

**DURHAM REGIONAL POLICE SERVICE DISCIPLINE HEARING  
IN THE MATTER OF ONTARIO REGULATION 268/10**

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

**IN THE MATTER OF**

**DURHAM REGIONAL POLICE SERVICE**

**AND**

**CONSTABLE ANDREW CHMELOSKY, #3252  
CONSTABLE JUSTINE GENDRON, #3687  
CONSTABLE BARBARA ZABDYR, #3291**

**Charges:**

**DISCREDITABLE CONDUCT (CHMELOWSKY)  
NEGLECT OF DUTY & DISCREDITABLE CONDUCT (GENDRON)  
DISCREDITABLE CONDUCT (ZABDYR)**

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**DECISION**

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Before: Superintendent (Ret.) Greg Walton  
Ontario Provincial Police

Counsel for the Prosecution: Mr. Ian Johnstone & Ms. Allison Johnstone

Counsel for Chmelowsky: Mr. William MacKenzie

Counsel for Gendron & Zabdyr: Ms. Joanne Mulcahy

Public Complainant: Mr. Dafonte Miller

Counsel for Mr. Miller: Ms. Asha James & Mr. Mitchell Goldenberg

Hearing Dates: May 15, 23, 24, 25, & 29, 2023

## **Background**

The offence date as noted on the respective Notice of Hearings is well over six years ago. Consequently, I find it necessary to provide a brief explanation for such a lengthy delay in this matter ultimately being heard. An off-duty member of the Toronto Police Service was involved in an incident on December 28, 2016. The Durham Regional Police Service responded to that call for service and investigated. It was not until May 2, 2017, that the Special Investigations Unit (SIU) invoked their mandate. Criminal proceedings followed in respect to the Toronto Police Service officer; Constable Michael Theriault.

Following those criminal proceedings, it was on March 12, 2021, that the Office of the Independent Police Review Director (OIPRD) notified the Durham Regional Police Service that misconduct against Constable Andrew Chmelowsky, Constable Justine Gendron, Constable Barbara Zabdyr, and Detective Constable Craig Willis had been substantiated. At the time of the incident, Constable Chmelowsky was an acting sergeant. At times in this decision, he will be referred to as Constable while at other times, as Acting Sergeant. Of note, not all allegations were substantiated by the OIPRD; the Notice of Hearings contain the charges recommended. The officers satisfied first appearance obligations on July 21, 2021.

Production material was voluminous and the matter was adjourned several times to allow for it to be fully disclosed to defence counsel. In due course, the matter of Detective Constable Willis was severed from these proceedings. Detective Constable Willis appeared before (Retired) Superintendent Elbers on January 30, 2023, where he entered a guilty plea and was found guilty of one count of neglect of duty.

Although it was more than six years from the offence date to hearing date, and nearly two years between the first appearance date and this hearing, the delay was reasonable considering the unique complexities that this file presented.

## **Plea / Representation**

On May 15, 2023, represented by Mr. William MacKenzie, Constable Chmelowsky entered a plea of not guilty. Constable Gendron and Constable Zabdyr were represented by Ms. Joanne Mulcahy. Constables Gendron and Zabdyr also entered not guilty pleas.

Mr. Dafonte Miller is the public complainant in this matter. He was represented by Ms. Asha James and Mr. Mitchell Goldenberg. Mr. Miller was in attendance on May 23 and May 24, 2023, but on the remaining hearing dates, he relied on his counsel's representation.

Mr. Ian Johnstone and Ms. Allison Johnstone represented the Durham Regional Police Service as prosecutors.

## **Decision**

For reasons which will follow, I find Constable Chmelowsky guilty of discreditable conduct, Constable Gendron guilty of neglect of duty, guilty of discreditable conduct, and Constable Zabdyr guilty of discreditable conduct.

## **Allegations of Misconduct (amended)**

### **Count #1: Discreditable Conduct – Constable Chmelowsky**

Constable Chmelowsky is alleged to have committed misconduct in that, on December 28, 2016, he acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force, thereby committing the offence of discreditable conduct, contrary to Part V, clause 80(1)(a) of the *Police Services Act* as amended, and section 30, clause 2(1)(a)(xi) of the Schedule “Code of Conduct,” Ontario Regulation 268/10, as amended under the *Act*.

The Statement of Particulars reads as follows (amended):

On December 28, 2016, at 2:48 a.m., Mr. Dafonte Miller had an altercation with an off-duty Toronto Police Service member, Constable Michael Theriault and his brother, Christian Theriault. Mr. Miller was pursued by the Theriault brothers to the side of a house in Whitby, where the Theriault brothers assaulted him. Durham Regional Police Service responded to the scene after numerous 9-1-1 calls.

As a result of the assault, Mr. Miller suffered a catastrophic injury resulting in the loss of his left eye. The SIU invoked their mandate on May 2, 2017, after being contacted by Mr. Miller’s lawyer. Ultimately, the Theriault brothers were charged with aggravated assault and obstructing police.

On March 12, 2021, the OIPRD notified Durham Regional Police that they had completed their investigation and concluded that misconduct against Constable Chmelowsky had been substantiated.

Constable Chmelowsky was the acting sergeant and road supervisor on the date of the incident. His duties included attending the scene, ensuring scene security, ensuring that officers obtain statements and evidence, and communicating information up the chain of command.

Constable Chmelowsky arrived on scene at 3 a.m. and observed Mr. Miller already in the ambulance with Constable Zabdyr. Constable Chmelowsky asked the paramedic about the injuries, to which the paramedic said Mr. Miller needed to be seen by a doctor.

Constable Chmelowsky stated he was aware from the onset of the call that an off-duty Toronto Police Service officer was involved. He recalled John Theriault (father of the Theriault brothers and a Toronto Police Service officer himself) arriving on scene and inquiring if the SIU would be contacted. Constable Chmelowsky stated he was not aware at the time that John Theriault was a police officer.

Constable Chmelowsky briefly spoke with the Theriault brothers to ask about their injuries and if they needed to be seen by paramedics who were still on scene. At 4:56 a.m., Constable Chmelowsky was provided an update on the severity of Mr. Miller's injuries and reported them to the duty inspector.

Constable Chmelowsky did not have further communication with the Theriault family but was aware that Constable McQuoid left the station to advise John Theriault of potential SIU notification, but nothing turned on that information because he believed the case was turned over to the Criminal Investigation Bureau (CIB). Constable Chmelowsky said that he tried to pin witnesses down to a statement but he was not too concerned if they were not because the CIB always follows up with witnesses as they review the reports.

It is alleged that Constable Chmelowsky demonstrated a pro-police bias, by accepting and not questioning the evidence of the Theriault brothers or taking additional steps to investigate how Mr. Miller substantiated his injuries. Constable Chmelowsky acted in a disorderly manner, in a manner likely to bring discredit upon the reputation of the police force.

**Count #1: Neglect of Duty – Constable Gendron**

Constable Gendron is alleged to have committed misconduct in that, on December 28, 2016, without lawful excuse, she neglected or omitted promptly and diligently to perform a duty as member of the police force thereby committing the offence of neglect of duty, contrary to Part V, clause 80(1)(a) of the *Police Services Act* as amended, and section 30, clause 2(1)(c)(i) of the Schedule "Code of Conduct," Ontario Regulation 268/10, as amended under the *Act*.

The Statement of Particulars reads as follows (amended):

On December 28, 2016, at 2:48 a.m., Mr. Dafonte Miller had an altercation with an off-duty Toronto Police Service member, Constable Michael Theriault and his brother, Christian Theriault. Mr. Miller was pursued by the Theriault brothers to the side of a house in Whitby, where the Theriault brothers assaulted him. Durham Regional Police Service responded to the scene after numerous 9-1-1 calls.

As a result of the assault, Mr. Miller suffered a catastrophic injury resulting in the loss of his left eye. The SIU invoked their mandate on May 2, 2017, after being contacted by Mr. Miller's lawyer. Ultimately, the Theriault brothers were charged with aggravated assault and obstructing police.

On March 12, 2021, the OIPRD notified Durham Regional Police that they had completed their investigation and concluded that misconduct against Constable Gendron had been substantiated.

Constable Gendron and her partner, Constable Sean McQuoid, were dispatched to a disturbance, that someone may have been breaking into cars and that an off-duty officer was involved.

Constable Gendron arrived on scene just as Mr. Miller was being escorted to the cruiser to be searched. She was advised that there was still one suspect outstanding and she and her partner left to check the area.

As it was pitch black outside, Constable Gendron determined that she would not be able to see any suspects. She and her partner returned to the scene, and at that time she observed two males at the driveway, Jim Silverthorn, and his son David Silverthorn. They were later identified as the homeowners where the incident occurred.

Constable Gendron explained in her SIU interview that she informed the witnesses that they had caught a male breaking into cars. Jim Silverthorn replied, "well they did not have to, they did not have to kill that guy." Constable Gendron asked Jim Silverthorn if he observed what had happened and he told her it was dark. She then asked, "did you see anyone armed with anything?" She knew at that point a pipe or pole had been used and Jim Silverthorn stated "no." Jim Silverthorn did tell her that he heard a confrontation outside and that someone was knocking on his door, and he looked out and saw a white male wearing a black toque. There was another white male, and one of them asked him to call 9-1-1. Constable Gendron advised Jim Silverthorn that he could go back inside because it was cold and late

and that if police needed anything else from him, somebody would come talk to him later.

Constable Gendron further stated to the SIU in an interview that she did not have her memo book with her and in her OIPRD interview, she stated she either had her memo book in her vest or in the police vehicle. When she was driving to the scene, her memo book was not up to date and did not have the incident number written inside it. She explained that she would write things down on her hand if her memo book was not up to date. She further explained that she used her memo book to write quick notes but made more detailed notes later in the occurrence report that she would prepare immediately after the incident. When asked in her interview if she would have noted down Jim Silverthorn's statement in her memo book if she had it with her at the time, she said she did not believe his comment was important enough to note.

When Constable Gendron completed her occurrence report, she did not include Jim Silverthorne's comment because she did not believe he observed what had happened. She believed his comment about "not having to kill the guy" was based on his observations of the aftermath and not from his observations of the incident.

It is alleged that by failing to properly record or document relevant utterances stated by Jim Silverthorn, and or take further investigative steps when interviewing Christian Theriault to ascertain how Mr. Miller sustained his injuries, Constable Gendron was neglectful and did not promptly and diligently perform a duty as a member of the police force.

#### Count #2: Discreditable Conduct – Constable Gendron

Constable Gendron is alleged to have committed misconduct in that, on December 28, 2016, she acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force, thereby committing the offence of discreditable conduct, contrary to Part V, clause 80(1)(a) of the *Police Services Act* as amended, and section 30, clause 2(1)(a)(xi) of the Schedule "Code of Conduct," Ontario Regulation 268/10, as amended under the *Act*.

The Statement of Particulars reads as follows (amended):

On December 28, 2016, at 2:48 a.m., Mr. Dafonte Miller had an altercation with an off-duty Toronto Police Service member, Constable Michael Theriault and his brother, Christian Theriault. Mr. Miller was pursued by the Theriault brothers to the

side of a house in Whitby, where the Theriault brothers assaulted him. Durham Regional Police Service responded to the scene after numerous 9-1-1 calls.

As a result of the assault, Mr. Miller suffered a catastrophic injury resulting in the loss of his left eye. The SIU invoked their mandate on May 2, 2017, after being contacted by Mr. Miller's lawyer. Ultimately, the Theriault brothers were charged with aggravated assault and obstructing police.

On March 12, 2021, the OIPRD notified Durham Regional Police that they had completed their investigation and concluded that misconduct against Constable Gendron had been substantiated.

Constable Gendron and her partner, Constable Sean McQuoid, were dispatched to a disturbance, that someone may have been breaking into cars and that an off-duty officer was involved.

Constable Gendron spoke with Christian Theriault and spoke to him as the victim of an assault. She believed he was the victim because prior to taking the statement, she had information about Mr. Miller assaulting Constable Theriault and Christian Theriault with a weapon and that he had stolen property from their motor vehicle.

Constable Gendron took a formal statement from Christian Theriault. He told her his account of events and that he and his brother chased Mr. Miller between two houses after breaking into their truck. Once they caught up to him, Mr. Miller swung a pipe at them hitting them repeatedly. Eventually, Christian Theriault and his brother Michael were able to stop Mr. Miller. Michael Theriault restrained and held Mr. Miller as Christian called 9-1-1. Christian Theriault stated he was hit with the pipe on his right back side of the head (later diagnosed with a concussion), the arms, and the body, and that his only injuries were sore head, arms, and legs. Constable Gendron did not observe any physical injury to Christian Theriault.

Constable Gendron returned to the station with her partner and completed her occurrence report.

It is alleged that by demonstrating a pro-police bias, either by accepting and not questioning the evidence proffered by Christian Theriault or take further investigative steps when interviewing him to ascertain how Mr. Miller sustained his injuries, Constable Gendron committed discreditable conduct.

Count #1: Discreditable Conduct – Constable Zabdyr

Constable Zabdyr is alleged to have committed misconduct in that, on December 28, 2016, she acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force, thereby committing the offence of discreditable conduct, contrary to Part V, clause 80(1)(a) of the *Police Services Act* as amended, and section 30, clause 2(1)(a)(xi) of the Schedule “Code of Conduct,” Ontario Regulation 268/10, as amended under the *Act*.

The Statement of Particulars reads as follows (amended):

On December 28, 2016, at 2:48 a.m., Mr. Dafonte Miller had an altercation with an off-duty Toronto Police Service member, Constable Michael Theriault and his brother, Christian Theriault. Mr. Miller was pursued by the Theriault brothers to the side of a house in Whitby, where the Theriault brothers assaulted him. Durham Regional Police Service responded to the scene after numerous 9-1-1 calls.

As a result of the assault, Mr. Miller suffered a catastrophic injury resulting in the loss of his left eye. The SIU invoked their mandate on May 2, 2017, after being contacted by Mr. Miller's lawyer. Ultimately, the Theriault brothers were charged with aggravated assault and obstructing police.

On March 12, 2021, the OIPRD notified Durham Regional Police that they had completed their investigation and concluded that misconduct against Constable Zabdyr had been substantiated.

Constable Zabdyr and her partner, Constable Bowler, were the first officers to arrive on scene. Constable Zabdyr observed one male with longer hair, (later identified as Christian Theriault), standing on the side of the curb on the phone who waved her down. She observed another male on the ground (later identified as Mr. Miller) with a male on top of him (later identified as off-duty officer Constable Theriault).

Christian Theriault explained that he and his brother found Mr. Miller and his friends breaking into their car. They chased Mr. Miller down but he started hitting them with a pipe or stick, although Constable Theriault was able to restrain him to the ground.

Constable Zabdyr knew Constable Theriault was an off-duty officer and passed her handcuffs to him so he could handcuff Mr. Miller. While being restrained on the ground, Mr. Miller stated to Constable Zabdyr that he had been hit with something.



Constable Theriault then escorted Mr. Miller to the police cruiser with the assistance of a Durham Regional Police officer and conducted a pat-down search. Marijuana, along with a few personal items like a cell phone were located.

Constable Zabdyr called for an ambulance to attend as soon as the pat-down search was complete as Mr. Miller had a severe injury to his left eye. As she walked Mr. Miller to the ambulance, she advised him he was under arrest for breaking into cars and for assault.

Constable Zabdyr read Mr. Miller his rights to counsel and caution while he was at the hospital. She advised him that he was being charged with assault, assault with a weapon, possession of marijuana, and theft. Upon being advised of his charges, Mr. Miller yelled out, "do you see any weapons on me?" Constable Zabdyr advised him that he did not need to agree with the charges, he just needed to understand what was going on. Mr. Miller did not ask to call a lawyer.

Constable Zabdyr did not have any further conversations with Mr. Miller. She was relieved of her duties at the hospital at 6:25 a.m. and returned to the police station where she completed her arrest report.

Constable Zabdyr knew that Constable Theriault was an off-duty officer and only considered the Theriault brothers' account of the events that had transpired that night. She did not conduct formal statements with the Theriault brothers and did not listen or follow up with Mr. Miller's statements about having been "hit with something," and that they had "the wrong guy," and that "he and his friends were just walking down the street and suddenly got jumped by these two guys."

It is alleged that by demonstrating a pro-police bias, either by accepting and not questioning the evidence proffered by the Theriault brothers, did not interview witnesses and not accepting Mr. Miller's evidence or investigate how he received his severe injury, Constable Zabdyr acted in a disorderly manner and in a manner likely to bring discredit upon the reputation of the police force.

## The Hearing

Exhibit #2 is titled “Admissions by Constable Gendron with respect to the statement of particulars for the allegation #1 and allegation #2 of the Notice of Hearing” submitted by Ms. Mulcahy. It reads as follows:

### Allegation #1:

On December 28, 2016, at 2:48 a.m., Mr. Dafonte Miller had an altercation with off-duty Toronto Police Service Constable Michael Theriault and his brother Christian Theriault. Mr. Miller was pursued by the Theriault brothers to a house in Whitby, where Justice Di Luca of the Superior Court of Justice found Michael Theriault assaulted him. The Durham Regional Police Service responded to the scene after 9-1-1 calls.

As a result of the altercation, Mr. Miller suffered a catastrophic injury resulting in the loss of his left eye. The SIU invoked their mandate on May 2, 2017, after being contacted by Mr. Miller’s lawyer. Ultimately the Theriault brothers were charged with aggravated assault and obstructing police. On June 26, 2020, Justice Di Luca of the Superior Court of Justice found Michael Theriault guilty of assault and not guilty of aggravated assault and not guilty of obstruct justice. Justice Di Luca found Christian Theriault not guilty of aggravated assault and obstruct justice.

On March 12, 2021, the OIPRD notified the Durham Regional Police Service that they had completed their investigation and concluded that misconduct (neglect of duty and discreditable conduct) against Constable Gendron had been substantiated. All other allegations against Constable Gendron were unsubstantiated.

Constable Gendron and her partner Constable Sean McQuoid were dispatched to a disturbance that two people were breaking into cars; the complainant caught at least one person and was restraining him in front of 113 Erickson Drive, and that an off-duty Toronto police officer was involved.

Constable Gendron arrived on scene and immediately left the scene with Constable Bowler to check the area for the outstanding suspect. As it was pitch black outside, Constable Gendron determined that she would not be able to see any suspects. She and Constable Bowler returned to the scene and at that time she observed two males at the driveway, Jim Silverthorn, who identified himself as the homeowner of 113 Erickson Drive, and his son David Silverthorn.

Constable Gendron explained in her SIU interview that Jim Silverthorn asked her what was going on. She informed Jim Silverthorn that they had caught a male breaking into cars. Jim Silverthorn replied, “well that does not mean they have to kill the guy.” Constable Gendron asked Jim Silverthorn if he observed what had happened and he told her it was dark. She then asked, “did you see anyone armed with anything?” She knew at that point a pipe or pole had been used and Jim Silverthorn stated “no.” Jim Silverthorn did tell her that he heard a confrontation outside and that someone was knocking on his front door, and he looked out and saw a white male wearing a black toque. There was another white male, and one of them asked him to call 9-1-1.

Constable Gendron advised Jim Silverthorn that he could go back inside because it was cold and late and that if police needed anything else from him somebody would come talk to him later.

Constable Gendron further stated to the SIU in an interview that she did not have her memo book with her. In her OIPRD interview, she stated she did not have her memo book when she was speaking with Jim Silverthorn and she did not know where her memo book was; that she either had her memo book in her vest or in the police vehicle. When she was driving to the scene, her memo book was not up to date and did not have the incident number written inside it. She explained that she would write things down on her hand if her memo book was not up to date.

Constable Gendron further explained that she used her memo book to write quick notes but made more detailed notes in the narrative text that she would prepare immediately after the incident as per her training with the Durham Regional Police Service.

