle to lodge the arrested party.

Realizing that a second person must be under arrest, A/Sgt. Robinson went to speak to Const. Todoruck, who told him about the arrest of Mr. Cohn. The officers placed Mr. Cohn in the back of A/Sgt. Robinson's vehicle, and then A/Sgt. Robinson returned to taping off the scene.

A/Sgt. Robinson then received a call from Acting Staff Sergeant Zafirides, who informed the sergeant that the people under arrest were reporters. A/Sgt. Robinson was aware that one of the arrestees was a reporter as Const. Todoruck had told him that he had been arrested after trying to access the scene.

A/Sgt. Robinson then returned to the police vehicles, gathered information from Const. Todoruck, and had a conversation with Mr. Cohn about his personal details and what had transpired. He also asked for EMS to check on Mr. Cohn. He was still handcuffed at that point, but by the time he was checked by paramedics, the decision had been made to release Mr. Cohn unconditionally. A/Sgt. Robinson testified that the reason for the release was that, in his opinion, there were insufficient resources to deal with the arrest or to transport Mr. Cohn under the circumstances. A/Sgt. Robinson also testified that Mr. Cohn agreed that, on release, he would not encroach on the scene and would cooperate, knowing that he could be arrested again if he failed to do so. At that time, A/Sgt. Robinson used EMS scissors to remove the zip-ties on Mr. Cohn's wrists.

A/Sgt. Robinson stated that being released unconditionally did not necessarily mean that Mr. Cohn would not be charged, as the option exists to lay charges after the fact.

When asked if he knew how long Mr. Cohn had been in his vehicle, A/Sgt. Robinson said that he did not know the time of the arrest, but that he had 1949 hrs (7:49 p.m.) as the time of his release.

A/Sgt. Robinson did not recall hearing Const. Todoruck reading Mr. Cohn his rights, or informing him of the reason for his arrest, though he thought he had seen the latter on a video when he was interviewed by the OIPRD.

A/Sgt. Robinson reported to superior officers during the event. He was contacted by A/S/Sgt. Zafirides on the telephone, and called him again when he was able to provide details of the arrest. The staff sergeant was not part of the decision to keep Mr. Ritchie in custody and release Mr. Cohn, but he was aware of the decision and could, according to A/Sgt. Robinson, have countermanded it.

Later, at 2035 hours (8:35 p.m.), he briefed Inspector Huss, who was on the scene by that time.

The prosecutor took A/Sgt. Robinson through the video taken with the commercial camera by Mr. Cohn. When asked, he identified the officer walking away from the camera as himself, as his moustache was visible when he turned around.

In the second scene of the video, A/Sgt. Robinson identified himself at the left side of the frame, apparently preparing to deploy the police tape. He agreed that there was no police tape deployed when he arrived. As that video scene continues, Const. Todoruck approaches him and engages him in conversation. A moment later, they are joined by Const. Baglieri, who drives away northbound after a few moments as A/Sgt. Robinson continues to affix police tape across the roadway.

I note that in this scene there is a substantial amount of pedestrian and vehicular activity in the immediate vicinity of the damaged GMC van.

In response to the prosecutor's questions, A/Sgt. Robinson testified that he may or may not have known at that time that Mr. Ritchie was under arrest.

Cross-Examination

The respondent officer cross-examined A/Sgt. Robinson after a short pause.

In response to questions from the respondent, A/Sgt. Robinson testified that as he travelled to the scene, he was aware that only Consts. Todoruck and Cino were there, and speculated that Const. Cino would have been positioned near the child, to the south of the vehicle and to the north of Const. Todoruck's location. He feels that the two officers would have been in visual contact, at least at times, despite the number of people and vehicles at the scene, because of the transmission Const. Cino made to the effect that Const. Todoruck required assistance. He felt that, from what Const. Cino said on the radio, he was not in a position to move to assist Const. Todoruck through no fault of his own, but was only able to make a radio transmission about the situation. He testified that he was unaccustomed to hearing Const. Cino sound as he did over the radio, and concluded that the nature of the scene was the cause of Const. Cino's vocal tone.

A/Sgt. Robinson said that Const. Cino, through the dispatcher, asked Halton Region officers to attend, and learned that they would arrive when they could. Such requests are not unheard of, particularly near the borders between the jurisdictions.

Firefighters on the scene were asked to support Const. Todoruck. A/Sgt. Robinson agreed that it was unusual to ask for their help for a disturbance, but there were precedents for getting help from firefighters.

A/Sgt. Robinson took from about 1844 hrs (6:44 p.m.), when he learned of the occurrence, until 1905 hrs (7:05 p.m.) to arrive, a period of about 20 minutes. Delays included the acting sergeant's need to gather his equipment and an incident that had closed Highway 403. He agreed that this was a significant amount of time to arrive at a scene where there was an immediate need.

A/Sgt. Robinson recalled that he had information that the situation appeared grave for the victim of the collision, and outlined that his duties on arrival would be to erect, maintain and manage the scene, identify witnesses and other people on the scene, and to speak to the involved driver. When asked about what is involved in maintaining a scene, A/Sgt. Robinson said that typically one would position a police cruiser in a way to close a road, erect police tape to demarcate a scene, provide verbal warnings to people not to obstruct the scene, and conduct a preliminary investigation by identifying people, collecting statements and preserving evidence at the scene.

The respondent asked how A/Sgt. Robinson would position the cruiser. A/Sgt. Robinson said that it depended on the situation, but if there were a live intersection, he would position the car to prevent people from driving through. The respondent asked specifically about the situation where there was no southbound traffic but still the potential for cars coming northbound from Highway 5 (Dundas St), and A/Sgt. Robinson said that he would place the car a short distance north of Dundas, but would not place the car across the road to allow access by other emergency vehicles.

When asked about his responsibilities at the scene, A/Sgt. Robinson said that there were initial supervisory responsibilities, but then he was just like any other officer on the scene, dealing with the issues that had to be dealt with at the time. He was concerned about the lack of resources on the scene as the other responding officers were responding as quickly as they could but had to choose alternate routes to get around the highway closure.

A/Sgt. Robinson agreed that securing the scene was not an easy task, as it is difficult to determine the size of a scene, especially when people want to talk, but it is necessary to prioritize. In this instance, he identified witnesses, directed them to their cars, and asked people in the area to return to their homes. He also dealt with bystanders around the scene and secured police tape appropriately. Everyone he spoke to was either a resident or had come from the cars near the scene.

A/Sgt. Robinson identified the driver of the van, determined that impairment by alcohol did not seem to be an issue, and turned the driver's licence over to Const. Baglieri. Throughout, he kept an open mind at the scene, as the matter could turn out to be a criminal offence and was certainly a death investigation. He ensured that he did his due diligence.

A/Sgt. Robinson agreed with the respondent that he had informed him of the arrest of Mr. Cohn, and the reason for the arrest. While he had not recorded the conversation in his notes, saying that it was not possible to note everything, A/Sgt. Robinson recalled that he was told that Mr. Cohn had come repeatedly to the rear of Const. Todoruck's cruiser, causing problems, being told to remain away but continually encroaching, resulting in his arrest.

The respondent asked A/Sgt. Robinson why he did not erect police tape immediately. A/Sgt. Robinson testified that doing so is time-consuming, and while it is something that should be done, it may not be the first priority.

Const. Cino had arrived before EMS and Hamilton Fire, and his duties precluded erecting tape; he had to try to protect life, perform first aid, provide comfort, and then concern himself with the required investigative steps.

A/Sgt. Robinson testified that Mr. Cohn asked for and received support from EMS personnel while lodged in A/Sgt. Robinson's vehicle. A/Sgt. Robinson did not know why the support was requested, and observed no injuries. He removed the zip-ties from Mr. Cohn's wrists on his release, and while he did not remember specifically examining the wrists, he did not notice injuries at the site. EMS personnel examined Mr. Cohn at the rear of the police vehicle, and then Mr. Cohn walked away.

A/Sgt. Robinson testified that Mr. Cohn's arrest was investigated by divisional detectives, and that he was not part of the investigation. He agreed with the respondent that the unconditional release did not mean that charges could not be laid later. He said that his decision to release Mr. Cohn was known to the staff sergeant and to Const. Todoruck himself and nobody objected, and said that he thought it was the best decision due to the resources available at the time and the seriousness of the ongoing investigation. He did not recall if Const. Todoruck had pressed him for charges to be laid at that time, and did not believe that charges had been laid after the subsequent investigation. A/Sgt. Robinson recalled that Mr. Cohn had agreed to stay out of the way if released; while he could not quote the conversation, he told Mr. Cohn that he had to stay

outside the scene and not cause problems for officers on the scene or scene management, and Mr. Cohn readily agreed to that.

Mr. Cohn also told A/Sgt. Robinson that there would be repercussions to the arrest of the reporters.

A/Sgt. Robinson was not specific about the time Mr. Cohn spent in his cruiser. He was only able to say that he was lodged some time after his arrival at 1905 hrs (7:05 p.m.) and Mr. Cohn's release at 1949 hrs (7:49 p.m.), and that he had performed a variety of duties at the scene before Mr. Cohn was lodged. He agreed with the respondent that he spent a maximum of 44 minutes in the police vehicle.

In response to a question from me, A/Sgt. Robinson indicated that Mr. Cohn was lodged after he mounted the first length of police tape, and that he went back and erected the other strands and continued to deal with witnesses after he was lodged.

During this time, he received the call from the staff sergeant, who informed him that the arrestees were reporters. Following that call, A/Sgt. Robinson spent his time trying to determine what had transpired by speaking to Const. Todoruck and Mr. Cohn, and determining how to manage the totality of the situation.

In response to questions from the respondent, A/Sgt. Robinson clarified that he had not been aware of the arrest of Mr. Ritchie before arriving at the scene. He learned of Mr. Ritchie's arrest when he was told that his police car was needed to lodge Mr. Cohn, as someone was already lodged in Const. Todoruck's car. He acknowledged being told that Mr. Ritchie was under arrest for obstructing police.

Re-Examination

The prosecutor clarified that A/Sgt. Robinson did not see the events leading to the arrest of Mr. Cohn, and that he learned of the reason for the arrest from Const. Todoruck. He also did not see any of the events surrounding the arrest of Mr. Ritchie. Mr. Ritchie had been arrested before A/Sgt. Robinson's arrival and Mr. Cohn after, but he did not see anything that led to Mr. Cohn's arrest.

The complainant was not present for the second day of the interview, and did not cross-examine Det. Const. Robinson.

Additional Evidence

At this point, the prosecutor entered his Document Book, labelled as Exhibit 9. As well as the delegation and designation documents and the notice of hearing, which were already introduced as exhibits, the book contained:

- The HPS policy entitled "Media Relations"
- The HPS policy entitled "Prisoners – Search of Persons / Care and Control"
- The transcript of the OIPRD interview of Const. Jeff Todoruck

The copy I was given was missing pages 96, 97 and 100 of the interview transcript, so the prosecutor read in passages from other parts of the interview, as follows. Note that the following was copy-typed from the transcript, with minor changes indicated in brackets.

Page 127, line 22, to page 129, line 6:

Q [the investigator]: Okay. All right. So, with Mr. Ritchie I'm going to ask very clear questions. Did you advise him why he was under arrest?

A [Const. Todoruck]: Yes.

Q: Did you read him his rights to counsel?

A: I did, but it was quite a ways after I arrested him.

Q: How long afterwards?

A: Uh...

Q: When did you arrest him?

A: Uh, from looking back at times afterwards, it looks like it was approximately 19:00 hours or 7:00 p.m. that he was arrested. Um...

Q: And when did you read him his rights to counsel?

A: Uh, it was 19:30 hours I – he did get, uh, EMS help, so I still hadn't read him his rights at that point because ...

Q: Thirty (30) is EMS?

