

This decision involves a young person arrested under the *Youth Criminal Justice Act* (YCJA). In accordance with the provisions of the YCJA, the young person's name has been redacted where it appears in the decision.

The incident took place at the home of a person who was a third party to the complaint which gave rise to this disciplinary hearing. This address, which is personal information, has been redacted in accordance with the *Freedom of Information and Protection of Privacy Act*.

The OIPRD has been ordered to redact the name of the OIPRD Investigator in this case, pursuant to the *Crown Employees Collective Bargaining Act*.

**IN THE MATTER OF**  
**Constable Shannon MULVILLE #2045**  
**and**  
**Constable Mykhaylo AZARYEV #1915**  
**OF YORK REGIONAL POLICE**

**APPEARANCES**

Mr. Jason Fraser	for	York Regional Police
Ms. Pamela Machado	for	Constable Shannon Mulville #2045 Constable Mykhaylo Azaryev #1915
SR		O.I.P.R.D. Complainant

**HEARING OFFICER**

Superintendent Graeme Turl #387  
  
York Regional Police

**DECISION WITH REASONS**

Before commencing with my decision in this matter, I wish to thank Mr. Jason Fraser, Prosecutor for York Regional Police and Ms. Pamela Machado, Defence Counsel, for the assistance they provided me over the course of the Hearing, including their submissions and exhibits tendered, all of which assisted me in reaching my decision.

Introduction:

Constable Shannon MULVILLE #2045 stands charged with:

1. On or about September 15<sup>th</sup>, 2013, acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force of which the officer is a member and thereby engaged in **Discreditable Conduct** contrary to the *Police Services Act*, Ontario Regulation 268/10, section 2(1)(a)(xi).
2. On or about September 15<sup>th</sup>, 2013, without good and sufficient cause makes an **Unlawful or Unnecessary Arrest**, contrary to the *Police Services Act*, Ontario Regulation 268/10, section 2(1)(g)(i).

Additionally;

Constable Mykhaylo AZARYEV #1915 stands charges with:

1. On or about September 15<sup>th</sup>, 2013, without good and sufficient cause makes an **Unlawful or Unnecessary Arrest**, contrary to the *Police Services Act*, Ontario Regulation 268/10, section 2(1)(g)(i).

The alleged misconduct relates to an on duty incident that took place on September 15<sup>th</sup>, 2013, when both Constables MULVILLE and AZARYEV were dispatched to a noise complaint at ■■■■■ Cr., Richmond Hill at approximately 00:46hrs (Incident 2013-255479). Both officers arrived on scene at the residence. Upon arrival Constable MULVILLE noted that there were beer bottles and red plastic cups scattered on the ground which in her view was evidence of a party and the consumption of alcohol. Constables MULVILLE and AZARYEV attended at the residence and spoke with a female party, DM, who advised that she was a resident at this location, that it was her friends at the house and that her Aunt was upstairs sleeping. Constable MULVILLE advised DM that the party needed to close down and people needed to leave. Constable MULVILLE was assured by DM that cabs were being called for those in attendance and that the party was coming to an end. Both officers then determined there was no reason to remain and left the scene to attend other calls.

At approximately 01:46hrs another call was received regarding the party at [REDACTED] Cr., Richmond Hill. According to the complainant, there were multiple youths from the party on his property throwing beer bottles at his residence. The complainant for this call lived next door (Incident 2013-255511) and both Constables MULVILLE and AZARYEV were dispatched to this call.

Constable MULVILLE arrived first at [REDACTED] Cr., Richmond Hill and observed several youths running from a neighbour's residence into number [REDACTED] Crescent. Constable MULVILLE then attended at the front door of [REDACTED] Cr., which was wide open, and entered the threshold. Constable MULVILLE states she observed several youths who had run from the neighbour's property into the residence. She was met inside by DM, and advised her to get her Aunt right away from upstairs. Constable MULVILLE remained at the front of the residence, also awaiting her back up, when DM returned from the upstairs and admitted that there was no Aunt upstairs. This made Constable MULVILLE aware that there was no adult supervision at the party and that most, if not all, of the youths were consuming alcohol underage. Constable AZARYEV then arrived and joined Constable MULVILLE in the residence of [REDACTED] Cr., Richmond Hill.

The main crux of the incident begins while Constable MULVILLE is speaking with DM. An unknown female, later identified as NR, came down the stairs towards both Constables MULVILLE and AZARYEV with her cellphone in her hand pointing it in the direction of the officers. NR was recording (video #4) the incident as she walked down the stairs and the conversation went as follows:

NR: *"Excuse me, Ma'am you did not have permission to walk into this house. Can I get your badge number?"*

MULVILLE: *"You! If you're filming me right now, you need to stop or I am going to seize your phone for best evidence. Do you understand that?"*

NR: *"Alright."*

MULVILLE: *"Are you filming me?"*

NR: *"No, I'm not filming you."*

MULVILLE: *"Let me see your phone then."*

NR: "No, Ma'am, oh it.....inaudible" The recording stops.

At this time Constable MULVILLE then began to speak further with DM, with some minor interruptions from NR. It appeared to Constable MULVILLE that NR was purposely trying to influence what DM did or did not say to the police. At one point NR was advised by Constable MULVILLE that if she continued to interfere she could be arrested and that if she continued to use her cellphone to record, it would be seized as she was obstructing her investigation. NR was escalating this matter taking it to a level it did not need to be and was then directed to go into the kitchen and stay out of the area.

During this time Constable AZARYEV remained in the hallway monitoring Constable MULVILLE and the group of youths who were in the kitchen and hallway area.

Throughout this time, the majority of youths, including NR, are in the kitchen area watching what is occurring with the officers and DM. A significant portion of this was captured on cellphone recordings by an unknown party and NR can be heard being spoken to and or responding. *(Four videos were submitted as evidence in the order of #4, #2, #3, #1: Exhibit Number 3)*

Several derogatory comments were made by the youth in relation to Constable AZARYEV and his perceived level of experience along with the youths making comments showing their limited and at times inaccurate knowledge of the law. At one point (video #2) an unknown female (UF) can be heard speaking to NR and others stating the following:

*Several people are talking at once and discussions about what the officers are doing and comments about getting arrested;*

UF: *They say they're going to arrest her.....inaudible .....If she gets arrested, she's arrested.*

*Try and get arrested then, N [REDACTED], they can't .... (Inaudible, unknown male also speaking)*

NR: *If I get into their cop car, they will get fucked over, they will get fucked over.*

Video #3 then continues from just prior to the ending of #2. NR can be seen standing at an entranceway to the kitchen leaning on the wall when Constable AZARYEV asks:

AZARYEV: *Are you making recording? Are you making a recording?*

*NR: I can record whatever I want to. You are not allowed to walk into this household without ... (inaudible)...*

Note: while speaking NR takes a couple of steps and can be seen tucking her cellphone into the back of her shorts.

It is at this time Constable MULVILLE is seen walking directly to NR, from speaking with DM, and placing her under arrest. Both Constables MULVILLE and AZARYEV are heard placing her under arrest, but no charge identified. There is some brief discussion between Constable MULVILLE and an Unknown Male and the following comments by Constable MULVILLE are captured on the recording:

*MULVILLE: You're not listening to this, guys, we've been here twice and don't need the attitude. This is what happens when you give attitude to the police and we have to come back multiple times. Does anyone else want to be arrested or does everyone just want to be quiet? Anyone? You laugh but you guys don't understand how serious this shit is. I have better things to be doing with my time that wasting my time with 15 year olds.*

*UM: We're not 15*

*MULVILLE: 16, I don't give two shits how old you are!*

*UM: 17....actually*

*MULVILLE: You're a young punk and I don't give two shits.*

*UM: You can't arrest her without reading her, her rights, actually.*

*MULVILLE: Of course I can. I'm going to read her, her rights in my car. (MULVILLE starts to walk out with NR)*

*Many people talking at once...portions of the conversations are inaudible.*

Constable MULVILLE led NR out to a marked police vehicle, did a brief pat down and placed her in the rear of the cruiser. Constable MULVILLE then returned to the residence and Constable AZARYEV. There were some discussions with the youths explaining what had occurred and that the party was over.

Constable MULVILLE then returned to the marked police vehicle, where several youths had congregated and attempting to speak with NR, who according to Constable MULVILLE, was treating this as a joke.

Constable MULVILLE then read NR her Rights to Counsel and cautioned her. NR was asked for her information (name etc.) however she would not provide it to her nor would she respond to any questions directed to her in relation to her Rights to Counsel. At some point a male, identified as SR, NR's father, appeared at the side of marked police vehicle.