When asked in her SIU interview if she would have noted down Jim Silverthorn’s comment in her memo book if she had it with her at the time, she said she did not believe his comment was important enough to note because she did not believe he had seen what happened but in hindsight she would have.

When Constable Gendron completed her narrative text, she did not include Jim Silverthorn’s comment because she did not believe he observed what had happened. She believed his comment about “not having to kill the guy” was based on his observations of the aftermath and not from his observations of the incident.

## Allegation #2:

On December 28, 2016, at 2:48 a.m., Mr. Dafonte Miller had an altercation with off-duty Toronto Police Service Constable Michael Theriault and his brother Christian Theriault. Mr. Miller was pursued by the Theriault brothers to a house in Whitby, where Justice Di Luca of the Superior Court of Justice found Michael Theriault assaulted him. The Durham Regional Police Service responded to the scene after 9-1-1 calls.

As a result of the altercation, Mr. Miller suffered a catastrophic injury resulting in the loss of his left eye. The SIU invoked their mandate on May 2, 2017, after being contacted by Mr. Miller's lawyer. Ultimately, the Theriault brothers were charged with aggravated assault and obstructing police. On June 26, 2020, Justice Di Luca of the Superior Court of Justice found Michael Theriault guilty of assault, not guilty of aggravated assault, and not guilty of obstruct justice. Justice Di Luca found Christian Theriault not guilty of aggravated assault and obstruct justice.

On March 12, 2021, the OIPRD notified the Durham Regional Police Service that they had completed their investigation and concluded that misconduct (neglect of duty and discreditable conduct) against Constable Gendron had been substantiated. All other allegations against Constable Gendron were unsubstantiated.

Constable Gendron and her partner Constable Sean McQuoid were dispatched to a disturbance that two people were breaking into cars; the complainant caught at least one person and was restraining him in front of 113 Erickson Drive, and that an off-duty Toronto police officer was involved.

Constable Gendron was directed by acting Sergeant Chmelowsky to take a witness statement from Christian Theriault. Constable Gendron spoke with Christian Theriault and spoke to him as the victim of an assault. She believed he was the victim because prior to taking the statement, she had information about Mr. Miller assaulting Constable Theriault and Christian Theriault with a weapon and that he had stolen property from their motor vehicle.

Constable Gendron took a formal statement from Christian Theriault. He told her his account of events and that he and his brother chased Mr. Miller between two houses after breaking into their truck. Once they caught up to him, Mr. Miller swung a pipe at them hitting them repeatedly. Eventually Christian Theriault and his brother Michael Theriault were able to stop Mr. Miller. Michael Theriault restrained

and held Mr. Miller as Christian called 9-1-1. Christian Theriault stated he was hit with a pipe on his right back side of the head (later diagnosed with a concussion), the arms, and the body, and that his only injuries were sore head, arms, and legs. She did not observe any physical injury to Christian Theriault.

Constable Gendron returned to the station with her partner and completed her occurrence report.

Exhibit #3 is titled “Admissions by Constable Zabdyr with respect to the statement of particulars in the Notice of Hearing” submitted by Ms. Mulcahy. It reads as follows:

On December 28, 2016, at 2:48 a.m., Mr. Dafonte Miller had an altercation with off-duty Toronto Police Service Constable Michael Theriault and his brother Christian Theriault. Mr. Miller was pursued by the Theriault brothers to a house in Whitby, where Justice Di Luca of the Superior Court of Justice found Michael Theriault assaulted him.

The Durham Regional Police Service responded to the scene after 9-1-1 calls. The Durham Regional Police Service had called for an ambulance to stage in the area.

As a result of the altercation, Mr. Miller suffered a catastrophic injury resulting in the loss of his left eye. The SIU invoked their mandate on May 2, 2017, after being contacted by Mr. Miller’s lawyer. Ultimately, the Theriault brothers were charged with aggravated assault and obstructing police. On June 26, 2020, Justice Di Luca of the Superior Court of Justice found Michael Theriault guilty of assault, not guilty of aggravated assault, and not guilty of obstruct justice. Justice Di Luca found Christian Theriault not guilty of aggravated assault and obstruct justice.

On March 12, 2021, the OIPRD notified the Durham Regional Police Service that they had completed their investigation and concluded that misconduct (discreditable conduct) against Constable Zabdyr had been substantiated. All other allegations against Constable Gendron were unsubstantiated.

Constable Zabdyr and her partner, Constable Bowler, were the first officers to arrive on the scene. She observed one male with longer hair (later identified as Christian Theriault) standing on the side of the curb on the phone who waved her down. Christian Theriault explained that he and his brother found Mr. Miller and his friends breaking into their car. They chased Mr. Miller down but he started hitting them with a pipe or stick, although Constable Theriault was able to restrain him to the ground.

Constable Zabdyr observed another male on the ground (later identified as Mr. Miller), with another male on top of him (later identified as off-duty officer Constable Theriault). Constable Zabdyr requested that the ambulance attend as soon as possible as she observed that Mr. Miller was bleeding from his left eye.

Constable Zabdyr knew Constable Theriault was an off-duty officer and handed her handcuffs to him so he could handcuff Mr. Miller. While being restrained on the ground Mr. Miller stated to Constable Zabdyr that he had been hit with something. Constable Theriault then escorted Mr. Miller to a citizen's vehicle right beside them with the assistance of a Durham Regional Police Service officer and conducted a pat-down search when marijuana was located along with change and a few personal items like a cell phone.

As Constable Zabdyr walked Mr. Miller to the ambulance, she advised him he was under arrest for breaking into cars and for assault.

Constable Zabdyr read Mr. Miller his rights to counsel and caution while he was at the hospital. After confirming the charges with Acting Sergeant Chmelowsky, she advised Mr. Miller that he was being charged with assault, assault with a weapon, possession of marijuana, weapons dangerous, and theft. After being advised of his charges Mr. Miller yelled out, "do you see any weapons on me?" She advised him that he did not need to agree with the charges she just needed him to understand what was going on. After this, Mr. Miller did not respond to any further questions by Constable Zabdyr and did not speak to her. He never asked to call a lawyer.

Constable Zabdyr did not have any further conversations with Mr. Miller. She was relieved of her duties at the hospital at 6:25 a.m. and returned to the police station and completed her arrest report.

Mr. MacKenzie did not submit a similar admission of facts but later noted, other than the last two paragraphs found in the particulars of allegations in Constable Chmelowsky's Notice of Hearing, the facts were substantially correct.

Ten days had been set aside to hear this matter, however, counsel agreed *viva voce* evidence would not be called. Instead, extensive documentary evidence stemming from various investigations and criminal proceedings was to be relied upon. The following exhibits were tendered and the hearing was adjourned for several days to allow me an opportunity to review the material:

- Exhibit #4 Testimony of Mr. Miller - Preliminary Inquiry - February 21, 2018
- Exhibit #5 Testimony of Mr. Miller - Preliminary Inquiry - February 22, 2018
- Exhibit #6 Testimony of Mr. Miller - Superior Court Trial - November 6, 2019
- Exhibit #7 Testimony of Mr. Miller - Superior Court Trial - November 7, 2019
- Exhibit #8 Testimony of Mr. Miller - Superior Court Trial - November 8, 2019
- Exhibit #9 Testimony of Constable Zabdyr - Preliminary Inquiry - February 21, 2018
- Exhibit #10 Testimony of Constable Gendron - Preliminary Inquiry - February 2, 2018
- Exhibit #11 OIPRD interview of Detective Constable Willis – September 3, 2020
- Exhibit #12 OIPRD interview of Detective Constable Willis – October 8, 2020
- Exhibit #13 Transcript of Radio Transmissions from December 28, 2016
- Exhibit #14 Book of Documents Volume 1
1. Detailed Call Summary from December 28, 2016
  2. Notebook entries from December 28, 2016
    - a. Constable Chmelowsky
    - b. Constable Gendron
    - c. Constable Zabdyr
  3. Durham Regional Police Service Occurrence Report - December 28, 2016
  4. Scenes of Crime Officer (SOCO) report and photographs prepared by Constable Bowler December 28, 2016
  5. SIU interview transcripts of:
    - a. Dafonte Miller - May 8, 2017
    - b. James Silverthorne (removed from exhibit, not viewed)
    - c. Constable Chmelowsky - June 8, 2017
    - d. Constable Gendron - June 13, 2017
    - e. Constable Zabdyr - June 13, 2017
- Exhibit #15 Book of Documents Volume II
6. OIPRD Complaint Forms and Schedules – August 15, 2017
  7. Court Transcripts of:
    - a. Testimony of James Silverthorn - October 29, 2019, and November 1, 2019
    - b. Testimony of Mr. Forde (inserted in error so not read or considered by this tribunal) Testimony of Constable Gendron - November 4, 2019
    - c. Testimony of Constable McQuoid (inserted in error so not read or considered by this tribunal) Testimony of Constable Zabdyr – November 5, 2019

Exhibit #16 Book of Documents Volume III

8. Justice J. Di Luca's decision – *R. v. Theriault*, 2020 ONSC 3317 (June 26, 2020)
9. OIPRD Interview Transcripts of:
  - a. Dafonte Miller - September 3, 2020
  - b. Constable Chmelowsky - September 8, 2020
  - c. Constable Gendron - September 8, 2020
  - d. Constable Zabdyr - September 9, 2020
  - e. James Silverthorn (removed from exhibit, not viewed by this tribunal)
10. Duty statement – Constable Zabdyr - October 9, 2020
11. OIPRD Investigation Report - March 12, 2021
12. Durham Regional Police Service Directives
  - a. Directive LE-01-023 - Criminal Investigation Management Plan
  - b. Directive LE-AO-19-001 - Memo Book and Note Taking Procedures
  - c. Directive LE-01-013 - Property Offence Investigations
13. *Durham Regional Police Service and Willis*, February 2, 2023 (Unreported)

Exhibit #17 *R. v Theriault*, 2021 ONCA 443 July 30, 2021

To follow is a summary of what I found to be some of the most relevant evidence, it is not meant to be a comprehensive overview of all material submitted.

According to the Detailed Call Summary, the first 9-1-1 call in relation to this incident was received on December 28, 2016, at 2:48 a.m. from Christian Theriault. He reported that one person had been caught breaking into cars and that person was being restrained in front of 113 Erickson Drive. Officers were dispatched at 2:49 a.m. Additional 9-1-1 calls were received from other callers including Jim Silverthorn whose name and address of 113 Erickson Drive were added to the Detailed Call Summary at 2:50 a.m. The Detailed Call Summary includes the fact that a caller observed one male holding an item, perhaps a stick, four feet in length and that the male was “possibly getting ready to strike the other male.” It was reported that one male was bleeding resulting in an ambulance being dispatched.

According to the Radio Transmissions Log, responding officers were informed that a complainant had caught at least one person trying to break into cars and that person was being restrained. They were told that another 9-1-1 caller from 113 Erickson Drive reported “one male appeared to want to kick complainant’s door in.”



At 2:50 a.m., responding officers were told that the complainant's brother was an off-duty Toronto Police Service officer. At 2:51 a.m., the dispatcher informed the officers that a male person possibly had a weapon, perhaps a stick in their pants and that "one male bent over a vehicle, second male holding a stick that is approximately four feet long, possibly getting ready to strike the other male."

At 2:55 a.m., Constable Zabdyr and her partner, Constable Bowler, were first to arrive on scene. Constable Zabdyr recorded the following information in her notebook:

Male black 19 - 20 years old on the ground. Injuries to left eye, side of the face.  
Male black restrained on the ground by male white with beard. Male white said that male black and friend were breaking into his car. Chased him down and restrained him. EMS on scene. Taken to Oshawa General Hospital.

Constable Zabdyr added an Arrest Report Narrative to the General Occurrence Report. In part, she stated:

On Wednesday, 28 December 2016 at approximately 2:50 a.m. Constable Bowler and I, Constable Zabdyr, were dispatched to a suspicious person call at 113 Erickson Dr. Whitby. Information received from the complainant was that he and his brother were in the garage smoking and they heard someone going through their car. As [we] were driving to the call, further information was received that the male suspect was being restrained, one suspect got away and the suspect was injured/bleeding from somewhere. Several calls were coming in regarding a fight between [a] few people and someone having a stick or something....

On arrival, I observed a male black being held down on the ground between a car and a snowbank by a white male with a beard. As I walked up to the parties, I saw that the male on the ground, later identified as Dafonte Miller, was bleeding from his left eye and I requested an ambulance attend ASAP. The white male, later identified as Michael Theriault, advised me that he and his brother, Christian, saw this guy and another guy breaking into his car... Dafonte was placed under arrest, handcuffed to the back. Male was assisted up to his feet, a search was conducted. Male had a cut to his left [eye], significant blood loss, and was escorted to the ambulance for medical attention. While the male was being transported to Lakeridge Health Oshawa, I was in the back of the ambulance. I did not ask any questions as his well-being was a priority. During the drive to Lakeridge Health Oshawa, the accused told the paramedics that he was just walking with two of his friends, and all of a sudden got attacked by these two guys.

Constable Zabdyr arrived at the hospital at 3:15 a.m. Her notes indicate that at 3:40 a.m., she approached Mr. Miller to “read some things to him - he would not answer. Was speaking with the nurse just fine, no issues. Then he threw up.”

According to her notes, at 4:25 a.m., Constable Zabdyr read Mr. Miller his rights to counsel and caution from her memo book. When she informed him of the charges he was facing, he responded, “what, do you see a weapon, any weapons on me?” Constable Zabdyr informed him that he did not need to agree, she just needed him to understand. Constable Zabdyr reported that Mr. Miller would not answer anything he was asked.

Constable Bowler added a SOCO Narrative to the General Occurrence. In part, she noted:

On December 28, 2016, at 2:50 a.m., the writer, Constable Bowler, and my partner Constable Zabdyr, were assigned to general uniform patrol in Central West Division and were dispatched to attend 113 Erickson Drive in the town of Whitby for a suspicious person. Information was received from multiple callers. The initial information was that the complainant caught at least one person trying to break into cars and that the person had been trying to get into the complainant’s car. The person is being restrained in front of 113 Erickson Drive. Another caller stated that there was a male on the front lawn and two people fighting, one male appeared to want to kick the complainant’s door in. The male was possibly armed with a stick and an off-duty Toronto police officer.

We arrived on scene at 2:55 a.m. and located multiple people on the front lawn of 113 Erickson Drive. One male was face down on the driveway between the snowbank and the car in the driveway with the second male restraining the male with his hands behind his back. The male restraining advised that he had located the male stealing from his car and a second male had taken off northbound. After the male was brought to his feet, he was placed facing the car. I had come around the front of the car and saw that the male had a quantity of blood coming from the left eye area and as EMS had already been called by the complainant, I updated that the eye injury appeared to be severe.

Constable McQuoid and Constable Gendron arrived on scene and I went to check the area to the west towards the complainant’s house for evidence and for the second suspect. I was requested to return to the scene to complete SOCO duties in relation to the scene. My partner Constable Zabdyr went in the ambulance with the accused.

I began photographing the scene and noted that the accused was inside the ambulance and had not yet been bandaged. I was able to take one photograph of the accused inside the ambulance prior to them bandaging the accused. The accused had a bloody fleshy piece under his closed left eye. There was blood on his face and during this quick photograph, no other major injuries were visible...

Constable Gendron's notes read as follows:

2:49 a.m. - suspicious person 113 Erickson Drive - male trying to break into cars - complainant caught one of possible two suspects.

2:56 a.m. - at scene - victims assaulted with pipe by male attempting to break into cars. One suspect still at large. Witness statement

4:11 a.m. - lock key [finalized witness statement]

4:15 a.m. - en route to 18 division

Prior to the conclusion of her shift, Constable Gendron added a Police Witness Statement to the General Occurrence. She and her partner Constable McQuoid were dispatched to the call at 2:49 a.m., arriving on scene at 2:56 a.m. she indicated that she searched the area with Constable Bowler for other suspects, possible witnesses, or evidence, with negative results. She added:

I spoke with Jim Silverthorne. He stated that he had heard a confrontation outside and someone banging on his door then someone yelling to call 9-1-1 but he did not see much else as it was dark. He said that the male yelling to call 9-1-1 was possibly a white guy with a black toque. Then pointed to Christian and Michael stating it was one of them who was yelling for 9-1-1. At 3:35 a.m. I used Constable Bowler's cruiser to take the statement of Christian Theriault.

Christian Theriault's statement, verbatim, was recorded as follows:

Gendron I'm going to get you to tell me what happened, everything you tell me is important, I want you to provide me with as much detail as possible and I will be writing it as you tell me, at the end I will read it back to you and you can make corrections to anything you think is not recorded properly.

C. Theriault My brother and I were in the garage and it was closed to have a smoke, so two minutes into having a smoke we heard the truck door closed and rattling outside of the garage, so immediately we opened the garage door and saw two males, one was running away from the

house, one was running north on Erickson Drive with a grey hood on and the other was running east on Erickson, my brother was pursuing the one running east so I followed my brother, coming up to 113 Erickson the guy who was breaking into our car decided to try and run in between the houses and attempt to jump the fence, once he realized we caught up to him he started swinging a steel pipe at both my brother and myself, so we tried to defend ourselves and stop him, he continued to swing the pipe at us and hit me repeatedly with the pipe all over and was hitting my brother, eventually we were able to stop him from hitting us, my brother held him on a car, and was yelling for someone to call 9-1-1 and I was already on the phone with them at this point. Police arrived and took over.

Gendron Where did the accused hit you with the pipe?

C. Theriault For sure, the right back side of my head and then in the arms and body as I was trying to defend myself.

Gendron Do you have any injuries?

C. Theriault No just sore, my head hurts same with my arms and legs.

Gendron Did you see where he got the pipe from?

C. Theriault I'm assuming out of his pants, its really dark between the houses and he just turned and hit me with it, I didn't even see it coming.

Gendron Can you describe the guy?

C. Theriault Approximately 6 feet three inches, 190 pounds wearing greyish white hoodie, blue jeans, black male about 18 or 19 years old.

Gendron Do you have anything else to add?

C. Theriault No I think that's it.

As indicated, Constable Chmelowsky was the acting sergeant during this shift. Constable Chmelowsky's notes indicate that he was dispatched to the call for service at 2:53 a.m. and arrived at 3 a.m. His notes state:

Male breaking into vehicle. Fight with victim. Constable Bowler advises male with eye injury in back of EMS. Observed male getting bandaged, blood on face. EMS advised not sure but needs to see doctor. Inspector Wagenberg advised (EMS injury updated and off-duty Toronto Police Service...) Constable McQuoid - accused entered vehicle victim... confronted. Both took off one took off northbound other ran east. Accused ran between residences came out with pipe. Victim struck with pipe. Accused sustained injury to his face. Accused to OGH by EMS. Constable Zabdyr in EMS. Constable Gendron and Constable McQuoid taken statements. Duty O/S briefed of occurrence. Clarity - possible SIU involvement...

At 4:22 a.m., Constable Jeffs informed Constable Chmelowsky that Mr. Miller's eye injury was "significant." At 4:56 a.m., he noted, "Jeffs advised injuries – badly damaged L-eye, broken nose, L cheek – update Duty O/S..."

In his Police Witness Statement added to the General Occurrence at 6:57 a.m., Constable Chmelowsky stated in part:

Once on scene, the writer was informed by Constable Bowler that the accused had an eye injury and is in the back of the ambulance. The writer walked over to the ambulance at which time the accused was being bandaged up. It appeared that there was a potential facial injury of some sort as there was blood on the face. The writer asked EMS personnel about the severity. EMS advised that he is not sure and that the doctor would be able to provide more detail.

The writer then contacted duty inspector - Acting Inspector Wagenberg and advised him of what information EMS provided. Further information was that the victim was an off-duty Toronto police officer.