A: Yes. So EM- I think – yeah. So, at 19:30 hours he was assessed by EMS. So, it was after he was being assessed by EMS at 19:50 hours that I was able to take the time away from my witnesses to, again, advise him of his rights, make sure that he knew them, and he was given his rights to counsel at 19:51 hours.

Q: *So, you believe that's a reasonable time to give him his rights to counsel after you've arrested him?*

A: *Generally, I would be doing it within – it usually happens with-, you know, within 30 seconds to a minute [after], it happens right at the time.*

Q: *Why didn't you do it?*

A: *But, uh, I wasn't able to do that because when I told him he was under arrest initially, it was a long process of arresting him. It probably took two [or] three minutes...*

Page 132, lines 9 to 13:

Q: *You're an experienced officer of 20 years. You know once you take somebody's rights, their freedoms, away and you've placed them under arrest, the onus is on you to read them their rights to counsel.*

A: *Yes.*

Page 156, line 22, to page 157, line 6:

Q: *'Kay. Let's move on with this one. Um, when you arrested Mr. Cohn, you said that you told him what his, um – why he was under arrest.*

A: *Mm-hmm.*

Q: *Um, did he complain about the, um, strip ties that you placed on his...*

A: I don't know. After I arrested him, I placed him in acting Sergeant Robinson's (ph) cruiser and I never seen him again until after I was informed that he was released. He was right back on scene again filming...

This concluded the prosecutor's case.

Defence Witness

The respondent officer initially indicated that he did not intend to call witnesses or offer evidence. A substantial discussion took place on the record to ensure that the respondent knew his rights under the tribunal process. I also outlined the process and options between this point in the hearing and its conclusion, underscoring the respondent's rights.

The respondent asked at the end of the second day of the hearing to enter his OIPRD interview in its entirety as evidence. While the prosecutor objected initially to this, he researched the matter at my request and submitted at the start of the third day that the Statutory Powers Procedure Act allowed the respondent to do enter the document as evidence, so his OIPRD interview was admitted as Exhibit 10.

At the end of the second day, the prosecutor and the respondent spoke to Mr. Mohammed Hanif outside the Tribunal, and agreed that he should be permitted to give evidence as a defence witness. Mr. Hanif, who had found the hearing venue with some difficulty and on his own initiative, is the father of the victim of the collision, and was at the scene of the collision. He was asked to return at 9:00 a.m. on the third day of the hearing.

As the third day began, the respondent offered additional exhibits. He offered the original OIPRD complaint form, three photos showing parts of the arm of the “affected person”, his memorandum book notes, and a criminal transcript involving charges against Mr. Ritchie. The prosecutor objected to the Ritchie transcript on the basis of relevance, and as none of the counts relates to Mr. Ritchie’s arrest but only to matters after that arrest, I sustained the objection.

The additional evidence admitted at this point was:

- Photos of the “affected person” – Exhibit 11
- OIPRD complaint document – Exhibit 12
- Const. Todoruck’s memo book notes – Exhibit 13

Evidence of Mr. Mohammed Hanif

Examination in Chief

In response to questions by the respondent, Mr. Hanif said that he had seen Const. Todoruck’s image on CHCH TV, and felt it important that he attend and give evidence. After checking at the courthouse and calling the HPS to no avail, he came to HPS Central Station at the end of Day 2 and returned at the start of Day 3.

He felt it important to offer evidence as he felt that he was there and saw what was happening around him, and as it was his daughter who passed away as a result of the incident.

Mr. Hanif testified that he did not note times or take notes, but saw interactions between Const. Todoruck and other citizens.

He said that he saw Const. Todoruck arrive, first officer at the scene. There were vehicles on the scene from Parkside (the northern end of Evans road) to Dundas, and his daughter ██████████ had been struck by a vehicle. Mr. Hanif was trying to clear people from the scene as a doctor and a nurse who lived nearby were tending to his daughter.

At one point, Mr. Hanif looked toward Dundas Street and saw Const. Todoruck taking a male to the ground on the grass, about 40 feet away (though he later described it as by the mailbox area). He did not know how the male's hands were restrained, but saw him being lodged in a vehicle. He described the arrested person as having short brown hair and a blue jacket, but could remember no more details. He later said that the man looked like anyone else in the crowd – a bystander. There was nothing to indicate that he was a member of the media; he expected members of the media to have corporate jackets and microphones. The arrest took place before his daughter was transported to hospital. He had the impression that the man was trying to force himself toward where his daughter lay, and did not see him carrying any equipment.

He left the scene in a police car, following the ambulance.

He did not feel that Const. Todoruck had done anything wrong, and was grateful for the officer's attempts to clear the area, which he said was a tough job for one officer as there were many people there.

He expressed grief and frustration that the matter was still ongoing. He never subsequently met with Const. Todoruck, but sent several messages of thanks to him through Const. Cino, and expressed his family's gratitude to the officer in the Tribunal.

Cross-Examination

There was no cross-examination of Mr. Hanif, and this concluded his testimony.

Complainant Witness(es)

The public complainant, a party to the hearing and therefore entitled to summon or call witnesses, declined to do so. He wished only to give a summation statement at the end of the proceeding.

I asked the prosecutor to give his submissions first, then the complainant, and then the respondent, who should have the last word as he is the party facing jeopardy.

Prosecution Submissions

The prosecutor began his submissions by underscoring that it is his position that Const. Todoruck is guilty of misconduct, and particularly of the unlawful or unnecessary arrest of Jeremy Cohn. Mr. Cohn was never read his rights, and was left too long or unattended in a police vehicle, all because Const. Todoruck failed to recognize, implement or apply the HPS media relations policy, which requires the police to cooperate fully and impartially with representatives of the news media, and to provide access to incident scenes except in specific circumstances.

There was no meaningful dialogue between the officer and Mr. Cohn, who was two or three hundred feet away from the collision scene. The officer only repeated hostile demands to leave, apparently to a place where he

could not do what media are entitled to do. Mr. Cohn did not block or prevent Const. Todoruck from doing anything, but was arrested in a split second by the agitated officer.

There is “highly probative” video imagery that illustrates this.

The prosecutor acknowledged that Const. Todoruck may have had a difficult time over the arrest of Mr. Ritchie, but seems in the videos to be hostile, angry and agitated before arresting Mr. Cohn. He submitted that the officer had become transfixed with shutting out the media.

The officer’s assertion that the road was closed made no sense, due to its distance from the collision scene, which surely did not extend as far as the gas station.

The prosecutor also acknowledged that for the first few minutes, the scene was difficult, even terrifying, and a series of exchanges between the officer and a man demanding the return of a camera led to the arrest of Mr. Ritchie. However, events developed as the victim was removed, police tape mounted, and witnesses interviewed. As A/Sgt. Robinson said, the scene became settled before Mr. Cohn was arrested.

Mr. Cohn had a light-blue Global News jacket when he was arrested, and the unnecessary arrest compounded the situation as Const. Todoruck had no vehicle to lodge him in, resulting in the officer walking Mr. Cohn around the area, leaving Mr. Ritchie alone in the police vehicle. Mr. Cohn was not read his rights, and the problems compounded themselves. The prosecutor submitted that this all would have been avoidable if Const. Todoruck had paused momentarily and opened up to discussion with others.

The prosecutor summarized the evidence, and the various types of evidence, that had been submitted. The video evidence is highly probative and valuable as it shows the exact interactions between the respondent and Mr. Cohn. Witness testimony came from three credible professionals who were firm in their testimony.

The transcript of the respondent's OIPRD interview, which the prosecutor invited me to review, should be given very little weight as it was not sworn and not subject to cross-examination.

The prosecutor turned to his Brief of Authorities, which had been admitted as Exhibit 8. He led me through excerpts of the PSA (Tab 1) that provide the authorities and requirements for the tribunal hearing, and Ontario Regulation 268/10 (Tab 2) that contains the prescribed code of conduct that articulates the five counts faced by the respondent. He underscored the onus on the prosecution to prove the counts on clear and convincing evidence. He referred to Jacobs and the Ottawa Police Service (Exhibit 14), an Ontario Court of Appeal matter from 2016, which (at paragraph 12) establishes this standard as higher than a balance of probabilities, but lower than the criminal standard of beyond a reasonable doubt.

The prosecutor elaborated on the issue of making an unlawful or unnecessary arrest without good and sufficient cause by referring to the Supreme Court case of R. v. Storrey (Exhibit 8, Tab 7). The prosecutor read a passage that is worth repeating. The first paragraph from page 250 is a quote from Dumbell vs Roberts (1944):

The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to

the community; but the power may easily be a used and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all the statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a prima facie case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.

The prosecutor called this a subjectivity/objectivity test; it is necessary to stand back from an officer's own consideration and make an objective assessment about reasonable and probable grounds.

The prosecutor turned to the 2010 Ontario Court of Justice matter of R. v. Kiradziev (Exhibit 15) to illustrate what is needed for a charge of obstructing the police. Quoting from page 12 (paragraphs 153 and 154):

The relevant portions of s. 129 of the Criminal Code state:

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 case raises two issues: Firstly, whether there was an obstruction of a police officer in the execution of his duty and, secondly, whether the obstruction was wilful.

The prosecutor pointed out that, according to the case law, there is a three-fold test for the offence of obstructing the police:

- There must be an obstruction of the police officer,
- The obstruction must have affected the police officer in the execution of a duty he was then executing, and
- That obstruction must be wilful.

He indicated a paragraph later in Storrey to that effect (paragraph 168, page 14), and also referred to paragraphs 170, 171, 173 and 174 on page 15, making the following points:

- The circumstances of each individual matter must be considered, as each case is unique. We must consider the circumstances leading to the act or acts complained of, the act itself, and the consequences of the act. What may be an obstruction in one circumstance may not be so in another.

- The act must constitute more than simply an inconvenience to the police officer. The courts are reluctant to find obstruction when the accused engages in purely passive conduct.

Turning to the 2020 Ontario Superior Court of Justice case of Correa v. Ontario Civilian Police Commission, a matter emanating from the G20 incidents in Toronto in 2010, the prosecutor read in the following (Exhibit 8, Tab 3, page 9, paragraphs 50-52):

The videos show that the interchange between Mr. Maclsaac and the applicant and the other officers was very brief. Mr. Maclsaac was not loud and disruptive in the few minutes leading to the arrest, although undoubtedly his conduct was annoying to the officers ...

Just prior to the arrest, Mr. Maclsaac was told to get off the street. Within a few seconds, he was rushed by the officers, and he fell to the ground. There was no opportunity given to him to comply, even though he had been compliant with an earlier request to move away. Indeed, the applicant and another officer conceded in cross-examination that there was one second between the order to get off the street and the move to arrest Mr. Maclsaac.

It was reasonable for the Commission to conclude, on this evidence, that there was not good and sufficient cause for the arrest in these circumstances. Even if the applicant was acting in good faith, as he asserts, the evidence does not support the claim that the arrest was made in the context of a potentially dangerous and dynamic situation.

The prosecutor submitted that even in dangerous and dynamic circumstances, officers need to be careful with respect to their authority to arrest.

To underscore the importance of the rights of an arrested person under the Charter, the prosecutor referred to the 2009 Supreme Court case of R v. Suberu (Exhibit 8, Tab 8). He referred to paragraph 20 on page 473:

Section 10(b) protects the right of a person in detention or under arrest to obtain legal counsel. It reads:

10. Everyone has the right on arrest or detention...

(b) to retain and instruct counsel without delay and to be informed of that right

To underscore the importance of this right and the requirement for immediacy, he read paragraph 2 on page 466, which says, in part:

...[F]rom the moment an individual is detained, s 10(b) is engaged and, as the words of the provision dictate, the police have the obligation to inform the detainee of his or her right to counsel “without delay”. The immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the Charter.