Constable MULVILLE spoke with SR who provided NR's name and date of birth and advised him that she would be seizing NR's cellphone. At this point SR shouted out to NR to lock her phone. Constable MULVILLE then opened the rear door of the marked police vehicle, and although she was handcuffed to the rear, NR managed to extract her cellphone from her shorts and toss it to SR.

Constable MULVILLE advised SR that she required the cellphone for evidence and that if he didn't turn it over he could potentially be arrested for Obstruct Police. This was reinforced by the Acting Sergeant who attended the scene and SR turned over the cellphone and he was given a property receipt for the item.

NR was then released on a Form 9 for the offences of Obstruct Police and Cause Disturbance.

This is a directed Hearing by The Office of the Independent Police Review Director (O.I.P.R.D.) as a result of a third party complaint by SR regarding the actions of Constables MULVILLE and AZARYEV on the treatment and arrest of his daughter, NR.

Throughout this Decision I have used the initials of the complainant, his daughter and one other witness due to NR being a young person, along with the names of any other youth at the time of their interaction with the police, in order to protect their identity.

#### The Hearing:

The Hearing commenced on December 05, 2014 and Constable MULVILLE entered a plea of Not Guilty for both counts against her. Constable AZARYEV also entered a plea of Not Guilty for the one count against him. The Hearing was conducted over numerous appearances and several days of testimony, concluding on June 10, 2015 and heard from five (4) witnesses as well as Constable MULVILLE. I have considered all of the evidence. If I fail to mention a

particular piece of evidence, it is not that it wasn't given consideration, it was simply not necessary for me to explain it further in order for me to reach my conclusion.

### The Evidence of Witnesses:

#### **NR**

NR testified that she was at a friend's (DM) house party at [REDACTED] Cr., Richmond Hill. During the party police attended the residence twice. NR was not aware of the first attendance by police but was told by a friend, but was aware of and saw the second attendance. NR stated that there were approximately 50 youths at the party, many if not most were under 19yrs of age, and drinking. She was aware that people were outside and that she was outside on her cell phone with her boyfriend at one point and saw youths, mostly guys, throwing beer bottles, plastic cups and tennis balls across the street. She did notice the home owners coming out and checking their houses. There was no music playing just loud talking and yelling in the house and outside. NR acknowledged that there was no adult supervision at the party.

After the first attendance of the police, her friend throwing the party was trying to keep people quiet and in the house. Some people had left already in cabs or were picked up. When the police arrived the second time, she was standing out front on the porch and there were others out front throwing things. When the police arrived everyone ran into the house. NR believes the door was shut after everyone ran into the house and that the police opened it when they walked in. Her friend, DM, knew the police had arrived the second time and were coming to the house. NR does not believe the officers knocked or were invited in but came into the residence anyway.

Upon the officers (MULVILLE and AZARYEV) arrival into the house, she came down the stairs, with her cellphone out, recording the situation and told the officers they were not allowed into the house and no one gave them permission to come in. (Video #4 tendered as an exhibit). The conversation ensues (see page 3) and NR admits to lying to the officers saying she was not filming them. NR believes that the officers were being rude to DM and herself and breaking the law by entering the house without permission. NR also believed that Constable MULVILLE was angry because she had to come back to the house, that she was raising her voice and firm in her tone.

NR testified she did speak briefly with Constable MULVILLE in the living room and then went to the kitchen area where the remainder of the videos were taken from. All of the videos except for the one of her coming down the stairs (#4) were taken by a friend only identified as "Sam". She received the videos via email from "Sam". NR acknowledges she was advised not to video record the police as she may be arrested and have her cellphone seized. NR doesn't trust the police due to her previous dealings with them and her own subjective perceptions.

Numerous comments can be heard on the videos by NR disparaging the police and having gone through this type of thing before many times. At one point during her testimony she advised the reason she was behaving this particular way was to protect and reassure her friend DM.

Upon Constable AZARYEV asking her if she is recording, she walks forward from the kitchen, tucking her phone into the back of her shorts. NR advised in her testimony that she did this because she did not want the police to have her phone. It is believed at this time her friend "Sam" is recording the interaction. As she advises Constable AZARYEV that she can record whatever she wants, Constable MULVILLE steps forward from speaking with DM and both officers place her under arrest.

NR is placed in handcuffs, taken directly out to Constable MULVILLE's marked police vehicle and placed in the back seat. Constable MULVILLE apparently gave her some information but she did not answer any of the questions as she believed she did not have to. When Constable MULVILLE left her in the car and returned to the house, she removed her cellphone from her shorts and called her father, using the "Suri" program. She advised her father that she had been arrested and where she was. NR states she was crying at the time and did not advise her father why she was arrested.

By the time Constable MULVILLE returned to the police car, NR's father had also arrived. When Constable MULVILLE opened the door of the police car and asked for her phone, NR threw her father the cellphone so that the police could not have it. NR's father was asked for the cellphone and did eventually give it to the officer. The cellphone was locked.

NR testified that while she was in the back seat of the police car, some of her friends and party goers came to see her. While they were there she was laughing, telling them to take pictures of her in the back seat. NR believed this incident was funny and that she was trying to look cool in front of her friends.

## **SR (Complainant)**

SR testified that he is the father of NR; that he did receive a phone call from NR advising that she had been arrested and to come and get her. SR left his residence and attended at 9 Barberry Cr., Richmond Hill. Upon his arrival he saw several police cars and people milling about out front of the house. He saw several officers and spoke with one and advised who he was. The officer told him that NR was under arrest and in the back of her police car. SR saw NR in the back of the police car.

While at the house he was approached by "Sam" and told that she had recordings of the interactions between NR and the police. He did attend at the cruiser and spoke with NR and did tell her to lock her cellphone after being told that the police wanted it. NR tossed him her cellphone when the door was open.

After SR was tossed the cellphone by NR, SR testified that he was told that NR could be released to him on an appearance notice if she turned over the cellphone, or if she didn't then she would be going to the police station. SR stated he preferred to get NR back and gave them the cellphone instead of having her go to the police station. According to SR he states an unknown officer told him that if he didn't turn the cellphone over he could be arrested as well.

During the conversation with the officer he was asked if he'd known what NR was up to and where she was. SR replied that he did not and the officer commented on his parenting skills in a sarcastic manner.

SR was aware of NR's previous dealings with police and testified that he had told her previously that if she was ever in a situation with authority figures and felt uncomfortable dealing with them then she should record the incident. SR admits that he is wary of police, has filed complaints against various officers from different police services and essentially does not trust them.

SR does not believe NR did anything wrong nor does he believe that the police had a right to go into the residence and also believes that NR was arrested for her attitude only.

SR submitted an O.I.P.R.D. complaint against three uniform officers identified as being involved in the matter the night NR was arrested. Another complaint was laid against a fourth officer as a result of a related incident. Regarding the complaint that involved the three officers, Constables MULVILLE and AZARYEV are the ones currently before this Hearing.

SR has made several complaints against officers previously, either to the officers' police service or to the O.I.P.R.D..

### **CS-P**

C S-P testified at the Hearing that she was employed by the O.I.P.R.D. and was assigned the complaint submitted by SR into the allegations against Constables MULVILLE and AZARYEV as identified in his complaint. Ms. S-P worked for the O.I.P.R.D. from October 2009 to 13 November 2014. Ms. S-P was dismissed by the O.I.P.R.D. for deceit and other issues, partially related to the investigation of the complaint currently before this Hearing but mostly regarding another complaint by SR.

Ms. S-P testified that the reasons for deceit were for a case related to this matter but not specific to the charges against Constables MULVILLE and AZARYEV currently before this Hearing. Ms. S-P testified that the other issues were as a result of failing to meet timelines and an email conversation with the complainant (SR), that in her view, were misinterpreted. The cause for her dismissal is currently being contested and Ms. S-P currently has counsel assisting her with her grievance. (Note: Ms. S-P's counsel attended the Hearing but did not have standing).

Ms. S-P testified as to her previous professional experience and her training while employed by the O.I.P.R.D.. This training consisted of: interviewing, note taking, along with *Ontario Police Services Act* training, arrest authorities and legal authorities. Other parts of her training were the procedures of the O.I.P.R.D. as they pertain to the steps of an investigation as well as the understanding of police tactics as they relate to use of force, which is done at the Ontario Police College (OPC).

Ms. S-P testified that she was the lead investigator of this file as well as a subsequent complaint from SR relating to the same incident but involving another officer. She was assisted by other investigators from the O.I.P.R.D..

During an investigation conducted by the O.I.P.R.D. the lead investigator keeps an investigative log, which is done electronically, that is supposed to detail the steps taken in an investigation by the investigator(s) and would act as a supplement to her notes. Ms. S-P also testified that anything pertaining to the investigation would also be put in her notes. Ms. S-P testified that the notes and logs are for her recollection of the investigation in the event of a Hearing taking place.

