

**NAME:** D. Mark Fenton

**RANK:** Superintendent, Toronto Police Service

**BADGE NUMBER:** 3535

**ALLEGATIONS:** discreditable conduct x 3; exercise of authority causing unlawful arrest x 2

**JUDGMENT DATE:** August 25, 2015

**HEARING OFFICER:** Hon. John Hamilton, Q.C.

**PROSECUTOR(S):** Brian Gover, Brendan Van Niejenhuis, Edward Marocco – Stockwoods LLP

**DEFENCE COUNSEL:** Peter Brauti, Lawrence Gridin, Bryan Bidali – Brauti, Thorning, Zibarras LLP

[1] Superintendent David Mark Fenton (“Fenton”) faces 5 charges of committing misconduct contrary to the *Police Services Act* R.S.O. 1990, chapter P.15, (“*PSA*”). He is alleged to have committed two types of misconduct. The first type, of which there are three charges, will be referred to as “discreditable conduct” meaning to have acted in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Toronto Police Service (“TPS”), contrary to section 2(a)(xi) of O. Reg. 123/98, therefore violating section 80 (1)(a) of the *PSA*. The second type, of which there are 2 charges, will be referred to as “unlawful arrest”. For these charges, Fenton is alleged to have exercised unnecessary or unlawful exercise of authority, by making unlawful or unnecessary arrests and arbitrary detention, without good or sufficient cause, contrary to sections 2(1)(g)(i) of O. Reg. 123/98, and section 80 (1)(a) of the *P.S.A.*

[2] The prosecution does not have to prove all particulars in an allegation in the Notice of Hearing to establish misconduct, *Leone v. Catalano* (1992), 1 PLR 573 at 578 (Ont. Bd. Inq.). The particulars define the scope of the conduct alleged in the allegation which is broadly stated in the charge. In this case, the particulars overlap between charges. There are 3 charges that relate to the incident on Saturday June 26, 2010 near The Novotel Hotel (“Novotel”) on The Esplanade in Toronto. Two charges relate to the incident on June 27, 2010 at the intersection of Queen Street West and Spadina Avenue (“Queen and Spadina”) and the detentions that followed. For ease of reference, I will refer to the charges relating to Queen and Spadina and charges 4 and 5, not charges 1 and 2 as they are numbered in the Notice of Hearing. Charge 4 alleges Fenton committed

discreditable conduct. The particulars refer to the containment of the crowd in the intersection during inclement weather and the detention at the PPC. The charge also lists in the particulars the arrests of the individuals at the intersection for breach of the peace and conspiracy to commit mischief. Charge 1, the unlawful and unnecessary exercise of authority by unlawfully and unnecessarily arresting the crowd at the Novotel is the same charge listed in charge 5 which pertains to Queen and Spadina. However, the particulars for each charge differ. For reasons unknown, the Queen and Spadina detentions of individuals at the intersection and the PPC were not particularized in a single charge of unlawful and unnecessary exercise of authority as the same conduct was particularized in charge 2 for the Novotel.

[3] During the incidents in question, Fenton was the TPS Incident Commander ("IC").  
The Major Incident Command Center 2010 G20 Summit Roles and/or Responsibilities  
 ("MICC Roles and Responsibilities") described the IC's command position as follows:

The IC is responsible for overall management of the event, and shall have operational and tactical control of all unit assigned to the TPS for the duration of the G20 Summit. For the G20 Summit, the IC will have a DIC assigned to assist with Operations. During the G20 Summit there shall be only one IC. The title of IC shall belong to the position occupied in the MICC of the TPS. This position shall have total command over all resources assigned to the G20 Summit.

The IMS training module, which was part of the TPS G20 Training for police officers prior to the G20, explained the role of IC as including the following: (1) responsible for overall co-ordination and direction of all responses; (2) sets objectives for the event and

prioritizes tasks; (3) should be in the Command Post; and (3) delegates authority not responsibility.

## **BACKGROUND**

[4] The conduct in question is related to the detention and arrests of protestors and others during the G20 Summit, a global economic gathering, hosting leaders and delegates from G20 countries as well as the International Monetary Fund and the World Bank. The purpose of the meeting was to discuss political and economic issues of global importance. It was held on June 26 and 27, 2010 in Toronto at the Metro Toronto Convention Center. Canada was the host. At every summit since 1999 there have been large protests and arrests. Six months before the G20 Summit, over one thousand protestors were arrested after clashing with police during the UN Conference on Climate Change in Denmark.

[5] The G20 Summit occurred on the heels of the G8 Summit, which was held in Huntsville, Ontario on June 25th and 26th, 2010. It was a first for both summits to be hosted back-to-back at different locations within a country. The G8 was hosted in a small community in a rural setting. On December 7, 2009, Toronto was announced as the location of the G20 Summit, giving policing agencies 6 months to prepare.

[6] The Royal Canadian Mounted Police ("RCMP") was the lead policing agency of the G8 and G20 Summits, overseeing and co-ordinating security planning and operations with the assistance of other law enforcement agencies and the Canadian Forces. The

RCMP established the Integrated Security Unit (“ISU”) to ensure safety and security at the Summits. Other police and government agencies including TPS were partners in the ISU.

[7] For the purpose of policing the G20 Summit, the City of Toronto was divided into zones. The RCMP was responsible for security of the internationally protected persons (“IPPs”) and summit sites, including the former were referred to as the Controlled Access Zone (“CAZ”) and the Restricted Access Zone (“RAZ”). The CAZ included the Metro Toronto Convention Center, the Intercontinental Hotel and the Royal York Hotel, enclosed by a security fence with no public access. The fence was chain link on top of a concrete barrier, together totaling 9 feet and ten inches in height. It had seventeen manned gates. The fence was the buffer between the G20 meetings attended by political leaders and the public, including protestors.

[8] The RAZ security fence included an area beginning on Front Street at John Street, to the north curb at York Street where it attached to the hotel. The RAZ continued from the front of the Royal York Hotel and ran westbound on Front Street. Photograph RoyalYork2 showed the distance from the fence on Front Street to the Royal York Hotel. The fence continued down Lower Simcoe to Lakeshore Boulevard. At Lakeshore Blvd., the fence ran south of the Steam Whistle and turned north toward the CN Tower. After crossing Bremner Boulevard, fencing continued past the Rogers Center and attached to the CN Tower. It continued northbound directly above the Tower to the start point at Front Street and John Street.