The prosecutor commented that it should be almost a reflex action to read rights on making an arrest.

The prosecutor turned to the Media Relations policy of the HPS (Exhibit 9, Tab 4). He pointed out the overall guidance provided on the first page of the policy, which is that the policy of the HPS is to cooperate fully and

impartially with the media. He read section B.6 of the policy into the record, which is worded in directive language as follows:

When approached by a media representative, a Member shall: ...

(f) permit the photographing of Members in the performance of their duties unless it poses a danger to the Members or may compromise an investigation;

(g) allow media representatives access to the scene except when:

- i. dangerous or hazardous conditions exist,*
- ii. the presence of the media may interfere with or obstruct emergency service personnel,*
- iii. media presence poses a danger to victims or others*
- iv. media presence could disturb evidence or a pristine crime scene*
- v. access would constitute trespassing, or violation of another Act (e.g. Coroner's investigation).*

(h) never intentionally block or harass a media photographer or camera person. The media have a right to photograph unless they are interfering with an investigation.

The prosecutor submitted that this policy sets a high bar, but a good bar.

Moving to the Prisoners – Search of Persons / Care and Control policy (Exhibit 9, Tab 5), the prosecutor pointed out the introductory message that “[i]t is the responsibility of all Members to ensure the security and well being of prisoners in the custody of the Police Service. Prisoner’s [sic] rights shall be maintained at all times”. The prosecutor underscored the importance of clause 3 of section B.2.1 (Transportation: General), which says: “Under no circumstances shall a prisoner(s) be left unattended in a police vehicle”, and also clause 1 of section B.3.3 (Detention: Other

areas), which states: “Where a prisoner is detained in any location other than a Custody area or a holding room, the prisoner shall be constantly accompanied by the Member who placed the prisoner in that location”.

The prosecutor moved on to a review of some of the evidence the Tribunal heard during the hearing. He began by reviewing the evidence of Mr. Cohn.

Mr. Cohn has a lot of experience, having attended hundreds of events on the crime beat. He was aware that the HPS has a media-relations officer, and knows the avenues of the relationship with the police service. At the scene, he was wearing a bright blue jacket with the Global logo on it, and was carrying a professional camera and tripod. There was no doubt that Mr. Cohn was a media person.

The prosecutor pointed out that most of the events that involved Mr. Cohn were 200-300 feet south of the collision scene, as illustrated by the position of Const. Todoruck’s vehicle near the purple tent visible in Exhibit 4 (well south of the scene). When Mr. Cohn arrived at the scene, the victim had been taken away, and everything that happened to him was after the victim was removed.

Hearing his name called from the back of a cruiser, Mr. Cohn went over to speak to Mr. Ritchie in the back of a cruiser, and had his first interaction with Const. Todoruck. The prosecutor played the video of that interaction (Exhibit 6, in which the officer apparently closes the vehicle window, makes utterances, does not provide his badge number when asked, and walks away to the north from the police vehicle). Mr. Cohn then moved away to call the media-relations officer for direction. The prosecutor underscored that a professional journalist was engaging the appropriate HPS member to get direction, as “something profound” had happened.

Mr. Cohn then set up his professional tripod and camera to obtain images from well north of his position, using a zoom lens from just north of the Pioneer gas station.

Const. Welton, the media-relations officer, asked Mr. Cohn by telephone to approach Mr. Ritchie so the two could have an exchange. Mr. Cohn facilitated the conversation by holding the phone toward the police vehicle in which Mr. Ritchie was lodged. Const. Todoruck had walked toward the scene to converse with A/Sgt. Robinson.

In what the prosecutor describes as “a moment of great irony”, while Mr. Cohn followed the direction of the media-relations officer to facilitate his conversation and to film down the road, Const. Todoruck is heard yelling at Mr. Cohn. His greeting, as we hear on the broadcast camera video, is “I’ve asked you to get out of here, OK?”. We hear Mr. Cohn, with concern in his voice, say “Don’t touch me!” and, almost instantly, Const. Todoruck says, “You’re under arrest”. Mr. Cohn replies, “OK”, and replies with “OK” and “no problem” when directed by the officer to put his camera down.

Mr. Cohn became compliant immediately after his arrest. There was no dialogue, despite the prosecutor’s proposal that a ten-second conversation would have sufficed to clarify who Mr. Cohn was and what he was doing. The prosecutor submitted that this violated the HPS media policy.

The prosecutor pointed out that while Mr. Cohn was recording the scene, Const. Todoruck came apparently out of nowhere and engaged in no dialogue, underscoring that the arrest was unlawful and unnecessary in the way it was effected. The prosecutor agreed with Mr. Cohn that, under the circumstances, Mr. Cohn’s initial “Don’t touch me!” is a natural response to being grabbed.

Mr. Cohn was taken by the officer behind the gas station, was taken to the ground, and had his hands tied with zip ties. Subsequently, as we see on the video taken by Mr. Collins (Exhibit 6), the officer does not seem to know what to do with Mr. Cohn, walking him as far as the burnt-out house but never reading Mr. Cohn his rights and remaining nowhere near the vehicle containing Mr. Ritchie, who was apparently suffering medical issues.

Mr. Cohn told the Tribunal that Const. Todoruck was confused, and that he was angry that the incident was recorded by Mr. Collins. Mr. Cohn also shared that the incident impacted him in that he has become guarded and resistant in dealing with the HPS, as the incident contrasted with all his previous experience with the police. He was shocked at the arrest of Mr. Ritchie, and alarmed if not terrified by his own arrest. Mr. Cohn testified that he was not given the opportunity to leave the scene, and that he was scared, as he did not know Const. Todoruck's intentions and was worried about more harmful conduct.

It was in cross-examination that Mr. Cohn revealed the conversation with Const. Welton in that officer's vehicle. The prosecutor referred to it as "not a good conversation", in that Const. Welton expressed embarrassment, demonstrating the seriousness of what happened, as did the fact that the incident was referred to more senior levels of the HPS as the evening progressed.

Moving on to Mr. Collins' evidence, the prosecutor recalled that Mr. Collins was observing the scene or taking photographs when he heard a scream from back up the road. He went back to find that Const. Todoruck had arrested and grounded Mr. Cohn. The video taken by Mr. Collins showed Const. Todoruck walking Mr. Cohn about around the road.

Mr. Collins talked about his experience on incident scenes, including the usual presence of police tape. When the officer challenged him for being on the road, he asked whether the “road” included everything down to Dundas St. The prosecutor submitted that the officer’s direction was ridiculous considering where the collision happened, and submitted that one cannot set up an obstruction charge on standards that are meaningless, vague or asserted to exclude the media.

Mr. Collins also talked about the end of the night when Const. Todoruck turned his spotlight and shone it on the media people, which he said was an extension of the officer’s hostility toward the media throughout the evening.

The prosecutor allowed that some of Mr. Collins’ own conduct was not “lily-white” as he used language he regretted, but that this shows that, as a witness, he understood what was happening and gave us direct and useful evidence about what happened.

A/Sgt. Robinson, the next witness, testified that he was told by Const. Cino that the scene had settled, which the prosecutor said made sense; the victim was gone, and it was possible to conduct witness interviews.

The prosecutor submitted that it was interesting in A/Sgt. Robinson’s evidence that he and a higher-level authority, A/S/Sgt. Zafirides, came into the discussion of Mr. Cohn’s release, underscoring the seriousness with which the events were taken. A/Sgt. Robinson knew that the matter of Mr. Cohn’s arrest was investigated, but that he was not charged.

The prosecutor made a few comments about the transcript of Const. Todoruck’s OIPRD interview (Exhibit 10), on which he suggested I place

little weight. There is a great deal of information about the arrest of Mr. Ritchie, including the officer retrieving a camera from the grass and Mr. Ritchie asked about repeatedly. We also hear on page 103 that he thought Mr. Ritchie was recording him with his cellular phone, but we also hear that Const. Todoruck recognized Const. Welton's voice on the phone, which, the prosecutor submitted, is strong evidence that he would have known that Mr. Ritchie was a media person. Mr. Ritchie apparently told Const. Todoruck that he was calling the Chief of Police, but we understand that he certainly called Const. Welton.

The prosecutor also indicated his belief from the interview transcript that there was no hint of discussion or dialogue between Const. Todoruck and Mr. Ritchie, which was the same pattern of conduct that led to the arrest of Mr. Cohn.

Also in the transcript (page 86), Const. Todoruck says that Mr. Cohn did not have a large camera, but only a tripod, and maintained that all the recording was done by cellular phones, which the prosecutor called "unbelievable".

On page 119 [and following] of the transcript, Const. Todoruck describes the lead-up to Mr. Cohn's arrest, and describes warnings he had given to Mr. Cohn, telling him to leave, as if there were some sort of prelude to the arrest, which, as we see on the video, simply did not happen. He describes three interactions with Mr. Cohn, while Mr. Cohn testified that there were only two. After the first, Const. Todoruck spoke to A/Sgt. Robinson and, when he returned, the arrest was instantaneous.

The prosecutor describes as "worrisome" some of the discrepancies we see between the interview transcript and the video, including the claim that

only cellular phones were used (page 140) and that there was nothing to identify Mr. Cohn as a media person (page 139).

The prosecutor then reviewed two videos. He played the first video (Exhibit 7) which recorded the first interaction between Const. Todoruck and Mr. Cohn, in which the officer replies “Nothing to do with me” when asked for his badge number, and inappropriately disregards Mr. Cohn. The prosecutor describes the officer as “frustrated, if not angry”.

The longer video (Exhibit 5) was stopped at the moment in which we hear Const. Todoruck say, “I told you to get out of here, OK?” and immediately arrest Mr. Cohn, as opposed to engaging in any attempt at dialogue. Const. Todoruck had been further down by the collision scene, perhaps interviewing witnesses, which the prosecutor thinks he should perhaps have continued to do.

The prosecutor led me through an exercise in which he applied the facts, as he presented them, to the law. For Count One, the unlawful or unnecessary arrest, we need to determine if there was a wilful obstruction of the officer. Mr. Cohn was well away from the collision scene, wearing media ID, filming the scene from a distance and facilitating discussion between the media-relations officer and Mr. Ritchie. The critical vehicles had left, the scene had calmed, and there was no attempt by Const. Todoruck to dialogue with Mr. Cohn, and no recognition of Mr. Cohn’s right as a member of the media to be there. The prosecutor took the position that Const. Todoruck did not have the right to say, “I told you the road was closed”, as Mr. Cohn was well back from any area that prevented investigation or caused danger at the site. Telling Mr. Cohn to leave is not good enough under the circumstances. The officer’s unilateral proclamation that the road is closed and direction to leave does not amount to a wilful obstruction of Const. Todoruck. If the officer was taking

statements, he could have, and should have, continued to do that. Mr. Cohn was not preventing anything at the time of his arrest, and none of the media-relations policy exceptions applied to the incident. With respect to the arrest, the prosecutor submitted that the officer was not wilfully obstructed, and the only objective assessment is that Mr. Cohn was attacked.

With respect to reading rights to counsel, which should be almost a reflex by an officer at the moment of the arrest, the prosecutor submitted that the Charter rights were never read to Mr. Cohn, and were only given to Mr. Ritchie later. This, he said, is not sufficient, as the right to counsel and to have that right read is a fundamental interface between freedom and arrest. It is not enough to claim a chaotic scene and that he would get around to it when things calmed down.

The prosecutor turned to the two discreditable conduct counts related to leaving Mr. Ritchie unattended, and also leaving Mr. Cohn unattended for 20-30 minutes. Mr. Ritchie was suffering from medical issues, but Const. Todoruck left him to speak to A/Sgt. Robinson, and also left him unattended for the time it took to arrest and lodge Mr. Cohn. The prosecutor said that these are the complications caused when officers over-reach and effect unnecessary arrests, which also creates problems with securing the scene and interviewing witnesses. The officer had become distracted by the media.