Ms. S-P acknowledges during her testimony that her notes and logs are not detailed and that they could have been more articulate and should read better. Ms. S-P also acknowledges that if she were to re-do them now they would be more detailed.

According to Ms. S-P the only information that would be disclosed by the O.I.P.R.D. is the information in her notes that are directly related to the case at hand. All other information in her notes pertaining to other cases would be redacted, along with personal information of witnesses spoken to.

For the purposes of the trial, Ms. S-P was given a copy of her redacted notes by the O.I.P.R.D. on the Friday before the Hearing. The notes provided for disclosure are only the notes pertaining to this complaint and are not a full copy of her actual notebook.

Ms. S-P testified that for the purposes of her investigation she also kept an “investigative log” that itemized events that occurred during the investigation, such as interviews, phone calls made and received, along with any new information. Information maintained in the log may or may not have been in her notebook. The Investigative Log could be accessed by any investigator in the O.I.P.R.D. along with the Director and her Manager.

Ms. S-P testified that she did speak to a few witnesses however others would not return calls. Several witnesses, such as DM, were not spoken to at the request of SR, purportedly from the family, that she not do so. SR reportedly did not want the O.I.P.R.D. seeking additional witness/photos/information as he did not want to get other people involved. The officers involved in the matter were interviewed.

For the purposes of her report to the Director regarding the file and potential offences, Ms. S-P testified that she did review various case laws i.e.: *R. vs. Maccooh (1993)* and others. The initial report was reviewed by her Manager for corrections, additions/deletions etc., prior to being reviewed by the Director. As a result of her report it is the Director who advises the Chief of Police, for the purposes of directing that a Hearing be held.

### **Constable Shannon MULVILLE**

Constable MULVILLE testified that she is employed with York Regional Police and has been so since April 2010. On the night of the incident she was and is still currently assigned to 2 District Uniform Platoon “B”. On the night of the incident, she was working in a uniform capacity, in a marked police vehicle on the 18:00 – 06:00 shift.

Constable MULVILLE testified that she attended [REDACTED] Cr., Richmond Hill with Constable AZARYEV for a noise complaint on September 15, 2013 at approximately 00:45hrs. Upon their arrival they noted several youths out on the front lawn, approximately 15-20 youths. There were beer bottles on the ground and the red plastic cups scattered across the lawn. On her approach to the front door she was met by DM, who told her that she lived at this location. DM advised Constable MULVILLE that her Aunt was upstairs sleeping and that the party would be shut down. Most of the youths in the party appeared to be about 17 years of age. As DM advised her that the party would be ending and people leaving, there was no need for the police to remain and they left the scene.

At approximately 01:46 Constables MULVILLE and AZARYEV received a second call to attend [REDACTED] Cr., Richmond Hill regarding a noise complaint from a different complainant. The complainant was advising there were multiple youths, male and female, on his property, next door to [REDACTED] Cr., Richmond Hill. The youths were observed throwing beer bottles and things at his house and car. The complainant believed the youths were from # [REDACTED].

Constable MULVILLE arrived on scene first, exited her marked police vehicle and testified that on approach she “.....saw a group of youth in front of the complainant’s house. They immediately scattered and started running towards [REDACTED] Crescent”. At this time, Constable MULVILLE testified she believed she had reasonable grounds to believe that an indictable offence had occurred. Constable MULVILLE stated that she believed the offence of mischief would have been taking place with the beer bottles being thrown and that property damage could be occurring. The fact that the youths ran away when they saw her was an indicator that there was some form of guilt on their part.

Constable MULVILLE then testified she followed the youths with “reasonable diligence” into the house with the authority to arrest, if necessary. Constable MULVILLE advised that the front door was wide open after being left open by a male youth who had run into the house. Constable MULVILLE kept herself at the front door as she did not wish to get into a confrontation with anyone without another officer present.

Upon entry into the residence she was met by DM, who was told to get her Aunt right away. DM went up the stairs but came down very shortly afterwards and advised that there was no Aunt in the house, nor had there been. At this time Constable AZARYEV arrived and Constable MULVILLE began further conversation with DM with concerns regarding an unsupervised party with minors consuming alcohol.

While speaking with DM, a female, now known as NR, came down the stairs with her cellphone pointing directly at Constable MULVILLE and telling her she could not come into the house. Constable MULVILLE asked her if she was filming her and was told that if she continued to do so, she would seize her cellphone for best evidence and that the continuation of filming was in fact obstructing her investigation. Constable MULVILLE told NR to stop. It was believed that NR stopped videoing but shortly thereafter continued to talk and tell DM not to talk to the police and that the police had no right to be there.

Constable MULVILLE had to stop her discussions with DM and tell NR to stop interfering with her investigation as she believed NR was influencing DM. Constable MULVILLE then had a conversation with NR separately in the living room area, telling her that she could be arrested if she continued to interfere with her investigation and also could seize her cellphone should she continue to video. Constable MULVILLE explained to NR that her recording all of the events that were taking place would show how she was obstructing the investigation. Constable MULVILLE demanded that NR go into the kitchen and stay out of the area she was in and that if NR came back, she would get arrested.

Constable MULVILLE testified that NR did go into the kitchen but within about 3-5 minutes NR was back out into the hallway stating "I can do whatever I want to". At this time Constable MULVILLE realized that her conversations with NR had failed and that NR felt she could do whatever she wanted to. In her mind this action by NR could cause potential escalation of the situation and that she did not want any of the other youth to follow suit. Constable MULVILLE stated that since NR was actively engaging herself back into the investigation that she perceived this as an act of aggressive resistance. At this point, Constable MULVILLE decided that NR needed to be removed from the residence and was placed under arrest. Her words during cross examination were *"It was no longer a passive aggressive in my mind that she was willingly disobeying what I had asked her to do, saying she can do whatever she wants. And, in my mind, I decided that communication with her had failed twice, and the only solution to prevent further escalation and further people following suit, creating more of a safety hazard, would be to eliminate her from that situation. So I arrested her with the intent on removing her. I still did not have any intent, at that point, to charge her."*

Constable MULVILLE testified that she placed NR under arrest, used minimal force placing her hands behind her back and handcuffing her to the rear. (Note: Constable AZARYEV can be seen assisting with the arrest in the video.) NR was not advised directly what she was under

arrest for at this time, as Constable MULVILLE felt it appropriate to speak to all of the youth present, and explain the severity of the events. Constable MULVILLE wanted them to understand that their behaviour, type of attitude they were displaying and interference was not okay and that this was a serious matter.

When she mentioned their ages, Constable MULVILLE acknowledges that she said “I don’t give two shits” to the youth present but that it was not said in a derogatory or demeaning manner. Constable MULVILLE states she did use the term “punk” out of some frustration to a male youth, but that she believed it to be a slang term, as his behaviour was rude and she was referencing his ignorant behaviour. Upon speaking to the male youth, Constable MULVILLE noted him to be smirking and laughing during the situation.

While walking NR outside to the marked police cruiser, Constable MULVILLE advised her of the reasons why she was under arrest but did not elicit any response. NR did not appear to be intoxicated although she had been drinking; Constable MULVILLE believed she was still in a frame of mind to comprehend what was being said.

Upon arriving at the marked police cruiser, Constable MULVILLE gave NR a quick pat down search, placed her in the back seat of the cruiser and re-attended inside the residence to check on Constable AZARYEV. The two officers then had a short conversation with the remaining partygoers advising what had happened, that the party was over and to make alternative arrangements to get home.

Constable MULVILLE then returned to her marked police cruiser, which had a few people around it trying to communicate with NR. Constable MULVILLE then testified she read NR her Rights to Counsel and cautioned her with both the youth rights to counsel and youth caution. NR, as is her right, remained silent and would not respond to any questions put to her by Constable MULVILLE. During this period NR would be smiling and laughing at her friends and at one point told her friends to take pictures of her in the cruiser.

Constable MULVILLE advised NR that if she failed to identify herself then she could remain in custody, taken to the police station and held for a Show Cause Hearing. NR was advised that it would be in her best interest to identify herself. NR did not seem concerned with any of this but was more concerned about having her friends take pictures of her.

While completing this phase of the arrest with NR, Constable MULLVILLE’S Acting Sergeant arrived on scene as did NR’s father, SR. Constable MULVILLE was unsure of how NR’s father

was aware but assumed that someone from within the party had called him. Constable MULVILLE explained to SR the reason behind NR's arrest and SR provided all the necessary information that Constable MULVILLE needed.