Information received from Constable McQuoid was that the accused's entered the victim's car, victims confronted the accused. Both accused's took off on foot one male traveled northbound up the street the other accused ran east with the victims in pursuit. The accused ran between the houses and came out with a metal pipe striking both victims. During the altercation the accused sustained an injury.

The accused was transported to OGH by EMS with Constable Zabdyr. Constable Bowler began conducting SOCO of the scene. Constable Gendron and Constable McQuoid were detailed to gather statements from the victims. Duty Inspector arrived on scene and was briefed of the incident. At approximately 4:22 a.m. the writer was informed by Constable Jeffs that the accused's left eye injury is significant. Duty Inspector was updated. The writer was again contacted by Constable Jeffs at 4:56 a.m. that the accused's injuries were a badly damaged left

eye, broken nose, and broken left cheekbone. The writer then contacted the Duty Inspector with the injury update...

The OIPRD received Mr. Miller's complaint on August 15, 2017. The OIPRD's 126-page Investigative Report is dated March 12, 2021. The following verbatim excerpts highlight some of the OIPRD's comments and/or findings:

Mr. Miller alleged that members of the Durham Regional Police Service conducted a negligent investigation of the Theriault brothers... Specifically, the responding officers failed to interview witnesses; blindly accepted the version of events given by the Theriault brothers; did not investigate how Mr. Miller received his injuries; did not investigate the Theriault's allegation that he broke into a vehicle in their parents' driveway; unlawfully arrested him; permitted Constable Theriault to handcuff him; applied the handcuffs too tightly; failed to notify the SIU of the incident; and conspired to protect the Theriault brothers from arrest and prosecution.

[Now retired] Constable McQuoid observed that Mr. Miller had a small cut under his left eye, and his eye was seeping blood. Mr. Miller was not struggling and did not say anything. There was blood and a yellowish fluid on the hood of the vehicle.

(According to Constable McQuoid, Constable Theriault informed him) at some point, Mr. Miller produced a pipe from somewhere and began swinging it at them. They had a struggle over the pipe, and Constable Theriault took his phone out to try to call 9-1-1 but lost his phone during the struggle. They managed to wrestle the pipe away from Mr. Miller who then ran to the front of 113 Erickson Drive, banged on the front door, and then walked northbound towards a vehicle. That is where Constable Theriault grabbed Mr. Miller, put him on the ground, and held him until the police arrived.

Notwithstanding the lack of injuries, Constable McQuoid denied "blindly accepting" the accounts of Constable Theriault and (his brother) as, from his experience, he had observed people get into fights where there are no injuries found.

[Constable McQuoid took a verbatim statement from Constable Theriault] At the end of the interview, Constable McQuoid asked how Mr. Miller was injured. Constable Theriault replied, "it could have started from the beginning of the fight until police were called." There were no follow up questions about Mr. Miller's injuries. Constable Theriault also told Constable McQuoid that he was not injured.

[Simon Renison is a Region of Durham paramedic, and] on the night of the incident, he was partnered with Ian Carter... He authored an Incident Report as a result of his attendance and co-authored an Ambulance Call Report with Mr. Carter. He was not interviewed by the SIU or the Durham Regional Police Service. The following summary is from an interview with the OIPRD.

Mr. Renison recalled that he and Mr. Carter arrived on scene at 3:00 a.m., left for the hospital at 3:08 a.m., and arrived at the hospital at 3:15 a.m.

When they initially arrived at the scene the police brought Mr. Miller over to them. Mr. Miller was placed on a stretcher in the rear of the ambulance. Mr. Miller complained of pain in his left eye, and his eye was swollen. Mr. Miller characterized the pain as extreme. The eye had tissue coming from it and was clotting. The pain increased during their assessment.

...one officer rode in the ambulance with him to the hospital. He does not recall who that officer was, but the officer was quiet during the transport. The Ambulance Call Report noted that Mr. Miller advised that he was attacked by multiple people with a weapon that appeared to be a metal pipe and that he was struck in the head and face multiple times. Mr. Renison additionally noted in his Incident Report that Mr. Miller told the attackers that they had the wrong guy...

Mr. Carter was partnered with Mr. Renison...(his) statement was like that of Mr. Renison...while he drove, he could not hear anything in the rear of the ambulance. At some point during his interaction with Mr. Miller, he vaguely recalled Mr. Miller saying something to the effect that he had been "beaten up," but otherwise, Mr. Miller was quiet and did not say too much in his presence. Mr. Miller's injury was significant given the fact that it was an injury to an eye globe...

Staff Sergeant Micah Wagenberg was the Acting Duty Inspector on December 28, 2016. He provided a statement to the SIU and to the OIPRD. The Investigative Report states:

... he was briefed throughout the morning on the events that were taking place, he never attended the scene. He received a call from Acting Sergeant Chmelowsky at 3:08 a.m. informing him of the incident and that it involved an off-duty Toronto Police Service officer. At that time he was not aware of the seriousness of Mr. Miller's injuries but knew Mr. Miller had been transported to the hospital in an ambulance...

At 4:58 a.m. Acting Duty Inspector Wagenberg received a call from Acting Sergeant Chmelowsky who informed him that Mr. Miller's injuries had been updated. He learned that Mr. Miller had several fractures to his face, that the injury to the eye was serious and that he may lose the eye. He felt that the injuries met the threshold of "serious injury" as defined by the SIU. [He made the appropriate notifications]

The Investigative Report summarized Constable Bowler's involvement and observations based on her SIU and OIPRD interviews and her court testimony:

Constable Bowler and Constable Zabdyr were the first officers to arrive on the scene. Constable Bowler... observed two males on the ground in between the vehicle and the lawn... When Constable Bowler arrived, the white male (later identified as Constable Theriault) stated that the black male (later identified as Mr. Miller) was stealing from his vehicle....

Constable Theriault had Mr. Miller restrained. As Constable Bowler approached them, Constable Theriault brought Mr. Miller to his feet with the assistance of Constable Zabdyr. She observed Constable Theriault and Constable Zabdyr lift Mr. Miller up off the ground with reasonable force. She did not lift Mr. Miller, search him, or place handcuffs on him.

Mr. Miller had a quantity of blood coming from his left eye, and there appeared to be a significant injury to that eye, as it was red underneath and very swollen. She said that looking at the injury made her uneasy. She updated communications and ask that they advise the paramedics. She noticed no injuries on Constable Theriault.

Constable Bowler executed her SOCO duties which included photographing Mr. Miller while seated in the ambulance and photographing Christian Theriault's reported hand injury. Constable Bowler later added a SOCO Narrative to the General Occurrence.

The OIPRD Investigative Report provided a summary of Constable Zabdyr's involvement based on her notes, her reports, her interviews with the SIU and the OIPRD, and her court testimony. I need not repeat the summary I have already provided but will instead focus on new or noteworthy observations. The OIPRD Investigative Report states:

They were the first officers to arrive on the scene... She [Constable Zabdyr] observed one male with longer hair later identified as Christian Theriault standing on the side of the curb on the phone. He waved her down. She observed another male on the ground (later identified as Mr. Miller) with a male on top of him (later identified as Constable Theriault).



Christian Theriault told her that he and his brother were having a smoke when they saw two males breaking into cars. They chased one male down, but he started hitting them with a pipe or stick or something, although he and his brother were able to restrain him. She asked Christian Theriault to confirm that the male with the beard who was on top of the other male was an off-duty police officer and he did...

Mr. Miller had blood coming from his left eye, but Constable Zabdyr was unable to assess the seriousness of the injury because Mr. Miller was face down.... Constable Zabdyr knew that Constable Theriault was an off-duty police officer because it was in the call, and she confirmed it with Christian Theriault.... as there was no struggle, Constable Zabdyr believed that rather than having Constable Theriault move aside so that she or her partner could handcuff Mr. Miller, Constable Theriault could handcuff him safely...

With the assistance of Constable Bowler, Constable Theriault lifted Mr. Miller off the ground and put him over the hood of the vehicle to be searched...

As she was walking Mr. Miller to the ambulance, she advised him he was under arrest for breaking into cars and assault. She based this on the call card and the information she had received from the Theriault brothers. Constable McQuoid was with her when she was walking Mr. Miller to the ambulance. Mr. Miller told her that they "had the wrong guy." She responded, "we always do." Mr. Miller advised that he and his friends were just walking down the street and suddenly got jumped by these two guys.

When she first arrived, Mr. Miller was on the ground and was screaming that he had been beaten up by the males who had been hitting him with something. After the preliminary inquiry, she recalled for the first time that Mr. Miller also said that he had been hit with a weapon. She made no entry of any of his utterances in her notes. She also did not mention his comments in her report, and she did not mention that she that he said he had been hit with a weapon in her interview with the SIU or during her testimony at the preliminary hearing. She explained that testifying at the preliminary inquiry jogged her memory, allowing her to confirm Mr. Miller's remark at the criminal trial.

Mr. Miller verbally identified himself to her, but they had no other conversation on the drive to the hospital. Mr. Miller did tell the paramedics that he was just walking and then he got jumped and beat up. They arrived at the hospital at 3:15 a.m. she

did not know how serious his injuries were, but she was uncomfortable by the sight of the injury to his eye.

The OIPRD Investigative Report provided a summary of Constable Gendron's involvement based on her notes, her reports, her interviews with the SIU and the OIPRD, and her court testimony. I will attempt to not repeat the summary I have already provided but will instead focus on new or noteworthy statements. The OIPRD Investigative Report states:

... she [Constable Gendron] observed two males at the driveway, Mr. Silverthorn, and his son. She could not remember who initiated the conversation but she did tell one of them that they caught a male breaking into cars. Mr. Silverthorn replied, "Well, they did not have to; they did not have to kill the guy." She asked Mr. Silverthorn if he observed what happened and he told her that it was dark. She said, "Okay did you see anybody armed with anything?" She knew at that point a pipe or pole had been used. He stated "no." He did tell her that he had heard a confrontation outside and that someone was knocking on his front door, and he looked out and saw a white male wearing a black toque, there was another white male and one of them asked to call 9-1-1. Constable Gendron made no notes of this conversation.

Mr. Silverthorne did not appear to be "overly cooperative" and was not really willing to provide much information "unless I was prying it from him."

...Constable Gendron advised that Mr. Silverthorn appeared "annoyed." She was not sure if it was because of the police being on his property, the timing of the incident, or the people on his vehicle. She did not take a statement from him because she did not feel he had material information. She then left him and went to speak to Acting Sergeant Chmelowsky. She was informed by Acting Sergeant Chmelowsky that CIB would be following up on the matter.

When asked if she would have noted down Mr. Silverthorn's statement in her memo book if she had it with her at the time, she said she did not believe Mr. Silverthorn's comment was important enough to note down. When she spoke to him, she was not aware that he was a 9-1-1 caller.

Mr. Silverthorn's comment was also not included in her narrative text in the occurrence report because she did not believe Mr. Silverthorn observed what had happened. She believed his comment about "not having to kill the guy," was based on his observation of the aftermath and the first responders on the scene and not from his observations of the incident...

Constable Gendron spoke with Christian Theriault as the victim of an assault. She believed he was the victim because prior to taking the statement she had information about Mr. Miller assaulting Constable Theriault and Christian Theriault with a weapon and that he had stolen from a motor vehicle.

Constable Gendron asserted that, at this time, she had no information about the seriousness of Mr. Miller's injuries and or Mr. Miller's allegation that he was attacked. She stated that this was either the first time or one of the first times she had taken statement from a witness on her own...

A review of the narrative text of the occurrence report revealed that Constable Gendron referred to Mr. Miller as "the accused" and did not ask Christian Theriault how Mr. Miller came to sustain his injuries. Constable Gendron asserted that she was not aware of Mr. Miller's injuries prior to the interview with Christian Theriault and stated that she had no contact with him. She knew that someone was injured but she did not know who or why. She assumed any injuries sustained were from the altercation between the three. She believed CIB would follow up and interview Christian Theriault and she denied "blindly accepting" his account...

Constable Gendron was aware that Constable Theriault was an off-duty police officer through the call information, but she did not directly speak to him...

Regarding her note taking, she believed it was a bad judgment call on her part for not making a note of Mr. Silverthorn's comment as she was a newer officer at the time and has learned from this experience going forward.

Constable Chmelowsky did not testify at the criminal proceedings. The OIPRD Investigative Report included a summary of his interview with the OIPRD. In part, the Report states:

The information he received that night was from the field and was fluid. He believed he received information from Constable McQuoid and Constable Gendron. He learned that the Theriault brothers were in the garage, heard some noise outside and confronted individuals at the at the vehicle. A foot pursuit ensued, which resulted in a physical altercation and injuries.

Acting Sergeant Chmelowsky arrived on the scene at 3:00 a.m. and observed Mr. Miller already in the ambulance. Mr. Miller did not say anything to him. He could not see much of Mr. Miller's injuries as he was bandaged up... Acting Sergeant Chmelowsky recalled seeing a bit of blood or mark under Mr. Miller's eye. In his early assessment, Mr. Miller's injuries did not appear to be significant....

Acting Sergeant Chmelowsky did not recall if Constable Zabdyr advised him that Mr. Miller said that the Theriault brothers had jumped him. He would not have been surprised if she had told him that, as they were vehicle owners pursuing Mr. Miller after finding him in their vehicle. When asked if he would act on this information from Constable Zabdyr, he said he would not because Mr. Miller was found at the vehicle, it would not be surprising that an altercation ensued. Acting Sergeant Chmelowsky stated that he would have needed more information from another witness to act on the conflicting information. He never spoke with Mr. Miller.

Acting Sergeant Chmelowsky called the duty inspector, Acting Inspector Micah Wagenberg, and advised him of the information received and that the incident involved an off-duty Toronto Police Service officer. He directed Constable Bowler to conduct SOCO duties and for exhibits to be seized.

Acting Sergeant Chmelowsky wanted statements taken, but Constable McQuoid and Constable Gender had already started to take a statement from Constable Theriault and Christian Theriault respectively...

From his observation of the interaction between Mr. Silverthorne and Constable Gendron and Mr. Silverthorn's body language, Acting Sergeant Chmelowsky determined that Mr. Silverthorn did not want to provide a statement or cooperate in the investigation. Mr. Silverthorn did not look impressed that the Durham Regional Police Service was at his residence.

Acting Sergeant Chmelowsky stated that you cannot force someone to provide a statement. When Constable Gendron walked back towards him, she did not seem impressed with Mr. Silverthorn's attitude. He believed he told her to make a note of Mr. Silverthorn's response and he figured that CIB would follow up with Mr. Silverthorn later....

Acting Sergeant Chmelowsky only briefly spoke to Constable Theriault and Christian Theriault to ask about their injuries and if they needed anything because the ambulance was on scene. They did not say much to him. He did not show Constable Theriault any favouritism because he was a police officer. Contrary to Constable Zabdyr's statement, he had no input on the charges laid against Mr. Miller. He also had no input on the SIU notification...

Acting Sergeant Chmelowsky denied the allegation against him for a negligent investigation. His role was to seek and gather information from the scene about Mr. Miller's injuries, to liaise with Actor Inspector Wagenberg and provide him the

information, and to also move that information up the chain of command, including potential SIU notification...

Acting Sergeant Chmelowsky said that he tried to pin witnesses down to a statement, but he was not too concerned if they were not because the CIB always follows up with witnesses as they review the reports. If there was anything that was not consistent it would be CIB's role to investigate.

The OIPRD Investigative Report provided the following verbatim summary of the 9-1-1 calls received in relation to this incident:

There was a total of five 9-1-1 calls placed in relation to this incident...

The first 9-1-1 call was placed by Christian Theriault who sounded to be very out of breath throughout the call. He told the 9-1-1 operator that they had caught one of the guys breaking into one of their cars. He interrupted the call to say, "Mike, grab him, grab him, buddy get down on the ground, Mike arrest him." He then told the 9-1-1 operator that his brother was an off-duty cop and clarified when asked, that his brother was an off-duty Toronto Police Service officer with 42 division.

Christian Theriault then advised that the male was trying to get away, and that his brother had him and that he was on the ground. He told the 9-1-1 operator that they needed an ambulance, and when she asked why, he said, "he was fighting us back, and we were trying to... he's all... we're all fucking bloodied right now." Christian Theriault then stated the male was bleeding, but he didn't know what was wrong.

While still on the call with a 9-1-1 operator, indistinct voices could be heard in the background. It then appeared that Christian Theriault stated to Mr. Miller, "I am on 9-1-1 you fucking, you fucking enter cars and shit eh, you picked the wrong cars." When the 9-1-1 operator asked about noise in the background, Christian Theriault told her that it was his brother and that the male was trying to call the police right now. Constable Theriault then came on the call and advised that he could not see the officers yet and, in response to questions by the 9-1-1 operator, provided additional information about where the other males were seen running. Police arrived shortly afterwards and the call ended.

The second 9-1-1 call was placed by Mr. Silverthorn's wife. This call came in while Christian Theriault was on the phone with 9-1-1. She advised that there was a fight next door and that someone was repeatedly ringing their doorbell. Mr. Silverthorn then came onto the line and stated that the guy was kicking their door and yelling

to call 9-1-1. The 9-1-1 operator told him that they had received another call and that police were on their way.

Mr. Silverthorn advised that there were several people on his driveway and that his son believed there was some kind of weapon involved, maybe a stick. Mr. Silverthorn advised that he was “going to go have a look,” and shortly after he advised “okay, seriously, the one guy’s got a stick. One guy’s bent over my wife’s car and this guy with a stick that’s probably about four feet long.” The 9-1-1 operator asked whether it was like a wooden stick, and Mr. Silverthorn stated “ya... and you know what? I think he’s going to strike the guy again.” The 9-1-1 operator advised him that police were on the way and told him that it looked like maybe one guy was trying to break into the other guys car, and she guessed the other guy was trying to restrain him. Mr. Silverthorn did not offer any more observations or information before the police arrived, and the call ended.

The third 9-1-1 call was from a neighbour who advised that he had been awoken by some young men fighting outside. The call ended when he was advised that police were on their way.

The fourth 9-1-1 call was from Mr. Miller. He asked for 9-1-1, and then the following exchange occurred in the background between Mr. Miller and Constable Theriault:

Theriault     You’re under arrest.

Miller         I know.

Theriault     Stop.

Miller         Hello, -9-11? Tell them to send...

Mr. Miller’s discussion with 9-1-1 was then interrupted when Constable Theriault took his phone. Constable Theriault advised the 9-1-1 operator that it was the same people (as on the other 9-1-1 call) and that they were holding the guy down. Although the sound was muffled, Mr. Miller could be heard in the background saying, “you got the wrong people bro.” Constable Theriault then stated, “please get the police here and ambulance, now.”

The last 9-1-1 call was from a neighbour who said there was a fight. The call ended very shortly afterwards when the caller was advised that police were on their way.

The OIPRD Investigative Report substantiated certain allegations, resulting in these proceedings, but many were unsubstantiated. The Investigative Report stated:

... the OIPRD investigation did not reveal evidence to support an allegation that officers conspired to protect the Theriault brothers from prosecution.

Significantly, however, there is evidence from which it can be reasonably inferred that officers demonstrated a bias in favour of police. This bias evidenced or manifested itself in the failure of various officers to properly record information that was favorable to Mr. Miller. It also was evidenced by the failure to conduct a proper investigation into how Mr. Miller came to receive his severe eye injury. It was only when the SIU was notified five months later by Mr. Miller's counsel that the matter was thoroughly investigated and charges subsequently laid.

During his *Police Services Act* disciplinary hearing, Detective Constable Willis admitted the following:

Detective Constable Willis was aware, as soon as he was assigned the file, that Mr. Miller had suffered an eye injury. He saw the photographs taken by Constable Bowler, one of which was of Mr. Miller's very bloodied face, and others of the blood and other fluids found on the hood of the car at the scene.

