

**ONTARIO PROVINCIAL POLICE DISCIPLINE HEARING
IN THE MATTER OF ONTARIO REGULATION 268/10**

**MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990, AND
AMENDMENTS THERETO;**

AND IN THE MATTER OF

**ONTARIO PROVINCIAL POLICE
AND
PROVINCIAL CONSTABLE FREDERICK A. OTCHERE, #12855**

CHARGE:

DISCREDITABLE CONDUCT

DECISION WITH REASONS

Before: Superintendent K.M. (Mike)
Bickerton
Ontario Provincial Police

For the Prosecution: Mr. Jason Kirsh
Ministry of the Solicitor General

Counsel for the Defence: Mr. James Girvin
Ontario Provincial Police Association

Public Complainant: Mr. James Smith

Hearing Date: June 8-10, 2022

This decision is parsed into the following parts:

PART I: OVERVIEW;

PART II: THE HEARING;

PART III: SUBMISSIONS, ANALYSIS and FINDINGS; and,

PART IV: DECISION

PART I: OVERVIEW

Parties to the Hearing

Parties to this Hearing include:

- Provincial Constable (PC) Frederick Otchere, represented by Mr. James Girvin.
- Mr. Jason Kirsh, represented the Ontario Provincial Police (OPP);
- The Public Complainant, Mr. James Smith.
 - Mr. Smith did not have legal representation however indicated he understood he had the right to do so. The hearing process and his role in it, was explained to him and he was provided with a copy of the tribunal rules; both electronically and hard copy. He actively participated throughout the hearing process.

Background

PC Otchere faces *Police Services Act (PSA)* misconduct charges in relation to a 2015 on-duty incident. During the evening in question PC Otchere was working with/ assisting PC Hearnden. As a result of his actions PC Hearnden was ultimately convicted criminally for assault. A trial and appeal of conviction took a considerable amount of time. For reasons addressed in detail in the related motion decision attributable to the ongoing criminal proceedings against PC Hearnden, PC Otchere's disciplinary matter was stood down or otherwise could not proceed.

Prior to the commencement of this hearing an abuse of process motion was brought by Mr. Girvin on behalf of PC Otchere. On July 20, 2021 the motion was denied. (*See Motion Decision for complete details*)

A hearing was held at Toronto OPP Detachment commencing June 8, 2022, and concluded on June 10, 2022.

Allegations of Misconduct

Provincial Constable Frederick A. Otchere, #12855 is alleged to have committed discreditable

conduct in that he did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended.

Particulars of Allegations:

It is alleged that on Tuesday, June 30, 2015, at approximately 11:58pm, the Ontario Provincial Police (OPP) were dispatched to a reported three vehicle collision located eastbound collector lanes of the 401 just west of Keele Street in the City of Toronto. A short time later, PC's Otchere and Hearnden were updated by the dispatcher that the incident was a report of a disabled vehicle, not a motor vehicle collision. PC's Otchere and Hearnden arrived at the scene and spoke with several persons at the scene.

One of the people involved in the incident, J.S. was on the phone calling CAA to attend the scene. When PC Otchere and PC Hearnden arrived J.S. got into his vehicle. PC Hearnden approached the vehicle to speak with J.S. J.S. indicated to PC Hearnden to wait as he was on the phone. The driver's side door of the vehicle was opened and PC Hearnden leaned in to speak with J.S. J.S. shut the car door subsequently hitting PC Hearnden's knee.

J.S. was removed from the vehicle and escorted back to a parked vehicle by PC Otchere and PC Hearnden where he was handcuffed. During the interaction, witnesses indicated J.S.'s head was hit off the hood of the car causing a dent. J.S. was later taken to the hospital by his father where he was diagnosed with a concussion.

J.S. subsequently contacted the Special Investigations Unit (SIU) who conducted a criminal investigation involving the injuries sustained by J.S. As a result of the SIU investigation, PC Hearnden was charged with one count of assault cause bodily harm involving J.S. on December 29, 2015.

On June 1, 2018, Justice Riun Shandler found PC Hearnden guilty of assault, contrary to Section 266 of the Criminal Code of Canada. An appeal process commenced immediately following the sentencing. The appeal matter was dismissed on October 8, 2020.

The trial judge held that PC Hearnden did not have any lawful authority for opening the vehicle door and that apart from the lack of lawful authority, he did not accept PC Hearnden's account that he had been assaulted by J.S. In the trial judge's view, PC Hearnden's account was "illogical, contrary to common sense and not supported by any witness at the scene." As there was no assault by J.S., PC Hearnden had no justification for forcibly removing J.S. from the vehicle and by doing so, PC Hearnden committed an assault.

It is alleged that during the criminal trial, PC Otchere testified words to the affect that:

You assisted PC Hearnden gain physical control of J.S. to handcuff him, and in doing so, J.S.'s torso was leaned over the hood of the car. In order to stop him from resisting, you struck J.S.'s shoulders with your right forearm and pushed him down towards the hood of the car and held him there.

PC Otchere saw afterwards there was a mark on the hood of the car and thought it was from J.S.'s head hitting it. He reported the damage to Sergeant (Sgt) Lana Smith, but testified, at that time, he was not concerned about injuries to J.S.'s head because he wasn't advised that his head had hit the hood.

PC Otchere's notes that were made in relation to the incident, are contrary to his testimony and state that J.S. was struck with your right arm to his upper shoulder area and J.S.'s head hit the hood, at which time J.S.'s glasses fell off and he was controlled and handcuffed.

On June 1, 2018, Justice Riun Shandler ruled that PC Hearnden did not have any lawful authority for his actions and no justification for forcibly removing J.S. from his vehicle. Therefore, PC Otchere had no lawful authority or justification for applying physical force upon J.S. in the course of his duties.

PC Otchere knew or reasonably ought to have known that his actions were discreditable.

Plea

At the outset of the hearing on June 8, 2022, PC Otchere entered a plea of not guilty to discreditable conduct.

Decision

My analysis and findings have led me, based on the absence of clear and convincing evidence, to find PC Otchere not guilty of discreditable conduct.

My reasons for the decision are as follows:

PART II: THE HEARING

Exhibits

The exhibits for this matter are listed in Appendix A.

Witnesses

The Prosecution witnesses included the following:

- Detective Sergeant (D/Sgt). Karen Medeiros
- Public Complainant, Mr. James Smith

Defence counsel witnesses included:

- PC Frederick Otchere

The public complainant did not call any witnesses.

The following are not meant to be an exhaustive recount of witness testimony and submissions. I will speak to what I consider to be the most relevant evidence, addressing the issues at hand. Relevant evidence will be discussed in further detail within the analysis that follows. My required analysis and deliberations will be concentrated on matters related to the allegations against PC Otchere. Peripheral information or submissions that do not relate to the allegations in the NOH will not necessarily be included in my analysis unless they might assist in providing context.

Witness Testimony

D/Sgt K. Medeiros

Evidence in Chief

- Has been an OPP officer since 1998
- Is currently and acting Sergeant Major in the Office of Professionalism, Respect, Inclusion & Leadership (OPRIL) formerly Professional Standards Bureau (PSB)
- As a new member of PSB D/Sgt. Medeiros was assigned to the PC Otchere investigation in June Of 2016.
- The investigation had been stood down due to a pending SIU investigation and resulting criminal trial of PC Hearnden.
- PC Hearnden was charged in December of 2016.
- In June of 2018 PC Hearnden was found guilty of assault against Mr. Smith, the public complainant.
- PC Hearnden appealed his conviction. In October 2020 the conviction was upheld on

appeal.

- PC Otchere testified at the trial.
D/Sgt. Medeiros attempted to arrange interviews with PC Otchere and PC Hearnden but was unable to do so due to the ongoing criminal Court process.
- In November of 2020 PC Hearnden declined to provide a statement and PC Otchere indicated he had nothing further to add to what he had said as a witness in Court.
- D/Sgt. Medeiros obtained certified copies of Court transcripts relating to the trial of PC Hearnden.

Issue:

Defence counsel argued it was improper to admit the transcripts including the Court's reasons for judgement. Defence counsel also argued that some or all the information in the transcripts was hearsay. With respect to transcripts, in particular the reasons for judgement, defence counsel suggested witnesses, including his honour, would be required to testify before this tribunal in order for the transcripts to be properly admitted. Defence counsel submitted the *Ghorvei* case (analysis below) in support of their position. I did not find this decision, on its own, challenged the position, statute, and jurisprudence put forth by the prosecution. Defence counsel agreed that the positions taken by the prosecution were conceptually correct, but the argument failed, because, amongst other contentions, the transcripts were from a criminal trial and PC Otchere was not the subject of that proceeding, he was a witness.

Prosecution cited section 5(2) and 9(2) of the *Ontario Evidence Act*:

¹⁵ (2) Despite any Act or regulation or the rules of Court, a transcript of the whole or a part of any evidence that has or proceedings that have been recorded in accordance with subsection (1) and that has or have been certified in accordance with the Act, regulation or rule of Court, if any, applicable thereto and that is otherwise admissible by law is admissible in evidence whether or not the witness or any of the parties to the action or proceeding has approved the method used to record the evidence and the proceedings and whether or not he or she has read or signed the transcript. R.S.O. 1990, c. E.23, s. 5 (2).

9 (2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in

¹ *Ontario Evidence Act*, R.S.O. 1990, c. E.23

evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (2).

In addition, Mr. Kirsh provided the *College of Nurses and Guilbeau*² and the *College of Physicians and Surgeons and Dr. N.K. Jha*³ in support of his position that the transcripts were admissible.

R. v. Ghorvei, 1999 CanLII 19941 (ON CA)⁴

Defence counsel cited *Ghorvei* in support of an objection to the admission of transcripts and particular questions related to past statements and/or testimony. I did not embark upon a detailed analysis on the record of this case. I have reviewed it and make the following observations.

In this case, the judicial finding that the officer's testimony was "false" and that he was a "compulsive liar" was not made in the context of proceedings concerning the truth or falsity of the testimony in question. The judicial finding was nothing more than a rejection of the officer's testimony, albeit in very strong terms. It is not proper to cross-examine a witness on the fact that his or her testimony has been rejected or disbelieved in a prior case. That fact, in and of itself, does not constitute discreditable conduct. The proposed fresh evidence could not have been used at trial to impeach the officer's credibility.

[22] In his application to introduce fresh evidence, the appellant sought to introduce the transcripts of three unrelated trials involving other accused persons in which Constable Nielsen had testified and which resulted in acquittals. Two of these trials, *R. v. Downey* and *R. v. Willis*, were held prior to the appellant's trial and the third, *R. v. Pappageorge*, was held some eight months after. The application is based on the contention that the fresh evidence, if received, could have a significant impact on Constable Nielsen's credibility since the evidence would show, first, that Constable Nielsen gave contradictory evidence in the *Downey* and *Willis* trials, and second, that his credibility was called into question by the presiding judge in *R. v. Pappageorge*.

Finding:

Unlike the matter before this tribunal, the *Ghorvei* transcripts from unrelated matters were being sought to be introduced as fresh evidence to impugn a witness' testimony. The prosecution, in the matter of PC Otchere, sought to introduce transcripts from the criminal Court trial and appeal of PC Hearnden. PC Otchere was a witness at trial and provided testimony under oath and a

² Exhibit 12: *College of Nurses and Gordon Guilbeau*, 2010 CanLII 100036

³ Exhibit 13: *College of Physicians and Surgeons and Dr. N.K. Jha*, 2020, ONCPSD 36 (CanLII)

⁴ Exhibit 15: Defence Book of Authorities

cautioned statement to the SIU. The Court proceedings are addressed and were part of the Notice of Hearing (NOH). I do not find the issue of the proposed use of transcripts in *Ghorvei* considerably divergent from the matter before me and of limited pertinence.

I accepted the prosecutor's submissions and ruled in favour of admitting the transcripts as evidence. My rationale included that the Court proceedings were mentioned in and were part of the particulars in the NOH. It should not have been unexpected that some or all the transcripts were going to represent at least part of the evidence. I advised the parties I anticipated hearing further evidence and submissions and would assess and weigh the transcripts and all evidence presented before arriving at a decision.

I considered oral and written submissions while on the record and stated as follows (paraphrased):

Court proceedings and decisions are mentioned in and are part of the particulars in the Notice of Hearing. I anticipate hearing submissions and further evidence and I will assess and weigh this and all evidence before arriving at a decision.

The objection either waned or was otherwise not renewed. Following the objection, the prosecution and defence both asked questions of witnesses from, and while referencing transcripts. In my view the Court proceedings were directly linked to the allegations. The witnesses involved swore or affirmed to tell the truth, and the transcripts were properly certified.

D/Sgt. Medeiros Evidence in Chief Continued

- D/Sgt. Medeiros obtained certified copies of the following transcripts:
 - February 7, 2018 Trial Transcript⁵
 - Oral Reasons For Judgement⁶
 - Written Decision of Justice Shandler⁷
- Mr. Kirsh referred D/ Sgt. Medeiros to pages 110 and 111 of the February 7 transcript (Exhibit 8) where PC Otchere described part of his interaction with Mr. Smith and PC Otchere's stated reason for calling his Sergeant to the scene.