The prosecutor took the position that all five counts have been made out.

In conclusion, the prosecutor allowed that the scene was chaotic at the outset, with many tasks officers are called upon to do. They must provide victim assistance, secure the scene and interview witnesses. It is also important to note that officers are required to cooperate with the media, as

the media are among the many things that must be considered by officers at such scenes. The important role of the media was either forgotten or not employed. Failing to consider that has led to far-reaching, if not shocking, assessments by the witnesses about how they were treated, and the “so-unnecessary” arrest of Mr. Cohn.

Complainant Submissions

Mr. Taggart began by saying that it is not lost on Global News that at the core of this matter is the tragic loss of a child, and that he does not take that lightly. He felt strongly about the issue before the Tribunal, but noted that it was sad that it was connected to tragedy, and expressed gratitude at the attendance of the child’s father despite the risk of his being re-traumatized.

This issue has come at a cost to people, and it is important to note the important role played by the media in public life. On this day, a journalist was prevented from doing the job that journalists take so seriously and that he had a right to do, which is unprecedented in Mr. Taggart’s experience. The incident involved a journalist who was assigned to cover a story in a public place on public property to cover a matter involving public resources and first-responders, which happens across the country many times a day, and for reasons we do not understand Mr. Cohn was arrested and prevented from doing that job.

He outlined the Global News “Principles and Practices” document, binding on all staff, which requires them to do their duties while obeying the law, and he submitted that Mr. Cohn was doing just that.

He expressed frustration that the matter has taken as long as it has, but hoped that the important role of the media can be reaffirmed, which is to tell the stories of the community, hold stakeholders to account, and share transparency in everything that happens in society.

He concluded by saying that he hopes, through this process, to develop better working relationships with HPS and other police and enforcement agencies with which Global deals each day across the country.

Defence Submissions

Expressing concern that the Tribunal had not heard from Mr. Ritchie when he is facing two counts related to him, the respondent began his submissions by referring to two passages from his OIPRD statement (Exhibit 10).

The first, from line 23 on page 105 to line 6 on page 106:

Q: So, let's just cover this – the arrest [indiscernible] with ...

A: Okay.

Q: ... um, Mr. Ritchie. So, you were able to put his – get his hands behind his back with the ...

A: With the assistance. Yeah.

Q: ... assistance of Kevin, uh, Tabay, I believe it is.

A: Okay.

The second, from line 10 on page 108 to line 7 on page 109:

Q: Okay. All right. Fair enough. So, um, other than him, as we sometimes call, turtled his hands in front of him ...

A: Mm-hmm.

Q: ...um, you didn't have to give any strikes to his arms ...

A: No, I never struck him at all.

Q: ... or anything else? So, with the assistance of the civilian, you were able to bring his hands behind his back and handcuff him.

A: Correct.

Q: Did you have to use one set of cuffs or two sets of cuffs?

A: I only have one set of cuffs.

Q: Okay. Fair enough. Um, and then he was placed in the rear of the cruiser, which was yours?

A: Halfway in with his leg hanging out and still refusing to bring it inside so I could shut the door, and eventually I pushed his leg in there and was able to shut the door...

Q: Okay. So you were able to push it in? You didn't have to strike him or anything else along that line?

A: No, because ...

The respondent then said that he was going to go over points, some mentioned in his opening statement, for more clarification, as a summary of the entire event which needs to be taken as a whole.

Starting with Count One, the unlawful or unnecessary arrest of Mr. Cohn, the respondent submitted that Mr. Cohn admitted to being told three times to leave, and he admitted to speaking twice to Mr. Ritchie in the rear of the police vehicle. Mr. Cohn also admitted that he became compliant when told he was under arrest, showing that he had not complied or cooperated before that, whether passively or actively. The respondent said that Mr. Cohn's own actions caused his arrest.

With respect to Count Two, the neglect of duty with respect to reading the s. 10 rights, the respondent's memo book shows that he was read his s.

10 a and b cautions and told that the charge was obstructing police, which Mr. Ritchie indicated he understood.

For Count Three, the neglect of duty with respect to the reading of Mr. Cohn's rights, the respondent said that Mr. Cohn had been warned he would be arrested prior to his arrest, and for what he would be arrested. The arrest itself, with the words "You are under arrest", was captured on video. The respondent submitted that he never had time to read the rights to counsel or even to get Mr. Cohn's name until his release about 20 minutes later due to the totality of the event. He had not had time to record the particulars of the previous arrest in his memo book, and he was always trying to attend to his duties for the fatal collision which was the only reason he was on scene.

Turning to Count Four, the discreditable conduct count that Mr. Ritchie was left alone in the police vehicle, the respondent submitted that the longest period he was left alone was during the arrest of Mr. Cohn, who was arrested in part to protect Mr. Ritchie's safety, which, he said, took precedence over leaving him alone in the vehicle for about two minutes. The respondent took the position that Mr. Ritchie was never unattended, as he only walked Mr. Cohn 20 metres from the police vehicle, and he did that for the safety of all concerned and in light of both arrested parties' resistance and inability to cooperate. Also of concern to the respondent was the association between Mr. Ritchie and Mr. Cohn.

For Count Five, the discreditable conduct count that Mr. Cohn was left alone in the police vehicle, the respondent submitted that custody had been turned over to A/Sgt. Robinson, making him the acting sergeant's responsibility, especially as A/Sgt. Robinson knew that Const. Todoruck had another person in his own vehicle. The respondent took the position that it would have been A/Sgt. Robinson's responsibility to read the

secondary caution to the effect that he did not have to speak to officers, but that did not happen because of the acting sergeant's many other activities. He pointed out that there is no evidence that anyone else spoke to Mr. Cohn during that time, and he was released about 20 minutes later.

The respondent stated that this is a third-party complaint lodged by Mr. Taggart of Global, as he supervised Mr. Cohn, and that the complaint also mentions Mr. Ritchie, who did not testify. He speculated that perhaps Mr. Taggart complained before he knew the facts, as the HPS was unable to give him details of an event that was before the courts. Mr. Taggart would be aware of what information could be provided to him, and also the basis of a complaint to be filed. The respondent acknowledged that Mr. Taggart has a right or even an obligation to protect his employees' rights. He recalled that Mr. Taggart had shown up late for an early appearance before the first hearing officer in this matter.

Later, he repeated his concern that the Tribunal had not heard from Mr. Ritchie, as two of the counts relate to him, and only Const. Todoruck and Mr. Ritchie have direct knowledge of the facts around those counts. He also expressed concern that Const. Welton had not been spoken to by the OIPRD or called as a witness, as only he could provide evidence of any directions he gave.

He expressed regret that Mr. Taggart did not offer evidence, as he might have been able to clarify Mr. Collins' role at the scene as he was under contract to Global at that time. He speculated that perhaps Mr. Taggart did not testify as he knew the complaint is not warranted, or because Mr. Cohn no longer works for him and has filed a grievance.

The respondent took the position that this is not a case of injustice toward the media, and therefore the media policy does not apply. He took the

position that Mr. Cohn, Mr. Ritchie and Mr. Collins were not identified as media to him, and took issue with the reporters' activities, in that that despite being at the scene to report on the collision, the video shows that their focus was on the officer's actions rather than the collision scene.

Following Mr. Ritchie's arrest, the respondent submitted that he had been able to return briefly to his duties, and that he had no intention of charging Mr. Ritchie, but only arrested him for his obvious obstruction of police duties. When Mr. Cohn arrived, he was forced to arrest Mr. Cohn in order to be able to continue his duties and ensure the safety of his prisoner. He suspected at the time that the Mr. Cohn might be friends with Mr. Ritchie, as he could not fathom any other reason why anyone would repeatedly disregard a direct order from a police officer not to speak to a prisoner.

The respondent submitted that because the three reporters are friends, I should place little or no value on their statements due to their lack of independence, and because while there were independent witnesses, none had been called by the prosecution.

He encouraged me to look at the whole event, which is more than the sum of its individual parts. Clear and concise evidence shows that Mr. Cohn and Mr. Ritchie obstructed him, especially as Mr. Ritchie admitted such in court. His grounds were more than sufficient to charge Mr. Cohn as well, but it was not in his power to make that decision, nor did he try to persuade the decision-makers to pursue charges.

The respondent pointed out inconsistencies in the testimony of prosecution witnesses.

- Mr. Cohn testified that he approached Mr. Ritchie on the driver's side of the police vehicle, but Mr. Ritchie was lodged on the passenger side, as seen in the video.
- He said that Mr. Cohn identified A/Sgt. Robinson on the video when the image was of Const. Todoruck, and mistook A/S/Sgt. Zafirides for A/Sgt. Robinson, despite having seen the video repeatedly both at the hearing and prior to it.
- Mr. Cohn was on the scene for at least 20 minutes before his arrest and 1.5 hours following his release, but he took only five minutes and one second of video.
- Mr. Cohn testified that he did not recall specific elements of the conversations he had with Const. Todoruck, and could not recall if media-officer Welton told him to follow the officer's direction.
- Mr. Collins testified that he was there to cover the collision as a freelancer, but was driving a Global News vehicle and had their camera with him. He also shot only about one minute of video footage, saying that it was because other Global personnel were there first, and he did not need to record more than that. As Mr. Collins said that the arrests were unheard of across Canada, the respondent assumed it would have been worth recording every second.
- Mr. Collins parked at the gas station possibly in contravention of municipal laws, despite being required, as Mr. Taggart said, to follow all laws.
- Both of the witnesses who provided video recordings testified that they were complete and in chronological order, but the respondent reminded me that he had pointed out in his cross-examination that this is contradictory as the images went darker several times, and as vehicle lights had come on due to ambient light in the images of the release of Mr. Ritchie. Later, he said that he believes that there is video missing, based on the interactions he had with Mr. Cohn

and Mr. Collins, especially as they both had cellular phones pointed toward him and said that they were recording him and he has seen no such images in the course of this matter.

- Both Mr. Cohn and Mr. Collins admit speaking to Mr. Ritchie, but neither can remember specifics of the conversation, though both say that the reason for Mr. Ritchie's arrest never came up. The respondent was sceptical that they could have heard Mr. Ritchie's voice, whether the window was down or not, over the noises at the scene.
- Mr. Cohn said that he had never met Const. Welton before that day and had to make calls to get his phone number, but Mr. Taggart says in his complaint that both he and Mr. Ritchie had a relationship with Cost. Welton prior to their arrests.
- Both Mr. Cohn and Mr. Collins testified that they were there to cover the collision, yet neither asked Const. Todoruck, the first officer on the scene, anything pertaining to it but rather focused on what they should already have known, like the reason for Mr. Ritchie's arrest and the respondent's name and badge number, which were displayed on his vest. They asked irrelevant questions about the staff sergeant, which was explained as an attempt to make contact for media purposes, even though all three had spoken to Const. Welton who said he would be attending the scene.
- Mr. Cohn yelled "Don't touch me!" before he was told he was under arrest, "thus admitting that I told him why he was under arrest". He also testified that he complied fully after the arrest, thus implying that he was not complying before the arrest.
- Mr. Cohn said that he had a broadcast camera, a professional camera, with a zoom lens, but that camera was not seen by the respondent or Mr. Hanif, was not mentioned by A/Sgt. Robinson, and not seen in the video recordings. Also, if the camera had a

zoom lens, why would Mr. Cohn have to walk past Const. Todoruck's vehicle to film closer to the scene after being told the road was closed?