Despite the lack of detail about how Mr. Miller came to sustain a serious eye injury, Detective Constable Willis never questioned the narrative provided by the Theriault brothers. Detective Constable Willis took the position that, without Mr. Miller's statement, he did not have sufficient evidence to refute what the Theriault brothers had told him. He did make some efforts to speak to Mr. Miller, both through Mr. Miller directly and then through his mother.

The OIPRD found there was sufficient evidence available to Detective Constable Willis to potentially refute the narrative provided by the Theriault brothers. When Mr. Miller was caught in between the houses, Detective Constable Willis failed to consider whether Mr. Miller might have wielded the pipe in self defence, fearing that the Theriault's had chased him in order to assault him. Detective Constable Willis never appeared to consider whether the force that they used in defending themselves was proportionate to the threat that Mr. Miller posed or whether it was excessive.

There were discrepancies in injuries, yet Detective Constable Willis appeared not to question the narrative provided by the Theriault brothers. The subsequent interview with Christian Theriault was initiated by John Theriault; there was no indication that Detective Constable Willis would have otherwise re-interviewed him

at all, notwithstanding that Christian Theriault's original statement did not even address how Mr. Miller came to receive his injuries.

Although Detective Constable Willis listened to the 9-1-1 calls, it appears that he did not use them to assist in the investigation as there were several pieces of valuable information contained in these calls that were not the subject of any further investigation. Detective Constable Willis failed to interview all the 9-1-1 callers.

He did not pursue obtaining the medical release from Mr. Miller and consequently never sought a medical opinion about whether the injuries sustained by Mr. Miller were consistent with the version of events provided by the Theriault brothers. The pipe that was seized which appeared to have blood on it, was never submitted for analysis nor were any other items from the scene.

Detective Constable Willis was aware that the SIU would not be investigating how Mr. Miller came to sustain his injuries therefore, it fell to him to determine whether an offence had been committed. The investigation conducted by Detective Constable Willis was really limited to an investigation of a theft from a vehicle. Apart from some efforts to speak to Mr. Miller - who was accused and therefore had a right to remain silent, Detective Constable Willis did not take any meaningful steps to investigate his injuries or to determine if the force used to cause these injuries was justified and proportionate...

Detective Constable Willis accepted the version of events proffered by the Theriault brothers notwithstanding that he knew the altercation was a two on one; that Constable Theriault had no injuries and that Christian Theriault did not have any observable injuries.

By failing to properly investigate the incident, Detective Constable Willis was neglectful and did not promptly and diligently perform a duty as a member of the police force.

Justice J. Di Luca's decision in *R. v. Theriault*, dated June 26, 2020, is found at tab 8 of Exhibit #14. Justice Di Luca's Reasons For Judgment is 64 pages in length. Justice Di Luca conducted credibility and reliability assessments of the witnesses in general and in relation to specific aspects of their evidence. There were aspects of Constable Theriault's evidence that Justice Di Luca accepted but also, there were "significant aspects of his evidence" that were not accepted. Similar conclusions were drawn in regard to Christian Theriault and Mr. Miller.



Regarding Mr. Silverthorn, Justice Di Luca stated:

James Silverthorn was also an honest witness. He gave a compelling and dispassionate account of what he observed on the night in question. His evidence was tested vigorously, and he remained objective and offered logical explanations for certain discrepancies in his evidence....

### **Submissions**

The hearing reconvened on May 23, 2023, and over the course of four days, counsel made submissions in relation to the evidence before the tribunal. The following exhibits were tendered by counsel in support of those submissions:

- Exhibit #18 Book of Authorities – Durham Regional Police Service Volume I
1. *Toronto v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII) [2003] 3 SCR 77
  2. *Rosario v. Thunder Bay Police Service Board*, 2015 HRTO 145 (CanLII)
  3. *C.K. v. H.S.*, 2014 HRTO 1652 (CanLII)
  4. *Khan v. York Regional Police Service*, 2014 ONCPC 4 (CanLII)
  5. *G.M. v. X Tattoo Parlour*, 2018 HRTO 201 (CanLII)
  6. *Penner v. Niagara Regional Police Services Board*, (CanLII)
  7. *Jacobs v. Ottawa Police Service*, 2016 ONCA 345
  8. *Gonzalez and Ontario Provincial Police*, 2006 ONCPC 5
  9. *Faryna v. Chorny* [1952] CanLII 252 (BC CA), 2 DLR 354 (BCCA)
  10. *O'Reilly v. Ottawa Police Service*, 2014 ONCPC 20
  11. *Girard v. Delaney* (1995), 2 P.L.R. 337 (Ont. Bd. Inq.)
  12. *Silverman and Ontario Provincial Police*, 1997 CanLII 22046 (ON CPC)
  13. *Mancini and Courage (Niagara Regional Police Service)*, 2004 CanLII 77199 (ON CPC)
  14. *Tapp v. Ontario Provincial Police*, 2018 ONCPC 16 (CanLII)
  15. *Phoenix v. London Police Service*, 2013 ONCPC 4 (CanLII)
- Exhibit #19 Book of Authorities – Durham Regional Police Service Volume II
16. *Gottschalk v. Toronto Police Service*, 2003 CanLII 87674 (ON CPC)
  17. *Bakos v. Hamilton Police Service*, 2009 ONCPC 4 (CanLII)
  18. *Hawkes v. McNeilly*, 2016 ONSC 6402 (CanLII)
  19. *Guenette and Ottawa-Carleton Regional Police Service*, 1998 CanLII 27136 (ON CPC)
  20. *Floria v. Toronto Police Service*, 2020 ONCPC 6 (CanLII)
  21. *Toronto Police Service v. Kelly*, 2006 CanLII 14403 (ON SCDC)

22. *Mowers and Hamilton-Wentworth Regional Police Service*, 1999 CanLII 31610 (ON CPC)
- Exhibit #20 Excerpt from *Police Services Act*, Section 42
- Exhibit #21 Excerpt from the text *Legal Aspects of Policing*, Section 2.1. & 2.6
- Exhibit #22 Book of Authorities – Public Complainant
1. *Jacobs v. Ottawa Police Service*, 2016 ONCA 345
  2. *Campoli v. Toronto Police Service*, 2020 ONCPC 11
  3. *Mulligan v. Ontario Provincial Police*, 2017 ONCPC 19
  4. *R. v. B. (M.)*, 2006 ONCJ 526
  5. *Potter v. Ontario Provincial Police*, 2017 ONCPC 20
  6. *Neild v. Ontario Provincial Police*, 2018 ONCPC 1
  7. *Dickinson v. Ontario Provincial Police*, 2018 ONCPC 20
  8. *Boutin v. Ontario Provincial Police*, 2022 ONCPC 10
- Exhibit #23 Select photographs from Exhibit #14, tab 4, enlarged
- Exhibit #24 Book of Authorities – Defence – Gendron & Zabdyr – Volume I
1. *Penner v. Niagara Regional Police Services Board*, [2013] S.C.J. No. 19
  2. *Allan v. Munroe* (Board of Inquiry – 1994)
  3. *Pollock v. Hill and Cowley* (Board of Inquiry – 1991)
  4. *P.C. P.G.* (Div. Ct. – 1995)
  5. *Hawkes v. McNeilly* [2016] O.J. No. 5397 (Div. Ct.)
  6. *Korchinski v. Office of the Independent Police Review Director* [2002] O.J. No. 4810 (Div. Ct.)
  7. *Bakos v. Gallant* (OCCPS – 2009)
  8. *Kraljevic and Svidran, Plump, Wilson and Ottawa Police Service* 2017 ONCPC 21
  9. *Shockness* (Board of Inquiry – 1994)
  10. *Monaghan v. Toronto Police Service* [2005] O.J. No. 1396 (Div. Ct.)
  11. *McCoy* (1969) O.P.R. 16
  12. *Rose et al and Toronto Police Service and MacIsaac and Office of the Independent Police Review Director*, (OCPC 2018)
  13. *Peel Regional Police and Crane*, May 25, 2020
  14. *Allen v. Alberta Law Enforcement Review Board* [2013] A.J. No. 533 (C.A.); leave to appeal SCC dismissed
- Exhibit #25 Book of Authorities – Defence – Gendron & Zabdyr – Volume II
15. *Hallam v. College of Physicians and Surgeons of Ontario* (1993) 61 O.A.C. 143 (Div Ct.)
  16. *Miles v. Krug* (Board of Inquiry – 1993)
  17. *Magda and Sheppard* (Div. Ct. 1992)

18. *Tomie-Gallant v. Ontario* [1996] O.J. No. 2863 (Div. Ct.)
19. *Charlton v. St. Thomas Police Services Board*, 2009 CanLII 25977 (Sup. Ct.)
20. *Golomb v. College of Physicians and Surgeons*, (1976) 12 O.R. (2d) 73 (Div. Ct.)
21. *Smith v. Murdock* (1987) 25 O.A.C. 246 (Div Ct.)
22. *Toronto Police Service and Wang*, October 22, 2015
23. *Katsoulakos v. Association of Professional Engineers of Ontario* [2014] O.J. No. 4430 (Div Ct.)
24. *Nguyen v. Chartered Professional Accountants of British Columbia* [2018] B.C.J. No. 699 (Sp. Ct.)
25. *Toronto Police Service and Gauthier*, August 23, 2021
26. *Canadian National Railways V. Canadian Human Rights Commission*, 1985 Carswell Nat 129
27. Section 62, *Police Services Act*
28. *Police Services Act*, Ontario Regulation 267/10
29. Oath of Office

Exhibit #26 *Special Investigations Unit Act*, 2019

To minimize repetitiveness in this decision, I will provide a summary of counsel's submissions but for the purposes of my analysis, I will consider the full scope of their respective positions.

### Prosecution submissions

Mr. Johnstone submitted the evidence clearly showed a definite pro-police bias; each of the involved officers were swayed by the presence and involvement of off-duty police officer Michael Theriault. Consequently, their actions and inactions were inadequate; they did not question the veracity of the statements provided by the Theriault brothers nor did they investigate how Mr. Miller sustained his injuries.

Mr. Johnstone walked me through the evidence including the OIPRD Investigative Report. He highlighted many aspects of the Investigative Report, noting the information lacking in officer memo books and supplemental reports which support his assertion that Mr. Miller did not receive the proper police attention deserved; the officers simply accepted the information received and did nothing of substance to investigate how he was injured. Mr. Johnstone submitted the sheer imbalance in injuries called for an investigation that did not occur, resulting in police misconduct.

Mr. Johnstone submitted I am bound by the findings of Justice Di Luca who found Mr. Silverthorn a credible, reliable witness. He submitted that his version of events is inconsistent with Constable Gendron's assertion that Mr. Silverthorn was uncooperative and pointed out one of the Theriault brothers as being at his door asking he call 9-1-1.

Mr. Johnstone noted that the responding officers were immediately aware that an off-duty police officer was involved in the arrest and detention of a person suspected of stealing from cars. It was that information which prompted Constable Zabdyr to pass her handcuffs to Constable Theriault based on limited information.

Mr. Johnstone submitted that while not all officers personally observed Mr. Miller's eye injury, they all would have been aware that he had suffered a serious injury; they stood by, awaiting word on whether the matter would become an SIU investigation before receiving witness statements. When the statements were taken from the Theriault brothers, the investigating officers and their supervisor, Constable Chmelowsky, had already determined they were only investigating a theft followed by Mr. Miller wielding a weapon.

Mr. Johnstone noted that the investigating officers including Constable Zabdyr, never considered a self defence narrative. Constable Zabdyr was aware that Mr. Miller made utterances indicating that the Theriault brothers had the "wrong guy" and that he "had been jumped" yet she never asked Mr. Miller to elaborate.

Mr. Johnstone noted that in her interview with the SIU, Constable Zabdyr stated that she informed Constable Chmelowsky that Mr. Miller told the paramedics he was walking down the street with friends when he was jumped by these two guys. Mr. Johnstone questioned why there was no such note about the comment or informing her sergeant in her memo book and that despite hearing this, she never inquired further. She noted that Mr. Miller would not speak with her after he had been read his rights to counsel and cautioned.

Mr. Johnstone submitted that Constable Gendron's notes are inadequate; they do not include Mr. Silverthorn's particulars that she claimed to have written on her hand. Mr. Johnstone noted that her version of her conversation with Mr. Silverthorn was inconsistent with his testimony.

In her SIU interview, Constable Gendron acknowledged that she was aware from the dispatch information that an off-duty police officer was involved. Mr. Johnstone noted that Constable Gendron stated that she was not aware that Mr. Silverthorn was one of the 9-1-1 callers despite this information being included in the call card which she had read. Constable Gendron did not take a statement from Mr. Silverthorn because she did not

feel he had information to provide. She took a statement from Christian Theriault because she was directed to do so by Constable Chmelowsky.

Mr. Johnstone submitted that Constable Gendron did not ask Christian Theriault about the nature or cause of Mr. Miller's injury because she had accepted the Theriault brothers' version of events because Michael Theriault was a police officer; her woeful note taking and lack of investigative questioning was a direct result. Mr. Johnstone submitted it made no sense for an officer of any level of experience to not question the fact that Mr. Miller was seriously injured, yet neither of the other two persons involved suffered anything more than a scratched hand. Mr. Johnstone added that Christian Theriault's suggestion that Mr. Miller produced a four-foot-long pipe from his pants was ridiculous; it would have been impossible for him to run with a pipe of that length concealed in his pants yet this went unchallenged by Constable Gendron.

Mr. Johnstone noted that in her SIU interview, Constable Gendron, for the first time, acknowledged that Mr. Silverthorn had said something to her to the effect that "just because a guy was breaking into a car doesn't mean they have to kill him." Constable Gendron did not incorporate this comment in her notes or in her Supplemental Report. She explained that she did not feel the information was important enough to warrant inclusion because she concluded that Mr. Silverthorn had not witnessed the incident, just the aftermath. Mr. Johnstone noted that in her SIU interview, Constable Gendron said she found Mr. Silverthorn to be uncooperative but she failed to mention that in her notes, or in her supplemental report, or during her interview with the OIPRD.

Mr. Johnstone submitted that Constable Gendron not examining the scene, not inquiring about what happened to Mr. Miller and not taking a statement from Mr. Silverthorn amounts to neglect of duty and is indicative of her accepting the version of events as fact from the Theriault brothers.

Mr. Johnstone acknowledged Constable Gendron had less than one-year of experience as a police officer working without her coach officer but submitted that she had received adequate training and was aware of her responsibilities. Mr. Johnstone noted that during her SIU interview, Constable Gendron conceded that she did not ask Christian Theriault if he had struck Mr. Miller during the altercation. She stated in her OIPRD interview that she was not aware of the extent of Mr. Miller's injury but she had assumed that it had occurred during their interaction. Mr. Johnstone submitted this illustrated Constable Gendron's level of acceptance of the Theriault brothers' version of events.

Mr. Johnstone submitted that in her notes and in her supplemental report, Constable Gendron failed to refer to Mr. Silverthorn's comments, or make any mention of Mr. Miller's injuries, or that they waited to allow for potentially the SIU invoking their mandate.

In his SIU interview, Constable Chmelowsky stated that he "probably" looked at the call summary when he was dispatched to this incident meaning he would have known the nature of the call; that an off-duty officer had had located a suspect breaking into cars and that the suspect had been injured as a result of the altercation and an ambulance was required. Constable Chmelowsky stated that Mr. Miller's eye was bandaged at the time he observed him in the back of the ambulance; he was not certain of the degree of his injury until later when he received updates from officers at the hospital.

Mr. Johnstone submitted that Constable Chmelowsky had already accepted the version of events that were relayed to him when he assigned Constable Gendron and Constable McQuoid to take witness statements from the Theriault brothers. He did not ask or cause to be asked, questions about how Mr. Miller sustained his injury. Mr. Johnstone noted that in his SIU interview, Constable Chmelowsky stated that he had talked briefly with the Theriault brothers to ensure they did not need medical attention. Mr. Johnstone submitted that Constable Chmelowsky indicated he was content relying on the investigating officers to ask the appropriate questions; he did not want to interfere. Mr. Johnstone submitted it was Constable Chmelowsky's responsibility to ensure the right questions were asked to ensure that the matter was properly investigated. Instead, Constable Chmelowsky failed to question the version of events being presented to him despite knowing that Mr. Miller was outnumbered two to one and was the only person to suffer a serious injury. Mr. Johnstone noted that in his OPRD interview, Constable Chmelowsky stated that he did not provide any direction to Constable Zabdyr to ask Mr. Miller what had happened or how he had suffered his injuries.

Mr. Johnstone submitted Constable Chmelowsky could not be certain if Constable Zabdyr had or had not informed him about Mr. Miller's comments to the paramedics about being jumped by the Theriault brothers. Mr. Johnstone noted that in his OIPRD interview, Constable Chmelowsky stated had he been told that Mr. Miller complained he had been jumped, it would not have changed his position; further information would have been required to act on it. Mr. Johnstone noted that Constable Chmelowsky made no effort to obtain that information.

Mr. Johnstone noted that in his Supplemental Report, Constable Chmelowsky referred to Mr. Miller's injury. In his Supplemental Report, Constable Chmelowsky did not elaborate at all about how Mr. Miller's injuries occurred nor did he indicate that neither of the Theriault brothers sustained an injury.

Mr. Johnstone submitted that in his interview with the SIU, Mr. Miller stated that at no time was he asked by any police officer what had happened. In his interview with the OIPRD, Mr. Miller stated that he had told an officer that he was the one who had been assaulted. He further stated that the items in his pockets belonged to him; he had not stolen them.

### Public Complainant Submissions

Ms. James submitted the responding officers each had a duty to treat people equally and to investigate how Mr. Miller sustained his injuries. Instead, he was charged with five criminal offences and was mocked when he claimed he was attacked. Ms. James submitted Constable Zabdyr accepted Constable Theriault's version of events without hesitation, Constable Gendron failed to properly question Mr. Silverthorn or record his comments to her, and Constable Chmelowsky showed a bias to Constable Theriault by failing to supervise the incident to ensure his subordinates conducted an appropriate investigation. Ms. James submitted the sequence of events clearly illustrated a pro-police bias and amounted to misconduct; it was not a series of mistakes or performance issues.

Ms. James submitted that the involved officers violated at minimum, the following sections of the Declaration of Principles found in Section 1 of the *Police Services Act*:

1. The need to ensure the safety and security of all persons and property in Ontario.
2. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.
4. The importance of respect for victims of crime and understanding of their needs.

Ms. James submitted the officers acknowledged that they reviewed the Detailed Call Summary and at 2:51 a.m. and 2:52 a.m., the dispatcher informed them:

Looks like one male bent over a vehicle, second male holding a stick that is approximately four feet long, possibly getting ready to strike the other male.

We have an ambulance enroute as one male injured, he is bleeding.

Ms. James submitted that despite knowing this information and the obvious injury to Mr. Miller, they did not ask a single question about what happened to him. Constable Zabdyr immediately passed her hand cuffs to Constable Theriault prematurely. Ms. James noted not only was it two on one, it was two adults versus one teenager; they simply accepted the version of events provided to them by the Theriault brothers without investigating. Ms. James submitted this approach defied their basic training; this was a citizen's arrest and despite the obvious gravity of Mr. Miller's injury, it went uninvestigated.

Ms. James noted that in his interview with the SIU, Mr. Miller indicated that he was treated like a criminal, never a victim. The injury was so significant, Constable Zabdyr indicated she could not look at it, and the photographs of the scene, including the hood of the car, show that the officers should have demonstrated concern about how Mr. Miller was injured.