Constable MULVILLE also testified that when she advised SR that she would be seizing NR's phone, he yelled out to NR to lock her phone, two or three times, stating "*N, lock your phone. They're coming for your phone. N, lock your phone*". Constable MULVILLE then walked up to and opened the rear door of the cruiser. At this point NR, with her hands still cuffed behind her back, had her cellphone in her hands and tossed it up in the air and her Dad caught it. Constable MULVILLE had not been aware that NR had stuffed her cellphone down the back of her pants prior to the arrest, nor did she find it in the pat down search she conducted on NR.

Constable MULVILLE testified that she and the Acting Sergeant explained to SR that they required her cellphone for evidence and that if he failed to hand over the to them he could potentially be arrested. After some consideration, SR did turn over the cellphone to them and he was given a property receipt for it.

Constable MULVILLE then released NR by way of a Form 9 and advised her that her cellphone had been seized by the police. NR appeared upset by that more than the charges she faced.

Constable MULVILLE testified that she is aware of several options available to her when dealing with youths: do not have to lay a charge, give verbal warnings, recommend the youth referral program or lay a charge. Constable MULVILLE testified that while processing NR she learned background history of NR; in that she had been arrested before but released unconditionally from other incidents with similarities to this, that she was prone to not identify herself when required. This incident showed her that this was a continued escalation of behaviour and that NR did not appear to show any remorse, therefore Constable MULLVILLE felt charges were warranted.

Additionally, Constable MULVILLE believed that anyone who was involved in the party could have been part of the Cause Disturbance, in relation to the two noise complaints received as well as NR matching part of the description provided by the complainants of teenager(s) running towards #█. Constable MULVILLE believed that those who were seen running away from the neighbour's property upon her arrival, into the residence provided her with reasonable grounds to believe the offence of Mischief and Cause Disturbance had been committed and that entering the residence was a continuation of "fresh pursuit/hot pursuit".

Constable MULVILLE advised she did not run after the youths, believed to be 6, 8 to 10 in number, but “followed them with reasonable diligence into the house” and entered via the open door, but stopped at the threshold inside the entranceway. She surveyed the interior and noticed that one male and some of those that ran upon her arrival were in the kitchen area. Constable MULVILLE cannot say for sure that NR was one of those youths that ran into the house upon her arrival. Some of the other factors/offences in her consideration were possibly Cause Disturbance continuations, potential for future Impaired offences and liquor offences.

Constable MULVILLE testified during her cross examination that she did not see the offence of mischief take place but believed beer bottles were being thrown at the neighbour’s garage. She did not see that or know for sure. Constable MULVILLE acknowledged that this was a possible assumption on her part due to her previous attendance earlier and information on the call history. She testified that she did not follow up on this, as C.I.B. were supposed to do the follow up but believed Constable AZARYEV spoke to the complainant and advised there were broken beer bottles on the driveway of the complainant. Constable AZARYEV spoke to the complainant after the arrest of NR.

During the whole incident Constable MULVILLE testified that many of her concerns while dealing with the youths were: safety hazards not only to police but the youths themselves as well as the escalation of the situation and or continuation of the offence(s). While speaking to DM, Constable MULVILLE believed she heard NR state “*I can do whatever I want to*” at which point she felt NR was interfering in the investigation. This is what she based her arrest upon. Constable MULVILLE acknowledged that, after viewing the video of that time period, NR actually stated “*I can record whatever I want to..*” in response to Constable AZARYEV’s question to her.

During cross-examination Constable MULVILLE acknowledges that she was frustrated with the youths when she used profanity speaking to them but used it in an effort to emphasize the seriousness of the situation. Additionally the use of the term “punks” is slang for an ignorant person with inappropriate behaviour. Constable MULVILLE states she was not angry and that none of the youths at the party swore at her or raised their voices to her or Constable AZARYEV.

Constable MULVILLE testified that she told NR and SR that she would be seizing NR’s cellphone for the purpose of the video as she believed it contained video evidence of the

offence that NR was arrested for: Obstruct. This would guarantee untampered evidence of the offence and support the charge.

Constable MULVILLE upon re-direct, advises that there were several conversations that she had with NR, not all of which were recorded. In these conversations NR was told repeatedly not to interfere. Constable MULVILLE states that at no time did she arrest NR because she was rude but because she felt that she was purposely trying to stop her investigation and injected herself on multiple occasions after multiple warnings not to.

### **MM**

MM acknowledges she is the mother of DM and the homeowner of the residence where the party was located on September 15<sup>th</sup>, 2013.

MM testified that she was up at her cottage when she was called by a female officer at about 3am and advised that police had attended at her residence twice for a noisy party call. She was advised that there were numerous youths at the house and that an arrest had been made.

MM states she returned home the next day and found her house in order and was grateful for the phone call. MM testified she made DM apologise to the neighbours for what had happened. MM also advised that her neighbour told her he was the one that called the police and she thanked him for it. MM was aware that beer bottles and possibly rocks had been thrown at neighbours' houses but was appreciative that nothing had been broken. MM was not aware of any damage being done.

MM cannot recall when she was made aware of the complaint made against the officers but did state that had she been there and as the homeowner she would have let the officers in and told them to go through the house. In her discussion with DM afterwards she advised she told DM that she should have called the police if it had gotten out of control.

MM states that she did not discuss the use of profanity with her daughter but that her daughter acknowledged the situation did get out of control and that the officer was being rude. MM acknowledged that she has no knowledge, other than what DM told her of the party getting out of control. MM states that there were apparently people at the party that she was not aware of or knew and thus that led to it being out of control in her view.

Upon being told what was said by the officers, MM states that she did not find it rude or offensive and may have actually have said worse had she been home.

### **Prosecution Submissions:**

The Prosecution identifies that the allegations at this Hearing against Constable MULVILLE and AZARYEV are in essence two Hearings regarding the two accused officers which have been treated as one and are therefore inextricably linked. The misconduct alleged in relation to the two officers consists of the unlawful or unnecessary exercise of authority or unlawful arrest in that they did, without good and sufficient cause; make an unlawful or unnecessary arrest. Additionally, within the same scenario there is the separate misconduct against Constable MULVILLE of discreditable conduct in that she used inappropriate language when dealing with several youth during the incident.

SR made a complaint to the O.I.P.R.D. regarding the arrest of his daughter NR. NR attended a party at her friend, DM's house. It has been stipulated that all of the people at the residence at the time were under age teenagers without any adult supervision. Police are called to the residence (the same two officers) MULVILLE and AZARYEV attend in both instances. The party is noisy and the youths, in various stages of alcohol consumption, were alleged to have been throwing things outside (beer bottles) at houses. At one point during the Hearing it was identified that there were youths in a car throwing bottles, however no follow up was done; nor can this be confirmed.

It is the second attendance by police that leads us to the Hearing, NR testified she was standing outside on the porch; other youth were outside as well, when she observed the police vehicle(s) arriving. NR runs into the house and states she closed the door. The officers apparently followed shortly thereafter and also entered the house, Constable MULVILLE first, then after a short period Constable AZARYEV through an open door. It is opined that the door was left open by other youth who also ran into the house after NR.

Prosecution suggests that the evidence is uncontested and that the officers did enter the dwelling without permission – they simply went into the house. According to Constable MULVILLE's evidence she testified that she went into the house based on fresh pursuit.

For the majority of the time Constable MULVILLE is speaking with DM, who lives at the residence and was the host of the party. It was during the initial conversations with DM, that NR began to film the incident on her cellphone. This video (number four), shows NR coming down the stairs, towards the officer and stating "Excuse me, ma'am, you do not have permission to walk into this house. Can I get your badge number?" The officer, MULVILLE, replies "You.....if

you're filming me right now you have to stop or I'll have to seize your phone for best evidence. Do you understand that?" Constable MULVILLE does not say "Don't interfere with the investigation." Or "Don't obstruct police" or "Back away from me."

Constable MULVILLE makes a move forward, potentially to seize NR's cellphone, however NR says she isn't recording and the cellphone is not seized.

Constable MULVILLE testified that she understands that there is nothing unlawful with a member of the public videotaping the police and her concern was how close the cellphone was to her face and that NR was obstructing. The video shows quite clearly that is not the response she gives to NR, but tells her to stop videotaping which appears to be the overriding concern of both officers – being captured on video. The officers both ask NR if she is videotaping on more than one occasion which is seen on the other videos that have been submitted.

Constable MULVILLE testified that she spoke to NR in the living room, which is not captured on video, and cautioned her not to interfere in the investigation and that NR was told to go into the kitchen. However, NR's evidence would seem to indicate that she's being told not to videotape. Additionally, it's also heard in evidence that NR is telling her friend, DM, not to speak with the police.