- Mr. Hanif testified that he told a man he did not recognize to get away from his daughter, and given the description of the man, the respondent stated that he believes the man to be Mr. Cohn.
- Mr. Cohn testified that he was told by Const. Todoruck that the road was closed and to leave the area, yet he stayed, ignoring the officer's direction because he saw other people at the scene, which shows defiance.
- Mr. Cohn stated that he was grabbed by the upper right side, but the photographs in evidence show the injuries of the "affected person", whoever that is. One picture shows a left upper-arm injury, though Mr. Cohn says it was not him and he did not suffer any physical injury.
- Mr. Collins testified that Mr. Cohn took himself to the ground, then contradicted himself by saying that the officer did not need to "ground" him.
- Mr. Collins' video seems to have been taken from a position very close to the officer making the arrest, and the audio is very clear, in fact much clearer than the video supplied by Mr. Cohn, in which the audio is muffled and unclear. Despite this, Mr. Collins testified that he remained about six feet away from the activity; the respondent disagreed, saying the video shows that he moved around and came closer than six feet.
- Mr. Collins testified that he heard Const. Todoruck tell Mr. Cohn that he was under arrest despite being about 115 feet away when the words were spoken. The respondent was sceptical about this because of Mr. Collins' distance from the arrest site and the proximity of the fire truck, which the respondent believes is always left running at scenes. The respondent was sceptical that Mr.

Collins could have arrived at the site of the arrest in time to record what he did, as the arrest itself took only five or ten seconds. The respondent said that he believed that it would have taken a full minute for Mr. Collins to walk the 115 feet around the obstacles present on and around the roadway.

The respondent recalled that A/Sgt. Robinson testified that he had many duties on his arrival, including scene containment and Const. Todoruck's wellbeing after Mr. Ritchie's arrest, which had required assistance from a citizen. He also testified that Const. Todoruck had told him that Mr. Cohn was under arrest, and the reason for the arrest. He recalled that A/Sgt. Robinson testified that there were many people and cars as he attempted to secure the scene. He underscored "attempted", which is important because the acting sergeant had difficulty securing the scene, even though time had passed and the victim had been removed.

The respondent recalled that A/Sgt. Robinson's decision, discussed with A/S/Sgt. Zafirides, to release Mr. Cohn was due to not having enough people to watch him. It was understood that Mr. Cohn would be investigated further, and A/Sgt. Robinson came to an agreement with Mr. Cohn that he would stay out of the way or risk being re-arrested. Before releasing Mr. Cohn, A/Sgt. Robinson checked with Const. Todoruck to ensure that the officer was OK with the release, and he did not object because he thought it was the right course of action, and the decision about proceeding ultimately rested with detectives.

The respondent allowed that the video shows Mr. Cohn wearing a jacket with the Global insignia, but said that, at the time, he did not see any news insignia on the jacket. Additionally, Mr. Hanif described a man that the respondent says was Mr. Cohn wearing a blue jacket, but testified that he did not see any insignia on it, and expected to see insignia and other

evidence such as microphones to identify media members. The respondent attributed his not noticing the insignia to “tunnel vision”, as he was in a stressful situation and focusing on Mr. Cohn’s hands, as they would be the “delivery system” for attacks upon himself.

All this time, the respondent submitted, he should have been able to focus on the scene, excluding unauthorized people, identifying witnesses and supporting emergency personnel.

The respondent said that the prosecutor had referred to the video recording of Mr. Cohn as the first contact with Const. Todoruck. He said that the truth is that Mr. Cohn admitted to speaking to Mr. Ritchie at least twice and was told by the officer to be off the road three times. The respondent also said that he believed that interactions other than the ones seen in evidence were also video-recorded.

The respondent recalled that the prosecutor described him as frustrated and angry. He admitted to being frustrated by the actions of the three reporters, but he was never angry, as he had no personal stake in the matter, unlike Mr. Hanif and his family, who continue to be upset by these proceedings.

The respondent recalled that Mr. Cohn testified that he suffered psychological injuries that made him guarded about dealing with the Hamilton Police Service, but Const. Todoruck has seen him attend later scenes.

Mr. Duxbury submitted that saying “Don’t touch me!” is an appropriate response at the time of the arrest, but the respondent said that he did not believe it to be appropriate when a police officer tells one that “you’re under arrest”.

The respondent questioned the relevance of the evidence about the spotlight, but clarified that he did not prevent anyone from recording at any time. He submitted that he used the spotlight as his vision was impaired by the camera lights and he simply “refuted” with his light to blind them and make them move back to allow him to drive away.

He referred to Mr. Hanif as the only truly independent witness at the hearing. He recalled that Mr. Hanif had said that Const. Todoruck had a big job to do with many responsibilities; that Const. Todoruck told someone identified by the respondent as Mr. Cohn to stay away; that Mr. Hanif had also told that man to stay away; and that he said he was 30-40 feet away when the arrest took place. The respondent estimated that the distance was closer to 70-80 feet.

The respondent concluded by saying that Mr. Hanif’s support struck him in his heart and gave him the strength to carry on through the hearing, knowing that he did his job to the best of his ability and that he had done the right things.

Prosecution Reply

The prosecutor replied that it was “remarkable” that the respondent has said that Mr. Hanif characterizes the person he saw as Mr. Cohn, while it is absolutely clear that he did not arrive until after his daughter had been removed from the scene. Mr. Hanif identified a blue jacket, but it is clear that the arrest he saw was that of Mr. Ritchie.

In response to the respondent’s comments about not hearing from Const. Welton or Mr. Ritchie, the prosecutor underscored that it is up to the

prosecution to decide whom to call to give evidence. Mr. Ritchie could not have given evidence about the arrest of Mr. Cohn, and as to the reading of the rights, we have ample evidence from other witnesses. Const. Welton was not at the scene, and most of the damaging material about him comes through cross-examination.

As to the inconsistencies to which the respondent drew my attention, none of them matter as none of them pertain to what we see in the videos with respect to the interactions between Const. Todoruck and Mr. Cohn. He gave the example of the amount of time it took for Mr. Collins to reach the arrest site, which is irrelevant because the fact that he *did* get there is captured on the video. The prosecutor commented that he was not sure of the math, but it does not matter because we see the aftermath.

Defence Reply

The respondent replied that he did not base his defence on Mr. Hanif's testimony. He had prepared his defence prior to Mr. Hanif's arrival, which was a surprise to all of the parties.

He commented on the complexity of mounting a defence without legal or investigative training or experience.

He said that he found it appalling that the prosecutor mentioned Mr. Hanif's testimony and said that it was untrue, as he had established at the start of the testimony that Mr. Hanif could not have been expected to remember times or consider the chronological order of events, considering what he had experienced.

The respondent repeated that Mr Hanif had witnessed the arrest of Mr. Cohn, which resulted in a dialogue between the respondent and the prosecutor. I stopped that dialogue, noting that it was my job to make that determination.

The hearing concluded at this point.

Analysis and Decision

Background

Constable Jeff Todoruck faces five counts of misconduct. One of the parties to this matter is a public complainant, and I am very aware that there is a public-interest element to this matter. I spent considerable time and took great care to review all of the evidence, whether testimony or documentary, and to (as the respondent suggested) consider the events in their totality as well as individually.

I am grateful for the exhibits and submissions of all three parties to this matter, which have helped me to arrive at my decisions.

In my analysis and decision, I will not necessarily refer to all of that evidence, as some of it does not pertain to my consideration of the clear and convincing evidence I require to register a conviction on none, some or all of the counts. Part of my function in these matters is to isolate which evidence pertains to the counts, and to determine whether the testimony and exhibits amount to clear and convincing evidence of misconduct. That said, I was careful to consider all of the exhibits and evidence, as well as the submissions of all three parties, in my analysis of this matter.

Exhibits

Exhibits 1 (my delegation) and 2 (the prosecutor's designation) are administrative and require no comment.

Exhibit 3, the Notice of Hearing, articulates the counts and particulars faced by the respondent in the matter. The prosecutor must substantiate the counts from the NOH through clear and convincing evidence, and it falls to me to determine if he has done so, or whether the evidence falls beneath that standard.

Exhibit 4, a large aerial photograph of the scene, was helpful, and I relied upon it to substantiate the articulation of distances and positions, as well as to visualize the broader picture of the images shown in the video evidence.

Exhibits 5 through 7, three videos that were reviewed by investigators, witnesses, the Tribunal and, after the fact, myself, were helpful in substantiating and giving context to other testimony. While the respondent repeatedly questioned whether they were complete and chronological, I have nothing other than his expressions of suspicion to give me reason to doubt that they are as described by the journalists who supplied them, and find that they are reliable and relevant.

Exhibits 8 and 9, the Brief of Authorities and Document Book supplied by the prosecutor, contain cases, excerpts from HPS policy and legislation, and the transcript of the respondent's OIPRD interview, all of which are dealt with throughout this finding. As the interview transcript in Exhibit 9 was incomplete, I have relied on the complete version that was submitted as Exhibit 10, which I have reviewed in its entirety. I do not recall the prosecutor referring to three of the cases in Exhibit 8, but I reviewed those cases (Hawkes and McNeilly, Kobayashi et al and the Waterloo Regional Police and Melville and Azaryev and the York Regional Police) as they were offered in evidence, giving particular attention to passages that had been highlighted.

Exhibit 10, the OIPRD interview of the respondent officer, was, as the prosecution pointed out, neither a sworn statement nor subject to cross-examination. It was admitted based on the Statutory Powers Procedure Act provision (subsection 15(1)) that, subject to limitations that do not exist here, “a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation as evidence in a court, (a) any oral testimony; and (b) any document or other thing, relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious”. I accept the prosecutor’s caution, however, and kept in mind the limitations of the transcript, as it is the unsworn record of an investigative interview.

Exhibit 11, the three photographs introduced as being of “the affected person”, were not conclusively identified or substantiated during the hearing. They also do not pertain directly to any of the counts faced by the respondent. I did not consider this exhibit in my analysis or finding.

Exhibit 12, the original OIPRD form completed by the complainant, was not sworn or subject to cross-examination but was considered as the early perspective of one of the parties to this matter, and I gave it the same weight and used it for the same purpose as the complainant’s submissions.

Exhibit 13, divided into 13(a) and 13(b) as it covers two different days, is the notes taken by the respondent officer on the day of the event, Tuesday, May 16, 2017, and four days later, Saturday, May 20, 2017. Memorandum books are fundamental tools for police officers. They record officers’ observations, actions and decisions, describe and articulate evidence, and become a crucial record of police matters and activities. As such, they are important accountability tools as well as a means by which officers can recall and report to supervisors, investigators, courts and, as in this case, tribunals. While I take no issue with the

veracity of that which is recorded in the respondent's notes, particularly on May 16, I find that while they contain narratives of what transpired, they are sparse and incomplete in terms of key data such as the times at which observations, decisions and arrests were made and even the name of one of the parties the respondent arrested, which makes them less reliable than they should be. I have given less weight to the notes made on May 20, as they pertained to events four days earlier and should have been made at the time or, at the latest, shortly after the events they describe.

Exhibits 14 and 15, two cases provided by the prosecutor in addition to the cases bound into Exhibit 8, were treated in the same way as Exhibits 8 and 9.

Witnesses

Prosecution

Even though some time has passed since the incidents that led to this hearing, I found that the prosecution witnesses, despite some minor possible inconsistencies and difficulty remembering specific details, to be reliable, credible and, for the most part, relevant to the matters at hand. I found that, from time to time, I had to caution myself not to be swayed by a certain amount of hyperbole, but I understand that journalists, skilled in language and rhetoric, are trying to make compelling points. I am disappointed at the lack of detail in some of the testimony, and in particular about the lack of evidence on the timing of events, but I have no reason to suspect that any of the witnesses acted in anything other than good faith, despite their appearance under the compulsion of summonses.

I understand that the respondent has concerns about the relationship among the three journalists, as they are friends or at least well-known to each other. Despite this, I found no reason to believe that such a relationship,

understandable among colleagues or even competitors in the news media, impacted the honesty or reliability of their testimony.