Ms. James highlighted a number of the SOCO photographs. She submitted that the responding officers were all well trained; the 9-1-1 caller information and their personal observations at the scene warranted a better response. When Mr. Miller stated that they had “the wrong guy,” Constable Zabdyr merely stated, “we always do;” it prompted no further inquiry from anyone. In the presence of Constable Zabdyr, Mr. Miller told the paramedics that he had been jumped and that too went ignored and unreported. Ms. James submitted, Mr. Miller called 9-1-1 seeking police assistance and received none.

Ms. James noted that Constable Gendron failed to record or follow up on Mr. Silverthorn’s comment that they did not have to kill the guy and she failed to note that he was uncooperative. The General Occurrence Report indicates that some 9-1-1 callers refused to provide their names but Mr. Silverthorn and his wife’s particulars were supplied. Ms. James noted that Justice Di Luca found Mr. Silverthorn to be a credible witness. The evidence he provided conflicts with the version presented by Constable Gendron as it relates to who was knocking on his door asking to call 9-1-1. Ms. James submitted it did not seem sensible that he would be uncooperative; he sought police assistance and walked outside to greet them.

Ms. James submitted that as the acting sergeant, Constable Chmelowsky failed to ensure the incident was properly and thoroughly investigated by his subordinates. In his OIPRD interview, Constable Chmelowsky expressed no surprise that Mr. Miller would complain about being jumped; it was the reasonable result of stealing from cars.

Ms. James submitted that Constable Chmelowsky and his subordinates left out vital information from their notes and reports which favoured Constable Theriault.

### *Defence Submissions – Ms. Mulcahy*

Ms. Mulcahy’s submissions were comprehensive. While I listened and considered each of her points, I will focus on the highlights in this summary.

Ms. Mulcahy cited specific case law, noting that it is the specific allegations detailed in the Notice of Hearings which must be proved on clear and convincing evidence; in this matter, the allegations have not been proven.



Ms. Mulcahy reviewed the standard of clear and convincing evidence and reminded me that it would be improper to “armchair quarterback” this incident; I must consider the facts as the officers knew them in real time in 2016, not through the lens of the OIPRD Investigative Report or the decision of Justice Di Luca. It would be improper to dissect the call for service artificially with the assistance of hindsight.

Ms. Mulcahy submitted that the officers were not informed by the OIPRD investigators that they were being investigated for a pro-police bias in advance of their interview which is contrary to section 62 of the *Police Services Act*. Ms. Mulcahy submitted it was fundamentally unfair to Constable Gendron and to Constable Zabdyr that they were subjected to that interview having not been properly informed of the allegations. Consequently, they were unable to explicitly deny allegations of pro-police bias.

Ms. Mulcahy submitted that Constable Gendron had no contact with Constable Theriault, consequently it was not possible for her to demonstrate a pro-police bias. Constable Zabdyr was at the hospital, she was not able to investigate and therefore, it is not feasible for her to have demonstrated a pro-police bias.

Ms. Mulcahy noted Justice Di Luca and the OIPRD found that the arrest of Mr. Miller was lawful which included the issue of Constable Zabdyr providing her handcuffs to Constable Theriault. Ms. Mulcahy submitted that therefore, Constable Zabdyr’s continuation of the arrest was proper. Ms. Mulcahy submitted that Constable Zabdyr made it clear that ensuring Mr. Miller received proper medical attention was her focus, it was the reason she waited to inform him of his rights to counsel. Afterwards, Mr. Miller exercised his right to remain silent; she cannot be disciplined for that.

Ms. Mulcahy submitted that although Constable Zabdyr failed to mention that Mr. Miller told her he had been hit with a weapon, it was merely an oversight. During criminal proceedings Constable Zabdyr testified about Mr. Miller’s utterance. The fact that Constable Zabdyr acknowledged this in court demonstrates she did not have a pro-police bias; her testimony helped convict Constable Theriault.

Ms. Mulcahy noted that Constable Zabdyr did include in her report that when she informed Mr. Miller of his charges, he responded by asking if she saw any weapons on him. She submitted that that was a helpful utterance for Mr. Miller and demonstrative of not showing a pro-police bias.

Ms. Mulcahy noted that in her Arrest Report Narrative, Constable Zabdyr included the following notation:

While the male was being transported to Lakeridge Health Oshawa, I was in the back of the ambulance. I did not ask any questions as his well-being was a priority. During the drive to LHO, the accused told the paramedics that he was just walking with two of his friends, and all of a sudden got attacked by these two guys.

Ms. Mulcahy submitted this would have been viewed by Detective Willis that morning and could have been pursued; including it in her report shows that Constable Zabdyr was not demonstrating a pro-police bias.

Ms. Mulcahy acknowledged that Constable Gendron and Constable Zabdyr were aware an off-duty police officer was involved, but accepting his version of events does not necessarily result in a pro-police bias. Ms. Mulcahy submitted Constable Theriault would have sworn his oath of office; Constable Gendron and Constable Zabdyr were correct to presume he would be truthful in his conversations with them.

Ms. Mulcahy submitted that informing her supervisor Constable Chmelowsky that Mr. Miller said he was attacked by two guys further illustrates Constable Zabdyr was not exhibiting a pro-police bias.

Ms. Mulcahy submitted Constable Gendron did not have any contact with Mr. Miller and was unaware of his utterances about being attacked and was unaware of the seriousness of his injury. Ms. Mulcahy submitted Constable Gendron has always said she made a mistake in not recording the utterance by Mr. Silverthorn but it was a judgment based on her belief he had not witnessed anything relevant; failing to do so is not misconduct.

Ms. Mulcahy submitted the actions or inactions of the officers must be obvious and overt to amount to a pro-police bias; pro-police bias is not a perception, it is not a reasonable apprehension of bias, it must have overt overtones.

Ms. Mulcahy noted that in their Investigative Report, the OIPRD stated:

In these circumstances, it was not unreasonable or contrary to policy for Constable Zabdyr to have given her handcuffs to Constable Theriault. She came upon a scene where an off-duty officer had a suspect on the ground, and she was advised that the suspect had been placed under arrest. As noted above, it was reasonable at this stage for her to rely on the information provided by Constable Theriault. The next step in the process would then be to handcuff the suspect....

Ms. Mulcahy submitted that to turn her handcuffs over to Constable Theriault, therefore, cannot be viewed as a pro-police bias, it was deemed reasonable behaviour.

Ms. Mulcahy submitted Constable Gendron did not commit misconduct when she failed to take a statement from Mr. Silverthorn, it was a judgment call. The OIRPD concluded:  
...Constable Gendron did not take a formal statement from him because she believed he had no direct evidence to provide and because he appeared unwilling to cooperate with the police. This was an unfortunate misjudgment, although it is noted that Constable Gendron was relatively new and inexperienced at the time...

Ms. Mulcahy submitted errors in judgment are not misconduct and any ambiguity favours the officer.

Ms. Mulcahy noted that the OIPRD concluded that there was no evidence of a conspiracy to cover up for the Theriault brothers, consequently, there can be no pro-police bias because the requisite overt evidence does not exist. Ms. Mulcahy added that there is no evidence of bad faith or that Constable Gendron nor Constable Zabdyr intentionally conducted a negligent or improper investigation.

Ms. Mulcahy referred to the matter of *Peel Regional Police and Crane*, suggesting that similarly, the OIPRD failed to consider the test for discreditable conduct in their analysis before recommending charges. Ms. Mulcahy submitted that as a result, I ought not to consider their findings in relation to that particular analysis.

Ms. Mulcahy submitted there is no evidence of the Theriault brothers receiving any type of advantage because of a pro-police bias.

Ms. Mulcahy reviewed cases related to neglect of duty and discreditable conduct and indicated that the evidence did not show the requisite level of moral culpability; Constable Gendron merely made an error in judgement, the act did not amount to neglect of duty.

Ms. Mulcahy submitted that Justice Di Luca made no negative findings about the credibility of Constable Gendron or Constable Zabdyr. Justice Di Luca also found that there was no probative value in the utterance made by Mr. Silverthorn about not having to kill the guy.”

Ms. Mulcahy noted that the involved officers expected the SIU to become involved and once it became known they would not, then they knew that the matter would be turned over to the CIB. She submitted that Constable Gendron’s behaviour did not amount to misconduct; it was nothing more than an error in judgement.

Ms. Mulcahy submitted that Neither Constable Gendron nor Constable Zabdyr exhibited any pro-police bias at any time.

### Defence Submissions – Mr. MacKenzie

Mr. MacKenzie acknowledged that the facts as alleged in Constable Chmelowsky's Notice of Hearing were substantially correct up until the second last paragraph wherein the word "pin" was used by the OIPRD not Constable Chmelowsky, but essentially, Constable Chmelowsky agreed with the OIPRD's suggestion.

Mr. MacKenzie submitted the term pro-police bias is one that he has not come across in a police disciplinary tribunal. He noted that the Notice of Hearing does not define it other than to suggest it was "by accepting and not questioning the evidence of the Theriault brothers or taking additional steps to investigate how Mr. Miller substantiated his injuries."

Mr. MacKenzie submitted the actions of Constable Chmelowsky were reasonable considering the circumstances. He tasked his officers to document and secure evidence and to take statements which was done by Constable Bowler, Constable McQuoid, and Constable Gendron. He ensured Constable Zabdyr attended the hospital with Mr. Miller and directed that the neighbours be canvassed as best as possible considering the time of day. He also notified the duty inspector with the understanding the SIU may need to be notified and he remained at the scene from 3 a.m. until 4:18 a.m.

Mr. MacKenzie noted Constable Chmelowsky was not a confirmed sergeant, he was in an acting capacity. It was a difficult position trying to determine how far to investigate versus wait for the SIU to invoke their mandate but he made the notification to the duty inspector almost immediately. Mr. MacKenzie submitted Constable Chmelowsky made repeated notifications to the duty inspector as he received updates about Mr. Miller's injuries and then submitted a report detailing those injuries.

Mr. MacKenzie submitted Constable Chmelowsky was entitled to assume that the officers in attendance were well trained and would do their jobs accordingly; it was not his responsibility to look over their shoulder to ensure every question that needed to be asked was done so. Mr. MacKenzie submitted it was reasonable for Constable Chmelowsky to expect that officers would take adequate statements from the involved persons.

Mr. MacKenzie submitted that based on the information Constable Chmelowsky received from the investigating officers, it was reasonable to conclude the Theriault brothers were being truthful. The reports submitted by the officers were detailed, including the extent of Mr. Miller's injury, no one tried to conceal that information. Mr. Miller's arrest was found to be lawful, and even after the witness statements had been taken, Constable Chmelowsky was notifying the duty inspector fully expecting that the SIU could still invoke their mandate.

Mr. MacKenzie submitted Constable Chmelowsky complied with Durham Regional Police Service Directives. He noted that Durham Regional Police Service policy does not state that supervisors ought to micromanage their subordinates.

Mr. MacKenzie noted Justice Di Luca's decision includes no adverse commentary about any of the investigating officers. Mr. MacKenzie submitted there is no evidence suggesting that Constable Chmelowsky demonstrated a pro-police bias.

### Prosecution Reply Submissions

Mr. Johnstone submitted that simply because Constable Theriault had taken a sworn oath did not mean that the investigating officers ought to ignore the obvious evidence at the scene. Mr. Johnstone conceded that Justice Di Luca made a finding of not guilty pertaining to the allegations of obstructing justice, but noted that the brothers were interviewed as complaints, not suspects which is the primary issue; the investigating officers failed to treat the Theriault brothers as suspects responsible for inflicting the injury to Mr. Miller.

Mr. Johnstone submitted the involved officers cannot rely on the fact that the CIB would be taking carriage of the investigation; the officers who attended the scene still have a responsibility to conduct a proper and thorough investigation and Constable Chmelowsky was responsible for overseeing that investigation.

Mr. Johnstone submitted the matter of *Crane* is not applicable; it was an abuse of process motion and it would be improper to consider such an argument during submissions after a hearing.

### Analysis

Constable Gendron, Constable Zabdyr, and Constable Chmelowsky face similar but not precisely identical disciplinary charges resulting from the same call for service. In this decision, I will speak to issues collectively but also, it is important to distinguish the individual roles and responsibilities held by each officer and what each of them knew at specific times. A fourth officer, Detective Constable Willis, also faced disciplinary charges. His situation was somewhat different because he did not attend the call for service, he was tasked with investigating the matter in the role of detective constable after the fact.

Ms. Mulcahy and Mr. MacKenzie acknowledged that much of the information contained in the respective Notice of Hearings was factual. Mr. MacKenzie took issue with the assertion that Constable Chmelowsky demonstrated a pro-police bias, by accepting and

not questioning the evidence of the Theriault brothers or taking additional steps to investigate how Mr. Miller substantiated his injuries. He submitted Constable Chmelowsky's actions were reasonable and at no time did he demonstrate a pro-police bias.

Similarly, Ms. Mulcahy took the position that the evidence failed to show that Constable Gendron demonstrated a pro-police bias by accepting and not questioning the evidence proffered by Christian Theriault or taking further investigative steps when interviewing him to ascertain how Mr. Miller sustained his injuries. Ms. Mulcahy submitted Constable Zabdyr did not demonstrate a pro-police bias by accepting and not questioning the evidence proffered by the Theriault brothers, or by not interviewing witnesses and not accepting Mr. Miller's evidence or investigate how he received his injury.

Furthermore, Ms. Mulcahy submitted the evidence failed to demonstrate that Constable Gendron committed neglect of duty by allegedly failing to properly record or document relevant utterances stated by Jim Silverthorn, and/or take further investigative steps when interviewing Christian Theriault to ascertain how Mr. Miller sustained his injuries.

As a result of the above noted admissions, I am not required to analyze every aspect of the information contained in the Notice of Hearings, instead, I can focus on specific issues. Before examining the evidence, it is important to review the standard of proof necessary to make a finding of guilt, the issues which must be considered in relation to the offences of neglect of duty and discreditable conduct, my understanding of "pro-police bias," and the Durham Regional Police Service Directives LE-01-023 - Criminal Investigation Management Plan, LE-AO-19-001 - Memo Book and Note Taking Procedures and LE-01-013 - Property Offence Investigations.

### Standard of Proof

In *Mowers and Hamilton-Wentworth Regional Police Service*, the Commission noted:  
Disciplinary proceedings involving police officers are labour relations matters. They are not criminal trials. Consequently, caution should be exercised in applying criminal law concepts (autrefois convict and autrefois acquit) or rulings laid out in what are essentially criminal cases...

In *Toronto Police Service v. Kelly*, the Divisional Court stated:  
Proceedings before a Hearing Officer are not criminal in nature, but rather, flow from an employer-employee relationship.

Jurisprudence on the issue of standard of proof pertaining to *Police Services Act* hearings has been consistent. In the 1994 matter of *Allan v. Munroe*, the Board of Inquiry stated:

The applicable burden of proof in this case is that of “clear and convincing” evidence. There must be weighty, cogent, and reliable evidence upon which a trier of fact, acting with care and caution, can come to the fair and reasonable conclusion that the officer is guilty of misconduct.

In the 2006 matter of *Gonzalez and Ontario Provincial Police*, the Commission stated:

Section 64(10) of the *Act* states that a hearing officer can only impose a penalty at the conclusion of a hearing if he or she is satisfied that the allegations against the officer are “proved on clear and convincing evidence.”

The *Act* does not define “clear and convincing evidence.” However, over the years a number of Commission decisions have attempted to articulate this burden of proof. It was perhaps best described in *Carmichael and Ontario Provincial Police*, supra at page 1238 as “weighty, cogent and reliable evidence upon which a trier of fact, acting with care and caution, can come to a reasonable conclusion that the officer is guilty of misconduct.”

In the 2016 matter of *Jacobs v. Ottawa Police Service*, the Court stated:

In my view, we are bound by the Supreme Court’s statement in *Penner* that the standard of proof in *Police Services Act* hearings is a higher standard of clear and convincing evidence and not a balance of probabilities.

I accept that “clear and convincing evidence” is the standard of proof as it pertains to the *Police Services Act*. Clear and convincing is a much higher standard than a balance of probability, yet less than the criterion required in the criminal context that being beyond a reasonable doubt. To make a finding of guilt in police disciplinary tribunals such as this, the evidence must be so weighty, so reliable, and so cogent that it causes me to reasonably conclude that an officer is guilty of misconduct as alleged. In other words, the evidence must be so clear, so reliable, and so convincing to persuade me the allegations are true and the facts in issue satisfied. This is the standard of proof which I will apply to this matter.

### Discreditable Conduct

Each of the subject officers faces one count of discreditable conduct. The matters of *Silverman and Ontario Provincial Police* and *Mancini and Courage (Niagara Regional Police Service)* were submitted for my consideration as was the matter of *Tapp v. Ontario Provincial Police*. I was the hearing officer in *Tapp*, where the Commission noted:

In our view, the Hearing Officer correctly stated the law as to discreditable conduct. Two decisions cited by the Respondent support this conclusion. In *Silverman...* the Commission wrote:

... the jurisdiction of the *Police Services Act* is not limited to on-duty activities and any officer whose activities off-duty bring discredit upon the reputation of the Police Service is subject to discipline by the Service. 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.

In the case of *Mancini...* the Commission wrote:

The concept of discreditable conduct covers a wide range of potential behaviors. The test to be applied is primarily an objective one. The conduct in question must be measured against the reasonable expectation of the community. It is not necessary to establish actual discredit.

In the 2018 matter of *Rose et al and Toronto Police Service and Maclsaac and Office of the Independent Police Review Director*, the Commission stated:

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.... 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 officers police force...

In the matter of *Allen v. Alberta Law Enforcement Review Board*, the Court stated:

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. While police discipline may not require a full level of *mens rea*, and negligence may in some instances amount to a disciplinary offence, there must be some meaningful level of moral culpability in order to warrant disciplinary penalties. As noted in *Rampersad v. Ford*, January 26, 1994 (Board of Inquiry under the *Ontario Police Act*) police work would become impossible if police officers were, regardless of the circumstances, subjected to disciplinary proceedings every time a judge found a charter breach.

In this matter, the subject officers were on-duty at the time of the alleged misconduct. To make a finding of guilt pertaining to the allegations of discreditable conduct, I must place myself in the position of a reasonable member of the community, fully aware of all the circumstances and then conclude that such a person would find that the officer conduct in question is likely to damage the reputation of the Durham Regional Police Service



should the public become aware of the facts. The behaviour must be more than a technical breach of the law made in good faith or a mere error in judgement or carelessness; a meaningful level of culpability must exist in order to make a guilty finding.

I do not accept that this is the proper venue for Ms. Mulcahy's submission in relation to the OIPRD failing to consider the test for discreditable conduct in their analysis before recommending charges. If Ms. Mulcahy took the position that in so doing the OIPRD's actions constituted an abuse of process, a motion to that effect should have been filed. In my analysis of the evidence, I will not rely solely on any of the findings of the OIPRD or the SIU; I will use their respective findings and/or analysis to point me in certain areas of the evidence to be considered. Once I review the evidence, I may agree or disagree with their respective findings based on witness statements, testimony, notes, police reports and the findings of Justice Du Luca.

### Neglect of Duty

Constable Gendron faces the lone allegation of neglect of duty. In the matter of *Gottschalk v. Toronto Police Service*, the Commission stated:

The disciplinary offence of neglect of duty is found at section 2(1)(c)(i) of the *Code*. A police officer is guilty of such misconduct if he or she "without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of the police force."

As was noted by the Commission at page 1375 of *Hewitt and Devine*:

Essentially, this is a two-part test as the Commission stated in *Soley and Ontario Provincial Police* (1996), 3 O.P.R. 1098 (OCCPS) at page 1100:

The charge of neglect of duty is a serious charge under the *Code of Conduct*. To be convicted of this charge, it must be shown that:

The member is required to perform a duty, and the member failed to perform this duty because of neglect, or did not perform the duty in a prompt or diligent manner.

Once proven, the member, to avoid discipline, must show that:

[the member] had a lawful excuse for not performing the duty in the prescribed manner.