Cross Examination- Mr. Girvin

- D/Sgt. Medeiros was not assigned the investigation prior to June of 2016 as she was not a member of PSB until around that time.
- D/Sgt. Medeiros was not aware whom else may have been assigned to the investigation

⁵ Exhibit 8: R vs Hearnden Trial Transcript, February 7, 2018

⁶ Exhibit 9: Justice R. Shandler, Oral Reasons for Judgement, R v Hearnden, June 1, 2018

⁷ Exhibit 10: Written Decision of Justice R. Shandler, R v Hearnden

prior to June 2016.

- The investigation relied on the SIU investigation and criminal Court brief. D/Sgt. Medeiros did not interview Mr. Smith or other civilian witnesses.
- D/Sgt. Medeiros checked Mr. Smith on a number of police data bases.
- Mr. Smith had complained in the past about the Durham Regional Police.
- There were a number of occurrences associated to Mr. Smith. The author of one report referred to Mr. Smith as having been anti-police.

Objection by Mr. Smith

Mr. Smith wished to clarify that police officers wrote the notes (believed to have been referring to the occurrences referenced immediately prior to the objection). Mr. Smith advised he had brought forward concerns, some related to his being racially profiled, to the Toronto Police and the Durham Regional police but the matters had been dropped.

I advised Mr. Smith that his point was noted and the appropriate weight will be assigned. I further indicated Mr. Smith would have the opportunity to clarify and make submissions.

D/Sgt. Medeiros Cross Examination Continued

- Mr. Smith had raised concerns in the past regarding racial profiling, had been investigated for using a licence plate not authorized for the vehicle to which it was affixed, was described as being evasive with police and having questioned police authorities.
- D/Sgt. Medeiros learned from her review of SIU materials that PC Otchere had initially been designated a witness officer, was re-designated a subject officer, and then back to a witness officer at some point later.
- PC Otchere had indicated to the SIU that he did not feel Mr. Smith's head came into contact with the hood of the car.
- PC Otchere was not charged criminally. He was not charged with deceit or with any misconduct related to note taking. He was not charged with using excess force or misuse of authority.
- Mr. Girvin submitted a transcript of the trial as an exhibit (Exhibit 10 duplicate)
- When referred to the Court transcript, D/ Sgt. Medeiros did not recall Mr. Smith saying an earring had been torn from his ear and that it had been bleeding. D/Sgt. Medeiros did recall Mr. Smith explaining that his hair had been pulled.
- No forensic analysis was done to the hood of the damaged vehicle. A photo had been taken of the damage but SOCO (Scenes Of Crime Officer) did not attend the scene.
- D/Sgt. Medeiros agreed police officers had a duty and obligation to assist another officer who are struggling to make an arrest.
- D/Sgt. Medeiros recalled that Mr. Smith had complained the handcuffs were too tight and

an officer loosened them.

Cross Examination- Mr. Smith

- Mr. Smith clarified through D/Sgt. Medeiros and with the assistance of Mr. Girvin that, regarding police data bases, officers enter the narrative portion based on their observations and opinions at the time of the interactions. The observations and opinions are not infallible and can be subject to scrutiny.
- Mr. Smith referred D/Sgt. Medeiros to page 113, lines 12-15 of exhibit 8. It was confirmed that PC Otchere described the dent to the hood of the car associated to the arrest of Mr. Smith.
- Mr. Smith confirmed through D/Sgt. Medeiros that part of a police officer's duty would include to protect citizens from abuse of power.

Mr. Smith

Evidence in Chief

- Mr. Smith was 26 years old and was employed as the front of house manager in a Toronto restaurant.
- He did not have a vivid memory of the 2015 events involving PC Otchere that were before this tribunal.
- He had a history of concussions and provided details of how and when they had occurred prior to and following the occurrence involving PC Otchere.
- He did remember what happened with PC Otchere but described his memory as hazy due to the multiple concussions.
- On the date in question in June of 2015 Mr. Smith was with two friends and was going to a car show in Vaughn. When they arrived they discovered the car show had been cancelled due to the weather.
- Mr. Smith was in a Volkswagen, his friend Adrian was in a Chevrolet, and the third car was a Mazda 3. Mr. Smith could not recall the driver of the Mazda's name.
- Mr. Smith was accompanied in his car by his then roommate, Mathew Dobson and Dobson's girlfriend Ashley. Mr. Smith was driving, Mathew was in the front passenger seat and Ashley was in the back seat.
- As the car show had been cancelled the group decided to return to Toronto.
- As he pulled onto highway 401 from highway 400 Mr. Smith's car battery died. All three cars pulled over. Mr. Smith's car was in the middle of the three with the Mazda being behind his vehicle.
- They tried to "boost" his car unsuccessfully. Mr. Smith called CAA to try to have his car towed to a garage in Oshawa. Mr. Smith and friend remained parked on the side of the 401 for about 20 minutes.

- Mr. Smith recalled two police officers arrived at the scene, PC Hearnden and PC Otchere. Mr. Smith recognized and identified PC Otchere in the hearing room.
- Mr. Smith had been attempting to contact CAA by telephone to arrange for a tow truck. He was sitting in his car with the windows up and the doors closed so he could talk to the CAA dispatcher without highway noise.
- When the officers approached his car, Mr. Smith held up his CAA card and his phone in an attempt to communicate with the officers that he was trying to contact CAA on the phone.
- PC Hearnden knocked on the window of Mr. Smith's car. Mr. Smith explained he continued trying to relay to the officer that he was on the phone. Mr. Smith did not know where PC Otchere was at this point. The hood was up on Mr. Smith's car at the time which obstructed his view.
- Mr. Smith knew PC Hearnden wanted to converse with him so he (Mr. Smith) opened his door. As PC Hearnden approached his car, the CAA dispatcher answered the phone so Mr. Smith closed the door again.
- PC Hearnden was pulling on the door and Mr. Smith released the door. PC Hearnden grabbed Mr. Smith's left arm and PC Otchere took his right arm and the officers removed him from the car.
- Mr. Smith explained he kept asking the same three questions of the officers; where are you taking me? Why are you arresting me? What is going on?
- The officers were yelling "stop resisting."
- PC's Hearnden and Otchere held him by the arms and dragged him to the Mazda that was parked behind Mr. Smith's vehicle. Mr. Smith described being dragged the length of his car to the Mazda.
- Mr. Smith was bent over the hood of the car and he kept repeating the three questions. As Mr. Smith was handcuffed by the officers his glasses fell off. He described himself as being agitated, scared, and upset as he cannot see without his glasses.
- Mr. Smith was unable to gain his footing, the officers had control of his arms and had complete control of his body.
- During the handcuffing Mr. Smith's head was slammed into the hood of the Mazda. He was struck from behind but his back was to the officers so he could not attest to which one caused his head to hit the car.
- When Mr. Smith was taken to the OPP cruiser he was told he had assaulted a police officer when he closed his door.
- Mr. Smith was brought to the cruiser by PC Hearnden. PC Hearnden told Mr. Smith his knee was injured from being struck with Mr. Smith's car door.
- Mr. Smith asked his friends to call his father as he needed a way to get home.
- PC Hearnden advised Mr. Smith that his license had been suspended and that he would be getting a ticket for this.

- Mr. Smith told PC Hearnden that the handcuffs were too tight and that it was not the first time police officers had assaulted him and that he had an unresolved complaint against the Durham Regional Police. Mr. Smith did not know where PC Otchere was at that time.
- Mr. Smith did not know his driver's license had been suspended. PC Hearnden wrote the ticket and released the handcuffs from Mr. Smith's wrists.
- To the best of his recollection, Mr. Smith believed PC Hearnden said Mr. Smith had to get his car off of the highway. Although CAA was on their way, the tow truck driver who was on scene had been authorized by police to move Mr. Smith's car. It was not a CAA tow truck. That tow truck price for a tow to Oshawa was too high so Mr. Smith had them drop his car at a nearby Canadian Tire parking lot to wait for CAA.
- The original tow truck driver charged Mr. Smith \$300 to take his car three city blocks to the Canadian Tire.
- While at the Canadian Tire lot Mr. Smith could feel and headache coming on and he was nauseous and dizzy. Mr. Smith recognized these as symptoms of a concussion and went to Toronto Western Hospital to be examined.
- The doctor diagnosed Mr. Smith with a concussion.
- When interacting with the officers PC Hearnden had told him he was being detained. The word arrest was not used. Mr. Smith was not charged with a criminal offence. He was charged under the *Highway Traffic Act* for driving under suspension but the charge was discarded for reasons not known to Mr. Smith.
- At the time of the incident Mr. Smith was 6'1" and 150 pounds.
- Mr. Smith never tried to hit the officer with the door. He was trying to close the door to speak with CAA.
- When Mr. Smith's glasses fell off PC Otchere told him when he calmed down he could have them back. PC Otchere did give Mr. Smith's glasses back.
- At the time Mr. Smith described himself as having been scared, very anxious and frantic from the trauma he had sustained. Mr. Smith felt the officers were aggressive and angry.

Cross Examination – Mr. Girvin

- Mr. Smith dropped the lawsuit against the OPP in relation to this matter as the legal fees were too expensive.
- The location of the incident was on highway 401 just off highway 400.
- There was not much traffic at the time.
- Despite traffic being light there was still noise from the highway, so he had to raise his voice and had to close his door to speak on the phone.
- Mr. Smith recalled being asked about a baseball bat in his car. He recalled having the baseball bat in the front seat of his car and explained he played baseball.
- When PC Hearnden knocked on the window, Mr. Smith was on the phone. There was no

verbal communication between Mr. Smith and PC Hearnden. Mr. Smith opened his door as PC Hearnden seemed to want to have a conversation.

- It was at this point that the door apparently struck PC Hearnden.
- Mr. Smith did not apologize to PC Hearnden as he never had the opportunity.
- Mr. Smith was dragged to the vehicle behind and his feet were dragging on the ground.
- After being removed from the car by PC Hearnden, PC Otchere became involved.
- Mr. Smith agreed it took a few seconds from the time he was in his car until the time he was at the Mazda.
- Mr. Smith agreed PC Otchere was assisting as he was being dragged to the Mazda and that the officers were saying stop resisting.
- Mr. Smith disagreed with the suggestion he resisted and tensed up as he did not have control of his body. He was being dragged and did not have proper footing. He repeated the three questions and was expressing them loudly.
- Mr. Smith indicated he was not limp and was scared, anxious and nervous. He disagreed he was angry.
- Mr. Smith believed he yelled out he was on the phone but did not recall the details of what was conversed.
- Mr. Smith did read the judge's decision and recalled the judge's comments on memory gaps due to the passage of time and concussions and acknowledged that he forgets things.
- When he was bent over the hood of the car officers continued to yell "stop resisting."
- Mr. Smith strongly disagreed he was not cooperating.
- Mr. Smith could not recall if his head was slammed before or after handcuffs were applied.
- Mr. Smith never said he to the officers that he was not resisting.
- (Mr. Smith was referred to the trial transcript) He agreed he noticed at the hospital when he removed his sweater that his earring had been pulled out and his hair had been pulled out. He did not recall if he mentioned it to anyone at the hospital or not.
- Mr. Smith was referred to SIU disclosure information which indicated he had told Dr. Khan his earring had been ripped out. Mr. Smith did not recall telling anyone about the earring but did recall it being torn from his ear. He explained his main concern had been the concussion.
- Mr. Smith was referred to the transcript (Exhibit 14) page 19, line 11 where he testified PC Hearnden grabbed his hair or neck and slammed his head toward the car. Mr. Smith agreed he did not know, at that time, it was PC Otchere who had pushed his head toward the car.
- Mr. Smith recalled telling the doctor the injuries he had sustained.
- Mr. Smith agreed that when he was being taken from the Mazda to the police cruiser he never mentioned his head was injured. He explained it was a traumatic incident and he was affected by adrenaline.

- Mr. Smith disagreed that when he was injured his first utterance should have been about his head.
- Mr. Smith agreed he shouted to his friends to take video of the incident.
- Mr. Smith repeated that it was not until he arrived at the Canadian Tire lot that he experienced concussion symptoms.
- He later discussed with his friends what had happened when they were off the highway.
- Mr. Smith did not recall when he saw the dent to the hood of the Mazda. He had washed the car earlier in the day and there was no dent on the hood.
- Mr. Smith was shown a photograph of the dent (exhibit10) and agreed there was no before photograph available of the hood.
- Mr. Smith agreed his glasses had been damaged during the incident but he had no photograph of the damage. He agreed it was PC Otchere who put his glasses back on.
- Mr. Smith agreed he never asked the officers why they slammed his head into the car.
- Mr. Smith agreed with the suggestion that once a person has had a concussion they become more susceptible to further concussions.
- Mr. Smith stated his father arrived at the scene and Mr. Smith explained to him the violent arrest and his head being slammed. Mr. Girvin pointed out Mr. Smith never said this at the criminal trial of PC Hearnden. Mr. Smith advised, that was because he had never been asked this before.