Defence

Based on my observations at the hearing, I have tremendous respect for the defence witness (the father of the girl who was killed tragically on the day these events took place) and am warmly grateful for his civic-minded efforts to locate and attend the hearing on his own initiative, despite the emotional pain it must have caused him. I believe him to have been earnest and honest in his testimony, and that he strove to be correct to the extent that anyone could be while recalling things that were observed in the midst of an unspeakable tragedy.

I find that the testimony he gave contradicted other credible and substantial evidence from witnesses and videos, which, while completely understandable under the circumstances, causes me to give less weight to the testimony he provided.

I wish to be very clear, however, that this does not reflect on my respect for his intentions, nor does it impugn his character.

The Counts

The five counts faced by Const. Todoruck are articulated at the beginning of this document and on the Notice of Hearing (Exhibit 3), and I will not repeat them here. I relied on the articulation of the accusations in Exhibit 3 as I determined whether the evidence is sufficiently clear and convincing for conviction.

Count One: Unlawful or Unnecessary Exercise of Authority

Constable Jeffrey Todoruck is alleged to have made an unnecessary or lawful arrest of Mr. Jeremy Cohn. Mr. Cohn had pressed Const. Todoruck for information on an arrested party, Mr. David Ritchie, and Const. Todoruck told him that he was not allowed to be at that location. Const. Todoruck threatened to arrest Mr. Cohn and told him to put his camera down. The officer then pushed Mr. Cohn to the ground, restrained him with a knee and secured his wrists with zip ties. Const. Todoruck pulled Mr. Cohn off the ground and placed him in the rear of a police cruiser. Mr. Cohn was released without charges about 20 minutes later.

It is my responsibility to determine if the arrest of Mr. Cohn was, in fact, unlawful or unnecessary, based on clear and convincing evidence. I am not required to find that it was both unlawful and unnecessary; only one of these characteristics is necessary to substantiate the count.

I found the prosecutor's reference to the Media Relations policy of the HPS (Exhibit 9, Tab 4) to be helpful in establishing, as context, the relationship and level of cooperation required of HPS members with respect to members of the media. It also made clear the intention of the Chief of Police that members of the Service are required by policy to provide cooperation and access to members of the media in the performance of their duty. While the NOH (Exhibit 3) does not accuse the respondent of violating that policy, the policy has relevance in establishing the necessity of the arrest of Mr. Cohn, as we know that the respondent was required to permit the photographing of members, permit access to the scene in most circumstances, and to never intentionally block or harass a media person, as they have the right to photograph unless they represent some danger or interfere with the investigation.

I understood the respondent's submission that media should not be given special treatment. I understand his position that they are required to obey rules like everyone else, but I also underscore that the HPS policy grants them certain specific things, like cooperation and access. While the respondent is not facing allegations of violating that policy, he nevertheless must obey it, as the prosecutor pointed out in Kobayashi et al and the Waterloo Regional Police, at paragraph 15:

[The officer's action] contravened the Service's procedure which took the form of an order from the Chief of the Service. In failing to comply with the order, Const. Kobayashi and Const. Green were insubordinate.

The respondent submitted that he did not know that Mr. Cohn, Mr. Collins or Mr. Ritchie were members of the media. In some ways, this is not relevant; Mr. Collins' position as a freelance journalist, for example, has no bearing on his right to record events around him with his video camera. However, Mr. Cohn, as is clear on the video, is wearing a bright blue jacket with the Global News logo clearly visible, and while at different times Const. Todoruck acknowledged or denied the existence of a news camera, he instructs Mr. Cohn to "put the camera down" during the arrest. I find that the respondent knew or should have known that Mr. Cohn, if not all three journalists, was a member of the news media, and therefore entitled to engage in the activities specified in the HPS Media Relations policy. This has an impact on whether the arrest was necessary.

The respondent submitted that Mr. Cohn was given clear direction to leave the area and multiple opportunities to comply, and that he was arrested for obstructing a police officer by failing to follow his direction and repeated attempts to disrupt his investigation and to prevent him from doing his duties.

In evaluating the actions of the officer in making an arrest for obstructing the police under these circumstances, I refer to the 2017 Ontario Civilian Police

Commission matter of Mulville and Azaryev and York Regional Police Service (Exhibit 8, Tab 6). While the prosecutor did not read this into his submissions, he provided and highlighted the following from paragraph 45, page 14:

The objective test would require that the Hearing Officer place a dispassionate reasonable citizen fully apprised of the same facts and circumstances, aware of the applicable rules and regulations, in the same situation to assess whether the officer's language was discreditable.

While the Mulville case differs from the current one, the “objective test” is compelling. What would a reasonable person, dispassionately separate from the upsetting and previously chaotic nature of the scene, who knew the applicable laws and policies and placed into the respondent's shoes, do in these circumstances?

I applied the test to the grounds the respondent said he used to justify the arrest:

Direction to Leave:

Constable Todoruck indicated that the road was closed, and that Mr. Cohn was required to leave it. There is dispute whether this direction was given twice or three times, but both involved parties agree that it was given. That said, what was the authority for that direction?

As we have heard repeatedly in testimony and can see from the aerial photograph (Exhibit 4), the collision scene was a substantial distance north of where Mr. Cohn had set up his camera. Although the road was available for emergency equipment, no element of the investigation of the collision with the possible exception of witness interviews would be taking place that far south of the position of the damaged GMC van. Although at the time of the arrest it seems there was no police crime-scene tape erected to demarcate the scene,

I find that belief on Mr. Cohn's part that he was not on the collision scene, and that he was not interfering with it, was reasonable. The reasonable person in Mulville would have acknowledged that Mr. Cohn was not a threat to the scene or the investigation, and that there was no reason to order him off the roadway that far south of the collision scene. His distance from the scene is demonstrated both on his commercial-grade video (Exhibit 5) and by his testimony.

The Ontario Highway Traffic Act (HTA, as it was on May 16, 2017, at section 134) gives a police officer the authority to direct traffic (including pedestrians) and to close roadways to vehicular traffic when he or she "considers it reasonably necessary" in conditions that include "to permit proper action in an emergency". I find that using this authority at a location dozens of metres south of the collision scene does not meet the standard of "reasonably necessary", nor was it necessary to "permit proper action in an emergency". I also believe that, for this reason, our "reasonable citizen" would not have invoked this authority. Mr. Cohn's decision to decline to follow Const. Todoruck's "orders" in this situation is therefore justified, as I find that, in addition to the arrest site being far removed from the collision scene, the legal basis for those orders did not apply in this case.

Repeated Attempts to Disrupt:

Mr. Cohn approached Const. Todoruck after having a conversation with Mr. Ritchie in the back of the police car (as seen on Exhibit 7). Const. Todoruck closed the car window, saying that Mr. Ritchie had "lost his window privileges" as he had been talking to Mr. Cohn. Mr. Cohn asked for Const. Todoruck's badge number, which the respondent did not provide, saying "I have a serious investigation" and "it has nothing to do with you". Mr. Cohn was calm, professional and polite.

While it is understandable that the officer felt pressured to return to the investigation of the collision, it would have been reasonable to identify himself, and to engage Mr. Cohn, however briefly, in civil conversation, even if only to tell him that he was not at liberty to give information about his prisoner. A reasonable person would not see Mr. Cohn's behaviour as disruptive, nor would the reasonable person have felt that ordering him to leave the roadway with the camera, particularly that far from the scene, was reasonable or that Mr. Cohn's presence there was disruptive.

Preventing Respondent from Doing his Duties:

By his own evidence, if left alone, Mr. Cohn would have taken video recordings of the collision scene and also looked into the arrest of his colleague Mr. Ritchie. The reasonable person would, in my opinion, have seen both of these pursuits as legitimate and, perhaps more importantly, his actions would have been supported by the HPS Media Relations policy. The reasonable person would have had a conversation with Mr. Cohn, determined his identity and mandate, and established parameters on Mr. Cohn's movements and activities in accordance with the policy. Mr. Cohn and Const. Todoruck would then both have been free to return to their duties. The unnecessary escalation of this situation would not have happened if the reasonable citizen from Mulville been in the respondent's shoes.

As to whether Mr. Cohn's actions gave Const. Todoruck the grounds for an arrest for obstructing the police, I turn to the submissions of the prosecutor, as follows:

In R. v. Kiradziev (Exhibit 15), paragraph 153 quotes the applicable section of the Criminal Code with respect to the charge of obstructing a public or peace

officer. It is quoted earlier, but I repeat it here for clarity and because it is at the heart of this issue:

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.

Separately but in addition to the “reasonable citizen” test applied above, I accept the prosecutor’s position, articulated in Kiradziev at paragraph 168, that I must consider whether there was an obstruction, whether the obstruction affected the police officer in the execution of a duty he was then executing, and that the person did so wilfully.

In making this determination, I turn again to Kiradziev at paragraphs 170, 171 and 173:

In trying to measure the interaction between an individual and a peace officer so as to determine what is innocent and what is culpable conduct, the Court must consider the circumstances leading to the act or acts complained of, the act itself, as well as the consequences of any such act.

Clearly, each case is dependent upon its own facts. What may [be] an obstruction in one set of circumstances may not be in another, even though the act undertaken is the same in both instances.

It is not ... sufficient for the Crown to meet its onus by simply demonstrating that the police officer has been inconvenienced to some degree. (R. v. Hargrove, (1985) 35 MVR 217.) The police are inconvenienced daily in their duties, but that is not enough to criminalize the actions of the person that has caused the inconvenience. When an inconvenience amounts to an obstruction is, of course, dependent on the individual circumstances of each case. Suffice it to say that the inconvenience or the extra work generated by the accused's conduct must be more than trifling or de minimus in nature.

Mr. Justice Zuker in Kiradziej also invokes lawyer Clayton Ruby in paragraph 174, where he says, "The Courts have generally been reluctant to find obstruction when purely passive conduct is engaged in by an accused".

So, again, what are the "individual circumstances" of this case?

According to his evidence, Mr. Cohn, wearing a blue Global News jacket, sets up his camera on Evans Road, facing northbound, dozens of metres south of the collision location where any scene-based investigation would be expected to take place. Hearing his name called, he speaks to his colleague who is handcuffed in the rear of a police vehicle. After a brief conversation in which the arresting officer refuses to engage or to provide information, he successfully contacts the HPS media-relations officer by cellular telephone. He returns to the police car containing his colleague while continuing to take video, both actions being on the instructions of the media-relations officer, a constable of the Hamilton Police Service. Using the speaker-phone feature on his cellular telephone, he facilitates a conversation between the media-relations officer and the prisoner, who is alone and unattended in the back of a police cruiser.

At this point, Mr. Cohn's evidence is that he sees Const. Todoruck approaching from the north, looking angry and red in the face. He thinks it best to gather his

equipment and retreat until things settle down, but is arrested at the moment of the officer's arrival and before he has a chance to retreat.

The respondent asked me to read the transcript of his OIPRD interview, and I found at and around page 122 an account of dialogue with Mr. Cohn prior to the arrest, but I find that such dialogue did not happen, at least not in the moments leading to the arrest. This is supported by the video recordings in Exhibit 5, as the camera image goes awry as Const. Todoruck takes physical control of Mr. Cohn, eventually taking him to the ground.

At the moment of his arrest, Mr. Cohn is recording a collision scene and facilitating a conversation between a police officer and a prisoner about whom he is worried. Const. Todoruck, who has left the prisoner unattended, returns and makes the arrest. Const. Todoruck may have felt inconvenienced by his inability to continue to take witness statements, but, as other Hamilton and Halton police officers have arrived on the scene by this point, this is merely an inconvenience. We have seen that, for a charge of obstructing a police officer, the obstruction must be more than inconvenience.

I return to the prosecutor's submission of R. v. Storrey (Exhibit 8, Tab 7 at page 250), and repeat it in part here:

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.