It is also worth noting that neglect of duty is not an absolute offence. The law is clear that there must be either "willfulness" or "a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct."

In the matter of *Bakos v. Hamilton Police Service*, the Commission also cited the application of the two-branch test articulated in *Soley*. In the more recent matter of *Kraljevic and Svidran, Plump, Wilson and Ottawa Police Service*, the Commission reiterated:

The Hearing Officer concluded his findings that Constable Svidran was not guilty of neglect of duty by quoting from the Commission decision in *Ontario Provincial Police and Sergeant Dalton Brown*, OCCPS #06-09 (31 October 2006). The Commission wrote:

On the latter question it is worth noting that neglect of duty is not an absolute liability offence. There must be either “willfulness” or “a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct.” ...In other words, mere failure to comply is not enough. There must be some evidence of deliberateness or recklessness.

In our view, the Hearing Officer correctly applied the law and his findings of fact were reasonable.

As per the wording in the Notice of Hearing and in accordance with the above noted jurisprudence, to conclude Constable Gendron committed the offence of neglect of duty, I must find that she knowingly had a duty to perform and because of neglect, without lawful excuse, she neglected to promptly and diligently perform that duty. The neglectful act must have been wilful, or it was such a degree of neglect which causes the matter to cross the line from a mere performance consideration to that of misconduct. If I find that to be the case, then I must consider whether she had a lawful excuse for not performing the duty in the prescribed manner.

### *Pro-Police Bias*

The discreditable conduct offences in each of the Notice of Hearings allege that the officers’ misconduct was a direct result of a pro-police bias. Mr. MacKenzie noted this is a unique case; there are no known other police disciplinary matters that connected misconduct to an alleged pro-police bias. Consequently, there is no definition of pro-police bias that has been established before other police disciplinary tribunals. Ms. Mulcahy submitted that to amount to a pro-police bias, overt evidence must exist demonstrating that the officers knowingly acted in a manner to cover for Constable Theriault’s behaviour in some manner. Mr. Johnstone submitted no such overt act is required, the behaviour can be subtle and/or inferred because of all the circumstances.

In their Investigative Report, the OIPRD stated:

Discrimination has been defined as a distinction, whether intentional or not, that is based on grounds relating to the personal characteristics of an individual or group, and that has the effect of imposing disadvantages or withholding advantages available to other members of society. Since it is rare for discrimination to be overtly displayed, in most cases, the nexus to differential treatment will have to be inferred from circumstantial evidence. The ultimate issue becomes whether an inference of discrimination is more probable from the evidence than the actual explanations offered. This same analysis would apply to an allegation that a bias in favor of an identified group (in this case, a police officer) led to the withholding of advantages available to other members of society (in this case, a civilian who was the victim of an aggravated assault).

I agree that pro-police bias does not require an overt act or actual utterance constituting a blatant bias is required. In his complaint to the OIPRD, Mr. Miller alleged that the officers conspired to protect Constable Theriault from prosecution. The OIPRD determined that allegation was unsubstantiated. To prove that assertion, it would have required obvious, overt evidence which does not exist in this case.

Essentially, the allegations in this matter are that the officers accepted and did not question the positions presented by the Theriault brothers or take further investigative steps to ascertain how Mr. Miller sustained his injuries because Michael Theriault was a police officer.

I note that when an abuse of process motion is considered in relation to a hearing officer's alleged bias, actual bias is not required, a reasonable apprehension of bias can be sufficient to meet the threshold. The Ceyssens and Childs Fully Annotated *Police Services Act* states:

The test that governs reasonable apprehension of bias is settled law and asks what an informed person viewing the matter realistically and practically and having thought the matter through, would conclude about whether the decision maker would decide fairly. The test is objective. Relying on established jurisprudence, the divisional court in *Forestall v Toronto Police Services Board* summarized the principles of governing reasonable apprehension of bias:

In determining whether there is a reasonable apprehension of bias on the part of the decision maker, the test is whether a reasonably informed person could reasonably perceive bias on the part of the decision maker. ... there must be an evidentiary foundation for the court to find a reasonable apprehension of bias...

The Ontario Court of Appeal examined the test in *Ontario Provincial Police Commissioner v MacDonald*:

The test contains a two-fold objective element: first the person considering the alleged bias must be reasonable; and second, the apprehension of bias itself must also be reasonable...

Allegations that amount to bare suspicion or speculation will not suffice; mere suspicion is not biased. Nor is any appearance of bias the proper test...

It seems reasonable to me to take a similar approach. It is my position that a pro-police bias happens when a reasonable member of the community, based on the totality of the circumstances should they be known to that member, could reasonably perceive that an officer demonstrated a pro-police bias. The existence of pro-police bias is not necessarily an indicator that misconduct has been established.

I do not find it necessary for the evidence to show actual favouritism; it is only necessary to show that the involvement of an off-duty officer in this incident adversely influenced the manner in which the investigation was conducted. In this instance, if an investigating officer was unable to perform their duty free of bias or impartiality as a direct result of Constable Theriault's status as a police officer, a pro-police bias may be established.

There is no evidence that any of the involved officers conspired to protect Constable Theriault but that is not the allegation. It is alleged that the officers demonstrated a pro-police bias. I do not find it necessary that an officer made or took overt actions to intentionally benefit Constable Theriault for a pro-police bias to exist. Therefore, in this instance, a pro-police bias is established when the evidence demonstrates to a reasonable person in the community that an investigating officer was influenced by the fact an off-duty officer was involved in the occurrence to such a degree, that they did not consider obviously apparent evidence, thereby, failing to properly investigate the matter before them.

Ms. Mulcahy submitted that the officers were not informed prior to their OIPRD interviews that one of the allegations being considered was a pro-police bias; failing to do so prevented the officers from being able to specifically deny the allegation. I note that the OIPRD did inform the officers that the allegations included neglecting their duty and that that they conspired to cover up or protect the Theriault brothers from prosecution.

I have reviewed the OIPRD interviews. The questions and answers were comprehensive. The officers each denied allegations of neglect of duty and discreditable conduct; they denied having done anything to protect or cover up for the Theriault brothers. I am

satisfied that had they been informed that one of the allegations was having a pro-police bias, that too would have been denied. They explained what they did and did not do and were given an opportunity to provide fulsome explanations. I do not find that it was fundamentally unfair to the officers that the OIPRD investigators did not cite “pro-police bias” as one of the investigative avenues. It is more than likely that when OIPRD reviewed the evidence following the officer interviews and found no evidence of a conspiracy or cover-up, that a pro-police bias became evident. I do not expect that having been informed of that additional allegation would have led to new evidence that was not unearthed during the course of the interviews.

I do not find that it was fundamentally unfair that the officers were not specifically told a pro-police bias was part of the interview inquiry; the officers fully understood the nature of the complaint and the scope of the investigation.

### Durham Regional Police Service Directives

The Criminal Investigation Management Plan LE-01-023 is 18 pages in length and was last revised September 20, 2016. In part, it states:

- (2H) Members shall document their activities in compliance with directive AO-19-01 “Memo Book and Note Taking Procedures.”
- (4C) Upon arrival at the crime scene, responding member’s duties shall include, but not be limited to the following:
  1. Observe and fully document all conditions, events, and remarks.
  2. Identify and remain aware of any officer or public safety hazards.
  3. Safeguard against the loss of life or destruction of property. I
  4. If grounds exist, arrest suspects at the scene or attempting to escape.
  5. Protect the scene and preserve all items.
  6. Provide frequent situation reports to the communication / 9-1-1 Unit and other responding members.
  7. Request the attendance of a supervisor, when warranted or mandated.
  8. Locate, identify, and segregate all witnesses and persons of interest.
  9. Conduct interviews and properly record all statements.
  10. Conduct area canvasses in keeping with the seriousness of the offence.
  11. Fully document all details in both their memo books and required reports.
- (6) The primary responsibility for conducting every investigation shall rest with the uniform member initially assigned to the incident until: They are reassigned by the reviewing platoon or patrol supervisor; or a branch or unit assumes responsibility for the investigation.

The Memo Book and Note Taking Procedures AO-19-001 was last revised in 2014. In part, it states:

- (3A) Members shall be aware of the following:
  1. All details surrounding any investigation into a General Occurrence Report whether charges are likely or not foreseeable, shall be accurately and completely entered into the Versadex Records Management System.
  2. Any relevant information that cannot be entered into Versadex by means of a text page, i.e., officer's notebooks or rough notes...
  4. The memo book shall serve in part as a reference index that is representative of the member's activities during their tour of duty.
  5. The memo book shall serve as a medium for recording information during the member's tour of duty that cannot reasonably be expected to be recalled from the time of the event to the time when a Versadex record is created.
  6. Any text page created in Versadex shall be locked by the author upon its completion...

The Property Offence Investigations LE-01-013 was last revised in 2012. In addition to other procedures, it lists the same 11 instructions as noted at 4C of the Criminal Investigation Management Plan LE-01-023.

The fact that officers are encouraged to include fulsome details in their General Occurrence Report as opposed to their memo book is noteworthy. The Notice of Hearings do not allege that officers did not take fulsome notes but had this been any other police service, that may have been the case. The Durham Regional Police Service prefer that a "memo book shall serve as a medium for recording information during the member's tour of duty that cannot reasonably be expected to be recalled from the time of the event to the time when a Versadex record is created." Therefore, I must consider an officer's Supplemental Report or Narrative added to the General Occurrence Report part of the author's memo book.

Of significant note to me is the Criminal Investigation Management Plan LE-01-023 as it relates to the responding member's responsibilities at a crime scene. It includes the word "shall" which leaves no room for ambiguity and notes that the primary responsibility for conducting every investigation shall rest with the uniform member initially assigned to the incident until relieved by another member or unit. Consequently, I do not accept that it was at all appropriate for any of the responding officers to rely on not conducting a proper or thorough investigation because the CIB would eventually be taking carriage of the matter. The officers were on scene at 3 a.m. The detectives from the CIB were not on

duty and not expected to commence until dayshift. The onus was on the responding officers to conduct the investigation and to pass on to the CIB whatever outstanding tasks remained. Knowing that the CIB would ultimately take carriage if the investigation does not obviate the responding officer's responsibility to conduct a proper investigation.

### Evidence

There are three components to this call for service; there is the original call for service regarding the theft from vehicles which evolved into an allegation that Mr. Miller assaulted the Theriault brothers with a weapon, then there is the injury sustained to Mr. Miller. The allegations do not relate to the officers' failure to properly investigate the alleged theft, rather it is alleged they accepted the Theriault brother's assertion that they were assaulted and overlooked how it was that Mr. Miller was injured. This was because one of the involved persons was an off-duty officer.

It is important to review the *Willis* matter. Detective Constable Willis also faced disciplinary charges. His situation was somewhat disparate in the sense that he did not attend the call for service; he was assigned to investigate the matter at approximately 6:30 a.m. on December 28, 2016, as a member of the CIB.

Detective Constable Willis made certain admissions during his *Police Services Act* disciplinary hearing. To make any findings of guilty regarding Constable Gendron, Constable Zabdyr or Constable Chmelowsky, I must find that the totality of the evidence provides clear and convincing evidence of an offence; simply because Detective Constable Willis was found guilty of neglect of duty, does not suggest that therefore other involved officers committed misconduct. However, I do find it noteworthy that Detective Constable Willis acknowledged certain facts, specifically:

- Mr. Miller had a very bloodied face. The pictures taken by Constable Bowler were from the scene, not the hospital.
- There were photographs of blood and other fluids found on the hood of the car at the scene.
- Detective Constable Willis never questioned the narrative provided by the Theriault brothers.
- Detective Constable Willis failed to consider whether Mr. Miller might have wielded the pipe in self defence, fearing that the Theriault's had chased him in order to assault him.
- Detective Constable Willis never appeared to consider whether the force that they used in defending themselves was proportionate to the threat that Mr. Miller posed or whether it was excessive.

- There were discrepancies in injuries, yet Detective Constable Willis appeared not to question the narrative provided by the Theriault brothers.
- The investigation conducted by Detective Constable Willis was really limited to an investigation of a theft from a vehicle. Apart from some efforts to speak to Mr. Miller, Detective Constable Willis did not take any meaningful steps to investigate his injuries or to determine if the force used to cause these injuries was justified and proportionate.
- Detective Constable Willis accepted the version of events proffered by the Theriault brothers notwithstanding that he knew the altercation was a two on one; that Constable Theriault had no injuries and that Christian Theriault did not have any observable injuries.

It is worthwhile to consider whether these aspects applied to these officers. I will start with the evidence which was apparent to the responding officers. I am satisfied that as per the Call Summary Details, the Radio Transmissions, the General Occurrence Report and officer interviews, Constable Gendron, Constable Zabdyr and Constable Chmelowsky were aware prior to arriving at the scene that an off-duty Toronto police officer had caught an individual breaking into cars and this individual was being restrained. They also knew there were multiple 9-1-1 callers, one of whom indicated someone was bleeding and had therefore requested an ambulance.

Constable Zabdyr arrived on scene at 2:55 a.m. She observed Mr. Miller being held down on the ground by Constable Theriault. She saw the injury to Mr. Miller's face and immediately requested an ambulance. Constable Zabdyr stated that she held off before reading Mr. Miller his rights to counsel and caution until 4:25 a.m. because him getting medical attention was her primary concern. That delay speaks to the seriousness of his injuries in her mind.

In her Arrest Report Narrative, Constable Zabdyr stated that based on her observations at the scene, she concluded Mr. Miller had suffered significant blood loss from the cut on the left side of his face. In her OIPRD interview, Constable Zabdyr responded to a query about Mr. Miller's injury:

Zabdyr            So, all I saw was just some blood gathering under his left eye.

Question        Did you think his injuries were serious at this point?

Zabdyr            I was disgusted by it because it's just...

Question        Okay



Zabdyr ...It's just blood. It was blood under his eye, but I don't..

Question You're not a doctor, so...

Zabdyr No... I, I don't know how serious it...

Constable Bowler who arrived at the same time as Constable Zabdyr described the injury as "severe." As I have indicated, the SOCO photograph DSC\_0061 shows a serious injury to Mr. Miller's face but there would be no way for Constable Zabdyr or anyone on scene to know that it would result in the loss of his eye and multiple facial fractures. The paramedics refused to speculate, telling Constable Chmelowsky that Mr. Miller needed to be seen by a doctor.

What is perfectly clear however in photograph DSC\_0061 and the observations by those who viewed the injury is that it was very serious and even gruesome; at the very least, it would require stitches and perhaps surgery. Constable Zabdyr would have been aware of this from the moment she arrived and saw Mr. Miller. The injury was so significant that it simply could not be left unexplained, yet that is exactly what occurred. In her SIU interview, Constable Zabdyr stated:

I saw there was some blood coming from his left eye... I couldn't really concentrate on anything else. I just saw the blood that was coming from his left eye, just, just on the bottom and that's when I called for the ambulance to come over... the blood was gathering under his eye. So, it looked like it was dripping down and it was just gathering, it was a big blob of blood what it looked like... I don't know where it's coming from, but it looks like, like I said it's right at the, all the blood is gathering right under his eyelid there... I have no idea how serious, it looked gross, I don't really know seriousness but it just, it was just blood hanging, hanging down so I, I don't know...

During her testimony, Constable Zabdyr was shown photograph DSC\_0067. Photograph DSC\_0067 shows a significant amount of blood and other fluids, potentially, bodily fluid on the hood of Mr. Silverthorn's vehicle. Exhibit #23 contains some photographs from Exhibit # 14 which have been enlarged, including DSC\_067.

In her report, Constable Bowler stated the hood of the vehicle had "blood in two places and yellowish substance on it..." Constable Zabdyr acknowledged during her testimony that she observed the hood of the car after Mr. Miller had been arrested and leaned against it.

I find that Mr. Miller's face left bodily fluids on it that would cause any person viewing it to be concerned about his welfare. The evidence at the scene left no doubt that his injury was very serious and begged for answers as to how it had occurred.

I appreciate that Constable Zabdyr and the other investigating officers did not become fully aware of the extent of Mr. Miller's injury until well after 4 a.m. but knowing that Mr. Miller would lose his eye and suffered facial fractures was not required to cause them to question the nature of his facial injury. It was blatantly obvious to all involved that Mr. Miller suffered a serious injury, the altercation was two persons versus one, and only one person received an observable injury beyond that of a scratched hand. The need to investigate how he came to be injured would have been obvious to any person let alone a law enforcement officer. Whether Mr. Silverthorn saw the altercation or just the result, his observation that "they didn't have to kill the guy" seems reasonable, a position that any member of the community would express. Furthermore, for Constable Zabdyr and Constable Chmelowsky, they were aware Mr. Miller complained about being attacked.

When testifying in court, in part, Constable Zabdyr stated:

Zabdyr           As we were walking to the ambulance the male black keeps saying that he didn't, he didn't do anything, he was just walking.

Question       Okay.

Zabdyr           We got the wrong guy.

Question       And is this in response, are you asking him questions or just tell me how.

Zabdyr           He's just.

Question       That comes about.

Zabdyr           Venting. He's just talking...

Question       What do you say in response to that?

Zabdyr           I said, we always do...

Zabdyr           Well, he said we got the wrong guy, so I said yeah, we always do...

Question       And what did you mean by that answer?

- Zabdyr        Every time, I've been a police officer for 15 years now, every time we, my experience has been that every time we charge somebody, arrest somebody, we're always wrong.
- Question      Okay.
- Zabdyr        So this was just, I guess me, excuse my language, being a smart ass...
- Question      Now, what happens next?
- Zabdyr        He's, he's put on a, he's placed on a stretcher in the ambulance. He's telling the ambulance [sic] the same thing, that he didn't do anything, he was just walking down and all of a sudden, he gets jumped by these two guys.

In her OIPRD interview, Constable Zabdyr stated that she would have told Constable Chmelowsky that Mr. Miller said he was jumped by two guys. She included this utterance in her Arrest Report Narrative. Ms. Mulcahy submitted in so doing, it shows that she showed no pro-police bias to Constable Theriault. In her interview, Constable Zabdyr also stated that she wanted to know what had happened but Mr. Miller refused to speak with her. I do not accept her assertion that she was anxious to hear Mr. Miller's version of events.

The OIPRD found that the arrest or continuation of the arrest of Mr. Miller was lawful. I agree. She received sufficient information to warrant continuing the arrest but almost immediately, she gave her handcuffs to Constable Theriault. That is an example of her being influenced by the fact that he was a police officer; she would not have provided her handcuffs to a civilian conducting a civilian's arrest. However, I attach no negative connotation to this aspect of the incident, it is just an instance of being influenced by Michael Theriault's status as a police officer.

Constable Zabdyr immediately accepted that Constable Theriault and Christian Theriault were credible and reliable witnesses. Based on the fact that Mr. Miller was being held to the ground and being told that they caught him going through cars, she continued the arrest. She had grounds to do so, but she never made any effort to ensure those grounds remained and were reasonable after Mr. Miller was in her custody. The lawfulness of an arrest is based on what the officer knew at the time. A police officer is obligated to continue to investigate the incident that gave rise to a person's arrest to ensure the continuation of that arrest is warranted. Constable Zabdyr did not continue to investigate,

in fact, she disregarded the disparity in injuries between the Theriault brothers and Mr. Miller and failed to follow up on the utterances made by Mr. Miller in her presence.

In her interview with the SIU, Constable Zabdyr was asked if she was concerned about what had happened or if she was taking the word of the off-duty police officer. She stated:

I'm going by the statement saying, of this, of, of this male who restrained the other guy, saying that they saw him and his friends going through cars, they chased him down, and they're saying that they were hit with, that he was hitting [them] with something.... it's winter, it's cold, it's slippery.... unfortunately as much as I hate to say it, accidents happen. I don't know how; I had no idea how his eye got injured. But, again, go, I'm continuing with my arrest based on the information I have from the complainant.