Re-Examination, Mr. Kirsh

- Mr. Smith repeated he had testified in criminal Court that he thought it was PC Hearnden who had slammed his head into the car. He explained his back was to the officers, so he did not actually know who it was.

Defence Witness

PC Otchere

Evidence in Chief

- PC Otchere was in his 14th year of policing with the OPP.
- He has been assigned to the Toronto and 407 detachments in the Highway Safety Division and was a member of the Emergency Response Team (ERT) for four years.
- PC Otchere has been assigned acting sergeant roles where he was responsible for, among other duties, supervising a platoon of constables.
- On June 30/July 1, 2015, PC Otchere was working as a constable from 6pm until 6am.
- PC Otchere had been conducting R.I.D.E. checks when, at 11:57pm he received a radio call regarding a three-vehicle collision in the area of highway 401 and Keele Street.

- PC Hearnden was also dispatched.
- While enroute to the collision PC Otchere was advised that the call was in relation to a disabled vehicle and no collision had occurred.
- PC Otchere arrived on scene at 12:01am. On arrival PC Otchere saw a Mazda sedan and a silver Volkswagen, with the hood open, parked toward the side of the road. He saw three people sitting on the guardrail. The area was artificially lit with overhead street lights.
- PC Hearnden had stopped his cruiser behind the grey Mazda. PC Otchere parked in front of the Volkswagen.
- PC Otchere approached the people sitting on the guardrail and spoke with a Mathew Dobson. PC Otchere felt that Mr. Dobson was being evasive and speculated it was because he was a "G1" driver and was not to have been driving on a highway along with other restrictions.
- Mr. Dobson indicated he was a passenger in the Volkswagen and pointed to it when PC Otchere asked who the driver was.
- PC Otchere's view was obstructed by the open hood on the Volkswagen, so he walked around toward the driver's side.
- PC Otchere saw PC Hearnden standing by the driver's door facing toward PC Otchere with his back to the traffic.
- PC Otchere moved toward the "A" pillar toward the front of the vehicle. He saw the driver (Mr. Smith) seated inside the vehicle on a cell phone in one hand and a CAA card in the other.
- PC Otchere asked PC Hearnden what was going on. PC Hearnden said he didn't know. PC Otchere found the situation odd.
- PC Otchere and PC Hearnden stood there for another 30 seconds or so. PC Hearnden then opened the door of the Volkswagen. The door shut violently, and the driver yelled out "I'm on the phone" as the door was being shut. PC Hearnden re-opened the door and told the driver that he (Smith) had hit him (Hearnden) with the door.
- PC Hearnden was loud, almost angry as he had been hit with the door. He told the driver what happened and told the driver to get out of the car. The driver did not get out and PC Hearnden grabbed the driver by the upper torso and removed him from the car.
- As PC Hearnden was removing the driver from the car the driver was yelling and his arms were moving all over the place. There was a lot of moving and yelling and the driver was not cooperating with being arrested.
- He did not hear the driver being told he was under arrest but in PC Otchere's mind, PC Hearnden said he was hit with the door, PC Otchere believed this was assault and that the driver was being arrested. When the driver was physically removed by PC Hearnden, PC Otchere believed it to be an arrest.
- PC Otchere explained he had officer safety concerns with the way Mr. Smith was behaving, agitated and moving the way he was. PC Otchere explained traffic was lighter than usual but there were still vehicles travelling past at highway speeds. PC Otchere

moved toward Mr. Smith and PC Hearnden to assist in bringing Mr. Smith under control.

- PC Hearnden and Mr. Smith had just passed the back of the Volkswagen when PC Otchere caught up to them and took Mr. Smith by the right arm.
- The two officers and Mr. Smith walked toward the grey Mazda.
- PC Otchere felt that Mr. Smith was tense and was moving back and forth and was yelling to his friend, Mr. Dobson to get a phone and start recording and to call his father.
- Mr. Smith was yelling “why are you arresting me, why are you doing this?” He repeated the questions, or words to that effect, over and over. Mr. Smith was told that PC Hearnden would tell him why he was under arrest. PC Otchere was telling Mr. Smith to calm down and stop resisting in a loud voice.
- PC Otchere did not feel Mr. Smith was trying to fight with the officers but he was not complying to facilitate handcuffing.
- As they arrived at the Mazda, PC Hearnden had Mr. Smith by the left arm and PC Otchere had his two hands on Mr. Smith’s right arm. Smith was leaning over the hood of the car.
- PC Hearnden was attempting to retrieve his handcuffs with one and had hold of Mr. Smith with the other. PC Otchere continued to tell Mr. Smith to stop resisting. PC Otchere decided to strike Mr. Smith’s upper torso to push him toward the hood of the car.
- PC Otchere believed Mr. Smith’s head may have contacted the hood and his glasses fell off. PC Otchere kept his forearm on Mr. Smith’s back until the handcuffs were on. Mr. Smith was resisting while the handcuffs were applied but not too much. Once handcuffed Mr. Smith was under control.
- When PC Otchere and PC Hearnden stood Mr. Smith up he became hysterical and was hyperventilating. PC Otchere was trying to calm Mr. Smith down and it became apparent that Mr. Smith was upset because his glasses had fallen off and he could not see.
- PC Otchere retrieved Mr. Smith’s glasses and felt that the glasses looked intact. PC Otchere put Mr. Smith’s glasses back on Mr. Smith’s face. Mr. Smith calmed down completely.
- The time from when PC Hearnden removed Mr. Smith from his vehicle until they were at the Mazda was a matter of 2 or 3 seconds.
- PC Otchere had been involved in many prior arrests and assisting other officers.
- PC Otchere did not hear PC Hearnden mention “arrest” and PC Otchere did not ask.
- PC Otchere explained his basis for assisting PC Hearnden was that PC Hearnden as the door was being opened had been struck on the knee by the car door when Mr. Smith closed it. PC Otchere deemed Mr. Smith was being arrested for assault.
- After PC Otchere put Mr. Smith’s glasses back on, the officers walked Mr. Smith to PC Hearnden’s police cruiser. PC Hearnden searched Mr. Smith. Mr. Smith’s arms remained tense.
- PC Otchere recalled Mr. Smith saying he may have a pocketknife but PC Otchere could not recall if one was actually found.

- Mr. Smith was still agitated but had calmed down considerably.
- As he was walking back to his cruiser PC Otchere saw Mr. Smith's CAA card on the ground. PC Otchere picked it up and gave it to PC Hearnden.
- PC Otchere spoke to the driver of the Mazda; Dominic Viscardi who advised he wanted to leave. PC Otchere saw the dent on the Mazda at this time. PC Otchere advised Mr. Viscardi of the dent and provided him with the incident number. PC Otchere further advised Mr. Viscardi he could contact PC Otchere or the OPP regarding repairing the damage. Mr. Viscardi was driving the Mazda but was not the registered owner.
- PC Otchere spoke with Ashley Deveaux who had been sitting in the rear passenger of Mr. Smith's Volkswagen.
- None of Mr. Smith's three associates mentioned that his head had been slammed into the car.
- At about 12:35am A/Sgt. Smith attended the scene. PC Otchere advised A/Sgt. Smith of the incident and arrest. He advised the sergeant that as a result of their interaction with Mr. Smith there was a dent in the hood of the Mazda. PC Otchere was not certain the dent occurred during the interaction and did not know if it was there before.
- Mr. Smith's father arrived at the scene. He recorded all officers present and obtained their badge numbers. PC Otchere told Mr. Smith's father they could talk at the station not on the side of the highway. Mr. Smith's father was told if he refused to leave the highway he could be arrested.
- PC Otchere understood that the CAA tow truck was enroute and was 5 minutes away. At a point sometime beyond 5 minutes another tow company was authorized to remove Mr. Smith's vehicle from the highway as CAA had not arrived. PC Otchere explained there were safety concerns the longer the disabled vehicle remained on the highway.
- PC Otchere explained the Pan Am games were underway in the Greater Toronto Area and the OPP had issued a directive that disabled vehicles were to be removed from the highway expeditiously because high level people and athletes would be using the highway and disabled vehicles could represent a threat.
- The first time PC Otchere heard that Mr. Smith's earring had been allegedly pulled out was during this tribunal. Nobody told him of this before and he did not see anything of that nature at the time of his interaction with Mr. Smith.
- Mr. Smith ever mentioned any injuries to PC Otchere.
- PC Otchere did not slam Mr. Smith's head into the hood of the car.
- A/Sgt. Smith had a camera and took a picture of the dent(Exhibit 11)
- PC Otchere was shown exhibit 11, a hardcopy and on a laptop. He explained, at the time of the incident, he thought the dent may have been caused by Mr. Smith's head or torso. PC Otchere explained that when he later saw the photograph he did not believe it to have been caused by a human head because of the shape and sharpness of the dent. PC Otchere explained he was not an expert in this regard.
- PC Otchere was designated as a witness officer by the SIU and was re-designated a

subject officer. He provided a cautioned statement to the SIU investigators.

- PC Otchere was never charged by the SIU.
- PC Otchere was shown a transcript of his interview with SIU where he described the amount of force he used to pin Mr. Smith was moderate, proportional to Mr. Smith's resistance, and was enough to put him off balance.
- PC Otchere did not recall the sound of Mr. Smith's head hitting the hood.
- When PC Otchere later learned Mr. Smith had a concussion PC Otchere was surprised as he did not think the force used was enough to have caused a concussion.
- PC Otchere explained he had used force in the past where he had to call for first aid for the subject. He did not call for an ambulance for Mr. Smith as he did not see any injury to Mr. Smith nor did Mr. Smith express being injured to him.
- PC Otchere recalled Mr. Smith complaining his handcuffs were too tight and PC Hearnden loosened them.
- Mr. Viscardi or the owner of the Mazda never made a damage claim for the dent to the hood.
- PC Otchere recalled that everyone had to raise their voices that evening due to highway noise.

Cross Examination - Mr. Smith

- PC Otchere agreed it was possible that a blow to the head could cause glasses to fall off.
- Mr. Smith asked if PC Otchere would agree that when an individual is arrested they may be uncomfortable bringing up their injuries, visible or not, to the arresting officers. PC Otchere responded by explaining he could not be in the mind of individuals. In scenarios where people are hurt they have told him so he could get help but he was unsure how every individual would react.

Cross Examination - Mr. Kirsh

- On arrival at the scene PC Otchere did not see Mr. Smith. Eventually he saw Mr. Smith in the driver's seat of the Volkswagen with a cell phone in one hand and a CAA card in the other.
- At the time of the interaction PC Otchere believed Mr. Smith's head had hit the car. PC Otchere thought the dent was caused by Mr. Smith's head hitting the car but when he later saw the picture of the dent he did not believe it had been made by Mr. Smith's head.
- PC Otchere could not say Mr. Smith's head definitively hit the hood but he assumed his head had made contact.
- PC Otchere did not see PC Hearnden tap on the window of Mr. Smith's car. PC Otchere did see PC Hearnden open the car door. PC Otchere did not know why PC Hearnden opened the door but assumed it was to speak with the driver.

- PC Otchere asked PC Hearnden what was going on. PC Hearnden advised he did not know.
- PC Otchere did not consider the call for service a traffic stop. It was dispatched as a motor vehicle accident and was changed to a disabled vehicle call.
- PC Otchere saw PC Hearnden open the door then the door was shut on him (Hearnden), then PC Hearnden opened the door and began to remove the driver. PC Hearnden had enough control of the driver to remove him from the vehicle.
- Mr. Smith was moving his limbs about and was yelling. PC Otchere did not feel PC Hearnden had complete control of Mr. Smith. Mr. Smith's arms were moving about.
- PC Otchere did not feel Mr. Smith was going to flee but believed he was resisting arrest. Mr. Smith was agitated not assaultive.
- PC Hearnden had Mr. Smith's left arm and PC Otchere, his right. PC Otchere described adjusting his hands and striking Mr. Smith with his right forearm to Mr. Smith's upper right shoulder area.
- PC Otchere said that when PC Hearnden was reaching for his handcuffs he only had one arm on Mr. Smith and may have lost control of Mr. Smith. PC Otchere felt he and PC Hearnden were disadvantaged as Mr. Smith had not stopped resisting. They maintained control of Mr. Smith.
- PC Otchere described PC Hearnden as a "big guy" at 6 foot 4 inches and about 250 pounds.
- PC Otchere disagreed that Mr. Smith's head was pushed into the hood of the car with a hand.
- There was no reason for stopping at the Mazda. PC Otchere and Hearnden could have brought Mr. Smith to the police car but things happened very fast.
- At the time of the incident PC Otchere thought the dent was caused by Mr. Smith's head but when he later saw the photograph of the dent he did not think it could have been caused by a head. PC Otchere was uncertain whether this issue was raised at the criminal trial. He could not recall if it was or not.
- Mr. Smith was not charged with assault. This was PC Hearnden's decision. PC Hearnden had explained that Mr. Smith had calmed down and he chose not to charge him.
- PC Otchere did not interview any witnesses.
- PC Hearnden never struck Mr. Smith.

Part III: SUBMISSIONS, ANALYSIS AND FINDINGS

The following are to be considered an overview and are not to be considered a reproduction of all submissions.