[9] TPS was tasked with maintaining order in the rest of Toronto. The area close to the security fence was described as the Interdiction Zone (“IZ”) The IZ extended in all directions beyond the security fence surrounding the RAZ and extended to Wellington Street to the north, Bay Street to the east, Lakeshore Blvd. to the south and Rees Street and Windsor Street to the west. For policing purposes, the IZ was divided into 2 zones, north and south, with Front Street serving as the dividing line.

[10] The area in the downtown core of Toronto that extended beyond the IZ was referred to as the Outer Zone (“OZ”). It included the outer perimeter of IZ fencing, the financial district, and buildings including the Provincial Legislature, TPS Headquarters (“HQ”) and courthouses. Key transit services were within the OZ, such as underground subway stations and tracks, and a substantial part of the PATH Underground walkway to shops, businesses and linkages to transit.

[11] The OZ was also divided into 2 quadrants – north and south. The north was bounded by Bloor Street West to the north. King Street West from Spadina Avenue to Simcoe Street and Adelaide Street West from Simcoe Street to Jarvis Street to the south. Jarvis Street to the east. Spadina Avenue to the West. The south quadrant was bounded by King Street West. From Dufferin Street to Simcoe Street, and Adelaide Street West from Simcoe Street to Jarvis Street to the north. Lake Ontario to the south. Jarvis Street to the east. Dufferin Street to the west.

[12] A Prisoner Processing Center or Mass Staging Area, (“PPC”) was built for the G20 to accommodate arrested individuals. It was not called Prisoner Detention Center. The PPC was located at 629 Eastern Avenue, which was in close proximity to the areas where protest was anticipated. Transporting prisoners to facilities or police divisions outside of downtown Toronto for processing was considered too arduous.

[13] In essence, all TPS personnel were on duty during the G20. At any given time, that would amount to at least thousand police officers as well as civilian members. An estimated seventy-five hundred members from other police forces and security personnel were brought to Toronto, in addition to the five thousand RCMP officers engaged in G20 policing functions.

### **Command Hierarchy**

[14] A framework of the command hierarchy was provided to the Tribunal by way of documentary and *viva voce* evidence. The Unified Command Center (“UCC”) was the top level of command over both Summits with the RCMP Incident Commander acting as the overall commander. It was located in Barrie, Ontario. The function of the UCC was described in the G20 Summit, Chapter 1 of the 2010, G20 Summit Toronto, Concept of Operations, dated June 9, 2010, draft 2.0, (“Concept of Operations”) as follows:

The UCC is the highest level of Command and Control for the Summits 2010 and the operations decision making authority in the Unified Command structure. It will be comprised of Commanders from all participating agencies/departments/services

forces. The RCMP Incident Commander will assume the role of overall commander. The structure of the UCC will facilitate comprehensive information flow to the RCMP Incident Commander.

Unified Command provides all agencies/departments/services with geographic or functional jurisdiction for an incident, the opportunity to manage the incident by establishing a common set of objectives and strategies

Agencies\departments\services will not relinquish their authority, responsibility, or accountability but will contribute to the command process by determining overall objectives, planning jointly for operational activities while conducting integrated operations and maximizing the use of all assigned resources.

[15] The Toronto Area Command Center (“TACC”) was second in the command chain under the UCC. It was located at Pearson International Airport, removed from the downtown core. TACC dealt with the resources related to the movement and activity of IPPs and co-ordinated requests for specialized resources, which were required to flow through the UCC. TACC also provided direction to RCMP units.

[16] The Major Incident Command Center (“MICC”) was the TPS control center, subordinate to the UCC in terms of overall G20 command. The Incident Management System (“IMS”) was the model used to design the functioning of the MICC and the command and control structure for the G20. The IMS Overview was part of the interactive electronic training TPS officers received as part of the G20 Training Modules. It noted that one of the benefits of the IMS model is unity of command and chain of command. In the Concept of Operations, the MICC’s command responsibilities were



described as follows:

The MICC will be the central point of command, communication and information for the Toronto Police Service. The MICC Incident Command Center, will have a full perspective of all resources under the Command of the TPS and tactical control of those resources in its function of ensuring the integrity of the Interdiction Zones beyond the Restricted Access Zones under the protection of the RCMP. Additionally the MICC will be responsible for the continuity of police services throughout the city of Toronto and liaising with the City's Emergency Operations Center. The MICC will maintain continuous communications and shared operational awareness with the Area Command Center through the Event Management System, Situation Board and other communications as appropriate.

In addition, the TPS G20 Training Module dealing with the IMS provided that the TPS G20 command structure came into effect in April 2010, as follows:

During the G20 event TPS Command and Control will follow the general principles of span of control defined by the ICS/IMS. As of April 15, 2010, members assigned to the G20 event will fall under one of the pillars of authority defined by the "G20 Command and Control" TPS G20 Command Model.

[17] The command lead of the MICC was Deputy Chief Anthony Warr. Next in line were the Command Operations Liaison, Staff Superintendent Jeff McGuire and Command Investigation Liaison, Staff Superintendent Richard Gauthier. Beneath the 3 commanders, were two Incident Commanders ("IC"). Superintendent Ferguson was the IC for shift 1 and Superintendent Mark Fenton, for shift 2. There were 6 policing units that reported directly to the IC, which included one of 2 Intelligence units.

[18] The TPS Intelligence Unit was led by Superintendent Fitzgerald on shift 1 and Staff Sergeant Demkiw on shift 2. The National Intelligence unit was the ISU - Joint Intelligence Group ("ISU-JIG"). It was an RCMP-led intelligence unit with various police agencies and the Canadian Forces at the table. Intelligence from the ISU-JIG was given to the TPS Intelligence Unit, which reported to the IC at the MICC.