Prosecution stipulates that from what we hear in evidence as to what occurs off camera, is that a young person, NR, is exerting what she believes to be her rights and at no point has she been identified as yelling at the officers or being rude to them. NR believed that DM did not have to speak with the officers, that they were unlawfully in the house and that she was allowed to video tape. In essence, NR was right.

The Prosecution asserts that in terms of the incident, we have two officers trying to break up a party that has gotten out of control to the officers exceeding the scope of their lawful authority.

In relation to the fresh pursuit or hot pursuit as identified by Constable MULVILLE; she believed and testified that is the reason she could lawfully go into the house. The Prosecution and Defence both provided *R. vs. Macooh*, the leading case in Canada concerning Hot Pursuit. The Prosecution identified the definition of Hot Pursuit as identified in *R. vs. Macooh*, paragraph 27, "*Generally, the essence of fresh pursuit is that it must be continuous pursuit conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction.*"

The Prosecution contends that the officer(s) did not have reasonable grounds to arrest anybody nor did they have the authority to arrest anyone when they went into the house. Additionally, the Prosecution submits that Hot Pursuit arises in a situation where there is one continuous transaction between the offence; grounds for the arrest, and pursuing the person the officer has grounds to arrest. This incident does not provide these characteristics as no reasonable grounds existed to arrest anybody. They did not have the authority to arrest anyone when they entered the house. The officer's intentions were to deal with underage drinking, a noisy party and to complete what they thought would have happened after their first visit – breaking up and shutting down the party. These reasons do not give the officers grounds to enter the home.

To illustrate this point, Prosecution provided *Regina v. Thomas (Nfld)* where the accused was acquitted on the main basis that the police were trespassing on her property and they did not have the lawful authority to enter the property. The officers were not engaged in the lawful execution of their duties because they were not in the house lawfully. According to the court, the police must rely upon a valid and revoked invitation to enter and remain in the house. The officers were never given permission to enter the home.

No reasons were given in evidence by Constable MULVILLE, in common law authority or of an arrestable offence for which she had reasonable grounds allowing her to enter the house or to allow Constable AZARYEV to enter the house.

Prosecution also provided *R. v. Zarder*, a Superior Court of Ontario decision, where in this instance officers entered the residence but only by a few steps to investigate a completed incident of mischief, not to make an arrest. The accused failed to provide his name and was telling the officers to leave. The court set aside the conviction as the officers had no legal authority to enter the residence. The court at paragraph 22 states: "*Given the relatively small number of exceptions to the rule against forced entry of residential premises by the police, and given their narrow definitions, the Courts have repeatedly held that there is no power to enter a dwelling simply for the purpose of furthering an investigation.*"

The Prosecution also identified *Ryan*, from the B.C. Court of Appeal (1956) and *Custer* to further their position regarding officers acting outside of their lawful authority to enter a residence. The Prosecution also identified *Feeney* as an authority as it led to the changing of the Criminal Code whereas if an accused is in a dwelling then there is a requirement for a "Feeney Warrant".

No evidence was presented at any time that the officer was entering on exigent circumstances. Constable MULVILLE indicated she entered on the basis of fresh pursuit but those grounds simply did not exist and the officer(s) were in the residence unlawfully, therefore they cannot be obstructed as they are not in the lawful execution of their duties.

Video number five: shows Constable AZARYEV asking on video “are you making a recording”.

Video number two: taking place in the kitchen with someone saying to NR to try and get arrested. This is not within earshot of the officers and appears to be young people talking amongst themselves. The profanity in the video is being said by the youths. There is no indication of the youths insulting the officers or using profanity against the officers.

Video number three: The arrest of NR which starts when Constable AZARYEV is asking NR “Are you making a recording?” NR is seen stepping forward towards Constable AZARYEV, with some distance between them, stating “I can record whatever I want to. You’re not allowed to walk into this household without adult supervision”. It is at this point that Constable MULVILLE turns away from DM and says “You’re under arrest”. Constable MULVILLE and Constable AZARYEV then approach NR and arrest her. NR has now been arrested unlawfully.

It is after this that we get into the allegation of the misconduct against Constable MULVILLE regarding the use of inappropriate language. Constable MULVILLE is seen saying *“I’m not listening to this, guys. I’ve been here twice and I don’t need the attitude. This is what happens when you give attitude to the police and we have to come back multiple times. Does anyone else want to be arrested or does everyone else just want to be quiet? Anyone?”* This is essentially saying if you give attitude to the police you will get arrested.

Constable MULVILLE has not been sworn at or insulted but goes on to say, *“You laugh, but you guys don’t understand how serious this shit is.”*

Constable MULVILLE contends that this was a form of tactical communication to bring compliance, however when reviewed it seems to be a reaction out of frustration. No one was yelling or being rude and only one youth challenged her on the ages she stipulated (15 verses 17). The only one that is heard yelling, swearing and using insulting language is Constable MULVILLE. The only time compliance was seen by the youths was after the unlawful arrest of their friend.

The language used can depend on the circumstances and the context. In this instance, after viewing the video, the language used is not appropriate for the circumstances and is not used in the proper context, therefore it brings discredit to the reputation of the Police Service and is discreditable conduct.

Video number one: Constable MULVILLE goes on to advise the youths that she has better things to do and that she doesn't give two shits when she is corrected by one youth about their reported ages and she states that this youth is a young punk. Constable AZARYEV is also seen advising the youth in the hall that he can arrest everybody. When asked why they are there Constable AZARYEV states; "you're under age and you're drinking."

The evidence of MM, provided some common sense and was appreciated, however does not assist the tribunal. MM was not present during the incident.

Constable MULVILLE tells the Hearing that the arrest of NR was for Causing a Disturbance and Obstructing Police. In both Examination in Chief and Cross Examination of Constable MULVILLE, NR was arrested for Cause Disturbance for what went on outside, not inside the dwelling. The evidence of the officer was that NR matched the description of a suspect; a teenager reportedly throwing bottles and making noise. This is not a description but a generalisation and an action but nothing specific.

The call history states that the car causing the trouble left, but this update was not seen by Constable MULVILLE at the time. Constable MULVILLE states she did not see any damage and had no idea if any was done. She did not speak to neighbours – there was no investigation only suspicion which rendered no reasonable grounds to arrest.

In relation to the obstruct charge, the videos clearly show that NR was not obstructing the officers, certainly not at the time of arrest. She was answering a question posed by Constable AZARYEV when she was arrested by both officers. Constable MULVILLE states that she was not aware NR was responding to Constable AZARYEV's question, which shows there is a lack of communication between the officers resulting in NR being arrested. The arrest was both unlawful and unnecessary.

Constable MULVILLE's recorded comments to the youth regarding attitude essentially identify that NR was arrested because of her attitude.

The Prosecution concedes that the officers did not intentionally set out to violate people's rights and that this whole situation was frustrating given the fact of having to go back a second time after being told that it was shutting down. It is understood that the officers were only trying to perform their duty however their powers are not as broad as their duties are supposed to be. Under the *Police Services Act*, the police have a duty to investigate crime but they are not empowered to undertake any action required to exercise that authority. In the interest of individuals' personal liberties and *Charter* rights, we restrict the police authority and individual liberty interests. All means must be achieved lawfully and with this case, the end result does not justify the means.

The Prosecution contends that the arrest of NR was unlawful; the officers were not lawfully in the dwelling and had no legal grounds to affect the arrest. In relation to the allegations of unlawful or unnecessary exercise of authority, a finding of guilt should be the outcome.

The language Constable MULVILLE used when speaking with the youth was inappropriate and therefore constitutes misconduct.

### **Defence Submissions:**

The Defence acknowledge that this is an O.I.P.R.D. directed complaint, with the complaint originating from a complainant that was:

- A. Not present at the incident;
- B. Openly admitted under oath to disliking the police and to having outstanding complaints against him; or at least did at the time of his testimony;
- C. Has not been forthcoming during his testimony to the Tribunal.

These points speak to the credibility of the complainant and should be taken into consideration as to the determination of weight by this Hearing to not only the substance of the complaint but also the complainant's testimony.

The Defence contends that the allegations before the Hearing are based on a combination of hearsay from the complainant, his daughter and a review of the videos that are incomplete. The videos are a snapshot of the incident, they're unsourced, they're unauthenticated and could have potentially been altered and lack accurately dated information.

Defence stipulated that the video is only known to have come from an individual named "Sam" but that this person was never called to provide evidence with respect to when they were taken, or how.