Summary of Defence Submissions

- The conduct of PC Otchere that is in question was merely a period of seconds rather than a prolonged course of conduct.
- PC Otchere was assisting PC Hearnden as he believed PC Hearnden had been assaulted.
- The force used was reasonable and proportionate.
- This was the third time PC Otchere had given evidence in relation to his conduct.
- Despite being a subject officer, PC Otchere provided the SIU with a cautioned statement.
- At the conclusion of the SIU investigation PC Otchere was not charged and has been forthright throughout this matter.
- PC Otchere is not charged with deceit, there were no issues raised with his notes and he was not charged with using excessive force.
- This proceeding is not a credibility contest, there were no witnesses from the scene called, no medical evidence, no forensic evidence regarding the dent. The authenticity of the photograph has not been verified.
- PC Otchere raised the issue regarding the dent with his sergeant and the owner of the vehicle at the scene which was indicative of good faith.
- The dent is not indicative of one made by a person's head.
- Mr. Girvin reviewed the 12 points depicted on the NOH.
- There are no cases decided by the Ontario Civilian Police Commission regarding section 5(2) of the *Ontario Evidence Act* because it is not appropriate to rely on transcripts. No weight should be placed on the transcripts of the criminal trial.
- There is insufficient evidence to conclude Mr. Smith's head hit the car.
- There is no evidence to support Mr. Smith's injury claim and his testimony is hearsay.
- The fact that PC Hearnden was found guilty of assault does not transfer to PC Otchere.
- The Judge's decision that PC Hearnden had no lawful authority to open the door is of limited assistance in this proceeding.
- Zero weight should be given to the transcript of the Judge's decision.
- The force used by PC Otchere in the brief seconds the interaction took was entirely reasonable.
- Regarding credibility, two persons can give different recounting of what happened. In this case, Mr. Smith and PC Otchere testified and there were no clear false statements.
- Mr. Smith has an admitted faulty memory.
- Mr. Smith would not accept the suggestion he was tense and insisted both officers had complete control.
- Mr. Smith did not mention his injuries or that his head hurt.
- Mr. Smith's recollections cannot be proven.
- Mr. Girvin discussed the "thin skull" principle and suggested Mr. Smith had suffered

previous concussions leaving him more susceptible to concussions.

- Officers are not at liberty to shirk their responsibilities. If PC Otchere had done nothing and something occurred due to his lack of involvement, he could have been scrutinized.
- PC Otchere had little time to do a fulsome assessment of the situation which was stressful due to live traffic and other circumstances.
- PC Otchere made a split-second decision to assist PC Hearnden to handcuff Mr. Smith and the force PC Otchere used was proportionate.
- The officers were trying to overcome resistance and there is no dispute they were yelling “stop resisting.”
- Mr. Smith’s conduct could be considered “failing to cooperate.”
- It is impossible to handcuff someone who does not want to be.
- PC Otchere employed a single strike or push which facilitated the ability to put the handcuffs on Mr. Smith.

Defence Case Law Submissions⁸ (*In addition to oral submissions my analysis is included*):

Crompton v. Walton

The background in this civil matter involved the police executing a search warrant at the wrong residence due to faulty intelligence. Mr. Crompton, the subject of the erroneous search, suffered a bruised jaw, a rotator-cuff injury and five cracked ribs. Following a lawsuit, Mr. Crompton was awarded damages.

Excerpts:

[44] Police officers act in dangerous and unpredictable circumstances. No doubt a trained police officer will have instructions and a game plan to follow when entering premises to execute a search warrant. But the officer will have to react to the circumstances that present themselves. Accordingly, police officers will be exempt from liability “if they use no more force than is necessary having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves”: Levesque v. Zanibbi, 1992 CarswellOnt 2832 at para. 17 (Ct. J. (Gen. Div.)).

I am reminded that the matter before me occurred on the side of highway 401, one of the busiest highways in Canada and PC Otchere had safety concerns for he and others in the vicinity. In addition, PC Otchere did not have the benefit of time to formulate a “game plan” as did the officers in *Crompton*. I am also instructed to consider the reasonableness of the amount of force

⁸ Exhibit 15: Defence Book of Authorities

used under the circumstances.

[45] Police officers are not expected to measure the precise amount of force the situation requires: ... Nor will they be denied the protection of s. 25(1) if they fail to use the least amount of force that would achieve the desired result. Allowance must be made for an officer, in the exigency of the moment, misjudging the degree of necessary force...Accordingly, the immediate decisions a police officer makes in the course of duty are not assessed through the "lens of hindsight"...

I find instruction in this passage regarding the Court's caution in not applying hindsight to a decision an officer makes at the time of a particular interaction. I am aware through experience and training that the reasonableness of an officer's conduct must be examined considering the circumstances that existed at a particular time. An officer is expected to use their judgment and to make quick, spur of the moment decisions in the course of their duties on many occasions and under a broad scope of scenarios. It is essential to examine the circumstances under which the officer was faced with and acted at the time the incident occurred. I must take my mind to the circumstances PC Otchere was faced with at the time and not restrict my analysis solely with the benefit of hindsight.

Levesque v. Sudbury Regional Police

Excerpts:

"With respect, I disagree that the law imposes such an obligation on police officers effecting a lawful arrest. In my view, the test to determine whether the officers used only as much force as was necessary is best expressed by Stevenson J. in Breen vs. Saunders et al. N.B.Q.B. at pg. 277, where the following passage is found:

"Was it more force than was necessary? A policeman's job is not an easy one. However, it is his lot to have to deal with persons who, fortified by drink, obstruct and provoke them while they are carrying out their duties. Mr. Justice Dickson, in Foster vs. Pawsey said: "Some allowance must be made for an officer in the exigencies of the moment misjudging the degree of force necessary to restrain a prisoner." The same applies to the use of force in making an arrest or preventing an escape. Like the driver of a vehicle facing a sudden emergency, the policeman "cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course." C.P. Ltd. vs. Gill (emphasis added)"

Although PC Otchere is not specifically alleged to have used excessive force, the above passage offers the acknowledgement of the challenges police officers face and suggests the avoidance of applying hindsight to an officer's actions.

“It is both unreasonable and unrealistic to impose an obligation on the police to employ only the least amount of force which might successfully achieve their objective. To do so would result in unnecessary danger to themselves and others. They are justified and exempt from liability in these situations if they use no more force than is necessary having regard to their reasonably held assessment of the of the circumstances and dangers in which they find themselves”.

Part of the allegations of misconduct against PC Otchere included that PC Hearnden did not have lawful authority for his actions and therefore neither did PC Otchere. The above excerpt is focused on the amount of force used, not specifically at issue in the matter before me, but offers guidance with respect to “having regard to their (an officers’) reasonably held assessment of the circumstances and dangers in which they find themselves”.

R. v. Creary

The underlying facts in *Creary* are not analogous to the matter before me. Use of force was, again, at issue in *Creary*. Use of force is linked to the allegations against PC Otchere but is not specifically alleged to have been excessive. The Court did offer insights for my consideration as follows:

[10] A police officer is entitled to use “such force as may be necessary” to effect an arrest, and to ensure that the arrest is maintained.[4] This includes the use of reasonable force to prevent the detainee from fleeing.[5] However, the degree of force used must be “no more than is reasonably necessary.”[6]

[11] In describing the legal standard for the use of force by police, the Supreme Court of Canada held in *R. v. Nasogaluak*:

...While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness.

[12] Officer safety is a factor justifying the use of force in subduing a person under arrest. In *Nasogaluak*, the Supreme Court emphasized the importance of assessing the police conduct within the context of the exigent circumstances they were facing, stating:

Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent

circumstances. As Anderson J.A. explained in *R. v. Bottrell* (1981, 1981 CanLII 339 (BC CA), 60 C.C.C. (2d) 211 (B.C. C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude.

[14] In *R. v. Magiskan*, Zelinski J. of this Court set out a useful list of relevant factors to consider in considering an allegation of excessive force by the police, which I adopt, as follows:

- the nature and seriousness of the offence for which the arrest is being made (one does not engage a bulldozer when a flyswatter is sufficient).
- the certitude of the fact of the offence which is the basis of the arrest having taken place (Persons are presumed to be innocent until proven guilty. The more that is known about the circumstances that establish guilt, the more thorough the inquiry, the more complete the objective evidence and the more reasonable the grounds upon which the arrest is made are important considerations which govern necessity and reasonableness).
- the need for detention as an aspect of intervention;
- the protection of the officers and other persons from violence;
- the prospect of flight/escape;
- the likelihood of continuation/resumption of offending conduct;
- the apparent physical condition of the person being arrested and/or alleged victims;
- police modules and training affecting the use of force;
- the prospect of escalation and retaliation;
- knowledge of the identity and access to the person to be arrested; (A person who is to be arrested does not, of necessity, have to be arrested at that time and place if use of force is contemplated when it is reasonable that this can be accomplished on another occasion without violence or with less violence);
- the nature and extent of the force reasonably contemplated as likely to be necessary;

- other exigent circumstances.

I reiterate, use of force is part of the allegations before me, however, there is no specific allegation that the force used was excessive. The allegation is that the use of force was not authorized. I may apply other principles excerpted as applicable to my further analysis.

Hewitt and Devine and the Toronto Police Service

The underlying facts in this matter are not specifically analogous to the matter before me and involve allegations of neglect of duty. The case revisits the issue of not applying hindsight when considering an officers' conduct addressed elsewhere.

Fenton, Supt. Mark v. Toronto Police Service

Fenton related to arrests at the 2010 G20 protests. Superintendent Fenton was an incident commander.

As is often the case in police disciplinary matters the underlying facts in *Fenton* are not at all similar to those in the matter of PC Otchere.

Mr. Girvin directed my attention to paragraph 108:

[108] In support of that submission, the appellant cited the following passage from Allen v. Alberta (Law Enforcement Review Board), 2013 ABCA 187 that good faith is a consideration to be taken into account in considering whether an officer is guilty of misconduct.

It cannot be the case that a Charter breach is ipso facto a disciplinary offence, because it would mean that mere errors in judgment or carelessness would inevitably rise to the level of discreditable conduct....there must be some meaningful level of moral culpability in order to warrant disciplinary penalties.

I note that the Ontario Civilian Police Commission (ONCPC), in the context of the submission put before them in *Fenton*, addressed the issue as follows:

[109] The Hearing Officer dealt with this argument at paragraphs [394-395] of his decision. He noted that even where a police officer acts in good faith, a misapprehension

of the law would not be sufficient to save him or her from a finding of misconduct for arresting an individual without reasonable and probable grounds.

In the matter of PC Otchere, he was assisting PC Hearnden who was the officer who initiated the arrest and, I infer, it was PC Hearnden who formed the grounds to arrest that were determined by the Court to be erroneous and unsupported. The evidence was clear that PC Otchere saw PC Hearnden take control of Mr. Smith and physically remove him from the car. PC Otchere testified he assumed or deduced that PC Hearnden was arresting Mr. Smith following the car door being shut and striking PC Hearnden's knee. The evidence was clear that PC Otchere's actions that followed were in an assistive role to PC Hearnden. There was no evidence that PC Otchere participated in the decision to arrest Mr. Smith or in the determination of grounds to arrest Mr. Smith.

The issue of *Good Faith* and the *Ancillary Powers Doctrine* sometimes referred to as the *Waterfield Test* were addressed as follows:

[115] The powers and duties of police officers arise from both common law and statute. Certain common law duties have now been codified in sections 42(1) and (3). The ancillary powers doctrine refers to those residual powers existing at common law. The doctrine was described in *R. V. Mann*, [2004] 3 S.C.R. 59 at paragraph 24.

The test for whether a police officer has acted within his or her common law powers was first expressed by the English Court of Criminal Appeal in *Waterfield*.....From the decision emerged a two-pronged analysis where the officers conduct is prima facie an unlawful interference with an individual's liberty or property. In those situations, courts must first consider whether the police conduct giving rise to the interference falls within the general scope of any duty imposed on the officer by statute or at common law. If this threshold is met, the analysis continues to consider secondly whether such conduct, albeit within the scope of such duty, involved an unjustified use of powers associated with the duty [emphasis added].

[116] In order for a police power to be justifiable in a given context, "[t]he interference with liberty must be necessary for carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference."

Further analysis:

[125] ... decision in *Gillespie v. Shockness*, Ont. Bd. Inquiry, 27 September 1994 as providing some guidance as to when an officer's actions may amount to discreditable

conduct. At page 14 the Board wrote the following:

Further, the Board finds that community standards (which are an element of the test of whether an officer's actions bring discredit upon his or her police force) require that there must be some element of subjective misconduct by an officer before making a finding against that officer. A technical breach of the law made in good faith would not be found by any reasonable person in the community to bring discredit upon that officer's force. At the same time, bad faith need not be proven in every case either, as in many cases recklessness or a high level of negligence may be sufficient."

I am guided by the principles outlined in paragraph 25 that there must be an element of subjective misconduct and that a breach of the law, may not, by default, constitute misconduct. As I consider discreditable conduct, I must do so from the perspective of the reasonable person in the community. I must also consider if recklessness or a high level of negligence were related to the behaviours of PC Otchere.