[19] Information from the IC flowed up to McGuire and Gauthier, and to the top of the command chain, Deputy Chief Warr. Fenton also had a direct line of communication to TACC which included a roster of TPS Staff Superintendents and Superintendents. TPS Commanders were full partners in the UCC command center too. The UCC received and filtered information down to the MICC through TACC.

[20] Under the IC and the 5 units, the Deputy Incident Commander ("DIC") was next in line in the command structure. The DIC for shift 2 was Inspector Holt. The Toronto Anti-Violence Intervention Strategy Unit, Delta Security site leads, the Duty Desk and Staging Area Site Leads all reported to the DIC. Branch Chiefs were supposed to report to the DIC (directly or through the Duty Desk), not directly to the IC. There were 5 branches of authority, with a Chief at the helm of each. They were Operations, Planning, Investigative, Logistics, and Finance/Administration. The Branch Chiefs were senior officers, with ranks of Staff Superintendent, Superintendent or higher. Each Branch Chief was responsible for a discreet area. Beneath the Branch Chiefs were Directors.

[21] The Directors led police teams based on geographic zones or key specialized units. For example, the OZ Branch Directors had OZ site leads (for north and south) and were located on the ground, not the MICC. The Special Operations Branch Directors, Staff Superintendent Needles for shift 1 and Inspector Marks for shift 2, were located in the MICC. The RCMP liaison officer sat directly in front of Marks or Needles, less than a few feet away. Marks and Needles were supposed to report to the Operations Chief and/or Deputy Operations Chiefs. The Tribunal heard that Fenton often dealt directly with Marks.

[22] The Public Order Unit (“POU”) and the Emergency Task Force (“ETF”) were under the command of Needles or Marks. Site leads were the ground commanders who were taking orders from them. The IMS Overview training included in the G20 Training Module for TPS officers, described the role of Leads in general terms:

While the MICC has full operational authority, and staff in the MICC with the full perspective of the event will strategically direct resources on the ground, ground commanders, called Leads (comparable to Site Commanders) will provide tactical leadership for the resources assigned to then known as single resources, task forces, strike teams (ICS/IMS terminology) or otherwise.

During the G20, the POU police officers were akin to foot soldiers on the ground. They wore hard-tac (or riot gear) which weighed an estimated seventy pounds, carried shields, batons and usually wore helmets. They were not highly mobile investigators.

[23] The 2010, G20 Summit Toronto, Chapter 12. Public Order Unit Operational Plan ("POU Operational Plan") provided the POU Mission Objectives were: (1) provide crowd management as required in Toronto or support to other locations during the G8 and G20 Summit meetings or related events; (2) maintain the peace; (3) prevent disturbances and other acts of violence; and, (4) to be deployed where required in any other emergent situations.

[24] In direct command of the POU officers on the street, the site leads communicated with the Special Operations Branch Directors Marks or Needles. Communication from the Directors to the site leads sometimes flowed through the POU liaisons. For shift 2 Staff Sergeant Sadler was the POU liaison. He was the conduit for orders and directions from Marks to the POU commanders on the ground. As indicated in the POU Operational Plan, the IC was responsible for actual deployment of the POU. Once deployed the Director was to provide commands and convey orders to the POU ground commanders. Tactics were supposed to be determined by the POU section leads.

[25] There was a Planning Chief for each shift. For shift 2 it was Inspector Wiedmark. He was assigned a key role in strategic planning before and during the G20. He was responsible for developing immediate action plans to deal with emerging events and collecting all documentation about the outcome. The MICC Organizational Chart and a Statement of Facts was provided to the Tribunal. The Statement of Facts, which was not agreed to all parties, explained that the Planning Chief reported up to the DIC through the Duty Desk. However, the MICC Roles and Responsibilities described that the Planning

Chief's place in the chain of command and role somewhat differently. It provided the Planning Chief was to: (1) report to the IC and work closely with the section Chiefs and Branch Directors to ensure information is shared effectively to establish the best possible picture of the incident and effectively plan to meet the need of the incident; (2) act as a conduct reconnaissance on incidents or receive a Situation Report from the Chiefs or Branch Directors; (3) determine the need for any specialized resources in support of the incident; and, (4) liaise with the Public Information Lead and construct messaging for the IC.

[26] Much of the evidence heard by the Tribunal pertained to activities that fell under the direction of the Special Operations Branch Directors. POU site leads were the commanders on the ground and reporting to the Directors. The site leads at the relevant times were Staff Inspector Whittle, Inspectors Cashman, Corrigan and D. Saunders. The activities of the POU were central to the allegations against Fenton.

[27] Particulars of allegations against Fenton, in part, relate to PPC. The 2010 G20 Summit. Chapter 17, Prisoner Processing Center Operational Plan ("PPC Operational Plan") described the function of the PPC:

The PPC is designed to facilitate receiving and investigating a large number of prisoners. It is key that the facility be streamlined to ensure and (sic) effective and timely response from booking to release.

Key responsibilities of the PPC included booking, searches, securing property, and facilitating access to counsel. Upon completion of the necessary steps, the PPC

Operational Plan indicates "Investigators will then commence their investigations" with necessary paperwork filled out after the investigations were completed.

[28] For shift 2, the PPC Commander in the MICC was Superintendent Katherine Martin. There was a Unit Commander of the PPC, also called the Officer-in-Charge ("OIC"). At the relevant times Superintendent Farrar and Staff Inspector Ruffolo were the site leads and OICs of the MICC. The PPC Roles and Responsibilities articulated in the PPC Operational Plan stipulated that PPC Unit Commander was a senior officer, meaning an Inspector or Higher. It stated that the Unit Commander also maintained Operational Command of the PPC during the G20 and reported directly to the MICC.

[29] According to the MICC Organizational Chart, the Investigative Chief reported through the DIC to the IC. However, the MICC Roles and Responsibilities made no mention of the DIC acting as the intermediary. It stated that the Investigative Chief works closely with the IC, Operations Chief and Branch Directors. In addition, at page 21, it provided that Staff Superintendent Richard Gauthier would act as the liaison and resource to the Investigative Chief. Gauthier was senior in rank to Martin and he was in a command position superior to the IC.