We return again to the concept of the “reasonable citizen”, and note that, as articulated in Storrey, there was an obligation on the officer to determine whether his grounds for arrest existed for objective reasons that would make sense to another person. It is apparent that the officer did not do that.

The respondent submitted that it was not reasonable for Mr. Cohn to shout, “Don’t touch me!” when he was under arrest. That, however, is not the way it happened. The video and Mr. Cohn’s evidence both show that the exclamation took place before the statement of arrest. I find that Mr. Cohn, surprised by the physical contact, initially yelled, “Don’t touch me!”, and that he became compliant immediately on being told he was under arrest, even to the point, as Mr. Collins’ testified, of allowing himself to be taken to the ground without resistance, after which his hands were, as we have seen, secured with plastic zip-ties.

I reject the submission by the respondent that Mr. Cohn had ever been actively resistant, justifying the use of force and intermediate weapons. Not only was Mr. Cohn never more than passively resistant, I find that any resistance, at least at the very low level at which it was offered, was justified.

I also find that at no time did Mr. Cohn wilfully attempt to obstruct or impede Const. Todoruck in the performance of his duties. He merely declined to follow direction given by the officer, direction that we have seen was not based on reason or authority.

I also reject the respondent’s submission that Mr. Ritchie required protection from Mr. Cohn. Mr. Cohn presented no kind of danger to Mr. Ritchie, even from the perspective of the respondent who, at that time, did not know the relationship between Mr. Cohn and Mr. Ritchie. Mr. Cohn spoke to Mr. Ritchie and aimed a cellular phone in his direction. Nothing more than that.

I know from my own experience what it is like to respond to tragedy, and to deal with chaotic scenes. I have a certain amount of sympathy for Const. Todoruck if he felt somewhat overwhelmed, at least initially, by weighty responsibility. However, it is incumbent on police officers to overcome such limitations as quickly as they can, to maintain a clear head, to remember the law, Service policies and particularly the rights of people around them, and to never lose a sense of what is reasonable, legal and professional under the circumstances.

Based on the above, I find that I have clear and convincing evidence that the arrest of Mr. Jeremy Cohn by Constable Jeffrey Todoruck was unnecessary.

As the Code of Offences stipulates that the arrest is “unlawful or unnecessary”, it is not required of me to make a finding on the lawfulness of the arrest.

Count Two: Neglect of Duty

Const. Todoruck is alleged to have failed to inform a prisoner, Mr. David Ritchie, of the reasons for his arrest and/or failed to provide him with his rights to counsel pursuant to s. 10 of the Charter of Rights and Freedoms. The NOH makes references to the Brydges decision, and while that was not offered in evidence, it is a 1990 case that makes it mandatory for police officers to not only notify an arrested person of his or her right to counsel, but also of the option to apply for legal aid and to access free legal advice and assistance at any time, wherever available.

It is my responsibility to determine, to a standard of clear and convincing evidence, whether Const. Todoruck did indeed fail to inform Mr. Ritchie of the reasons for his arrest or fail to provide him of his s. 10 rights to counsel. I am not required to find that both omissions occurred; only one omission is required to substantiate the count.

In order for me to convict a police officer of Neglect of Duty, it is incumbent on me to articulate that the officer, in fact, had a duty that he or she was required to perform. As the prosecutor pointed out, the duty is contained in the Canadian Charter of Rights and Freedoms, which is quoted in R. v. Suberu (page 473, at paragraph 20):

Section 10(b) protects the rights of a person in detention or under arrest to obtain legal counsel. It reads:

10. Everyone has the right on arrest or detention ...

(a) To retain and instruct counsel without delay and to be informed of that right;

The prosecutor also provided me with the case of Hawkes v. McNeilly, which, at paragraph 30, states:

To constitute a neglect of duty, the impugned conduct must include an element of wilfulness in the police officer's neglect or there must be a degree of neglect which would make this matter cross the line from a mere job performance issue to a matter of misconduct.

I accept this statement, and find that this matter does, in fact, cross the line to misconduct, whether the officer withheld the statement of rights from s. 10 of the Charter from either Mr. Ritchie or Mr. Cohn wilfully or negligently. Reading Charter rights is the work of a moment, but the right to counsel (along with direction at the appropriate time on how to obtain counsel) is absolutely fundamental when a person is arrested, as the prosecutor pointed out in Suberu at Paragraph 2, page 466:

[F]rom the moment an individual is detained, s. 10(b) is engaged and, as the words of the provision dictate, the police have the obligation to inform the detainee of his or her right to counsel “without delay”. The immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the Charter.

The evidence I have in this matter is limited by the fact that I did not hear from Mr. Ritchie during the hearing; he was not called as a witness by any of the parties. However, the prosecutor read into evidence the following passages from the OIPRD interview transcript of Const. Todoruck. It appears earlier in this document, but I repeat it here for clarity.

From page 127, line 22, to page 129, line 6:

Q [the investigator]: Okay. All right. So, with Mr. Ritchie I'm going to ask very clear questions. Did you advise him why he was under arrest?

A [Const. Todoruck]: Yes.

Q: Did you read him his rights to counsel?

A: I did, but it was quite a ways after I arrested him.

Q: How long afterwards?

A: Uh...

Q: When did you arrest him?

A: *Uh, from looking back at times afterwards, it looks like it was approximately 19:00 hours or 7:00 p.m. that he was arrested. Um...*

Q: *And when did you read him his rights to counsel?*

A: *Uh, it was 19:30 hours I – he did get, uh, EMS help, so I still hadn't read him his rights at that point because ...*

Q: *Thirty (30) is EMS?*

A: *Yes. So EM- I think – yeah. So, at 19:30 hours he was assessed by EMS. So, it was after he was being assessed by EMS at 19:50 hours that I was able to take the time away from my witnesses to, again, advise him of his rights, make sure that he knew them, and he was given his rights to counsel at 19:51 hours.*

Q: *So, you believe that's a reasonable time to give him his rights to counsel after you've arrested him?*

A: *Generally, I would be doing it within – it usually happens with-, you know, within 30 seconds to a minute [after], it happens right at the time.*

Q: *Why didn't you do it?*

A: *But, uh, I wasn't able to do that because when I told him he was under arrest initially, it was a long process of arresting him. It probably took two [or] three minutes...*

From page 132, lines 9 to 13:

Q: You're an experienced officer of 20 years. You know once you take somebody's rights, their freedoms, away and you've placed them under arrest, the onus is on you to read them their rights to counsel.

A: Yes.

I have little information about the arrest of Mr. Ritchie, including how long it took and whether the respondent was justified in having safety concerns. There may have been justification in not reading Mr. Ritchie his s. 10 Charter rights immediately on arrest; quite frankly, I do not know, but am willing to allow some latitude at the outset based on the evidently chaotic nature of the scene as testified by A/Sgt. Robinson, and by Const. Todoruck's notes (Exhibit 13a, page 80-82), which indicate that he required the help of a citizen to effect the arrest and that Mr. Ritchie offered some resistance at the time.

However justified a delay may be while danger exists, any justification is removed when the scene becomes calm. While I have no specific information on the time of Mr. Ritchie's arrest (other than an approximation by the respondent during his OIPRD interview that he was arrested at about 7:00 p.m.), Mr. Cohn testifies that Mr. Ritchie was in custody when he arrived shortly after 7:00 p.m. During that time, we have evidence from videos and several witnesses that Const. Todoruck was involved in several other activities while Mr. Ritchie sat unattended in the police vehicle, and I must wonder why he did not use some of that time to ensure that Mr. Ritchie had been read his s. 10 rights. One example is the video (Exhibit 7), taken by Mr. Cohn before his own arrest, in which Const. Todoruck is seen at the vehicle in which Mr. Ritchie was held.

I do not accept that it was impossible for Const. Todoruck not to read Mr. Ritchie his rights until 7:51 p.m. Even without knowing the exact time of Mr. Ritchie's arrest, there was a gap of about an hour during which the rights were not read despite ample time to do so.

I find that this is clear and convincing evidence of the charge of neglect of duty, and I find the respondent guilty of Count Two.

Count Three: Neglect of Duty

Similarly to Count Two, Const. Todoruck is alleged to have failed to inform a prisoner, in this case Mr. Jeremy Cohn, of the reasons for this arrest and/or failed to provide him with his rights to counsel pursuant to s. 10 of the Charter of Rights and Freedoms. The comments about the Brydges decision also apply here, as do the other legal aspects that pertain to this count.

Again, I am responsible for determining if there is clear and convincing evidence that Const. Todoruck failed to inform Mr. Cohn of the reasons for his arrest or failed to inform him of his s. 10 rights to counsel. As in Count Two, I am not required to find that both omissions occurred; only one omission is required to substantiate the count.

Mr. Cohn testified that, after his arrest, he was walked around for a short while by the respondent, and eventually placed in a police vehicle about 50 metres north of the arrest site. He testified that Const. Todoruck did not read him his rights or inform him of the reason for the arrest before placing him in what was later identified as the acting sergeant's vehicle.

Once there, he sat alone for 20 minutes or more before being spoken to by A/Sgt. Robinson, who told him that he did not know why he had been arrested. The acting sergeant returned a few minutes later and the two men had a dialogue in which Mr. Cohn expressed his concerns about the situation. A/Sgt. Robinson released Mr. Cohn unconditionally; Mr. Cohn's evidence is that he was told he was free to continue doing his job, and A/Sgt. Robinson's evidence is that Mr.

Cohn agreed on his release not to encroach the scene and to cooperate, knowing that he could be arrested again if he did not. In either case, Mr. Cohn was clear in his evidence that he was never told the reason for the arrest, nor was he given his Charter rights.

Mr. Cohn testified that he had no further contact that night with Const. Todoruck, except to see him drive away and shine a police-vehicle spotlight at reporters, a curious but short event that does not pertain to the counts facing the respondent.

While the videos in evidence show the period following Mr. Cohn's arrest, they are not helpful in showing the absence of something – in this case, the notification of reasons and reading of rights.

In his statement to the OIPRD, the respondent claims to have informed Mr. Cohn that he was under arrest for “obstruct police”, but he admits that he did not read Mr. Cohn his rights. From pages 138-139 of the interview transcript:

Q: Okay. And you never read him his rights to counsel?

A: No, I never had the opportunity

Q: Okay.

A: ... because I placed him in someone else's custody in their car, didn't even have his name, and ...

Q: Okay

A: ... clearly, as we're going through now, I hadn't even had an opportunity to read the first arrest his rights to counsel. So, I'm certainly not gonna skip ahead and make him a priority.

By the time of Mr. Cohn's arrest, we have evidence that the scene was no longer chaotic, and there were more officers than at the outset to help to ensure that everything required could be completed. The rights to counsel were never read, and the duty rested on Const. Todoruck to read them. He had ample time to do so, either at the moment of the arrest or, perhaps more reasonably, immediately on Mr. Cohn's placement in the police vehicle, but in any case, "without delay".

The respondent disputes (in submissions rather than under oath or affirmation) that he did not inform Mr. Cohn of the reasons for his arrest. A/Sgt. Robinson, while he did not hear the respondent read Mr. Cohn his rights, testified that he thought he heard the officer inform him of the reason for the arrest on an OIPRD video.

However, the respondent admits that he did not read Mr. Cohn his Charter rights, as Mr. Cohn testified. This is sufficient to give me clear and convincing evidence that Mr. Cohn was never read his rights after being arrested, and I find Const. Todoruck guilty of this count of Neglect of Duty.

Count Four: Discreditable Conduct

Const. Todoruck is alleged to have left a prisoner, Mr. David Ritchie, unattended in the rear of a police vehicle, contrary to the HPS policy that states, in part, "under no circumstances shall a prisoner(s) be left unattended in a police vehicle".

I must now determine on clear and convincing evidence whether Mr. Ritchie was left unattended as prohibited by HPS policy, as written.