Stevenson v. Bryson, Green and Durham Regional Police Service

Mr. Girvin cited the following regarding the test for discreditable conduct:

[30] The Hearing Officer referred to a number of decisions that describe the test for Discreditable Conduct starting with *Toy v. Edmonton (City) Police Service*, where the Court wrote the following:

The Presiding Officer articulated what counsel agreed was an acceptable test for determining discreditable conduct. In sum, the test involves an objective evaluation as would be made by a dispassionate reasonable person fully apprised of the circumstances and with due regard for any applicable rules and regulations (or law) in force and with due regard for good faith considerations where the officer under scrutiny was required to exercise discretion under the circumstances.

[31] This test in a slightly modified form has been adopted by the Commission in a number of cases including *Mulligan v. Ontario Provincial Police*, 2017 ONCPC 19 and *Mulville and Azaryev and York Regional Police Service*, 2017 CanLII 19496 (ON CPC) where the Commission stated the test as follows:

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

[32] This test must be read in conjunction with section 2(1)(a)(xi) of the *Code of Conduct*, which sets out the Discreditable Conduct occurs when an officer “acts in a disorderly manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force of which the officer is a member”.

I will apply the test as depicted in paragraph 31.

Nobody v. Adams, Donaldson, Fardell, Simpson, Toronto Police Service and the Office of the Independent Police Review Director

Nobody related to arrests at the 2010 G20 protests.

The following paragraphs were cited by Mr. Girvin. The import of the excerpts are addressed elsewhere:

“[25] The Hearing Officer then wrote the following:

Obviously if more force is used than necessary that amounts to an assault. Proportionality, necessity and reasonableness are the constraining principles. The police do not have the unlimited power to inflict harm in the execution of their duties.

[26] He then adopted the following quotation from *R. v. Nasogaluak*, 2010 SCC 6 (CanLII), [2010] 1 S.C.R. 206:

Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances”.

Rose, Arcand, Liburd, Correa, Fuller v. Toronto Police Service and Adam MacIsaac and Office of the Independent Police Review Director

Rose et al is another matter relating to the 2010 G20 protests.

Mr. Girvin pointed to the following excerpt. Many of the principles identified are addressed elsewhere in this decision:

“[48] *There is no analysis in the decision of the Hearing Officer to show if Cst. Fuller’s actions rose to the level of discreditable conduct. Not all breaches of a policy automatically give rise to a conviction. The test for Discreditable Conduct is an objective one to be considered from the viewpoint of a dispassionate, reasonable person fully*

apprised of the facts: Mulville and Azaryev and York Regional Police Service, 2017 CanLII 19496 (ONCPC). A technical breach of the law made in good faith would not be found by any reasonable person in the community to bring discredit upon that officer's police force: See Gillespie v. Shockness. (September 27, 1994 Bd. Of Inquiry)".

Summary of Public Complainant Submissions

- PC Otchere agreed in his testimony that Mr. Smith was not kicking, punching or biting the officers.
- PC Otchere acknowledged striking Mr. Smith on the shoulder with his forearm and that he had control of Mr. Smith at that time.
- At no time did PC Otchere testify that the officers lost control of Mr. Smith or his body.
- Mr. Smith was not told he was under arrest or being detained until he was in the back of the police cruiser. He had no clue until that point why the officers were acting the way they were.
- Mr. Smith's referred to the reasons for judgement in PC Hearnden's criminal trial. He referenced the fact that the Court found his head had been slammed into the car and that there was a dent.
- Regarding defence counsel's discussion about Mr. Smith speaking to his father, Mr. Smith confirmed he spoke to his father about the incident and it was addressed in two areas of prior testimony.
- PC Otchere agreed it was plausible that after an aggressive arrest a person may be uncomfortable in discussing their injuries with the police officers who arrested them.
- Mr. Smith acknowledged he understood that it was PC Otchere's actions and not PC Hearnden's that are at issue. The Court did not accept PC Hearnden's account.
- PC Hearnden was 6 foot 4 inches and 250 pounds and the officers never lost control of Mr. Smith during the arrest.
- Mr. Smith assumed there was training available on how police can subdue a civilian.
- Mr. Smith felt unprepared for the hearing. Mr. Smith thanked all present.

Summary of Prosecution Submissions:

- The facts as alleged amount to discreditable conduct; the evidence is clear and convincing.

- Justice Shandler’s decision in criminal Court cannot be relitigated and directed my considerations to the *doctrine of abuse of process* found at tab 7 in the prosecution book of authorities (BOA)⁹.
- The facts that, PC Otchere was not an accused person, PC Hearnden had no authority to arrest Mr. Smith and his actions were not supported, Mr. Smith did not assault PC Hearnden, PC Hearnden assaulted Mr. Smith, are not open to relitigation. This tribunal cannot undermine the Court or cast a shadow on the Court’s decision.
- With respect to credibility and reliability, Mr. Kirsh invited me to review *Faryna v. Chorny* (Tab 4 BOA) and other cases. (see below for analysis)
- Mr. Smith was a credible and reliable witness. He was candid about his memory loss but was able to recall most of what happened. Mr. Smith’s evidence was clear and concise and when he could not remember something he would say so.
- The fact that Mr. Smith’s head hit the car is something that would stick out in his mind.
- Mr. Smith was adamant he was not resisting. He was not told he was under arrest. His head was slammed into a car hood. He would not forget this.
- Mr. Smith could not say which officer pushed his head onto the car as his back was to them. He went to the hospital and was diagnosed with a concussion. He mentioned clumps of hair having been pulled out and his earring having been ripped out when he was at the hospital.
- Mr. Smith is a credible witness and his evidence should be accepted.
- Transcripts should be given full weight as they contain an admission by PC Otchere.
- Regarding the admission of transcripts from Court, Mr. Girvin had suggested 5(2) of the *Ontario Evidence Act* had not been addressed by OCPC because it does not somehow apply. Mr. Kirsh opposed this suggestion and indicated that it is just as likely that the issue had simply not been raised before. Statements made under oath are admissible and reliable. The hearsay rule does not apply to admissions.
- Cited the *Foreman* at paragraph 37 (additional case submitted) which addressed the admissibility of admissions.
- Encouraged me to read the entire transcript and directed my attention to exhibit 8 pages 111 and 112 where PC Otchere described striking Mr. Smith and that his head might have hit the hood of the car.
- PC Otchere acknowledged he never told Mr. Smith he was under arrest and he did not hear PC Hearnden telling Mr. Smith he was under arrest.
- PC Otchere “waffled” as to whether Mr. Smith was under control but then acknowledged they had him under control.
- Mr. Kirsh referred to the point in PC Otchere’s testimony when questioned about PC Hearnden had one arm or two arms on Mr. Smith and PC Otchere, in testimony suggested it was incorrect and may be a transcription error.

⁹ Exhibit 16: Prosecution Book of Authorities

- PC Otchere's evidence was inconsistent and evasive.
- The force PC Otchere used was unnecessary and unreasonable.
- Referred to the *Jacob's* case (tab 5 BOA) paragraph 12, regarding the standard of proof in *PSA* disciplinary matters.
- This matter is not a credibility contest and findings should be made on evidence that is credible and reliable.
- *Carter* case tab 11, paragraph 43 speaks to the issue that not all particulars outlined in an NOH must be established.
- *Gerrard and Delaney*, tab 6, speaks to the test for discreditable conduct.
- Good faith can be a consideration in this case. *Wong* at paragraphs 27-29 (additional case submitted) indicated good faith is not the "be all and end all."
- Discreditable conduct does not require intent and an officer's conduct must be measured against the expectation of the community.
- *Saxon*, tab 2 page 14 regarding community expectations of police.
- PC Otchere ought to have known PC Hearnden's actions were unlawful.
- PC Otchere should never have struck Mr. Smith causing his head to slam into the hood of the car.
- The size of the officers played a role in what is reasonable. Stature and strength plays a role and should be considered.
- Applying force that is not necessary is discreditable conduct.
- This incident began as a disabled vehicle and PC Hearnden's unlawful removal of Mr. Smith from his car. PC Otchere acknowledged Mr. Smith was not being assaultive and was not trying to flee. There was no need to strike Mr. Smith.
- The photo of the dent is the position proposed by defence regarding shape and size is "straw man." No expert evidence was called regarding the dent.
- The evidence of Mr. Smith and admission of PC Otchere demonstrate there is clear evidence that discreditable conduct was committed.

Defence Counsel Reply

- It is improper for the prosecution to imply a concussion when no medical evidence was called.
- In Mr. Smith's submission's he referenced a transcript regarding the conversation he had with his father. Transcripts should not be relied on and are not evidence.
- Mr. Smith referenced the Judge's decision *Regina v. Ghorvei* (additional case submitted) discussed issues related to reliance of decisions and transcripts in other proceedings.
- There has been no attempt to relitigate anything.
- The prosecution ignored the event took place over a few seconds.
- Abuse of process is not applicable in this matter.

- It is not unusual for people who have had concussions to lose their memory.
- The earring, hair loss, and bleeding suggested by Mr. Smith shows the unreliability of his evidence.
- There is a lot of information in the transcripts that do not apply to the matter before this tribunal.

Prosecution Authorities

*Her Majesty the Queen v. Foreman*¹⁰

This was a criminal Court appeal decision addressing exceptions to the hearsay rule regarding admissions. While not bound by Criminal decisions I am certainly guided by principles and tenets found therein. The following excerpts are helpful in addressing objections made by defence counsel with respect to the admission of transcripts and questions related to past statements and/or testimony.

“[37] Admissions, which in the broad sense refer to any statement made by a litigant and tendered as evidence at trial by the opposing party, are admitted without any necessity/ reliability analysis. [See Note 1 at end of document] As Sopinka J. explained in *R. v. Evans*, 1993 CanLII 86 (SCC), [1993] 3 S.C.R. 653, 85 C.C.C. (3d) 97, at p. 664 S.C.R., p. 104 C.C.C.: [page216]

The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, “[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath” (Morgan, “Basic Problems of Evidence” (1963), pp. 265-6, quoted in McCormick on Evidence, *ibid.*, p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.”

Mr. Kirsh submitted that during Court testimony PC Otchere made an “admission” regarding his interaction with Mr. Smith. I note PC Otchere’s evidence before me did not substantially vary from his version in Court as it related to the NOH. As a lay person the term “admission” can carry connotations. I believe Mr. Kirsh to have been using the word admission in a legal sense. In any

¹⁰ Prosecution Authorities- Additional Case, *R vs Foreman*, 2002 CanLII 6305 (ON CA)

event, as addressed above, I admitted the transcripts as, among other reasons, they directly related to the allegations in the NOH against PC Otchere.

Wong and the Toronto Police ¹¹

There are some parallels in the underlying facts between the matter of PC Wong and PC Otchere. PC Wong was the arresting officer, who acted without proper grounds or authority. PC Otchere was assisting PC Hearnden who was the arresting officer in the matter before this tribunal. In addition to the portions cited by Mr. Kirsh I find additional instruction from the following:

20. The Hearing Officer as the trier of fact was required to act with care and caution and come to a fair and reasonable conclusion that Const. Wong was guilty of misconduct. The evidence to reach this conclusion must be weighty, cogent and reliable. However, the standard of proof remains the balance of probabilities: see Jacobs v. Ottawa Police, 2015 ONSC 2240 at paras. 37 and 41 (Div. Ct.). That does not change.

Jacobs v. Ottawa Police (cited above)

37] In 2008, the Supreme Court of Canada, in *McDougall*, looked at the “clear and convincing evidence” test in professional discipline cases. The Court stated, at paragraph 46, that “Evidence must always be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test.” The Court’s conclusion was that “clear and convincing evidence” related to the nature of the evidence required to justify the standard of proof, rather than to the recognition of a different standard. In our view it stands as a warning message that, to meet the balance of probabilities test, the *quality* of the evidence must be sufficiently clear and convincing. The *sufficiency* of the evidence is met when it establishes an issue on a balance of probabilities. *McDougall* squarely rejected the existence of an intermediate standard of proof.

[41] In *McDougall*, the Supreme Court had specifically rejected the existence of an intermediate standard. Accordingly, the remarks by the Court in paragraph 60 of *Penner* cannot be taken as their intention to overturn, vary, or modify their decision in *McDougall* in light of the fact that the issue was neither before the Court nor addressed by the Court in *Penner* on the basis of any jurisprudence. Therefore, it is my view that the civil burden of proof of a balance of probabilities has not been displaced by the s. 84 wording, requiring “clear and convincing evidence,” nor by the Supreme Court’s remarks in the *Penner* decision.

¹¹ Prosecution Authorities - Additional Case, *Wong and Toronto Police Service*, 2015 ONCPC 15 (CanLII)

The following are key to the assessment of evidence and resulting findings and inferences in Ontario police disciplinary hearings.

“Evidence must always be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test”.

“In our view it stands as a warning message that, to meet the balance of probabilities test, the *quality* of the evidence must be sufficiently clear and convincing. The *sufficiency* of the evidence is met when it establishes an issue on a balance of probabilities”.