[30] The Second-in-Command for each shift reported to the Martin. For shift 2 it was Detective Sergeant Callaghan. He was responsible for specific functions related to the PPC, included recording and documenting information with respect to investigations and prisoner processing. Site leads (also called OICs of the PPC) reported to the Second-in-

Command. They were tasked with monitoring and tracking the status of prisoners, logging all prisoners and their status and ensuring operations were complaint with TPS and Unit Governance. The Investigative Site Leads were to maintain tactical control of all resources assigned under their command.

### **Layout of the MICC**

[31] The MICC was located at TPS headquarters, situated in a large octagonal shaped room. It was an open plan concept. Commanders sat in close quarters. There was a common gathering spot in front of a bank of televisions, accessible to all.

[32] The work day was divided into 2 twelve hour long shifts. Day shift was referred to as shift 1 and night shift was shift 2. During each shift, seventy-five people worked in the MICC. Commanding officers often sat within earshot of each other. This allowed them to share information by speaking directly to each other, and also being aware of each other's activities. For example, Martin often spoke to Fenton, and at times Fenton spoke directly to the POU liaison.

[33] A site visit of the MICC occurred during the hearing, allowing parties to get a sense of the MICC floor plan and dimensions of the space. At the time of the visit, the seating areas had changed. The MICC was not operational and part of the space was being used for other activities.

[34] A large bank of closed circuit television (“CCTV”) screens were positioned on a wall of the MICC, depicting mobile, aircraft and fixed surveillance camera footage of events occurring throughout the City. Media footage and live news programs were available too. There was also a television or CCTV live-feed available in the 7<sup>th</sup> floor conference room. The Tribunal was not provided with a record or log detailing either the details of the content playing in the MICC from either the CCTV or the news reports.

[35] A Situation Board was posted in the MICC, and served as the portal for communications from the UCC and TACC. Personnel acted as screeners. They were tasked with ensuring the important information was brought to the attention of the IC, along with other information that related to an event or events that they determined to impacted the G20 Summit or safety of IPPs.

[36] The MICC also received information via electronic, radio and telephone communication about the potential locations of criminal activity in the downtown core. The information was not supposed to be provided directly to the IC. Rather, it was to be filtered up the long chain of command to the IC and/or other command staff, which was a mechanism to ensure its’ trustworthiness before reaching decision-makers. However, during the G20, intelligence from TPS intelligence was often provided directly to the IC by the Intelligence Officers.



## Intelligence

[37] Prior to the G8/G20 Summit, the ISU-JIG shared a comprehensive list of all G20 related protests planned in Toronto, including specifics about each event and whether violence or public order concerns existed. Each was ranked by the ISU-JIG with the perceived level of anticipated police interference from low to high. Intelligence regarding the risks of domestic extremism, including cyber threats, threats to critical infrastructure, chemical, biological and other types of threats was provided to the MICC. The risk levels were assessed on an on-going basis. The ISU-JIG possessed information about itineraries of the IPPs and details regarding tenants with businesses within the secured zones. It had comprehensive information about employees in the hotels.

[38] Intelligence operations were conducted before the G20. Police knew that the Anti-Capitalist Convergence of Montreal ("CLAC"), an anarchist group, was sending up to eight-hundred activists by bus and car to protest throughout the G20 weekend. In addition, the Tribunal heard reference to a one-year undercover operation conducted by the OPP dubbed 'Project Onus'. It included various teams of undercover officers and supporting officers, including police from Montreal. At least forty-three police officers involved in Project Onus were working undercover during the G20, in addition to TPS officers.

[39] The TPS- Intelligence Division Daily Situational Report of June 18, 2010 at 4:01 p.m. described the covert operations of a number of teams that were part of Project Onus.

Their operation went beyond the borders of Toronto and involved investigating and monitoring individuals and anarchist groups. The Daily Situational Report listed activities of Project Onus team members including: (1) Montreal Police to assist in coordinating the investigation into their activist's activities; (2) COVERT to continue preparing for multi-jurisdictional undercover crowd deployments; and (3) the team dealing with individuals referred to as "sources" to continue to assist Project Onus with its' investigations.

[40] There were TPS undercover teams engaged in G20-related investigations. Appendix 6 of the PPC Operational Plan detailed the make-up of the TPS Plain Clothes Rapid Response Team, comprised of a total of fifty-one police officers, and a liaison officer, all under the command of a Detective Sergeant. The team was in operation throughout the G20. Plain clothes officers on extraction teams were tasked with removing and arresting people from within a crowd. Unlike the Rapid Response Team, they were under the direct control of the IC unless performing pro-active arrests. Before performing an extraction arrest, the Officer-in-Charge of the specific arrest team was required to telephone the MICC and speak to the Intelligence Lead.

[41] The prosecution and counsel for Fenton agreed on the definition of intelligence information. The Tribunal was advised that intelligence is information received from various sources was categorized as true or false, accurate or inaccurate and reliable or unreliable. Wholly unhelpful in deciding whether it was worth anything. Intelligence received by the MICC was supposed to be "washed", meaning it was reliable.

[42] Intelligence reports were generated before and during the course of the G20. Written and oral reports were provided to the IC and the Directors in the MICC ranging from high level intelligence forecasts to real-time information available on social media, such as postings on Twitter. It goes without saying that intelligence was shared with TPS Commanders in advance of the G20. The Planning Chiefs and commanding officers required it to allocate resources and formulate an action plan. During business cycle meetings in the MICC, which were scheduled to occur 5 times per twelve hour shift, the TPS Intelligence division representative shared information related to evolving intelligence with the commanders. The information shared at the meetings was not documented in scribe notes as it was sensitive in nature.

### **Scribes**

[43] Civilian TPS members acted as scribes for commanding police officers during the G20, both in the MICC and on the street. The theory was that commanding officers were too busy to take contemporaneous notes. Each commanding officer, including the IC, had a personal scribe. The MICC Roles and Responsibilities indicated that scribes were to make notes and “ensure direction of conversation and parties involved in conversation are clear”. The scribe notes were copied at the end of each shift. The original notes became the property of the commander for whom the scribe was recording and retained by the commander.