It is suggested that there were investigative errors that occurred with the O.I.P.R.D.'s investigation, inclusive of incomplete notes, potential witnesses not being interviewed, actual witnesses not being followed up with, and interviews that included the investigator's opinion rather than fact. The ultimate arrest of the affected person was lawful, based on calls from independent witnesses regarding allegations of several different criminal and provincial offences such as: cause disturbance, mischief, including beer bottles thrown at vehicles and homes, impaired driving concerns, breach of the peace and underage drinking.

The Defence note that the O.I.P.R.D. investigator in her testimony stated that it was upon the direction of the complainant that she did not interview several witnesses, including the homeowner and DM. The investigator never made any attempts to follow up to confirm whether or not these witnesses would or would not wish to be interviewed and just took SR at his word.

In providing context to the complaint, the Hearing heard from Constable MULVILLE who testified that she attended the property twice, were she was lied to regarding adult supervision and ultimately, Defence presented that the arrest was lawful and based on an uncooperative person, not videotaping, but by consistently interfering with an ongoing investigation despite being cautioned to stop doing so, therefore obstructing the police's ability to complete their duties.

Defence contend that the complaint was made, not because NR was arrested but because her phone was seized and both NR and SR were unhappy about that. Defence believe that Constable MULVILLE was faced with a house party, full of underage teenagers who were drinking that could potentially become a violent and dangerous situation for everyone involved. DM, the home owner's daughter, lied to the officers saying there was adult supervision. Identified in the evidence and report of C S-P was that there were at least 100 kids at the party. MM testified that she was not aware of who the people were at her house.

Constable MULVILLE did not know how many people were at the house, where they were situated, their intoxication level, whether they were on drugs or if there were even weapons in the house. Constable MULVILLE is dealing with a room full of individuals who were

disrespecting her authority by consistently interrupting her ability to do the job she is mandated to do.

There are utterances in the videos that are heard of NR and others to the extent of; “*Try to get arrested, N?*” and “*If they put me in their cop car, they’re gonna get fucked over.*” These utterances are within the context of what these officers are dealing with. To state that they weren’t being rude or disrespectful is not only inaccurate but offensive. The charge against the officer is for using language that is a less vulgar vernacular than what the affected person is using herself.

Constable MULVILLE testified that the vernacular she used was directed only at one individual whose body language and demeanour made it clear to her that he was not taking the situation seriously. This male is leaning against the wall with his arms crossed and antagonizing Constable MULVILLE.

Defence contend that Constables MULVILLE and AZARYEV did their jobs as per their duties identified within the *Police Services Act*, but also as identified in the case law provided: *Brown v. Regional Municipality of Durham PSB, 1998 CanLII 7198 {ONCA}*. Defence advised the Hearing that “*The facts of this case are different. This involves arbitrary detention and imprisonment with respect to checkpoints on public highways, but the principles that are taken out of this case are most relevant with respect to detentions and common law powers of arrest.*”

*At page three of this case, the Court states:*

*"The police have a common law power to arrest or detain to prevent an apprehended breach of the peace, but the apprehended breach must be imminent and the risk that the breach will occur must be substantial."*

*"...power to arrest in anticipation of the commission of an indictable offence is meant as a mechanism whereby the police can control and monitor on an ongoing basis the comings and goings of those they regard as dangerous..."*

*There is definitely a breach of the peace happening here, that's evident from the independent neighbours that call as well as the police observations of the kids outside, not once, but twice, applied to this case.*

*At page 17 of that case, the Court goes on to say, "...the police are under a duty to maintain the public peace and prevent crime:..." And they quote the Police Services Act sections 42(1)(a) and (b)."*

Defence further states that *“by running into the house they're left with no choice but to enter to determine whether or not everyone's safe, to determine whether or not there are any other crimes being committed, and to see if there's an adult in there. That's definitely a justifiable interference with individual liberty, I would submit to you. And the courts would agree on the basis of the authorities that I've provided you. And the Court goes on to say:*

*“The police have a duty to prevent crime and keep the peace. They also have a general duty to “protect life” which extends beyond their crime prevention and peace keeping functions.”*

*At page 19, the Court says:*

*“The police duty to prevent crime and maintain the public peace commands proactive measures on their part. Often those measures do not conflict with any individual rights and do not raise constitutional issues. Many facets of community based policing involve proactive measures taken with the full support and co-operation of those affected by the measures.”*

The two officers did what they were supposed to in this type of situation: prevent crime, keep the peace along with attempting to educate them, directing them, warn them and caution them. Unfortunately, instead of receiving positive feedback the officers are charged, and are forced to listen to testimony of complainants that lie and investigators who are incapable of doing their jobs to the same level as would be expected of our officers.

Defence state that at no point does the prosecution or public complainant provide any evidence that DM asked the police to leave. It is NR, who has no entitlement to the home, is intoxicated, was advising the police they had no right to be there, however she was spoken to three times and cautioned but still refused to comply.

The communication used by Constable MULVILLE was used in fact as a form of tactical communication – used for a purpose not to defame, not to abuse or be insulting. Constable MULVILLE used the language she did to help de-escalate and to demonstrate to a room full of teenagers that the police have the situation under control. The language used was not in a public place, but in a private residence to a distinct group of individuals. The situation and the language used is not offensive in nature, it was the youth’s own vernacular and was necessary and ultimately successful.

Defence contends that the other officers involved are collateral parties. The initial charges against one officer have been dismissed. No evidence has been presented against Constable

AZARYEV to show he is guilty of the offence he is charged with. The evidence presented at the Hearing does nothing other than to show that the complaint is of itself based on hearsay and speculation.

The officers involved did what they were required to do as per the *Police Services Act*, section 42(1), specifically: preserving the peace, preventing crimes and other offences and assisting victims of crime. The officers preserved the peace by entering a home where they had the belief that several offences had taken place, not just *Liquor Licence Act* offences but indictable ones as well. They were able to prevent the commission of crimes from occurring any further and get the situation under control.

The description of the offenders given to Constable MULVILLE via the communications equipment gave her reasonable grounds to believe the offence of mischief, interfering with the lawful use of property and damage to property had occurred. Upon arriving on scene they see multiple youths run into the house. That in of itself, the legal authorities are clear, implies guilt. They ran inside because they knew they were committing crimes and knew they were going to get into trouble.

The officers were in hot pursuit of those who ran, who they had reasonable grounds to arrest. It does not matter that the officers did or didn't run after them quickly, as it is irrelevant. The officers did not need permission to enter the house because they were doing their job preventing the further commission of crimes.

Constable MULVILLE is trying to gather simple information however she's unable to because NR continues to interrupt her. Constable MULVILLE advises NR not to interfere and advises her that any videos taken could potentially be seized for best evidence. Section 489(2)(c) of the *Criminal Code* permits and justifies the seizure of this type of evidence. NR is the sole person responsible for encouraging the interference with the officer's investigation. NR continues to counsel others, but also continually and actively interferes in Constable MULVILLE's investigation. Constable MULVILLE only reacts when NR has taken it to the point where it is now an untenable situation and is preventing her ability to complete her duties. The arrest of NR was an effective means of reducing any further risk of continued offences, such as Breach of the Peace, from taking place.

It is the position of Defence that there were exigent circumstances during this instance, specifically the safety of the youths in the home, and therefore they also have a lawful authority to enter the residence.

As it pertains to credibility of witnesses; NR's testimony was inconsistent. She lied to police at the scene saying she wasn't taping, when she was. She appears to have a lack of memory on where she got alcohol that evening but has no problem remembering what she drank, what the content is and how much she drank. NR says she was scared and embarrassed, yet admitted to egging on her friends to take pictures of her in the back of the cruiser when she was under arrest and wanted them posted. NR admitted that this part of her interaction with police was funny however on the stand she proceeded to cry and state it was embarrassing.

In relation to the complainant, SR's credibility; he admitted he has a propensity to complain against the police. He lied about contacting a member of YRP to obtain our Policies and Procedures. The complainant only wants accountability for the police but not for his daughter's behaviour that night or even other instances where she had interaction with police. SR currently has two other complaints against the police, which clearly established a bias against the police. The O.I.P.R.D. only interviewed who SR wanted them to; he provided them with case law that he felt they should review. There were upwards of 70 people at the party and only NR was interviewed. Was there a concern that people may say something that was not in agreement with his complaint? Cases referred to by the O.I.P.R.D. – legal authorities – are all to do with references to section 10(b), rights to counsel, arbitrary detention. These are cases that SR provided. SR wanted to direct the investigation.

The O.I.P.R.D. directed a Hearing take place; hence the reason we are here. Their lead investigator was fired for deceit. This was only learned because the Defence called her as a witness and she testified to that fact. The O.I.P.R.D. did not notify any of the affected parties of this fact – which is tantamount to negligence. This issue brings up the credibility of the entire matter at hand.