To me, as a lay person tribunal adjudicator, saying something is proven on a balance of probabilities means that it is more likely than not to have occurred. I have heard the analogy used that the scales of justice are perfectly balanced, but when tipped to one side or another the balance (of probabilities) is identified. To find an imbalance, the evidence must be clear, convincing, cogent and reliable.

“27. ... whether there was good and sufficient cause – requires a more nuanced analysis. The lack of objective grounds for the arrest is relevant but it is not necessarily determinative. It requires an analysis of other factors including the officer’s subjective belief. To be clear... acting in good faith does not necessarily satisfy the requirement of good and sufficient cause required by section 2(1)(g)(i) of the Code of Conduct: Wowchuk and Bernst v. Thunder Bay Police Service, (October 2, 2013 OCPC). It is merely one of the considerations, and each case must be examined on its own merits”.

Good faith is a consideration available for deliberation but should not be viewed in isolation. I observe that the above related to unnecessary/unreasonable use of force and not specifically to discreditable conduct.

“29... As indicated above we disagree that good faith alone on the part of the officer committing the breach or a subjective belief of good and sufficient cause necessarily satisfies the requirements of good and sufficient cause required by section 2(1)(g)(i) of the Code of Conduct”.

*R. v. Nasogaluak*¹²

In this matter the facts are significantly more palpable with a notably higher degree of aggression than the matter of PC Otchere. Two officers punched and kned Mr. Nasogaluak several times resulting in significant injuries. The accused received a reduced sentence, upheld on appeal, as a result of the officers having used excessive force.

¹² Prosecution Authorities - additional case, *R. v. Nasogaluak*, 2010 SCC 6 (CanLII), [2010] 1 SCR 206

Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter.

Section 25(3) ...The officer's belief must be objectively reasonable. This means that the use of force under s.25(3) is to be judged on a subjective-objective basis (*Chartier v. Greaves*, [2001] O.J. No. 634 (Ont. S.C.J.), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.

35 Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *Bottrell v. R.* (1981), 60 C.C.C. (2d) 211 (B.C. C.A.): In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

In the matter before this tribunal, the prosecution suggested that when an officer uses excessive force or force that is not authorized it equates to discreditable conduct. Defence counsel pointed out PC Otchere was not charged with using excessive force for which there is a specific subsection under the code of conduct. With the respective positions in mind, I consider *Nasogaluak* clearly involves the excessive use of force, severe to the point where the Supreme Court of Canada upheld the reduction in a criminal sentence.

I find the excerpted portions of the *Nasogaluak* decision instructive in my consideration of the allegations against PC Otchere including:

- The grounds for an officers' actions and the amount of force used require analysis.
- The belief of the officer must be objectively reasonable. To me, this means that I take the view of a theoretical reasonable person in our community placing themselves in the place of the police officer at the time of an interaction. Would this person find the officer's actions and conduct reasonable under those circumstances? The subjective reasonableness is more nuanced in that I must assess whether PC Otchere's account of his intentions at the time, what transpired and the actions he took were reasonable under the circumstances.

- The actions taken by PC Otchere ought not be viewed through the lens of expected perfection. Although investigations and a Court decision revealed that PC Hearnden's actions were not grounded in or supported by the law it is the actions and behaviour of PC Otchere under consideration. Were PC Otchere's actions reasonable under the circumstances he faced at the moment of interaction with Mr. Smith or were they unreasonable, unsupported, and did they rise to the level of misconduct?

Prosecution Book of Authorities¹³

1. *Burrows v. Ontario Provincial Police*

At paragraph 62 ONCPC cited the *O'Hallaran Test* found in *Faryna v. Chorny* which stated:

The credibility of interested witnesses, particularly in a case of conflict in evidence must be reasonably subjected to an examination of the consistency of their stories with the possibilities that surround the currently existing of a witness in such cases must be its harmony with the preponderance of the probabilities, which a practical and informed person would readily recognize as reasonable in that place under those conditions.

At paragraph 63 ONCPC made clear that a hearing officer must not simply enunciate *the test* but it must be properly applied.

2. *Saxon v. Amherstburg Police Service*

At page 8 of the decision ONCPC affirmed the correct test for discreditable conduct is:

The most recent application of the test for discreditable conduct in Ontario confirms that the test is "primarily an objective one" and that the conduct must be measured against the "reasonable expectations of the community". The Ontario Civilian Commission on Police Services has articulated the following approach regarding the meaning of "likely" to bring discredit upon the reputation of the police force: The measure used to determine whether conduct has been discreditable is the extent of the potential damage to the reputation and image of the service should the action become public knowledge.

I will apply this test as an integral part of my ultimate decision.

At page 10 ONCPC wrote:

¹³ Exhibit 16: Prosecution Book of Authorities

Behaviour, including tone of voice and body language can be sufficient to establish incivility.

I will consider whether this tenet applies to the matter of PC Otchere.

At page 14 ONCPC wrote:

...we agree that the public expects police officers to be held to the highest level of civil conduct. When this does not occur, the public has a right to be concerned and discredit to the reputation of a police service may result.

3. *Susan Mancini and Constable Martin Courage of the Niagara Regional Police Service*

The prosecution highlighted the test for discreditable conduct similar to that which is addressed elsewhere in this decision.

Further principles were identified:

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

94. It is not even necessary that the conduct in question offend, frighten or be "vexatious" to the individual who is the object of the action in question. This is reflected in a number of Commission decisions. An example is Burdett and Guelph Police Service (13 May, 1999, O.C.C.P.S.).

4. *Faryna v. Chorny*

In addition to the O'Hallaran *test* discussed above, the following paragraph offers insight as to how the test should be applied.

11. The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a Court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others but is based on all the elements by which it can be tested in the particular case.

5. *Jacobs v. Ottawa (Police Service)*

Analysis above.

6. *P.C. William Delaney and the Durham Regional Police*

The prosecution highlightd areas of this case related to discreditable conduct addressed elsewhere in this decision.

7. *Toronto (City) v. C.U.P.E., Local 79*

This case was submitted by the prosecution in relation to issues of *estoppel* and abuse of process. There is overlap between the disciplinary matter before this tribunal and the settled criminal matter resulting in the conviction of PC Hearnden. This tribunal must not relitigate or make findings or inferences that would undermine the previous Court decision.

23 Issue estoppel is a branch of *res judicata* (the other branch being *cause of action* estoppel) which precludes the relitigation of issues previously decided in Court in another proceeding.

37 ... Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

38... The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

I intend not to revisit the decision of the Court that would in any manner be considered re-litigation or would otherwise undermine the integrity of the court's decision.

8. *R. v. Hearnden* (and underlying decision)

This is the appeal of conviction and sentence decision regarding PC Hearnden's criminal conviction. I have read the decision in entirety. I do not find it assistive to offer further analysis.

9. *Polgrain Estate v. Toronto East General Hospital*

This case addresses comparable issues as in *Toronto (City) v. C.U.P.E., Local 79*. I have reviewed the case in entirety. I do not find it assistive to offer further analysis.

10. *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services*

The Divisional Court in *Pitts* has identified the following features for me to consider in making credibility assessments:

- *The appearance and demeanour of the witness, and the manner in which he testified. Did the witness appear and conduct himself as an honest and trustworthy person? It may be that he is nervous or confused in circumstances in which he finds himself in the witness box. Is he a man who has a poor or faulty memory, and may that have some effect on his demeanour on the witness stand, or on the other hand, does he impress the tribunal as a witness who is shifty, evasive and unreliable?*
- *The extent of his opportunity to observe the matter about which he testified. What opportunities of observation did he in fact have? What are his powers of perception?*
- *Has the witness any interest in the outcome of the litigation?*
- *Does the witness exhibit any partisanship, any undue leanings towards the side which called him as a witness? Is he a relative, friend, an associate of any of the parties in this case, and if so, has this created a bias or prejudice in his mind and consequently affected the value of his testimony?*
- *It is always well to bear in mind the probability or improbability of a witness' story and to weigh it accordingly. That is a sound common sense test. Did his evidence make sense? Was it reasonable? Was it probable? Does the witness show a tendency to exaggerate in his testimony?*
- *Was the testimony of the witness contradicted by the evidence of another witness, or witnesses whom the tribunal considered more worthy?*
- *Does the fact that the witness has previously given a statement that is inconsistent with part of his testimony at trial affect the reliability of his evidence?*
- *After weighing these matters and any other matters that the tribunal believes are relevant, it should decide the credibility or truthfulness of the witness and the weight to be given to the evidence of that witness.*

I acknowledge assessing demeanour, described in the first bullet above, must be done with caution as this line of assessment on its own can be inaccurate and unreliable. The decision suggests filters through which testimony can be viewed before arriving at conclusions.

11. *Carter v. Ontario Provincial Police*

The following excerpt serves as a reminder that every particular in the NOH need not be established or proven by the prosecutor for a finding of misconduct.

[43] The appellant submitted that the Hearing Officer erred when he decided that the withdrawal of the criminal charges was irrelevant as they were referred to in the Notice of Hearing. No authority was cited by the appellant on this submission. A prosecutor need not establish every particular set out in a Notice of Hearing to successfully establish misconduct. We see no error on the part of the Hearing Officer when he wrote that “the conduct of the officer is at issue and not the fact that criminal charges were initiated.”

I find the following paragraph instructive in that it confirms the appropriateness, in some circumstances, for a hearing officer to consider the circumstances and the emotional state of an officer at the time the misconduct occurred.

[41] In our view, under the circumstances, an inference of anger on the part of the appellant was a reasonable one for the Hearing Officer to have drawn. He read the text messages from the appellant and heard the evidence of Cst. Peck and Jordyn.

Issue- Credibility and Reliability of Witnesses

I consider credibility, from a lay person’s perspective, to be when a witness presents that they sincerely believe they are speaking the truth. Reliability relates to the actual accuracy of their testimony. In determining this, I consider a witnesses ability to accurately observe, recall and recount the events in issue. A credible witness may give, in some cases, unreliable evidence.

In assessing credibility, I turn my mind to and was guided by the established principles outlined in jurisprudence provided or referenced by the parties in their submissions. I am guided by the tenets therein.

I am reminded through submissions and otherwise that this matter should not be addressed or viewed as a credibility contest. PC Otchere’s guilt or innocence is assessed through the established standard of proof in *Police Service Act* hearings; clear and convincing, based upon all evidence heard. Guilt or innocence should not be based on credibility findings in isolation. The issue of guilt or innocence and credibility and reliability, while inter-related, need to be addressed individually. The onus is on the prosecution to prove their case by said standard of proof. There is no onus or obligation on PC Otchere to prove his innocence.

D/Sgt. Medeiros' credibility and reliability was not challenged. Defence counsel questioned aspects of Mr. Smith's evidence and prosecution challenged aspects of PC Otchere's evidence.

Having reviewed transcripts of the criminal trial and His Honour's reasons for judgement I am aware that the Court raised concerns with the evidence of Mr. Smith, PC Hearnden, and PC Otchere. I may not echo or appear to adopt the court's position. This is not because I disagree in any way, but because this is a police disciplinary tribunal, an entirely different and distinct process, different circumstances, within a distinct context. The Court was primarily focussed on the actions, decisions and behaviour of PC Hearnden with respect to a criminal allegation. I am primarily focused on the actions, decisions and behaviour of PC Otchere with respect to discreditable conduct under the *Police Services Act*.

Mr. Smith acknowledged his faulty memory as a result of having suffered multiple concussions. He has testified in the criminal proceedings and has received disclosure in relation to this tribunal. He has had the opportunity to refresh his memory as has PC Otchere. Mr. Smith did not hesitate to say he did not recall a particular issue and did not overtly go out of his way to testify in a manner that was exaggerating or overstating his experience. There was no point where I found Mr. Smith's faulty memory, on its own, adversely effected his response to questions. For example, Mr. Smith said he did not know which officer pushed his head into the car as his back was to the officers even though, at the point he testified, he knew PC Otchere was the officer that struck his upper back/shoulder area from the Court trial.

Mr. Smith indicated he discovered at the hospital that his earring had been pulled out of his ear and his hair had been pulled out. He did not recall telling hospital staff this, but he did recall finding the injuries. Mr. Smith did not elaborate on this point to any degree, he did not blame the officers specifically, while generally attributing the injuries to the interaction with PC Hearnden and PC Otchere. This is the type of scenario where witnesses are often tempted to, intentionally or otherwise, aggrandize or add emphasis to support their assertion. Mr. Smith did no such thing. This is but one example of Mr. Smith presenting as having been "matter of fact" well spoken and, for the most part, fair and unemotional in his testimony.

Both PC Otchere and Mr. Smith had uncomfortable moments when testifying, Mr. Smith, on occasion did not directly or without hesitation, answer defence counsel's questions. There was a moment when the prosecution asked PC Otchere about the actions of PC Hearnden and referenced a transcript of a prior proceeding. PC Otchere seemed taken aback by what had been transcribed and suggested there may have been an error in transcription. These are examples of, what I consider, difficulties in testimony but did not directly speak to the issues related to the allegations in the NOH. The slight foibles of both PC Otchere and Mr. Smith could theoretically be attributed to the amount of time that has passed since the incident occurred and

perhaps inexperience as a witness. I did not consider these issues to impugn or undermine credibility.