[44] At least 1 OPP commander who testified before the Tribunal indicated that his scribe also used a digital recording device to record communications. TPS scribes did not capture entire conversations verbatim, or every word spoken by the commanding officer. Scribes were not present with their commanders at all times – as there were occasions when commanders were in the MICC outside of their regular shifts. However, commanders were not prohibited from using their scribe's notes to assist them in making their own notes at a later date. Scribe notes often required interpretation because they lacked context. It makes sense because scribes were capturing information they thought was important. The scribe notes provided to the Tribunal were not complex or difficult to decipher. They were written in plain language, sometimes short form, but not short-hand. During testimony, scribe notes were often put to commanding officers. The content and meaning of the notes could be explained with ease.

### **Black Bloc**

[45] Black bloc referred to the tactics used by individuals committing acts of vandalism and/or violence during protest events. Many black bloc protestors were anarchists. Persons engaged in black bloc tactics characteristically, but not universally, wore black clothing. They often carried backpacks. They were known to break out into small groups of like-minded individuals with a similar comfort level regarding the lengths they were willing to go to in the name of expressing dissent – be it break windows or assault police. In keeping with anarchist views, there was no one person in charge of groups or dictating rules about conduct. Flouting the law was the norm. Using peaceful protestors as cover,

so to speak, allowed black bloc members to move freely and avoid detection. Black bloc tactics were described by McMahon J. in *R v. Pflug-Back* (19 July 2012), Toronto (Ont. S.C.J) at p. 4 as follows:

The individuals initially participated in a mass peaceful protest with their faces visible. During the protest march at some point with others shielding them from discovery, they emerge from the protest all wearing black with their faces covered with masks, scarves or bandanas.

After perpetrating acts of violence or vandalism, black bloc protestors often changed out of black clothing back into non-descript civilian attire.

[46] Black bloc tactics were not new to the G20. The Tribunal heard evidence that they have been in existence for years, and were a common feature of anti-establishment protests in Canada and abroad. Intelligence regarding individuals and groups with a history of engaging in black bloc tactics was on the TPS radar, so to speak, before the G20. For example, busloads of protestors from the CLAC, known to engage in black bloc tactics, travelled to Toronto from Montreal for the G20. There were arrests of black bloc members made at Westmoreland Avenue and 16 Bancroft Avenue, which included out-of-town organizers of G20 anarchist events. The Tribunal also heard that events such “Saturday Night Fever”, organized by anarchists. It was advertised as a roving dance party with the aim of reclaiming the streets from police. However, it was to serve as a gathering for black bloc protestors, from which they would fan out and engage in black bloc tactics.

## **Training**

[47] TPS G20-related training material, guidelines and operational plans were provided to the Tribunal. Some were in draft form and/or had a version number which was not final. There were training and briefing sessions for G20 commanders in June 2010 including an RCMP-led session. Specific training was provided for certain units, such as the POU. It is unclear whether the TPS police officers received formal G20 training in person in addition to electronic training modules.

[48] A significant number of the police officers on duty during the G20 were wearing standard police uniforms. They were referred to as “flat hats”. The nature and extent of the G20-specific training they received is unknown. Many of the police officers on the front line during the G20 were members of the TPS Community Response Unit (“CRU”) and rode bicycles. Although they were more mobile than flat hats, their uniforms provided less protection than those worn by flat hats. CRU officers often wore shorts and short-sleeved uniform shirts. The Tribunal was advised that CRU officers were experienced in crowd control measures.

## **Communication**

[49] Extensive plans for communication were created for the G20 including the Public Order Unit ("POU"). Communications Plan - Special Operations Public Order, which detailed communications systems, encrypted radio networks and telephone numbers. Efforts were made to anticipate the importance of enhanced and effective radio communication for police during the summit.

[50] Radios and handheld devices were the most utilized means of police communication during the G20. Transmissions from an OPP radio band of June 26 and 27, 2010 were played at the Tribunal. Transcripts were entered into evidence. Identities of individuals communicating on the radio were often indecipherable. TPS radio transmissions, messages sent using handheld devices including text messages from the MICC to commanders on the ground, or vice versa, were not shared with the Tribunal.

### **Protestors organizing for the G20 Summit**

[51] Like police, protestors prepared for the G20 Summit. Protestors came from far and wide to participate in demonstrations. There were groups concerned about the environment, socio-economic inequality, labour, and housing to name a few. Protestors ranged from those involved in the highly organized labour movement to average citizens who wanted their voices to be heard. The G20 galvanized many.

[52] Material was proffered at the Tribunal as intelligence, such as a publication of students of the University of Guelph, called The Peak. It was a University of Guelph

student publication. The Peak, volume 49, issue 6, provided a description of why the students were being called to attend the G20:

The G8 and G20 summits do not represent the world: Different races, classes, migrant workers, women, homosexual, bisexual, and transgendered peoples are not adequately represented, and so their views of the issues being discussed are not being heard. These meetings are focused on trying to fix capitalism, a system that only seems to work for individuals like the G8/G20 leaders, ignoring countries with less advanced economies as well as the poor in their own countries.

[53] The Peak also contained information about resistance, including an article entitled “A Security Primer”. In it were pictures with captions including “Stop Snitching”, “Don’t be a sucker – Keep Your Mouth Shut”. It advised readers to keep quiet about involvement in illegal activities and not to communicate such plans by telephone, e-mail or mail, to avoid interception by authorities. It provided advice to new protestors in “A Quick Guide to Street Actions”. For example, it recommended that uniform clothing be worn, so it would “[M]ore difficult for the pigs to distinguish between individuals.” If the Peak spurred black bloc protesting at the G20, by University of Guelph students or others, the Tribunal did not hear about it.

[54] Prior to the G20 Summit, police warned citizens that it would likely cause disruptions to downtown services, such as transit. A number of downtown businesses allowed their employees to work from home or other office locations during the G20 meetings. Many protestors did not heed warnings to avoid downtown Toronto. Doing so would mean they would be denied the ability to protest near the G20 meetings. It was a



given that Toronto would be the site of protests and the fence was the next best option to protesting at the meetings, which were closed to the public. A number of Tribunal witnesses, such as Ella Henry, testified that she believed it was important for her to demonstrate peaceful dissent at the G20 summit. Henry and her brother each travelled to Toronto from different ends of the country to do so.