Constables Zabdyr stated she did not ask Constable Theriault if he had struck Mr. Miller. I do not understand how one of her first questions to the Theriault brothers would have been something to the effect of, "what happened to his face," and to Mr. Miller, "what happened to your face?" Not only were they not her first questions, they were questions that she never posed to them.

Constable Zabdyr heard Mr. Miller inform the EMS before she left that he had been jumped. While at the scene, Mr. Miller had told her that she had the wrong guy and in her Arrest Report Narrative, she noted:

During the drive to Lakeridge Health Oshawa, the accused told the paramedics that he was just walking with two of his friends, and all of a sudden got attacked by these two guys.

Constable Zabdyr was aware that Mr. Miller, on multiple occasions, denied being involved in the theft and complained about being jumped or attacked. She failed to consider the legitimacy of his assertion. I find that had Michael Theriault not been a police officer, she would have been more inclined to investigate more thoroughly.

As noted, Mr. Miller told Constable Zabdyr shortly after she took custody of him that they had the wrong guy. Her response, "we always do." She had no personal knowledge of whether he was responsible for stealing from cars or not. For her to conclude he was the "right guy," meant to accept the version of events provided by the Theriault brothers. Constable Zabdyr immediately accepted their version of the events; it was never questioned despite the arrested party telling her he was the "wrong guy" and telling the EMS personnel in her presence that he was jumped by these two guys.

It is obvious to me that the fact that an off-duty police officer was the arresting person, not a civilian, adversely influenced how Constable Zabdyr handled herself; she knew that the Theriault brothers had no obvious injuries and that Mr. Miller's facial injury was substantial. Once Mr. Miller denied being involved in the theft and complained about being jumped, she was obligated to investigate that complaint. Instead, she made a sarcastic comment and completely discarded his assertion that he had been jumped. She stated that at the hospital she wanted to get his side of the story but he would not talk to her. That is inconsistent with how she dealt with Mr. Miller from the beginning. At no time is there any evidence that supports Constable Zabdyr's assertion that she wanted his side of the story.

Once Mr. Miller denied being involved in the theft and told Constable Zabdyr he was jumped, she should have asked him how he was injured. This did not require rights to counsel or a caution, it is a separate inquiry. By all accounts, he was conversing coherently and this conversation should have occurred in immediate response to his statement that he was the wrong guy while they were walking to the ambulance. The appropriate professional response is, "ok, tell me what happened, how were you injured," not, "we always do."

An investigative conversation also could have occurred while he was being treated by EMS in the back of the ambulance. The injury was not preventing Mr. Miller from communicating coherently; she could have easily asked Mr. Miller to explain how he sustained his injury while he was being treated by EMS. There is no evidence that Constable Zabdyr ever asked Mr. Miller how he was hurt.

I accept that telling Constable Chmelowsky that Mr. Miller complained to the EMS he had been jumped is inconsistent with a pro-police bias. However, it is not a significant enough act to overcome her remaining behaviour which does demonstrate a definitive pro-police bias. The fact that she may have informed Constable Chmelowsky does not obviate her from her duty and responsibility to investigate an assault, or potential aggravated assault, or potentially assault with a weapon allegation.

Ms. Mulcahy submitted because Constable Zabdyr was only at the scene for mere minutes, she was unable to, and not responsible for, conducting an investigation or taking statements. I disagree. There was nothing preventing Constable Zabdyr from asking Mr. Miller what had happened to him while at the scene. In fact, that is exactly when it should have occurred before the loss of evidence, while other officers could consider the authenticity of the complaint in real time. Instead, she remained silent and did not ask any questions; she did not consider that Mr. Miller could be telling the truth. She said as much

when she disregarded his complaint of being jumped and sarcastically dismissed his assertion that he was the wrong guy.

Constable Zabdyr accompanied Mr. Miller in the ambulance and then secured him at hospital; she had ample opportunity to inquire with Mr. Miller how he was injured. I do not accept that his injury was so severe that this type of inquiry as not available to her; there is no evidence suggesting he was unable to communicate.

Constable Zabdyr knew that at least one of the attending EMS personnel was privy to Mr. Miller's complaint yet she made no effort to take a statement from him or ask him to write out a statement on his own and provide it to her or obtain a copy of the EMS Report. This omission is consistent with her not being interested in how Mr. Miller was injured, dismissing his version of events, and accepting the Theriault's account instead.

As it turns out, the Ambulance Call Report noted that Mr. Miller advised that he was attacked by multiple people with a weapon that appeared to be a metal pipe, that he was struck in the head and face multiple times and that they had the wrong guy... It is not the fact that there was significant evidence lost that is important, it is the fact that the inquiry was never made; that is what illustrates the utter lack of interest in actually investigating the matter. I am convinced the fact that Michael Theriault was a police officer played a critical role in Constable Zabdyr not pursuing obvious investigative avenues.

Constable Zabdyr reported that Mr. Miller would not talk with her after he was given his rights to counsel and cautioned but there is no indication that she made any effort to ask him any questions and if so, what those questions were. She noted that he did not wish to call a lawyer but she did not record whether he understood his rights to counsel, whether he understood his caution, or if she asked him if he wished to contact a lawyer. There is no evidence indicating that she wished to hear his side of the story, period. There is no evidence to suggest that at any time did Constable Zabdyr consider that Mr. Miller may have been a victim of an assault. Even if he had not complained about being jumped, whether he was responsible for stealing from cars or not, Constable Zabdyr was obligated to inquire about how he received his injuries. This duty became even more obvious once he indicated he was the wrong guy and had been jumped.

At trial, Constable Zabdyr testified that Mr. Miller told her he had been hit with a weapon; it was the first time she had reported the utterance. Ms. Mulcahy submitted that not mentioning it earlier was nothing more than an oversight and the fact that Constable Zabdyr acknowledged the utterance at trial, demonstrated she did not have a pro-police bias; her testimony helped convict Constable Theriault.

I do not accept that recalling the utterance at trial suggests that Constable Zabdyr did not possess a pro-police bias on December 28, 2016; the matters are completely unrelated. The allegations are that Constable Zabdyr committed misconduct on December 28, 2016; telling the truth about what she heard when testifying at trial in 2019 is irrelevant to the allegations at hand.

I am impacted by the fact that Constable Zabdyr did not record in her notes or in her Arrest Report Narrative that Mr. Miller complained to her that he had been struck. She testified:

Question Did he, [Mr. Miller] or anyone, give you any indication of how that injury to his eye occurred?

Zabdyr Um, when he was on the ground when we first showed up, he was, uh, screaming that he was beat up by the, by the males, and that they were hitting him with something....

Not only did Constable Zabdyr not record the utterance, more importantly, she did not act on it, she ignored it; she did not ask Mr. Miller any follow-up questions and did not ensure the assertion was investigated.

Similar to Detective Constable Willis, Constable Zabdyr knew Mr. Miller was severely injured yet never questioned the narrative provided by the Theriault brothers despite Mr. Miller's protests about having "the wrong guy" and that he had been hit by something. Constable Zabdyr failed to question or investigate how Mr. Miller received his facial injuries.

As noted, Constable Gendron knew before she arrived on scene that an off-duty Toronto police officer had caught an individual breaking into cars and this individual was being restrained. She knew there were multiple 9-1-1 callers, one of whom indicated someone was bleeding and had requested an ambulance.

I am satisfied, based on clear and convincing evidence that Constable Zabdyr's actions, and inactions, amount to discreditable conduct.

Constable Gendron's memo book entry for this incident is brief at best. It shows that she arrived on scene at 2:56 a.m. Her entire notebook entry before leaving at 4:15 am says, "at scene - victims assaulted with pipe by male attempting to break into cars. One suspect still at large. Witness statement. Lock key."

I understand that the officer's note taking is not part of the alleged misconduct and I will not consider it in that perspective. I accept that making the limited recordings that she did, could be a result of her lack of experience, but it could also be because she merely accepted that the victims were "assaulted with a pipe."

Constable Gendron's Supplementary Report provides only slightly more information. She recorded the dispatch details and noted that once she arrived on scene, she searched the area for the outstanding suspect, witnesses, or evidence with negative results. She referred to her conversation with Mr. Silverthorn and noted that she took a statement from Christian Theriault. Constable Gendron made no mention of the fact that Mr. Miller suffered any type of injury, nor did she mention that Mr. Silverthorn uttered the comment to the effect of "they did not have to kill that guy."

Constable Gendron explained she did not find Mr. Silverthorn's utterance noteworthy because she did not believe he had observed the altercation, rather, his comment was based on his observations of the aftermath of the incident.

Constable Gendron stated that she had reviewed the Call Summary while driving to the scene. Therefore, she should have been aware that Mr. Silverthorn was one of the 9-1-1 callers. I will give her the benefit of the doubt that perhaps she read it and forgot the name. She did not make a notebook entry of who the 9-1-1 callers were.

The conversation between Constable Gendron and Mr. Silverthorn occurred shortly after she had arrived on scene. I accept that perhaps, she had not seen Mr. Miller's injury personally, but she was aware that his injury was "severe" and that he required immediate medical attention. Constable Gendron also knew that a pipe or pole had been used in the altercation between the Theriault brothers and Mr. Miller. Consequently, Constable Gendron should have conducted a more thorough interview with Mr. Silverthorn. She was too quick to decide that he had not witnessed the altercation. Even if that were the case, Constable Gendron should have taken better notes and should have taken a witness statement noting what Mr. Silverthorn did and did not see especially given that he had just suggested to her that excessive force had been used in the arrest and/or detainment of Mr. Miller. His contention was supported by the "severe" injury sustained by Mr. Miller and the evidence clearly visible at the scene.

I do not find it necessary to analyze whether Mr. Silverthorn appeared uncooperative or whether I accept his version of the events or Constable Gendron's as it relates to their exchange. What is important is that she dismissed his potential evidentiary value by assuming he had not seen anything without making a full and proper inquiry. In her SIU interview, Constable Gendron stated:



I specifically asked him if he had seen anything and then I asked him if he had seen anybody with a pipe, and when he said no, I was like, okay, well then, he really didn't see anything, I guess. I didn't speak to his son so I don't know if his son saw more, or if he saw more and then didn't tell me in the time, in the quick 30 second conversation I had with him. I don't know I didn't drill in; I didn't drill into it further...

Constable Gendron acknowledged she spent only 30 seconds speaking with Mr. Silverthorn, and in that short time, concluded he was not worthy of an interview. She dismissed the fact that he saw enough to conclude that the use of force used by the Theriault brothers was excessive. Constable Gendron did not record Mr. Silverthorn's comment, did not tell anyone about it, and did not conduct a proper interview to explore it further. She also decided it was not important to speak with his son. I do not accept that disregarding evidence of this nature is a result of inexperience; any person would find that further questioning was required and full documentation of her observations considering the seriousness and nature of the investigation.

Constable Gendron stated she was not aware that Mr. Miller's injury was serious when she took the statement from Christian Theriault. I find that most unlikely. The *Special Investigations Unit Act* is marked as Exhibit #26. Section 15(1) states:

The SIU Director may cause an investigation to be conducted into any incident in which any of the following occurs, if the incident may have resulted from criminal conduct by an official (the definition of official includes a police officer):

1. The death of a person.
2. The serious injury of a person.
3. The discharge of a firearm.
4. The sexual assault of a person's reported.

In this instance, obviously, Constable Chmelowsky and the Duty Inspector were concerned that the injury sustained by Mr. Miller may have been serious enough to warrant notifying the SIU. This was relayed to Constable Gendron and Constable McQuoid as they were told to not take witness statements until there was clarity as to whether the SIU would invoke their mandate. Constable Gendron stated that after she met with Constable Chmelowsky, she "stood by my car waiting for direction." She arrived on scene at 2:56 a.m. and did not commence her statement with Christian Theriault until 3:35 a.m. It took approximately 30 minutes before getting cleared to commence her interview of Christian Theriault.

In the *Special Investigations Unit Act*, serious injury is defined as follows:

A person sustains a serious injury if he or she,

- a) Sustains an injury as a result of which he or she is admitted to a hospital;
- b) Suffers a fracture to the skull, or to a limb, rib, or vertebrae;
- c) Suffers burns to a significant portion of his body or her body;
- d) Loses any portion of his or her body;
- e) As a result of an injury, experiences a loss of vision or hearing; or
- f) Sustains a prescribed injury...

I do not expect that Constable Gendron ought to have been aware of the definitions in the *Special Investigations Unit Act*, but I am satisfied that she was aware that Mr. Miller had sustained a serious injury. Constable Bowler had just observed Mr. Miller and informed other officers over the radio that Mr. Miller's injury was serious. Then, Constable Bowler and Constable Gendron walked down the street together. I have little doubt they would have discussed the extent of the facial injury that Constable Bowler had just seen.

In her OIPRD statement, Constable Gendron stated that she was unaware that Mr. Miller had complained that he had been jumped by the Theriault brothers at the time she took the statement from Christian Theriault. If there is truth to that statement, I question what the officers were doing for the 30 minutes while waiting to hear from the duty inspector about the SIU. I suspect that Constable Gendron's statement about standing around by her cruiser was likely accurate. But why would she not look at the scene? There was blood and bodily fluid clearly visible on the hood of the vehicle in the driveway and trails of blood near the car and the front of the house, not to mention the pipe that was allegedly used in the offence, was clearly visible on the front yard. It is difficult to comprehend, inexperienced or not, that an officer would not make observations of a crime scene while waiting to take a statement from a person directly involved in that incident.

Even if Constable Gendron was unaware that Mr. Miller had indicated he had been attacked, Constable Gendron had to know that his injury needed to be explained. As articulated earlier in this decision, she knew he had an injury described as severe which required immediate medical attention, knew that the situation involved two persons versus one, and a scratched hand was the only visible injury sustained by the Theriault brothers, juxtaposed to Mr. Miller bleeding profusely and requiring hospitalization.

In his statement, Christian Theriault told Constable Gendron that he had had been struck on the "right back side of my head and then in the arms and body as I was trying to defend myself." The SOCO photographs DSC\_0071, DSC\_0072 and DSC\_0100 show the silver metal pipe clearly visible on the snow. While it could be possible for someone to be struck by such a substantial item and not have visible injuries, it is something which begs to be

questioned, examined, and maybe even doubted by an investigator. Instead, Constable Gendron accepted it without further inquiry despite the disparity in visible injuries.

I concede that some of Constable Gendron's behaviour could be linked to her lack of experience, but when all factors are considered, I do not find that to be the case. I find that any reasonable person in the community armed with the same degree of knowledge that Constable Gendron had at the scene, would have conducted further, obvious inquiries. I find that there is a direct correlation between the fact that she knew an off-duty police officer was involved in the arrest of Mr. Miller and her deficient investigation. Constable Gendron did the absolute bare minimum as reflected in the minuscule notes, the feeble exploratory conversation with Mr. Silverthorn, and the then not questioning Christian Theriault's version of events, merely accepting they had been "assaulted with a pipe."

By the time that she wrote her Supplementary Report, Constable Gendron was furnished with much more information and yet she still failed to include Mr. Silverthorn's utterance in her report or in her memo book.

My earlier position remains applicable to Constable Gendron's circumstances; the need to investigate how Mr. Miller came to be injured would have been obvious to any person let alone a law enforcement officer. Mr. Silverthorn had just opined to her, based on his personal observations, the Theriault brothers "didn't" have to kill the guy" which, as noted by the OIPRD, suggested that an excessive degree of force had been used. Any person would find it necessary to determine whether the level of force used in the arrest and/or apprehension of Mr. Miller was reasonable.

Police officers are highly trained in the field of use of force, they are keenly aware that any level of use of force must be justified when police officers arrest or detain a civilian. It is not simply inexcusable behaviour that in this instance, Constable Gendron, Constable Zabdyr, and Constable Chmelowsky completely ignored this responsibility; it rises to the level of misconduct if it was due to a pro-police bias.

In her SIU interview, Constable Gendron acknowledged there was significant information not included in the statement of Christian Theriault; she could not explain why certain information was omitted. Constable Gendron's opening question in her interview of Christian Theriault was to ask what happened seeking as much detail as possible. However, the statement contains very little detail nor did Constable Gendron seek clarification even when it was obviously required. For example, Christian Theriault suggested that Mr. Miller produced the pipe from his pants after they had chased and cornered him. This is beyond improbable; how could a person run with a pipe

approximately three to four feet in length concealed in their pants? Yet, the claim went unchallenged, it was simply accepted by Constable Gendron.

Christian Theriault stated that he and his brother had been repeatedly struck by the pipe wielded by Mr. Miller yet there was no explanation or clarification sought as to how they were able to take control of Mr. Miller and the pipe or why it was that the only visible injury to them was a small scratch on Christian Theriault's hand. There was not one question about how Mr. Miller was injured. In her SIU interview Constable Gendron stated:

Yeah, he didn't tell me how the injury happened. I assumed, and I probably should have investigated it more, I guess, now that I look at it, but I assumed that it had happened in the struggle. I wasn't sure.

This is not armchair quarterbacking. Constable Gendron did not question the theory presented to her by Christian Theriault where it was clearly required. There is no doubt Constable Gendron should have done more, but to rise to the level of misconduct, the omissions must amount to more than a training or performance issue, and in this instance, just a lack of experience. While a lack of experience may have also been an issue in Constable Gendron's case, I do not accept that as an excuse; her responsibilities were blatantly obvious yet she failed to properly record or document relevant utterances stated by Jim Silverthorn, and or take further investigative steps when interviewing Christian Theriault to ascertain how Mr. Miller sustained his injuries. I find Constable Gendron knowingly had a duty to perform and without a lawful excuse, she did not promptly and diligently perform her duty as a member of the police force. The degree of neglect causes the matter to cross the line from a mere performance consideration to that of misconduct.

In her SIU interview, Constable Gendron stated the following:

Question ... did you ask Mr. Theriault if he hit Mr. Miller

Gendron The, one that I interviewed? I asked him, he said that he, there was an altercation and in self defence, I believe he said he was trying to defend himself because they, he was swinging the pipe at him so, I didn't know if.

Question You said he was defending himself?

Gendron Hmm-hmm

Question Did he say, did you ask him if he hit him?

Gendron I don't know if I asked him that or not. Yes, I did. Can I read that again to make sure? No, I didn't ask him if he hit him then apparently.

Question Okay. So, Mr. Miller, Mr. Miller went to hospital with an injury.

Gendron Hmm-hmm

Question Were you concerned about how the injury happened to Mr. Miller?

Gendron I believe it happened in the struggle. I wasn't overly sure. So, I didn't ask how it happened.

Question Okay, so you didn't think that Mr., that you should ask Mr. Christian about that?

Gendron No I didn't.

Constable Gendron denied “blindly accepting” Christian Theriault’s account, but never questioning the veracity of his statement in the face of contradicting or questionable evidence is indeed blindly accepting his version of events.

Constable Gendron knew that Mr. Miller had a severe eye injury that required immediate medical attention and hospitalization. She knew that as a result, the investigation was paused pending the notification of the SIU. Constable Gendron knew Michael Theriault was an off-duty Toronto police officer, knew that the Theriault brothers sustained no visible injuries and knew that Mr. Silverthorn was concerned, stating that “they didn’t have to kill the guy.” Despite this, Constable Gendron never questioned the narrative provided by Christian Theriault. She acknowledged that she did not know how Mr. Miller suffered his injury but made no effort whatsoever to determine that. Constable Gendron failed to question/investigate whether the force used by the Theriault brothers was proportionate to the threat that Mr. Miller posed or whether it was excessive despite the discrepancies in injuries and the fact that it was a two versus one altercation. I am convinced that Christian Theriault, being the brother of Michael Theriault, an off-duty police officer, strongly influenced Constable Gendron.