The lead O.I.P.R.D. investigator states she has received minimal training and that her notebook entries are minimal. Ms. S-P states she put everything in her notes that was pertinent but we learn through her testimony that some of the information that should have been in notes was instead in the logs. Defence did not have the logs. Defence contents that there was a lack of competence and disclosure on the part of the O.I.P.R.D. as it pertains to this investigation.

Defence's position is that the officers, MULVILLE and AZARYEV did their jobs. NR was arrested because she was interfering with their ability to do their job. It was a combination of attitude and actions of NR that caused the situation. NR aggravated the situation and instigated the police in further attempting to rally the people around her. NR was the sole cause for what transpired.

### **Complainant's Submission (written)**

SR who has standing, submitted a written submission as to this his position regarding the conduct of the two officers.

SR essentially states that the officers abused their authority and brought discredit to the police force. He states that officers MULVILLE and AZARYEV entered the residence unlawfully, seized property unlawfully and made an unlawful arrest.

SR believes that NR was polite in her dealings with the officers but was the only one arrested despite the fact that every teenager in the residence matched the description of the youths that was provided.

According to SR, it was obvious after their first interaction with NR the officers did not like their activities being legally recorded. The officers involved, in his view not only broke the law, they contravened the YRP code of ethics and were disrespectful towards the youths in the residence.

### **Analysis of Hearing:**

At this point I again wish to thank both Counsels for their presentations and for the cases provided in relation to this matter. I reviewed each of the cases provided and although I may not reference them all in my analysis, they were of great assistance to me in the analysis of the issues. I would also like to thank SR for his submission presented to this Hearing in writing.

A Hearing conducted under Part V of the *Police Services Act (PSA)* is an employer / employee issue. It relates to officers duties under the *PSA* and his or her on and off duty conduct. The standard of proof required is contained within section 64(10) of the *PSA*. That standard of proof is clear and convincing evidence. The evidence must be based on "weighty, cogent and reliable evidence upon which a trier of fact, acting with care and caution, can come to the fair and reasonable conclusion that the officer is guilty of misconduct."

The overall situation before this tribunal is that we have a noisy house party, with underage drinkers and no adult supervision occurring where complaints come in about noise and alleged

damage being done by items being thrown; we've heard rocks, plastic cups and beer bottles. As a result Police were called to attend the scene, twice.

In the first instance, officers were lied to by DM in stating that her Aunt was upstairs sleeping and that the party was shutting down. Officers left without further action based on the comments by DM. It is the second instance, which is the main cause for this Hearing due to the arrest of NR, resulting in an O.I.P.R.D. complaint, investigation and directed hearing regarding allegations of misconduct by Constables MULVILLE and AZARYEV.

There are three fundamental points that need to be determined from this incident, in this Hearing:

1. Was Constable MULVILLE's entry into the residence, # [REDACTED] Cr., Richmond Hill lawful?
2. Was the arrest of NR by Constable MULVILLE and Constable AZARYEV lawful?
3. Were the verbal communications used by Constable MULVILLE towards the party goes after the arrest of NR appropriate?

There were four civilian witnesses who provided testimony in this Hearing:

1. NR – the affected party;
2. SR – the complainant;
3. Ms. S-P – the O.I.P.R.D. investigator; and
4. MM – the home owner where the party took place.

Constable Shannon MULVILLE testified, however Constable Mykhaylo AZARYEV did not choose to do so, as is his right.

In reviewing the credibility of the witnesses, I take into consideration the following passage on page 11, from the Board of Inquiry, *Police Services Act Part VI*; Allan v. Munro, Niagara Regional Police Force, (PC055/93) which states: *"Credibility is central to our determination in this case. In coming to our conclusion of this allegation, we have considered the evidence of the witnesses, their demeanor when testifying, any internal inconsistencies in their versions of the events, and the extent to which they had an interest in the outcome of the case."* This was the same approach I took when reviewing the evidence of each witness to assess their credibility and coming to my determination. I am also mindful that a tribunal need not accept every aspect of a witness's testimony as a witness may fail to recall "irrelevant minutiae".

In relation to the evidence of NR in this Hearing, I found it to be somewhat conflicting and self-serving at times to the extent she seemed to want to downplay her actual role in this whole situation. During the incident, her comments made to her friends were condescending regarding the police, i.e.: “they’re fucked”. Her comments to her friends at the party were also flippant and exaggerating. She can be heard on the video saying she’s been through this hundreds of times – that in of itself can be concerning as to her character. Her actions are that of an individual who does not think of the consequences of their actions and tends to show off.

Although for the most part, NR was relatively polite to the police, I do find it concerning that she found it so easy to initially lie to the police about not filming them when asked by Constable MULVILLE, as this appeared to set the tone for the incident. This action or ability seemed to come very easy to her and was done without hesitation. This too speaks to character. That being said, while she was testifying at this Hearing it appears that the gravity of the situation and her actions dawned on her and perhaps opened her eyes to what the reality of her actions were. I would have placed far less weight on her testimony had it not been for the videos presented at this Hearing, showing parts of the incident in question and assisted in setting the tone of the incident as a whole. These videos were entered as exhibits and approved by both Prosecution and Defence.

With regard to the evidence of SR, he acknowledges that he has a mistrust of authority, and that mistrust has been passed on to NR. SR also acknowledged that for most interactions he has with the police he has a propensity to lodge a complaint; however, that is his right. Whether there is a factual basis for that mistrust is not a requirement of this Hearing to determine. SR was questioned by Defence as to his parenting skills or lack thereof and knowledge of NR’s whereabouts but again that is not within the purview of this Hearing to determine. Putting the beliefs of SR’s aside and any potential for bias, I have no issues with his evidence as it relates to what he saw at the scene when he arrived. He was a concerned parent.

I find it interesting that when Constable MULVILLE first mentions NR’s cellphone to SR, his first reaction is to yell out to NR to “lock her phone” instead of attempting to discuss his concerns to Constable MULVILLE. This action potentially aggravated the situation further.

I do have concerns with the amount of input he was allowed to have in relation to the investigation conducted by the O.I.P.R.D., as that is supposed to be an independent investigation that is completed. The testimony of SR and that of the O.I.P.R.D. investigator do show that he was attempting to drive and take control of the investigation. His attempts at

surreptitiously obtaining YRP Policies and Procedures and not being truthful about it, are also concerning.

In relation to his standing, he is a Third Party Complainant in this matter, the father of NR, who was under 18 years of age at the time of the incident. This gives him standing.

The evidence provided by Ms. C S-P, in my view was credible. Her testimony was honest and frank, as it pertained to her investigation, notes, role with the O.I.P.R.D. and her termination by the O.I.P.R.D..

Ms. S-P acknowledged that her notes were not the best that they could have been, the reasons for being terminated by the O.I.P.R.D. and that she allowed input from SR into her investigation. I do find it very concerning that the O.I.P.R.D. either failed or neglected to advise that they had fired Ms. S-P, although the matter was dealt with in an earlier motion, it is in my view unprofessional at the very least, however not fatal to the Hearing. The investigation conducted by Ms. S-P, in my view and experience, was at most, lacking and not of the standard expected from the O.I.P.R.D.. This is partially because of the constant input and direction allowed by Ms. S-P by SR into the investigation. It is the responsibility of the O.I.P.R.D. investigator to direct the investigation, to determine who would be a potential witness and who they speak with, not that of the complainant's.

I have no issues with the evidence provided by MM however; agree with the Prosecution that although her evidence is interesting, it does not have any bearing on the case at hand. MM was not present or involved in the matter, other than the fact that she was the homeowner where the party took place.

The evidence presented by Constable MULVILLE is an important aspect of this Hearing. Constable MULVILLE was articulate and detailed as to her knowledge and beliefs at the time of the incident along with what she perceived were her responsibilities as it pertained to this matter. I do find that there are leaps regarding assumptions made as opposed to facts obtained or sought during her investigation.

There is some discrepancy as to the events of the night in question and how it unfolded as provided by the testimony of NR and Constable MULVILLE along with the videos shown which show significant portions of the interactions. Minor discrepancies are to be expected. It is recognized that there were other conversations taking place, that weren't videoed and that the

perceptions by both Constable MULVILLE and NR as to the content and direction may be different. Each person involved has their own subjective perceptions of the incident.

The crux of this Hearing is to determine whether or not the officers exceeded their authority as it pertains to their entry into the residence leading to the arrest of NR and if the interaction by Constable MULVILLE with the youths was discreditable.

I have reviewed all of the authorities provided by both the Prosecution and Defence in relation to this Hearing, in particular as they pertain to lawful/unlawful entry; “hot pursuit” and obstruct as to the execution of their duties. I do not feel the need to list them all as they are all on record as being provided.