### **AUTHORITY TO ORDER MASS ARRESTS**

[55] TPS G20-related governance and training materials provide a clear distinction between self-generated arrests by police officers and mass arrests ordered by commanders. During the G20, mass arrests were to be conducted under the authority of the Special Operations Director, and required authorization by the IC.

[56] The POU Operational Plan refers the POU's role in making arrests during the G20. There was a distinction between arrests in the course of fulfilling POU functions and mass arrests. The relevant sections read:

#### **ARRESTS:**

Officers should be prepared to respond to any act involving violence, damage, public/private property and other Criminal Code offences requiring immediate arrest. Members of the POU should use discretion when determining to arrest and be mindful of such considerations as the seriousness of the offence, officer safety, public safety and the potential for increased violence. Mass arrests shall be conducted only under the direction of the INCIDENT COMMANDER.

### Mass Arrests:

Mass arrests shall only be conducted under the authority of the SPECIALIZED OPERATIONS DIRECTOR in consultation with the INCIDENT COMMANDER or OPERATIONS CHIEF. In the case of mass arrests, all personnel are to follow the Arrest Plan established for this event.

[57] The PPC Operational Plan, Appendix 14 provided specific direction for the management of prisoners in terms of mass arrests. It stated that any deviations or changes to the established rules, regulations and orders were at the discretion of the IC. Numbered TPS procedures including TPS 01-01 related to Arrest and Release were cited in the Appendix.

[58] A TPS training presentation for police officers called TPS Training – G20, Toronto Police College, June 2010, provided the steps required when arrests were made on the bases on an officer's formation of reasonable and probable grounds. The arresting officer was required to use a radio to the request prisoner transportation, standby for a wagon or screened car, and escort the prisoner on foot to it. A separate section of the presentation dealt with safety, and stated "Mass arrests should be a planned event and supervisor determined".

## EVENTS

### **The Lead-up to the G20 & Friday June 25, 2010**

[59] The allegations before this Tribunal do not relate to June 25, 2010. However, the events of that day are helpful in understanding what followed.

[60] According to the June 26, 2010 ISU-JIG Daily Situational Report, on June 25th it indicated that 4 buses filled with activists including members of CLAC, arrived at the University of Toronto address of 16 Bancroft Avenue.

[61] The first G20 protest event that the Tribunal heard about was the “Free the Streets” march of June 25, 2010. It began at Allan Gardens in downtown Toronto. Protestors erected a tent city. Others joined the gathering. In short order, the group grew to an estimated one thousand protestors. During the afternoon, a bus from Montreal dropped approximately two hundred protestors - some wore black bloc attire such as helmets, knee pads and bandanas. Individuals from the group were seen carrying bags of liquid and backpacks filled with stones and bricks. Police seized sticks from the buses, as well as protest-related items. Presumably, the protestors went on their way, on foot.

[62] TPS received reports that approximately twenty protestors wearing black bloc attire were seen in the underground pedestrian PATH system. A portion of it had to be secured for investigation.

[63] In the late afternoon, the large crowd of Free the Streets protestors walked from Allan Gardens along Carlton Street. Black bloc protestors were observed in the crowd walking in a group carrying a black flag and chanting “Bomb the RBC”. A few of them were carrying hammers.

[64] As the Free the Streets march reached Yonge Street, police observed members of the group wearing black clothing sending text messages. At the same time, police received information that protestors within the group possessed Molotov cocktails. Police in the area were directed to don their helmets. POU officers were ready to be deployed, if needed. It was a wait and see approach.

[65] The march then headed west on College Street. When it reached the vicinity of TPS HQ, protestors pushed police officers against storefronts. Two officer assist calls were broadcast over the police radio. Such calls signal that police officer is in a need of police assistance, and all available police officers in the area respond to it. Back-up rushed to the area. Protestors threw glass bottles, liquids and even bicycles at the police, which led to a physical confrontation between the two sides. After lashing out, the black bloc protestors in the crowd quickly retreated back into the march of non-violent protestors.

[66] At 5:10 p.m. a skirmish between police and protestors occurred in front of TPS HQ. As it ended, black bloc protestors put on masks and goggles. A small contingent of black bloc protestors mixed unknown liquids in plastic bags and jars, which produced a cloud of thick black smoke. A police bomb disposal unit was dispatched to the area.

[67] The Free the Streets march continued south on University Avenue and east on Elm Street, toward Allan Gardens. A black balloon was released into the air, which appeared

to be a signal of sorts. As it was released, black bloc protestors in the march changed into non-descript clothing and disappeared into the crowd.

**Saturday June 26, 2010 – the Novotel**

[68] The “People First! We deserve better.” (“People First”) march was the biggest organized demonstration scheduled to occur during the G20. The ISU-JIG schedule of events lists its organizers as Ontario Labour groups, Greenpeace, Oxfam, the Canadian Peace Alliance and other non-government organizations. Over ten thousand participants were slated to attend the march. It was scheduled to start at 1:00 p.m. at Queen’s Park. After marching a route in the downtown core, it was to wrap-up at Queen’s Park at 5:00 p.m.

[69] At 12:30 p.m., a police officer from the TPS mounted unit observed 5 individuals near Queen Street West and Noble Street filling duffel bags with ropes and grappling hooks. The individuals left the area on foot and bicycles heading east. At the same time, protestors began gathering on the grounds of Queen’s Park, for the People First march.

[70] At 12:49 p.m. the MICC was advised that 6 people in possession of golf balls and frozen water bottles were arrested at Union Station. Five minutes later, a handful of black bloc protestors were arrested behind 483 Bay Street, preparing Molotov cocktails.

At approximately 1:00 p.m., two people in possession of incendiary devices were arrested outside of the Royal Bank located at University Avenue and Dundas Street West.

[71] At 1:30 p.m. approximately ten thousand protestors participating in the People First march left Queen's Park and marched southbound in all of the lanes of University Avenue. A few of the protestors put on masks. Black bloc protestors in the crowd stripped the signs off of the sticks holding them. CRU officers were tactically placed at the front and rear of the march and travelled with it.