The prosecutor has pointed me to three sections of the HPS policy on Prisoners – Search of Persons / Care and Control (Exhibit 9, Tab 5). The introduction to the policy states that “[i]t is the responsibility of all Members to ensure the security and well being of prisoners in the custody of the Police Service. Prisoner’s [sic] rights shall be maintained at all times”, and section B.2.1 states, in part, “Under no circumstances shall a prisoner(s) be left unattended in a police vehicle”. Section B.3.3 states, “Where a prisoner is detained in any location other than a Custody area or a holding room, the prisoner shall be constantly accompanied by the Member who placed the prisoner in that location”.

As we saw earlier in Kobayashi, Service procedure, or in this case policy, is an order from the Chief, and not to follow policy is to be insubordinate. The choice has been made to proceed on a disorderly conduct count rather than insubordination under the code of offences, so I now have to determine if Mr. Ritchie was left alone, and if doing so amounts to acting “in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force”.

Again, I have the limitation of not having heard from Mr. Ritchie during the hearing, but we have Mr. Cohn’s testimony that he was in custody in the back of Const. Todoruck’s police cruiser when he arrived just after 7:00 p.m. We have information from the OIPRD transcript (Exhibit 10), which is less than testimony but which has not been denied or retracted by the respondent, that he arrested Mr. Ritchie at about 7:00 p.m. (page 127-129).

We see on the cellular-phone video (Exhibit 7), 16 seconds in length and taken by Mr. Cohn shortly after his arrival, that Const. Todoruck rolled up his car window and then walked northward on Evans Road, leaving Mr. Ritchie unattended in a police vehicle.

We have the video taken by Mr. Collins (Exhibit 6), one minute and 52 seconds in length, starting immediately after the arrest of Mr. Cohn, showing him escorting Mr. Cohn northward on Evans Road before being placed in A/Sgt. Robinson's police vehicle, leaving Mr. Ritchie unattended in a police vehicle.

We have the video taken on the media camera by Mr. Cohn (Exhibit 5), about five minutes in length, starting shortly after Mr. Cohn's arrival after 7:00 p.m. when the evidence shows that Mr. Ritchie was in custody and lodged in the back of Const. Todoruck's police vehicle. The video shows Const. Todoruck walking to the collision scene and speaking with A/Sgt. Robinson and another officer (from time index 0:54 to time index 2:00), and, in the same take, as Const. Todoruck arrests Mr. Cohn (from time index 2:57 until the image ceases at time index 3:20), leaving Mr. Ritchie unattended in a police vehicle.

From time index 3:20 to time index 3:30, we see Const. Todoruck talking to another officer, apparently A/S/Sgt. Zafirides, and since we have evidence from Mr. Cohn and Mr. Collins that the videos appear in the sequence in which they were shot and we see a man, apparently Mr. Ritchie, being released at time index 4:52, it seems the conversation with the acting staff sergeant also resulted in Mr. Ritchie being left alone in a police vehicle, contrary to policy.

We also know that Const. Todoruck, perhaps in the mistaken belief that taking statements was a priority when he had a person under arrest, spent some time taking statements during this period, leaving Mr. Ritchie unattended in a police vehicle.

We also have Const. Todoruck's memorandum book notes (Exhibit 13a), which, while no times are provided, gives a narrative of events after Mr. Ritchie was lodged in the police vehicle. At page 81-82:

I advised him he was under arrest for obstruct police and resist arrest ... placed him in the rear of my cruiser he [sic] continued to resist, holding his leg outside, so the door couldn't be shut, eventually – approx. 1900 hrs. – another male showed up and started filming the arrest. I asked him to leave, he refused, I attempted to continue the MVC investigation once again and the 2nd male returned with a camera and tripod...

This leads into the arrest of Mr. Cohn, but supports the position that Const. Todoruck spent time on investigative duties unrelated to the arrest, rather than giving his attention to his prisoner as policy requires. It is clear from the HPS policy that once he had arrested Mr. Ritchie, that arrest and his prisoner should have taken priority over all other activities. While there was a shortage of resources when the collision scene was first established, that situation was alleviated by the subsequent arrival of both Hamilton and Halton police officers, prior to the arrest of Mr. Cohn.

For some of these absences he was some distance from his police vehicle. For example, he chose to walk up to the acting sergeant's location rather than speaking with him on a cellular phone or police radio, both before and after Mr. Cohn's arrest.

I find that I have video images, supported by Mr. Cohn's account of his own arrest, that make it clear that Mr. Ritchie was left alone, not continually but repeatedly and for substantial periods of time, between his arrest and his release, in the rear of Const. Todoruck's police vehicle, a situation exacerbated by the medical complaints that necessitated examination of Mr. Ritchie by EMS personnel.

As to whether all this has the potential to bring discredit, or whether it brought discredit, to the Hamilton Police Service, Const. Todoruck of the HPS was the arresting officer, and the person arrested, Mr. Ritchie, was a member of the news

media. There were several other members of the news media present at the time who were witnesses to the matter. They were very aware of what was going on, to the extent that they changed their journalistic focus from the tragic death of a young girl to the arrest and treatment of a fellow journalist. It was a senior member of the journalistic community who went to the OIPRD to complain about the arrests, and I expect that the event was reported and, until concluded, will continue to be reported.

I find that I have clear and convincing evidence that Const. Todoruck, by violating the Service's policy on prisoner care and control, and particularly by leaving a person who was complaining of medical distress alone in his police vehicle, has acted in a disorderly manner or a manner prejudicial to discipline or likely to bring discredit upon the police force.

I do not require proof that discredit has actually been brought upon the HPS, but only that it is likely to do so. That said, several members of the media are integrally involved in this matter and fully aware of what transpired, and as the relationship between the media and the police is an important and delicate one, discredit in that circle is both likely and undesirable. The legitimate role of the media to report and to hold authority accountable, moreover, has the potential to broadcast the discredit to the wider community.

I therefore find Const. Todoruck guilty of this count of discreditable conduct.

Count Five: Discreditable Conduct

As is the case in Count Four, Const. Todoruck is alleged to have left a prisoner, in this case Mr. Jeremy Cohn, unattended in the rear of a police vehicle, contrary to the HPS policy that states, in part, "under no circumstances shall a prisoner(s) be left unattended in a police vehicle".

As in Count Four, it is my responsibility to determine to a standard of clear and convincing evidence whether Mr. Cohn was left attended, as prohibited by HPS policy.

I am satisfied on the evidence of Mr. Cohn and A/Sgt. Robinson that Mr. Cohn was left alone in A/Sgt. Robinson's police vehicle for what seems to be in the neighbourhood of 15 minutes, as he and Const. Todoruck placed him there shortly after his arrest and then went their separate ways to perform other duties until A/Sgt. Robinson, when made aware of the professions of the prisoners, returned to gather more information.

The fact that Mr. Cohn was left alone is a problem; not only is it a violation of policy, but it created risk in that nobody would have been there to address any problems or safety concerns that might have arisen.

That said, I am not convinced that Const. Todoruck believed that he was leaving Mr. Cohn unattended, or that he intended to do so. Const. Todoruck stated in his opening remarks that he had given custody of Mr. Cohn to another officer. He also stated in his summation that, even though he had not read rights to Mr. Cohn, A/Sgt. Robinson would have been obliged to read a secondary caution to the effect that Mr. Cohn was not required to speak to police officers. This suggests to me that Const. Todoruck, however mistakenly, believed that by placing Mr. Cohn in A/Sgt. Robinson's vehicle, he had effectively turned over custody of the prisoner to the acting sergeant.

This comes up again in the OIPRD interview of Const. Todoruck (Exhibit 10). On page 138-139, the following exchange occurs:

Q: Okay. And you never read him his rights to counsel?

A: No, I never had the opportunity. ...

Q: Okay.

A: ...because I placed him in someone else's custody in their car, didn't even have his name, and ...

While I recognize that the opening remarks, the summation and the interview transcript are not sworn testimony, I must consider this information, which comes from two sources, two years apart, one of which was read into the record by the prosecutor, when I determine whether the time that Mr. Cohn spent unattended amounts to misconduct on the part of the respondent officer.

I find that, while Const. Todoruck may not have done his due diligence by ensuring that the prisoner would not be left alone contrary to HPS policy, his apparent belief that he had turned the prisoner over to the acting sergeant removes an element of negligence or intent, as another officer accepting custody would have relieved him of that responsibility. I find that, while due diligence may not have been done by Const. Todoruck or, arguably, by the acting sergeant in charge of the scene, these circumstances do not amount to misconduct.

I therefore dismiss Count Five.

Finding

After careful analysis of the evidence offered, I find that I have clear and convincing evidence of the allegations articulated in Counts One through Four.

Constable Jeffrey Todoruck is therefore found guilty of:

- Count One: Unlawful or Unnecessary Exercise of Authority
- Count Two: Neglect of Duty
- Count Three: Neglect of Duty
- Count Four: Discreditable Conduct

He is found not guilty of:

- Count Five: Discreditable Conduct

I now leave it to the parties to arrange for submissions to penalty.

A handwritten signature in black ink, appearing to be 'Peter Lennox', written in a cursive style.

Peter Lennox
Superintendent (retired)
Hearing Officer

APPENDIX A

LIST OF EXHIBITS

Constable Jeffrey Todoruck, 607, and the Hamilton Police Service

1. Letter of Delegation: Superintendent (ret) Peter Lennox, Hearing Officer
2. Letter of Designation: Mr. Brian Duxbury, Prosecutor
3. Notice of Hearing: Constable Jeffrey Todoruck, 607, Hamilton Police Service
4. Google Earth image of the incident scene at Evans Rd. and Dundas St.
5. Video taken by Jeremy Cohn on commercial camera
6. Video taken by Andrew Collins on cellular telephone
7. Video taken by Jeremy Cohn on cellular telephone
8. Book of Authorities, which includes the following:
 - 1st. Excerpts from the Police Services Act: Sections 68, 80, 82-86
 - 2nd. Ontario Regulation 268/10 to the Police Services Act
 - 3rd. Correa and Ontario Civilian Police Commission, 2020 ONSC 133
 - 4th. Hawkes v McNeilly, 2016 ONSC 6402
 - 5th. Kobayashi et al and Waterloo Regional Police Service, 2015 ONCPC 12
 - 6th. Mulville and Azaryev and York Regional Police, OCPC 16-ADJ-001
 - 7th. R v Storrey, SCC 1990
 - 8th. R v Suberu, 2009 SCC 33
9. Document book, which includes the following:
 - 1st. Notice of Hearing: Constable Jeff Todoruck, 607 (original version)
 - 2nd. Delegation of Powers and Duties to Hearing Officer
 - 3rd. Designation to Brian Duxbury
 - 4th. Hamilton Police Service, *Media Relations Policy*, 2010.12.10

- 5th. Hamilton Police Service, *Prisoners – Search of Persons / Care and Control Policy*, 2009.11.09
- 6th. Hamilton Police Service and Constable Jeff Todoruck, 607 – *Interview of Police Constable Jeff Todoruck*, Transcript of Interview by OIPRD, recorded by Ponka Verbatim Reporting Services Inc. [missing several pages]
10. Hamilton Police Service and Const. Jeff Todoruck, Transcript of Interview by OIPRD (complete version), recorded by Ponka Verbatim Services Inc.
11. Three photographs showing the wrist, arm and torso of a person
12. OIPRD Complaint Form, completed by Mr. Mackay Taggart (two versions, one redacted), dated 2017.06.02 (signed and received at OIPRD)
13. Notes of Const. Jeff Todoruck from 2017.05.16 and 2017.05.20, labelled “13a” and “13b”
14. Jacobs v. Ottawa (Police Service), 2016 ONCA 345
15. R. v. Kiradziev, 2010. OHCJ 162