In reviewing the evidence of all involved parties and exhibits, there is a significant amount of information that has been provided to this Hearing, some of which is relevant and some of which is not.

Upon Constable MULVILLE’s arrival at the residence, the second time, she states that there was an allegation of youths were throwing things at neighbours garage (as per the call history) – none that was seen. The description provided of those responsible and presented to this Hearing was, if anything, severely lacking in detailed description and the detail stating only “teenagers/youths”. The youths, upon seeing the marked police vehicle, began to run back into the residence at ██████████ Cr., Richmond Hill. The call history tendered as evidence (Exhibit #5) itself stated it was unknown if there was any damage.

Constable MULVILLE arrived first and walked towards the front of the residence at #9 Barberry Cr., Richmond Hill. Constable MULVILLE states she believed she had grounds to believe an indictable offence had taken place and was therefore in hot pursuit of the suspects. None of which she could identify but believed because they were there upon her arrival and seen running into the house they had some form of guilt and therefore there were grounds to believe they had committed an offence.

At no point did she or Constable AZARYEV attempt to determine if any damage had taken place or speak with the initial complainant while dealing with this incident.

Constable MULVILLE advises that the door of #9 Barberry Cr., was open as she reached it and therefore walked in, as she was in hot pursuit. Constable MULVILLE states she stopped inside the residence at the front door but watched some of the youths that she believed had run from

her go into the kitchen area. Upon her entry into the residence she was met by DM, which then began the interaction involving NR. Constable AZARYEV joined her inside the residence shortly thereafter.

The call history for this incident (Exhibit #5), which is received at 01:27:15 and dispatched at 01:46:50 shows that at 01:38:50 an entry is made stating the youths are getting into cars and leaving and at 01:53:18 states the youths have left area. Constable MULVILLE arrives at 01:53:40.

Nothing identified or presented to the officer at the time or from her evidence at the Hearing lends to a belief beyond a mere suspicion that an offence has taken place. I do not find that at this time Constable MULVILLE had reasonable grounds to make an arrest. I find that the belief and reasoning for “hot pursuit” is lacking and that the officer did not have specific grounds to arrest anyone or to enter the residence. There was no continuous action on the part of Constable MULVILLE in relation to her perceived reasonable grounds. It all seemed to disappear upon her entry into the residence and conversation with DM where she asked her to get her Aunt. There was sufficient information to commence an investigation, although one was never done, however not enough information to make an arrest.

At no time is it addressed in this Hearing that Constables MULVILLE and AZARYEV attempted to continue to determine where or who those youths were that ran, that they were in hot pursuit of for committing a possible indictable offence. Nor is there an indication that there was any attempt to identify them. There was no due diligence attempted as to this fact upon entering the residence. The only comment made, in this Hearing, by Constable MULVILLE is that she stopped as she became aware that there were numerous youths who had been drinking, were possibly intoxicated and she became concerned for their safety. She then saw DM and demanded that she get her Aunt downstairs.

Constable MULVILLE should have stopped at the threshold of the residence, even though the door was open. There was no hot pursuit or exigent circumstances in this incident. Constable MULLVILLE should then have asked for DM or called out to her when she saw her as she states she did upon her entry into the residence. Any further action performed by the officer(s) after this point is now exceeding their authority. As identified in *R. v. Waterfield*, [1963] 3 All E.R. 649 at p. 661, 48 Cr. App. Rep. 42 (C.C.C.) *“That approach requires first, that the police be acting in the execution of their duties and second, that in all the circumstances, the police*

*conduct constitutes a justifiable interference with individual liberty.” In this instance, there was no justifiable interference.*

I agree with the point made and identified by Defence from *Brown v. Regional Municipality of Durham PSB, 1998 CanLII 7198 {ONCA}*, where it discusses *R. v. Storrey, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, 53 C.C.C. (3d) 316, .....Cory J., for an unanimous court found that the officer had reasonable and probably grounds to arrest Storrey. He went on to hold that their intention to pursue the investigation after the arrest was not improper but was necessary if the police were to properly perform their “essential role” of investigating crime.*

*“An arrest which is lawfully made does not become unlawful simply because the police intend to continue their investigation after the arrest. To repeat, in the case at bar the police had reasonable and probably grounds on which to base their decision to arrest the appellant. Further, there was nothing improper about the police intention to continue their investigation of the crime after they had made the arrest. Neither that intention nor the continued investigation made the arrest unlawful. The circumstances of the arrest of the appellant did not constitute an infringement of s.9 of the Charter.”*

In all normal circumstances where there are reasonable grounds to make an arrest, there are no issues with continuing the investigation. In this instance, however, since the entry into the residence is unlawful, the arrest is also unlawful.

Neither Constable MULVILLE nor Constable AZARYEV attempted to address the comments made by NR regarding them not having permission to be in the house nor did they reply to her request for a badge number. They only wanted to speak with DM and did not want to be filmed. The fact that DM may not have asked the officers to leave does not negate that their entry was unlawful. Further, I do not accept that the closeness of the filming at the stairs was a safety issue.

In this instance, I believe that there were many interactions by Constable MULVILLE with NR and DM. This was attested to during both NR’s and Constable MULVILLE’s testimony. I have no doubt that NR was annoying and frustrating the officers with her comments, however that does not automatically constitute an obstruct. At no time was it presented that this situation was getting out of hand, that the officers were unable to sufficiently control the situation or that any officer safety issue existed. NR did go to the kitchen as asked by Constable MULVILLE.

It should be noted, that in the determination that the officers entry was unlawful, this then deems the comments made by NR to DM about “not having to speak to the police”, as correct.

In relation to the taking of video or pictures of officers in the performance of their duties there is no law in Canada that prevents a member of the public from taking photographs or video of a police officer executing his or her duties in public or in a location where the photographer is in a location lawfully (in fact, police officers have no privacy rights in public when executing their duties);

- Preventing a person from taking photos or video is a *prima facie* infringement of a person's Charter Rights;
- One cannot interfere with a police officer's lawful execution of his or her duties, but taking photos or videos does not, in and of itself, constitute interference;
- A police officer cannot take your phone or camera simply for recording him or her, as long as you were not obstructing;

In the absence of an overarching and tangible safety concerns, such as telling a videographer or photographer at a fire scene to back away if there is a danger, telling people not to record these interactions, whether they be a bystander or the person the police are dealing with, is not a lawful exercise of police power. An officer who conducts him or herself reasonably has nothing to fear from an audio, video or photographic record of his interaction with the public.

In this instance, those making the recordings are in the residence lawfully, therefore can film as much as they want. When Constable AZARYEV addresses the youths asking to the effect “*Are you making recording? Are you making a recording?*” NR steps forward and states “ *I can record whatever I want to.....*”, she is correct. At this time both Constables MULVILLE and AZARYEV proceed to arrest NR. In conjunction with their unlawful entry into the residence, I find that the arrest of NR by Constables MULVILLE and AZARYEV is unlawful and therefore exceeds their authority.

I do find it interesting, that just prior to the point of NR's arrest, it is others that appear to have been doing the video recording but at no time was the Hearing advised they too were questioned or addressed by the police.

The public has a right to use means at their disposal to record their interactions with the police, something that many police services conduct themselves through in-car cameras and body

worn cameras. An officer's powers exist to allow them to protect the public, themselves and to enforce the law; they do not extend to controlling the public record of an incident.

As it relates to the conversation captured on video between Constable MULVILLE and the other youths in the residence at the time of NR's arrest, I find that the comments she made to the other youths were inappropriate. It appears that it is Constable MULVILLE's frustrations that are being espoused when the youths asked or commented on what was happening. The manner in which the youth(s) questioned the officer(s) is not, in my observations, disrespectful or rude. There were no indications of aggression or potential aggression parlayed on the part of the youths that were seen on video as testified to by Constable MULVILLE. The comments made to the youths by Constable MULVILLE are not reflective of the values and ethics of York Regional Police.

**Decision:**

Based on all the evidence before me in this Hearing, it is the decision of this Tribunal that Constable Shannon MULVILLE:

1. Is found GUILTY of Discreditable Conduct as stated in the allegation contained in Count #1 of her Notice of Hearing.
2. Is found GUILTY of Unlawful or Unnecessary Arrest as stated in the allegation contained in Count #2 of her Notice of Hearing.

Based on all the evidence before me in this Hearing, it is the decision of this Tribunal that Constable Mykhaylo AZARYEV:

1. Is found GUILTY of Unlawful or Unnecessary Arrest as stated in the allegation contained in Count #1 of his Notice of Hearing.

Hearing Officer:



Superintendent Graeme Turl #387

York Regional Police

Dated: November 05, 2015