[72] At 2:00 p.m. the march turned westbound on Queen Street West. Groups of black bloc protestors darted out of the main crowd of peaceful marchers, and ran down side streets. Approximately one hundred black bloc protestors congregated near the end of the march. They ran down John Street and engaged with combat POU officers, throwing sticks and objects at them. The assaultive behaviour of the black bloc protestors was captured in the visuals of defence video 3 and 1400BB, demonstrating how black block protestors used the peaceful protestors as a buffer between themselves and the police.

[73] TPS Inspector Gerald Cashman was a POU commander on June 26, 2010. In 2010, he had over thirty years of experience as a police officer. During the G20, he was in charge of POU section B which was comprised of an estimated forty-five police officers. Cashman testified about the dynamic situation at Queen Street and John Street on June 26, 2010. His team formed a line east to west, across John Street. Approximately one hundred protestors broke from the crowd of marchers and changed into black clothing. They attacked the line of police, trying to push past in a southerly direction. Cashman testified that his team of POU officers was assaulted with sticks, bottles, golf balls as well as ball bearings capable of penetrating police shields. Protestors threw bags

of feces and containers of urine at police too. His team managed to push the crowd up to Queen Street. Cashman testified that the assaultive protestors "left us about as quickly as they formed on us." The black bloc protestors retreated to the march, which headed toward Spadina Avenue on Queen Street West.

[74] At approximately 2:45 p.m., POU officers were attacked by a group of approximately one hundred black bloc protestors who were brandishing sticks. Hundreds of peaceful marchers in the People's First march were marching behind the black bloc group, which was at the front of the march. The black bloc protestors threw pieces of wood, batteries, stones, golf balls and containers of urine at the police who were also at the front of the march. The TPS mounted unit, which was positioned behind the POU officers, were hit with golf balls. During the melee, a protestor was seen preparing a molotov cocktail on the east side of Spadina Avenue, south of Queen Street West.

[75] Just before 3:00 p.m. a POU of OPP officers at Richmond Street and Spadina Avenue radioed the MICC, in need of urgent assistance. They were under attack from black bloc protestors and unruly protestors who joined in. At the same time, several black bloc protestors were seen mixing liquids in a bus shelter in front of 161 Spadina Avenue.

Soon after, the People First march splintered. The main group of marchers continued westbound on Queen Street West. A large group of black bloc protestors ran back eastward on Queen Street West. The breakaway group of black block protestors began to commit acts of vandalism.

[76] A large plume of black smoke rose from within the breakaway group, between Peter Street and Spadina Avenue. Police put on gas masks as did a number of protestors. Video 1503 Black Bloc at Queen and Spadina depicted events that occurred at Peter and Spadina immediately before and after an incendiary device was lit. The video showed a mix of black bloc protestors, other protestors and the media in the crowd. POU officers deployed tear gas in an effort to break up the crowd, to no avail. As seen throughout the G20 events, many protestors and individuals in the vicinity stood by and watched the black bloc protestors run amuck, while a small number joined in. Police cruisers were damaged and lit ablaze. Ferguson, the IC at the time, ordered all police officers in uniform or on bicycles out of the area. He made an urgent request through TACC for POU officers to be deployed from Huntsville to assist in Toronto.

[77] OPP Staff Sergeant Thompson and POU officers under his command were part of the POU contingent sent to Toronto from Huntsville on an emergency basis. He had over twenty years of policing experience in 2010 and managed the Middlesex OPP detachment. One of his extra duties was acting as a POU commander. During the G20, Thompson was responsible for a POU unit of approximately forty POU police officers. He was under the command of Inspector Miles from the York Regional Police ("YRP").

Thompson testified that on June 26, 2010, his team managed to push the crowd back on Queen Street West in the vicinity of a burning police cruiser. It was a dangerous situation. He thought they had TPS POU behind them, protecting them from a rear attack. However, in the midst of dealing with the aggressive crowd on Queen Street West, he



looked back and the POU was gone. Within a short time, Thompson managed to move his team back to Queen and Spadina. He described the situation they faced:

I no sooner got back to my team at the corner of Queen and Spadina and the identical thing happened all over again. I looked over my shoulder to the east and the same thing happened only the group of individuals coming towards us down Queen Street seemed to be much more vigorous and numbered, running. And they quickly overtook the burned cruised. They re-lit the fire, jumped up and down on the roof and the hood of it. [S]ome continued coming towards us, so now we were in a location where I had my men across in a line facing westbound, but we actually had individuals coming at us from both sides now.

So I made the decision that – that stretch of Queen Street was lost, as far as I was concerned from a control standpoint. Individuals standing in the intersection of Queen and Spadina were starting to become much more vocal with us. They were throwing items: sticks, stones, water bottles. We eventually smelled bags of bleach....[s]ome of our officers got hit with bags of what certainly smelled to be urine. And I made the decision to pull my team out of that location down to the south, down to an alleyway that we had established as a safe-zone a block south of Queen off of Spadina.

I made the decision that Queen Street was lost, from a control standpoint, individuals standing in the intersection of Queen and Spadina were becoming more vocal with us – throwing sticks, water bottles, stones, bags of bleach. Some officers got hit with bags that smelled like they contained urine. I pulled the team out and went to an alleyway a block south of Queen. The team used the ARWEN to protect themselves.

[78] At 3:12 p.m. a group of the black bloc protestors vandalized TPS police cruiser #766, was a TPS Staff Sergeant in uniform, was at the wheel. Black bloc Protestors used weapons and implements to shatter the vehicle's lights and windows. A long stick was

used to smash the driver's side window.<sup>1</sup> Defence videos 1512BB overwhelm and attack car 766(1) (2) depicted the events. A lone flat hat police officer was standing near the police car, standing in a fighting stance and using her baton to signal to the crowd to get back. Other flat hats assisted. At that critical time, no POU officers were in sight.

[79] At 3:19 p.m. police officers at the intersection of Queen Street West and Beverly Street were faced with a crowd of black bloc and peaceful protestors heading toward them from the east. The police retreated to their vehicles and drove northbound on Beverly Street. The protestors passed the intersection and travelled along Queen Street West. The group included individuals, possibly non-black bloc protestors and troublemakers who decided to join in, smashed storefronts and ATM machines, overturned mailboxes and broke windows using objects or by kicking them out. It was a free for all. Not action targeting corporate headquarters or conglomerates. It was destruction for the sake of destruction.