Finding

I found both PC Otchere and Mr. Smith to have given credible and reliable evidence in relation to the allegations in the NOH. A careful review of each witness's testimony revealed that both recounted a very similar description of the events. The testimony diverged, for example, when Mr. Smith described himself as being upset and apprehensive but not tense or resistant of the officers. Mr. Smith's recollection that he felt the officers had "complete control of his body" is accepted. Likewise, I accept PC Otchere's testimony that he felt Mr. Smith was not completely cooperative with the arrest procedure and handcuffing.

PC Otchere described Mr. Smith as having been tense, his arms were moving about, and he was shouting etc. Both witnesses, in my view, having watched and listened carefully to their testimony, were essentially saying the same thing with the distinctions being attributable to perception and perspective.

To me a person's perception is an observation, idea, thought, or awareness of an event or incident which is interpreted through the individuals' experience, knowledge and capacity to understand what is before them. It is a decision a person arrives at "in the moment". Perceptions may remain unchanged or may be adjusted with the benefit of hindsight. Perspective, in my opinion as it relates to the misconduct allegation before me, is the viewpoint and resulting perception influenced and informed by the distinct roles and intentions of Mr. Smith and PC Otchere at the time.

I accept Mr. Smith describing himself as being upset, apprehensive, and possibly fearful at the time of his interaction with the officers. The emotions experienced and associated personal presentation by Mr. Smith may well have been perceived as "tense". It is reasonable to accept that his arms and body may well have been braced or tensed up, a natural physiological response to significant angst or fear. As a result of his apprehension Mr. Smith may have been moving about to a degree. Other behaviours described could reasonably have been perceived as resisting in that Mr. Smith did not go limp or otherwise become completely compliant with the officers. This does not imply Mr. Smith intended to challenge, use force against, or repel the officers. The emotions he was experiencing could have generated the perception that he was less than compliant from PC Otchere's perspective. Indeed, the evidence, including the testimony of PC Otchere, made clear that Mr. Smith was not trying to escape from, nor assault or physically fight with the officers. The officers were apparently having difficulty applying the handcuffs.

Mr. Smith's perception was that the officers had complete control of him. This is not entirely contrary to PC Otchere's testimony. Although, Mr. Smith's perception was that he was under the complete control of the officers, from PC Otchere and a police training perspective, complete control is not achieved until a subject is handcuffed and/or otherwise secured. I know from training and experience that handcuffs are not only applied when a person has been combative but also even when an arrested person is compliant. This serves as a precautionary measure should the subjects' demeanour change and they become aggressive. I do not accept the submission of the prosecutor that PC Otchere "waffled" as he testified in relation to the issue of Mr. Smith being under control or not.

PC Otchere also testified in a manner that I found credible and reliable. He did not present as a witness who, at any point, minimized his actions. He did not hesitate to acknowledge that he "struck" Mr. Smith in the upper shoulder area and that he thought Mr. Smith's head might have come into contact with the hood of the car. From the evening of the incident itself until he testified before this tribunal PC Otchere has acknowledged and consistently described what he did. PC Otchere did not present as a witness who was going out of his way to overstate his description of Mr. Smith's behaviour to cast a poor light on Mr. Smith.

On the issue of Mr. Smith's head contacting the car it seems PC Otchere's position has evolved somewhat from the onset of the incident. He initially indicated, apparently in his notes, to his sergeant and other investigative persons that Mr. Smith's head hit the hood of the car. Over time it seems PC Otchere is less certain of this fact and the cause of the dent in the hood of the car. PC Otchere's perception may have changed slightly with hindsight, but he did not at all present as trying to minimize what he did and the possible results. He readily acknowledged what he did and the resulting plausibility of Mr. Smith's head striking the car.

The testimony of the witnesses is addressed elsewhere in this decision. I need not revisit every line of testimony to assess credibility and reliability.

I was guided by *Pitts* as well as *Farnya and Chorny*. Both Mr. Smith and PC Otchere remained composed and calm when testifying. Neither presented as being evasive, reluctant or confrontational. It was clear that PC Otchere had an interest in the outcome of this tribunal as it was he who faced possible consequences. I do not consider Mr. Smith disinterested, but perhaps less so than PC Otchere. I did not detect from either Mr. Smith or PC Otchere, that they tailored their testimony with an overt bent or predisposition toward a particular result.

For reasons described I found both Mr. Smith's and PC Otchere's testimony was consistent with the possibilities that surround the events of the evening in question. I find a practical and informed person, having viewed and heard the testimony of Mr. Smith and PC Otchere, would

find their evidence was in harmony with the preponderance of possibilities and that the witnesses account of events were both reasonable.

Issue/Finding: Race and Racial Profiling

In evidence the issue of racial profiling was raised with Mr. Smith and by D/Sgt. Medeiros. Mr. Smith agreed that he had experienced difficulties with the police in the past due to racial profiling as he is a racialized person. Mr. Smith did not raise this issue in the matter before this tribunal nor did it make up any part of the allegations against PC Otchere. PC Otchere is also a racialized person.

Issue/Finding: Use of Force Training of Police Officers

The parties did not call specific evidence in relation to police use of force training and considerations. What follows is my understanding from training and as an experienced officer, of what considerations and terminology guide officers through the unfortunate but unavoidable use of force situations. I offer this for the understanding of non-police officers and with the caveat that I am not, by any means, an expert on use of force training and terminology. The semantics, terminology, and police jargon can sometimes lead to confusion and I will try to alleviate this to extent that it may be helpful.

When police respond to an incident or are interacting with the public they must continually assess the situation for actual or potential threats to themselves and others. Maintaining situational awareness would include evaluating the behaviour of the persons the officers are interacting with, the physical location they find themselves in, traffic and weather conditions if on a highway, visibility and the like.

In submissions and evidence the term “resisting” was used when PC Otchere described Mr. Smith’s behaviour. PC Otchere and Mr. Smith stated that the officers were saying or shouting “stop resisting” to Mr. Smith. Mr. Smit genuinely believed he was not resisting.

The term resistance is used even to describe more passive behaviours of a person who is interacting with officers. The subject may simply refuse to comply with an officer’s direction or request but generally takes no physical action toward the officers. Mr. Smith was described by PC Otchere as being resistant in what I consider to be somewhere between *passive resistance* and *active resistance*. I consider *active resistance* to occur when a subject might take a non-assaultive action to resist the request or demand of officers. Resistance, passive or active, does not necessarily involve intent on the part of the subject.

In this case Mr. Smith was fearful and upset by the actions of the officers but made no conscious

decision to resist or otherwise be combative with the officers. His emotional state, understandable under the circumstances, initially made it difficult for the officers to apply handcuffs.

The use of force continuum, as I understand it, goes on to address assaultive and serious bodily harm or death scenarios which clearly do not apply to the matter before this tribunal.

Issue: The Force Used by PC Otchere

From the evidence it is apparent that the officers were having difficulty applying the handcuffs to Mr. Smith. As described elsewhere, the level of resistance evidently unintentionally posed by Mr. Smith was minimal. I agree with the notion put forth by defence counsel that even minimal resistance, intentional or otherwise, posed by a person when an officer is trying to apply handcuffs makes the process challenging. I know this through training and actual personal experience.

PC Otchere testified as to the challenges he and PC Hearnden faced in applying the handcuffs. To facilitate this process and to bring Mr. Smith under further control, PC Otchere “struck” Mr. Smith in the upper shoulder area to force Mr. Smith’s torso toward the car and to bring him further under control. I interpreted the “strike” to be a blow with PC Otchere’s forearm in the manner of a combination between an actual blow and a push. The result was Mr. Smith’s upper body being forced down toward the hood of the car. In the process Mr. Smith’s head contacted the hood of the car causing him injury. Mr. Smith’s glasses became dislodged from his face at the same time. PC Hearnden was able to put the handcuffs on Mr. Smith who, by his own account and as described by PC Otchere, became quite anxious when the glasses fell off as he could not see. PC Otchere replaced Mr. Smith’s glasses and Mr. Smith calmed almost immediately. Mr. Smith was walked to and placed in PC Hearnden’s cruiser.

Again, based on personal experience, to gauge or judge the exact amount of force an officer should use in applying energy as described by PC Otchere is not possible. How hard to push or strike someone can only be judged by the effect and outcome after force has been applied. The evidence is clear that in this case, the outcome to Mr. Smith was physically and, perhaps otherwise, traumatic, and extremely regrettable. In consideration of the evidence presented, the circumstances, and the issues raised in jurisprudence for consideration, I could not conclude that the described force used by PC Otchere was excessive or disproportionate.

Issue: The Authority/Propriety of the Use of Force

PC Hearnden was directly interacting with Mr. Smith while Mr. Smith was sitting in his vehicle. As indicated in his testimony, PC Otchere was standing toward the front of Mr. Smith’s vehicle

and saw Mr. Smith on the phone and holding a CAA card. PC Otchere asked PC Hearnden what was going on. The officers waited for approximately 30 seconds. PC Hearnden opened the car door. The door was shut, violently, according to PC Otchere and Mr. Smith yelled out he was on the phone. PC Hearnden re-opened the door and told Mr. Smith he had hit him with the door and told Mr. Smith to get out of the car. PC Hearnden was loud and possibly angry as he had been struck with the door. PC Hearnden then began to physically remove Mr. Smith from the vehicle. As Mr. Smith was removed from the car PC Otchere recalled Mr. Smith's arms were moving all over the place. PC Hearnden and Mr. Smith were moving toward the back of Mr. Smith's car and PC Otchere approached. PC Otchere described Mr. Smith's behaviour as "a lot of moving and a lot of yelling" and that Mr. Smith was not cooperating with being arrested.

PC Otchere did not hear PC Hearnden tell Mr. Smith he was under arrest. PC Otchere inferred, because of what PC Hearnden had told him, that Mr. Smith was being arrested for assault i.e. for hitting PC Hearnden with the car door. It is settled, by way of criminal conviction for assault against PC Hearnden, he did not have the authority to open Mr. Smith's door nor grounds to physically remove and arrest him.

I find PC Otchere's belief, at the time, that Mr. Smith was being arrested was reasonable given the amount of time he had and the little information available before he recognized the need to assist PC Hearnden with bringing Mr. Smith under control. I suggest that a reasonable person in the community would find similarly. I would expect other officers to have acted similarly. This is not to say that Mr. Smith's head should have been pushed into the hood of the car but that PC Otchere was required to act under the circumstances he was faced with at the time. In retrospect, I find it was an honest but mistaken belief on the part of PC Otchere. With that said, PC Otchere's options were extremely limited. He could have done nothing which could have been followed by consequences for not carrying out an imposed duty, or he could have asked PC Hearnden to explain his grounds, which would have been completely implausible and untenable given the situation.

My purpose is to assess the actions of PC Otchere in relation to the misconduct allegation. I am reminded as I conduct this analysis jurisprudence cited above makes it clear I should conduct my analysis from the perspective faced by PC Otchere at the time of the incident and not with the benefit of hindsight.

Based in part by what PC Otchere saw and heard and more substantially by what PC Hearnden had said, at the time of the interaction, PC Otchere had a reasonable belief that PC Hearnden was lawfully arresting Mr. Smith. This entire transaction occurred within mere seconds. PC Otchere felt that PC Hearnden required assistance in controlling Mr. Smith and applying the handcuffs and used the force previously described.

I found the *Waterfield* test, cited and explained in jurisprudence above, was helpful in conducting this line of analysis.

1. Did PC Otchere's actions fall within the scope of a police duty imposed by statute or recognized in common law?

The *PSA* contains legislated duties of police officers in Ontario. The duties are based on, and, in some cases, mirror, what I understand to be the common law duties of a police officer; to preserve the peace, protect life and property, prevent crime, enforce the law and apprehend offenders.

I have determined PC Otchere's belief Mr. Smith was being lawfully arrested for assault was reasonable at the time. PC Otchere had moral, professional, legal obligations and legislated duties to assist another officer under the circumstances.

2. Did PC Otchere's actions constitute a justifiable, necessary, and reasonable exercise of powers associated with the duty?

PC Otchere observed that Mr. Smith was not completely under control, shouting and moving his limbs. Fairly, PC Otchere described the level of resistance minimal and did not think Mr. Smith was being assaultive or trying to escape. PC Otchere's strike/push of Mr. Smith was a singular transaction that resulted in the desired effect of facilitating handcuffing and control of Mr. Smith. It had the particularly lamentable outcome of Mr. Smith's head striking the hood of the vehicle resulting in injury.

I accepted Mr. Smith's evidence he had no intention or conscious state of mind to resist the officers. I accept the evidence of PC Otchere that Mr. Smith was not aggressively or significantly resisting the demands of the officers. To take control and secure a person being arrested is not done simply by what has transpired but what might transpire and to prevent possible escalation.