Mr. MacKenzie acknowledged that Constable Chmelowsky was the acting sergeant and road supervisor on December 28, 2016. His duties included attending the scene, ensuring scene security, ensuring that officers obtain statements and evidence, and communicating information up the chain of command.

I will add that as the supervisor on scene, Constable Chmelowsky shouldered overall responsibility for all aspects of this incident. Not that anything hinges on this but of note, the OIPRD Investigative Report states that Acting Inspector Wagenberg never attended the scene but Constable Chmelowsky reported that he had “arrived on scene and was briefed of the incident.”

The OIPRD Investigative Report states that according to Acting Inspector Wagenberg, his role was to review the investigative steps that had been taken and allocate resources as required, it was not his responsibility to conduct the investigation. I agree, it was Acting Sergeant Chmelowsky’s obligation to ensure the matter was properly and thoroughly investigated.

Constable Chmelowsky was made aware of the call for service without delay and was aware that an off-duty police officer was restraining a person he had caught going through cars and one of the multiple 9-1-1 callers requested an ambulance. The call was dispatched at 2:53 a.m. and he arrived at 3:00 a.m.

It was Constable Bowler who photographed the scene; she stated that initially, she looked for the outstanding suspect but was asked to return to conduct SOCO duties. The SOCO photographs presented to this tribunal were not time stamped but they are numbered sequentially beginning at DSC\_0058.

In her Supplementary Report, Constable Bowler stated that she arrived on scene at 2:55 a.m. with Constable Zabdyr but she did not indicate what time she began taking photographs. Mr. Renison stated that they arrived on scene at 3 a.m. and left for the hospital at 3:08 a.m., arriving at 3:15 a.m.

Constable Bowler was able to take one photograph of Mr. Miller while he was in the ambulance and before his face was bandaged. It is safe to presume that the fourth picture taken was the one of Mr. Miller as it is numbered DSC\_0061. I can deduce then that Constable Bowler had commenced with her SOCO duties well before 3:08 a.m. as she had taken that picture before Mr. Miller’s face was bandaged in the ambulance. The officers agreed that Mr. Miller received near immediate medical attention from EMS and his face was bandaged quickly.

There is no indication that Constable Chmelowsky viewed the picture of Mr. Miller’s injury before it had been bandaged although it was accessible to him on Constable Bowler’s camera. He stated that he did not pay attention to the medical questions that were being posed to Mr. Miller while he was in the ambulance. Ignoring the dialogue between EMS

and Mr. Miller is inconsistent with Constable Chmelowsky's alleged concern or desire to learn more about the nature of Mr. Miller's injuries.

In his OIPRD interview, Constable Chmelowsky stated:

I took a look at the injury that I could see, but it was bandaged and all I could see was a bit of blood or a mark under the eye, from what I remember.... it didn't, in my opinion at the time, it didn't appear significant....

This is in direct contrast to Constable Bowler's comment that she found the injury was severe and Constable Zabdyr who was so concerned about Mr. Miller's injury that she waited well over an hour to advise him of his rights to counsel and caution because him receiving medical treatment was such a priority.

In his SIU statement, Constable Chmelowsky stated:

I took a quick look at the individual who was being assessed by paramedics and I couldn't tell, other than it was an eye injury, other than just cut him under the eye. How, not a hundred percent sure how it happened yet, other than, obviously, there was an altercation of some sort and that was pretty much it....

He stated that he was unsure how Mr. Miller sustained the injury, but he did nothing to further that understanding. There is some uncertainty as to whether it was Constable Chmelowsky who directed Constable Bowler to process the scene as the SOCO officer but in any event, he knew that was occurring. He held the scene and waited until it was determined that the SIU would not be notified before having the Theriault brothers interviewed. While they were waiting, the officers did not make any attempt to identify the 9-1-1 callers and ask what if anything they had observe nor did Constable Chmelowsky analyze the scene because he did not wish to contaminate it.

In his OIPRD interview Constable Chmelowsky was asked whether Constable Zabdyr had informed him that Mr. Miller informed EMS personnel that he had been jumped by two guys. Constable Chmelowsky stated:

She might very well have stated that to myself. I can't say no. But it wouldn't surprise me if, you know, if he had broken into a car and the owner engaged you. I think that's the way I took it.

I find Constable Chmelowsky's comment telling. He found it fitting that a person might suffer a severe facial injury as the price to be paid for stealing from vehicles. However, despite his personal feelings on the subject, Constable Chmelowsky was obligated to conduct an investigation to determine whether, the use of force used to apprehend the suspect, was appropriate. He made no such effort.

Because he was uncertain as to whether he had been informed about Mr. Miller's assertion, Constable Chmelowsky was asked whether knowing that Mr. Miller had complained about being attacked would have changed his approach. He stated:

...No, because he was placed at the vehicle, in the vehicle. So it wouldn't be surprising that there would be an altercation, it wouldn't change my mind in, not really, no. There'd have to be more information, there'd have to be, like, an independent witness or somebody to provide me with something to go, you know, say something. Just because he was jumped that's not enough for me.

I find this concerning. A civilian had sustained a significant facial injury that required hospitalization which triggered a potential SIU notification. The other two combatants suffered virtually no visible injuries. Constable Chmelowsky stated he would not be influenced by Mr. Miller's assertion he had been attacked because there was no independent witness who had volunteered impartial information. Constable Chmelowsky was the officer in charge. It was his duty to investigate or ensure the matter was investigated; instead, he merely accepted the version of events proffered by the Theriault brothers without taking any steps to verify or challenge it.

Constable Chmelowsky accepted the Theriault's version of events without them having an independent witness to corroborate it yet he said he would not even consider what Mr. Miller might have said about being attacked because he had no independent witness. This is beyond troubling. Mr. Miller indicated he was attacked and he had an injury that could verify that assertion. Two brothers, who had no obvious injuries, alleged that they caught Mr. Miller going through cars; there was no independent witness to verify their version of events. The difference of course is that one person is an off-duty police officer.

I take no issue with the responding officers accepting the version of events first proffered by Constable Theriault and his brother which allowed the officers to continue the arrest, but there was a need to investigate to verify or refute their narrative. That did not occur at any time. Mr. Miller indicated he was walking with friends when he was jumped. Officers said they searched the area for other suspects but there is no indication that any officer asked Mr. Miller for the name of his friends who might be able to verify his account; this is because the responding officers never considered that there may be any truth to it. Even if they did not believe it was likely, they were obligated to consider Mr. Miller had been randomly attacked or mistakenly identified.

I find Constable Chmelowsky had already accepted the version of events that were relayed to him when he assigned Constable Gendron and Constable McQuoid to take witness statements from the Theriault brothers. Constable Chmelowsky did not ensure the interviewing officers cautioned the Theriault brothers prior to their interview. What was



the more significant investigation, a suspect possibly stealing from vehicles or the injury to Mr. Miller? He provided no direction that the officers inquire during their interviews, how Mr. Miller sustained his injury, despite recognizing that Mr. Miller's injury was serious and only knowing that it had occurred during the altercation. Constable Chmelowsky simply instructed that they take witness statements with no further direction provided.

Mr. Mackenzie submitted Constable Chmelowsky had the right to trust the officers would conduct their duties adequately, he was not required to micromanage them. I agree, but it was his duty as the supervisor and officer in charge of the incident to provide guidance and direction where appropriate. He was not required to tell them what specific questions to ask and to not ask, but he was obligated to direct them to take statements from the Theriault brothers about the theft and about how Mr. Miller was injured.

In his SIU interview, Constable Chmelowsky stated that the duty inspector arrived at the scene quickly. When Inspector Wagenberg arrived, Constable Chmelowsky was still uncertain about the severity of Mr. Miller's injury indicating that they would "get more of a definitive answer when he gets to the hospital..." This suggests that the duty inspector was there within a few minutes, definitely before Constable Gendron and Constable McQuoid took statements from the Theriault brothers. In the SIU interview, Constable Chmelowsky was asked what information he had provided to Inspector Wagenberg. He stated:

Pretty much what McQuoid had told me; Officer involved, they broke into his car, suspects took off, they pursued the individual, he ran between a house, he came out with a pole, he confronted the two victims, they struggled for the pole, one of the officers were struck, I think, with the pole. And they went to the ground and, the accused had ended up getting an injury and that was pretty much it. I said, until we know more from what they are going to tell us at the hospital, then we'll know which way, direction we're going to proceed,...

Constable Chmelowsky had already concluded Mr. Miller was hurt when "they went to the ground." He came to this conclusion without corroborating evidence and prior to the any of the involved persons being formally interviewed.

Constable Chmelowsky did not just show up at the scene and leave without paying the matter any attention whatsoever, but he did very little while he was there. He secured the scene while waiting to receive direction about SIU involvement. He knew SOCO obligations were being fulfilled and that two witness statements were to be taken. Constable Chmelowsky provided no direction to his subordinates at the scene that they were to investigate how Mr. Miller sustained his injury. He acknowledged that he assumed that Mr. Miller was somehow injured during the altercation but as noted earlier in this

decision, that is not sufficient; he was obligated to determine whether the injuries suffered by Mr. Miller were justified, excessive, and/or proportionate.

The following excerpt is from Constable Chmelowsky's SIU interview:

Question ... did you take any steps to determine how those injuries were, came to be?

Chmelowsky From the way I'd understood, is when they were in the altercation, the ground, it's, there's asphalt, obviously roadway, paved driveway or it could have been stone driveway, but there, there snow on the boulevards and where the grass would be and it's icy. So, from my understanding is, during that altercation, when the officer was struggling to get the pole, pole away, I believe, they all went down onto the ground and I, I guess, with the amount of weight that went down, whether he went, was on top of him or on the side of him, the, the accused struck his face on the ice mount that was on the ground. That was my understanding as to how he got that eye injury.

Question And who told you that?

Chmelowsky Constable Bowler I'm pretty sure it was Constable Bowler.

This statement is troubling. There is no record in any officer's memo book or report or transcript that mentions an explanation of this nature. I question how it could be that Constable Chmelowsky, if he had been told this, would not record it in his notebook or in his Supplementary Report. I also question how Constable Bowler would have obtained this information since she was actively processing the scene from a SOCO perspective and not conducting interviews. Constable Bowler's Supplementary Report is very detailed; I am satisfied that had she somehow obtained information to the effect that Mr. Miller was injured as a result of striking his face on an "ice mount," it would have been included in her notes or her Supplemental Report. This premise was not contained in either of the statements received from the Theriault brothers, nor was it information provided by Mr. Miller. There is simply no explanation for Constable Chmelowsky's hypotheses other than that it was nothing more than a simple assumption, an acceptance that the use of force applied during the arrest and detention of Mr. Miller by Constable Theriault was lawful and appropriate.

In his interview with the SIU Constable Chmelowsky indicated that he observed "some fluid on the ground, possibly biological fluid, like blood or animal matter..." Constable Chmelowsky indicated he wanted to keep his distance to ensure he did not contaminate

the scene. This is understandable but there is no reason why he could not examine the scene with the SOCO officer so as not to contaminate it, or immediately after Constable Bowler had taken photographs. Examining the scene would have assisted him in his investigation and analysis of the incident. Instead, he did not conduct an investigation, he simply accepted the information he was provided without the benefit of actually considering its merit.

In response to being questioned by the SIU about the criminal charges laid, Constable Chmelowsky stated:

I believe there was assault, theft and, and stuff I didn't, like I said, my role was done at that point in time. Whatever they're deciding they're deciding on their own investigative part.

Constable Chmelowsky stated he was not certain what criminal charges Mr. Miller faced. Constable Chmelowsky was the supervisor, it was his responsibility to be more engaged than merely notifying the degree of injuries up the chain of command. A supervisor's responsibility when overseeing a criminal investigation is to ensure that the proper charges are filed. Constable Chmelowsky appeared solely focused on notifying the duty inspector; erroneously, he felt his responsibilities ended there.

I understand that in this case the CIB would become engaged when they arrived for dayshift, but it is important to consider their role. Had Mr. Miller not been severely injured by an off-duty officer, the CIB would not have been notified or become engaged in a theft under investigation or even an assault with a weapon, assuming Mr. Miller had struck the Theriault brothers with the pipe. It is the serious injury to Mr. Miller which triggered the notification and engagement of the CIB. I do not accept any assertion that it would have been appropriate to put off any aspect of the investigation until such time the CIB became involved; officers at the scene were dutybound to conduct as thorough an investigation as possible.

## **Conclusion**

The inequity in injuries and one-sided result of the altercation alone begged for questions to be asked. I am convinced that the main reason those inquiries did not occur is because of the involvement and role of an off-duty officer. Like the OIPRD conclusions, I find that even assuming Mr. Miller did not initiate an assault in self defence and that it was only the Theriault brothers who feared for their lives, the investigating officers never considered whether the force used in defending themselves was proportionate to the threat that Mr. Miller posed or whether it was excessive. Proportionality would have to consider the Theriault brothers were young and healthy males, that Mr. Miller was a

teenager and that this was a two on one situation. It would also have to consider in contrast the injuries suffered by the various parties. The officers were instantly aware that an off-duty officer was involved in the arrest of Mr. Miller and were immediately aware that Mr. Miller had suffered a serious facial injury yet they solely focused on the alleged theft and completely disregarded the circumstances that gave rise to that injury. It is not as if the officers engaged in a thorough discussion with the Theriault brothers about how Mr. Miller was injured and then accepted their explanation, it was a feeble inquiry at best; the issue was essentially disregarded.

I find the evidence clear and convincing; despite the obvious evidence at the scene, no one questioned the disparity of injuries, they accepted the version of events presented by the Theriault brothers. I find it difficult to comprehend that not one of the officers in attendance thought it prudent to investigate whether the injuries suffered by Mr. Miller were justified, excessive, and/or proportionate. I am convinced it was the fact that an off-duty officer effected the arrest that influenced the responding officers to accept his version of events without the need to investigate accordingly.

Ms. Mulcahy and Mr. McKenzie submitted that generally, the officers acted appropriately. Constable Theriault like all officers swore an oath when he became an officer with the Toronto Police Service. To accept that he was being truthful about the events is not demonstrative of a pro-police bias, they expected him to honour his oath of office and be truthful.

While I agree there is an expectation that police officers are to be honest and trustworthy, nonetheless, police officers are dutybound to investigate; they needed to consider that the explanation provided was self-serving, the evidence needed to be examined to ensure it aligned with the version of events being proffered. Instead, that did not occur because of a pro-police bias; they accepted his version of events, unequivocally and unchallenged.

In the Reasons For Judgement, Justice Di Luca stated:

I am troubled by the absence of any mention that Michael Theriault wielded the pipe and struck Mr. Miller once Mr. Miller was seeking assistance at the Silverthorne residence. I agree with the crown but the failure to even mention that Michael was holding the pipe at this point in time is likely an attempt to distance Michael from the pipe.

Prior to arriving on scene, the responding officers were informed, “looks like one male bent over a vehicle, second male holding a stick that is approximately four feet long, possibly getting ready to strike the other male.” This information was never pursued

despite the officers' observations at the scene. Furthermore, the officers never considered why it was that Mr. Miller, the alleged suspect in the theft, called 9-1-1 seeking assistance.

Exhibit #21 is an excerpt from the text *Legal Aspects of Policing*. Section 2.6. In part it states:

Although the common law duties of the police have yet to be judicially circumscribed, the common law has evolved four principal duties: the duty to preserve the peace; the duty to prevent offences; the duty to preserve life, safety, and property; and the duty to investigate offences....

One important common law duty of police officers is to enforce the law, particularly the criminal law. Courts of law referred to the 'duty to enforce the law' and the 'duty to investigate offences' interchangeably. As various court judgements have observed,

There is no question that police officers have a duty to enforce the law and investigate crimes. The principle that the police have a duty to enforce the criminal law is well established at common law...

The police must investigate crime. That is their duty.

So a police officer cannot just shrug their shoulders and walk away....

Section 42 of the *Police Services Act* lists the duties of a police officer:

The duties of a police officer include,

- a) preserving the peace;
- b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
- c) assisting victims of crime;
- d) apprehending criminals and other offenders and others who may lawfully be taken into custody;
- e) laying charges and participating in prosecutions...

It is clear that the responding officers had a duty to investigate the incident they were dispatched to, an alleged theft or attempt theft from a motor vehicle. The dispatch information included the fact that the person suspected of committing the theft or attempt theft had been injured and that one male was bent over a vehicle while a second male was holding a stick, approximately four feet long, possibly getting ready to strike the other male. Upon arrival they knew a metal pipe was present and Mr. Miller had sustained an egregious injury. Therefore, the attending officers also had a duty to investigate the nature of Mr. Miller's injuries and to inquire about who was about to strike whom with a stick, or

pipe. In contravention of Section 42 of the *Police Services Act* and their common law duty, this was not done. I am satisfied that the direction of their investigation or lack thereof was a direct result of knowing that an off-duty officer had effected the arrest of Mr. Miller. I am satisfied that any person, fully knowledgeable of all the facts would question how it was that Mr. Miller sustained his injuries. The officers blatantly overlooking this aspect of the evidence is more than a training issue or a performance issue or an error in judgement; it amounts to misconduct.

I am not swayed by the following finding of the OIRPD, but I do happen to agree with it.

...there is evidence from which it can be reasonably inferred that officers demonstrated a bias in favour of police. This bias evidenced or manifested itself in the failure of various officers to properly record information that was favorable to Mr. Miller. It also was evidenced by the failure to conduct a proper investigation into how Mr. Miller came to receive his severe eye injury...

Placing myself in the position of a reasonable member of the community, fully aware of all the circumstances I find that the conduct of Constable Chmelowsky, Constable Gendron and Constable Zabdyr is likely to damage the reputation of the Durham Regional Police Service should the public become aware of the facts. The public would find it unacceptable that the officers overlooked the obvious evidence and chose to not explore how Mr. Miller sustained his serious injury. Their behaviour is far beyond that of a technical breach of the law, it was not an error made in good faith, nor was it an error in judgement or carelessness.

I find that a reasonable person in the community would conclude that each of the three officers demonstrated a pro-police bias, that they were so influenced by the fact an off-duty officer was involved in the occurrence that they did not consider obviously apparent evidence, thereby, failing to properly investigate the matter before them.

I find Constable Gendron knowingly had a duty to question the evidence of the Theriault brothers, a duty to not simply accept that evidence, a duty to interview Mr. Silverthorn, and a duty to investigate how Mr. Miller received his injury. I find, that because of neglect, without lawful excuse, Constable Gendron neglected to promptly and diligently perform that duty. The wilful, neglectful action and inaction of Constable Gendron was such a degree of neglect that it causes the matter to cross the line from a mere performance consideration to that of misconduct.

## Decision

I find that the evidence is clear and convincing. Consequently, I find Constable Chmelowsky guilty of discreditable conduct, Constable Gendron guilty of discreditable conduct and neglect of duty, and Constable Zabdyr guilty of discreditable conduct. The evidence is so weighty, so reliable, and so cogent that it causes me to reasonably conclude:

- Constable Chmelowsky demonstrated a pro-police bias by accepting and not questioning the evidence of the Theriault brothers or taking additional steps to investigate how Mr. Miller substantiated his injuries.
- Constable Gendron demonstrated a pro-police bias, by accepting and not questioning the evidence proffered by Christian Theriault and by not taking further investigative steps when interviewing him to ascertain how Mr. Miller sustained his injuries.
- Constable Gendron was neglectful and did not promptly and diligently perform her duty when she failed to properly record or document relevant utterances by Jim Silverthorn and failed to take further investigative steps when interviewing Christian Theriault to ascertain how Mr. Miller sustained his injuries.
- Constable Zabdyr demonstrated a pro-police bias, by accepting and not questioning the evidence proffered by the Theriault brothers, by not interviewing witnesses, and by not accepting Mr. Miller's complaint or investigate how he received his injury.



Greg Walton  
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