There was no evidence that PC Otchere acted in anger or malice, in fact, the evidence indicated the contrary. Mr. Smith had lost his glasses and was described as being hysterical. PC Otchere took the time to attempt to calm Mr. Smith, retrieve the glasses and place them back on Mr. Smith's face. This happened mere moments after PC Otchere struck/ pushed Mr. Smith. This was clearly a moment of compassion from PC Otchere toward Mr. Smith. There is no evidence PC Otchere intended for Mr. Smith's head to hit the hood of the car. I acknowledge that *intent* is not a requirement for a finding misconduct occurred. PC Otchere's behaviour prior to and following the misconduct as alleged against him provided insight and context worthy of contemplation and consideration.

In circumstance of an assault arrest the public would expect the police to be prepared to bring a believed perpetrator under control and to use as much force as necessary to achieve that purpose. Notwithstanding public expectations, officers are duty bound to apprehend those persons believed to be perpetrators of a crime. Having had a coherent yet, retrospectively, mistaken belief that Mr. Smith was being properly arrested by PC Hearnden, PC Otchere's response during the interaction was necessary to have fulfilled his duty.

Issue/Finding: Mr. Smith's Diagnosis of Concussion

Mr. Smith testified he was diagnosed with a concussion by an emergency room physician following his interaction with PC Hearnden and PC Otchere. The fact that Mr. Smith had suffered a concussion was raised and acknowledged during PC Hearnden's criminal trial. During this tribunal was not the first time the issue of Mr. Smith having a concussion was raised and it was not previously positively challenged.

Although no medical evidence was called, I accept and infer from the information put before me that Mr. Smith suffered a concussion during the interaction with the officers, the subject of allegations in the NOH. I expect, based on experience, if Mr. Smith did not have a concussion, the issue would likely have been raised long before this hearing commenced. Additionally, without specific medical evidence being presented, I can only comment as a layperson that it is generally accepted when a person suffers a concussion, or multiple concussions as Mr. Smith had, they are more susceptible to further concussions.

The issue of Mr. Smith losing hair and having an earring pulled out was not explored at any length by the prosecution or defence counsel. PC Otchere testified that during the tribunal was the first time he had heard of these injuries. I am not casting doubt on the existence of the injuries at the time. In exhibit 8, a Court transcript, similar injuries were referenced from a medical report during Mr. Smith's cross examination. This was not the first time the injuries had been mentioned. When Mr. Smith mentioned these injuries in his testimony he attributed them to the interaction with police but there was no indication as to how or at who's hand the injuries occurred.

During this tribunal there was a dearth of evidence upon which I could draw any conclusion or inference related to earring and hair injuries alleged.

Issue: The Dent in the Hood of the Mazda

It was Mr. Smith's belief that the dent¹⁴ occurred when his head was slammed or forced into the hood of the Mazda.

¹⁴ Exhibit 11: Photo of dent to Mazda 3

On the evening in question, PC Otchere believed the dent to have been caused by Mr. Smith's head striking the Mazda. In testimony, PC Otchere explained he later saw the picture of the dent and was doubtful that it was caused by a human head due to the shape of the dent. PC Otchere acknowledged he had no expertise in this regard.

PC Otchere advised the owner of the car, immediately following the incident, how a claim for the damage could be made and provided the driver/owner with contact information. No claim for the damage was made.

No expert and/or forensic evidence was called in relation to the dent. Aside from testimony, the single photograph of the dent, hardcopy and electronic versions, was all that was available.

I accept it is quite plausible the damage may well have been caused as described by Mr. Smith and as was, at least initially, believed by PC Otchere. It is also conceivable that the dent could have been caused as a result of the interaction as described but not by Mr. Smith's head. Aside from Mr. Smith's belief the dent did not exist before the interaction, this was not independently verified by the owner or driver of the car or by any other means. As stated, neither the prosecution nor defence presented specific evidence in this regard.

While it may be more probable than not that the dent was caused by Mr. Smith's head there was no evidence upon which I could reasonably and properly conclude or infer the dent was caused in this manner as a matter of fact. My speculation as how the dent occurred does not rise to the level of clear and convincing evidence.

Issue/Finding: Test for Discreditable Conduct

From jurisprudence submitted and referenced elsewhere it is clear the I must consider:

... the test for discreditable conduct is an objective one. The objective test would require that the Hearing Officer place a dispassionate reasonable person fully apprised of the same facts and circumstances, aware of the applicable rules and regulations, in the same situation to assess whether the conduct in question was discreditable”.

I must consider whether actual discredit to the OPP resulted from PC Otchere's behaviour or the extent of any potential damage to the reputation and image of the OPP should the action become public knowledge. I must consider the circumstances at the time and avoid viewing the circumstances with the benefit of hindsight.

I have addressed in detail above the circumstances faced by, actions of, observations made by, and conclusions of PC Otchere. He was pressed to make a split-second decision to assist PC

Hearnden, who, as it turns out, made an unlawful arrest resulting in his (PC Hearnden's) criminal conviction. At the time PC Otchere reasonably believed the arrest was lawful.

Many of the narrative points on the NOH provide context. The following paragraphs speak to the allegation of discreditable conduct:

1. PC Otchere's notes that were made in relation to the incident, are contrary to his testimony and state that J.S. (Mr. Smith) was struck with your right arm to his upper shoulder area and J.S.'s head hit the hood, at which time J.S.'s glasses fell off and he was controlled and handcuffed.
2. On June 1, 2018, Justice Riun Shandler ruled that PC Hearnden did not have any lawful authority for his actions and no justification for forcibly removing J.S. from his vehicle. Therefore, PC Otchere had no lawful authority or justification for applying physical force upon J.S. in the course of his duties.

With respect to point one, PC Otchere's notes and the issue surrounding them as alleged was not explored in detail. There was little evidence presented that spoke to this allegation other than as outlined in testimony. PC Otchere's evidence during this tribunal indicated that he believed (paraphrased) it was possible or plausible that, as a result of his actions, Mr. Smith's head struck the hood of the car. His testimony in this area did not present as though he was hesitant or reluctant to say Mr. Smith's head hit the hood of the car. It presented as though PC Otchere agreed it was possible and perhaps likely that this is what occurred but that he was simply not certain. If, indeed his notes said Mr. Smith's head struck the car it could be, that upon reflection with the amount of time that has passed, PC Otchere second guessed this fact. I would not consider this to be contradictory or "contrary" to his previous testimony or theoretically, his notes per sae. I have found that Mr. Smith's head did contact the hood of the car as described. In relation to the allegations against PC Otchere I find the paragraph numbered point 1 to be inconsequential. Again, there was limited evidence presented in relation to paragraph 1.

Regarding point two, I find this paragraph transfers the actions and errors of PC Hearnden onto PC Otchere. For reasons addressed above I have found that PC Otchere, despite the erroneous actions of PC Hearnden, acted reasonably and as he should have given the exigent circumstances with which he faced. To reiterate, PC Otchere's choices were to act, as he did in aid of a colleague, do nothing, or attempt to have PC Hearnden articulate his grounds and authority for the arrest of Mr. Smith while PC Hearnden struggled to control and/or handcuff Mr. Smith.

I find, given the facts presented, and the utter seconds PC Otchere had to decide and act, to transfer PC Hearnden's error and misjudgement onto PC Otchere would be patently improper and manifestly unfair. To adopt such a position and create such a precedent could produce a

future scenario where officers second guess or hesitate to decide to go to the aid of a colleague or member of the public. This could place officers and members of the public at risk and have potentially calamitous results.

There was no evidence placed before me that would lead me to believe this matter had been the subject of significant media attention. There was a public Court trial and Appeal which undoubtedly shone a light on this matter to members of the community, civilian witnesses, Court staff and others. At least to a degree, this matter is in the public realm. With this said there was no evidence presented that would cause me to conclude or infer actual discredit has occurred to the reputation of the OPP.

I turn my mind to the potential of future damage to the reputation of the OPP. In order to conduct this analysis I assume the viewpoint of *a dispassionate reasonable person fully apprised of the same facts and circumstances, aware of the applicable rules and regulations, in the same situation to assess whether the conduct in question was discreditable.*

As I have addressed previously, I have found PC Otchere had little choice but to assist PC Hearnden. The nature of the force used under the circumstances was not excessive. The result of Mr. Smith's head striking the car and receiving a concussion is tragic. Had PC Otchere used slightly less force the results may have been lessened. As stated earlier in this decision, there was no evidence that the amount of force used was intentionally or negligently carried out to strike Mr. Smith's head on the hood of the car. I find a reasonable dispassionate person fully apprised of the facts and circumstance of this matter, aware of the applicable rules, laws and regulations, and in the same situation, would not find PC Otchere's actions rose to the level of bringing discredit upon the reputation of the OPP. I do not find there is potential for future damage to the reputation of the OPP based upon PC Otchere's actions, should they become known more broadly.

Conclusion

This was an extremely unfortunate incident for Mr. Smith and for PC Otchere. The Court described Mr. Smith's actions when he first interacted with officers as "rude." In finding him guilty of assault the Court found PC Hearnden's unlawful actions resulted, in part, from his impatience with Mr. Smith. As a result of PC Hearnden's impatience and misjudgements, for which he has been held to account, PC Otchere became embroiled in this messy scenario and, sadly, Mr. Smith was injured and his view of the police may be further diminished.

Despite his less than cordial greeting of the police, who were initially at the scene to help him on June 30 / July 1, 2015, Mr. Smith did not deserve to have been treated the way he was and to have received a concussion during his interaction with OPP officers. On behalf of the OPP I

sincerely apologize to Mr. Smith for what he has endured.

For reasons addressed in detail in this decision, I cannot find PC Otchere guilty of discreditable conduct. There is simply no evidence upon which I could conclude or infer that his actions were unreasonable under the circumstances nor did they amount to actual or potential damage to the reputation of the OPP.

PART IV: DECISION

My analysis and findings have led me, based on the absence of clear and convincing evidence, to find P/C Otchere not guilty of discreditable conduct.



K.M. (Mike) Bickerton
Superintendent
OPP Adjudicator

Date electronically delivered: 18 July 2022

Appendix “A”

The following exhibits were tendered during the hearing:

- Exhibit 1: Delegation, Adjudicator Superintendent Taylor
- Exhibit 2: Delegation, Adjudicator Superintendent Bickerton
- Exhibit 3: Designation, Prosecutor Inspector Young
- Exhibit 4: Designation, Prosecutor Inspector Doonan
- Exhibit 5: Designation, Prosecutor A/Inspector Fournier
- Exhibit 6: Delegation, All Officers
- Exhibit 7: Designation, Prosecutor Mr. Kirsh
- Exhibit 8: R v S. Hearnden, Criminal Court Transcript [7Feb2018]
- Exhibit 9: R v S. Hearnden, Transcript – Reasons for Judgement [01Jun2018]
- Exhibit 10: Written Decision, Justice R. Shandler [01Jun2018] (duplicate Exhibit 9)
- Exhibit 11: Photograph of dent
- Exhibit 12: *College of Nurses of Ontario v Guilbeau*, [2010], Decision
- Exhibit 13: *College of Physicians and Surgeons of Ontario v Jha*, [2020]
- Exhibit 14: Transcript Mr. Smith testimony [7Feb2018]
- Exhibit 15: Defence Book of Authorities
 - *R v. Ghorvei*, [1999] CanLII 19941 (ON CA)
 - *Crampton v Walton*
 - *Levesque v Sudbury Regional Police Service*, [1992]
 - *R v Creary*
 - *Hewitt and Devine and The Toronto Police Service*
 - *Fenton v Toronto Police Service*
 - *Stevenson v Bryson, Green and Durham Regional Police Service*
 - *Nobody v Adams, Donaldson, Fardell, Simpson, Toronto Police Service and OIPRD*
 - *Rose, Arcand, Liburd, Correa, Fuller v Toronto Police Service and MacIlsac and OIPRD*
- Exhibit 16: Prosecution Book of Authorities
 - Tab 1 – *Burrows v. OPP*, [2012] ONCPC 13
 - Tab 2 – *Saxon v Amherstburg Police Service*, [2011] ONCPC 2
 - Tab 3 – *Mancini and Courage v Niagara Regional Police Service*, [2004] CanLII 768101051
 - Tab 4 – *Faryna v Chorny*, [1951] CarswellBC 133
 - Tab 5 – *Jacobs v Ottawa Police Service*, [2016] ONCA 345

- Tab 6 – *Girard v Delaney (Board of Inquiry)*, [1994] BOI 95-26
- Tab 7 – *Toronto (City) v C.U.P.E. Local 79*, [2003] SCC 63
- Tab 8 – *R v Hearnden*, [2019] ONSC 4306
- Tab 9 – *Polgrain Estate v The Toronto East General Hospital*, [2008] ONCS 427
- Tab 10 – *Re Pitts and Director of Family Benefits Branch of the Ministry of the Community & Social Services*, [1985] CanLII 2053 ON SC
- Tab 11 – *Carter v OPP*, [2018] ONCPC 10
- Additional cases submitted:
 - *R. v Foreman*, [2002] OJ No 4332
 - *Wong v Toronto Police Service*, [2015] ONCPC 15
 - *R v Nasogaluak*, [2010] SCC 6