[80] By 3:35 p.m. POU officers were engaged at every intersection on Queen Street West between Spadina Avenue and University Avenue. It was chaotic. They were dealing with aggression, violence and lawlessness. The MICC was not in control of the situation – placing officers on the ground, peaceful protestors, business owners, their property, employees and patrons at risk.

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<sup>1</sup> *R. v. Coté*, [2011] O.J. No. 5966 (C.J)(QL): The individual used the wooden pole that was used to smash in the driver's side window was an admitted member of the black bloc.

[81] Not far away, a large crowd of black bloc and other protestors moved south on Bay Street from Queen Street West. Video [1540 KingBay1](#) showed the march and the mayhem. The street signs seen in the video confirmed the route and a clock was visibly on a building at the corner of Adelaide Street and Bay Street, thirty-six seconds into the video. Protestors smashed police vehicles with implements at the intersection of King Street West and Bay Street, undeterred by the sound of police sirens. All the while, non-black bloc protestors and others were standing by taking photographs and recording the mayhem of video.

[82] Police abandoned a number of police vehicles at King Street West and Bay Streets, as seen on the [1540 KingBay1](#) video. Protestors jumped up and down on the roof of at least 1 of police cruisers and tried to overturn another. Police property was stolen. Police officers stood back in a line. Helpless. Outnumbered. Eventually the crowd continued marching, some of whom were heard yelling "Fuck law and order."

[83] Defence video twenty-five, City TV news footage depicted a police vehicle ablaze at King Street West and Bay Street. It showed damage perpetrated by the individuals in the area just north of King Street West near Adelaide Street. City TV was one of the television stations being viewed in the MICC. Video [1540 KingBay2](#) showed police reinforcements arriving at the intersection of King Street West and Bay Street during the same transaction captured in the City TV news footage.

[84] At approximately 3:50 p.m. multiple explosions occurred within a burning police car. A second police car was set on fire. Video 1549 Kingbay3 depicted the situation at King Street West and Bay Street. It showed 2 burning police cruisers and protestors marching past the vehicles eastbound on King Street West. A line of police officers standing in front of the security fence and additional police officers close to the intersection were visible. Photos taken by witness Sam Katz, IMG\_2225 and IMG\_2228, showed the burning police cars and black bloc presence in the vicinity. Many protestors in the area of King Street West and Bay Street ran north to Adelaide Street and westbound toward Yonge Street. Others ran straight across King Street West, in an easterly direction.

[85] An estimated one thousand marchers moved north on Yonge Street, led by contingent of black bloc protestors. Protestors from the group smashed windows of businesses. In some instances, patrons and staff were inside. Looting occurred. As the march reached the intersection of Yonge Street and Dundas Street, many onlookers hurriedly moved aside. Others stood and watched the chaos. Black bloc protestors zigzagged through the crowd, armed with implements such as sticks and traffic signs. Tools of destruction.

[86] At 4:05 p.m. Command Lead Deputy Chief Warr told commanders in the MICC that he wanted to crowd shut down immediately. What that meant and how that was to happen was unclear.

[87] At 4:09 p.m. police officers located at 415 Queen Street West, near Queen and Spadina, reported that they were under attack and required help. Ferguson, the IC at the time, ordered the OZ Deputy Director to get the officers out of the area. Police were on the run.

[88] By 4:20 p.m., the large crowd of protestors from Yonge Street and Dundas Street were at the intersection of Yonge and College Street, not far from TPS HQ. The chaos continued. The crowd turned east on College Street. TPS HQ was on lockdown. A sparse group of police officers stood guard on the steps of HQ. Where were the legions of POU officers? Black bloc protestors pelted police with objects. The front windows of HQ were smashed, feet from the front steps of the building, as depicted in video 1620westoncollege3. Expletives were spewed at the police. A crowd of people stood by and watched. Others, including black bloc protestors, continued moving in a westerly direction. At 4:09 p.m. police officers near 415 Queen Street West were instructed to leave the area.

[89] At 4:30 p.m. or soon after, protestors vandalized 2 police vehicles. Police scout car #3251 was looted and torched. The visual aspect of 1630Cruiser2 showed the surreal behaviour of a shaggy haired male in civilian clothing. He used the police radio, apparently broadcasting a false call over the police radio indicating an officer was in trouble. Later he stripped off his shirt and danced on the roof of the car. There were no police in sight.

[90] At approximately 4:40 p.m. the MICC was advised that two hundred black bloc protestors were moving west on College Street, toward University Avenue. It was advised members of the group smashed windows of an occupied van. Later it came to light that the van had been empty. Video 1638College2 depicted a bus shelter and police van being vandalized by protestors. A couple of individuals wearing bright orange baseball caps walked past the van, near the protestors by the van.

[91] At quarter to 5, a large group of black bloc protestors at Queen's Park were removing their black clothing and replacing it with street clothing. People surrounded them to provide cover. Within minutes, the OZ Deputy Director advised the IC that there was a large group of protestors moving southbound on Bay Street and southbound on Yonge Street. Black bloc protestors wearing police jackets were in the crowd.

[92] By 5:00 p.m. police officers had been on the streets dealing with hoards of protestors, those committing brazen acts of vandalism for nearly ten hours, much of it in the summer heat. Field Commanders on the ground advised the MICC that POU officers were having difficulty responding to the incidents because they could not keep up with the highly mobile groups. No surprise. The mobile police officers were the flat hats and the CRU.

[93] Shortly after 5:00 p.m. a number of People First marchers remained at Queen's Park. Some were defiant. Police gave the crowd verbal commands to "Get back" and "Move back", to which the crowd retorted, "No, we will not move".

[94] At 5:13 p.m. the TPS Intelligence Chief advised the commanders in the MICC that protestors were leaving Queen's Park and heading northbound.

[95] At 5:24 p.m. Fenton assumed the role of IC.

[96] At 5:30 p.m. large crowds of protestors were blocking intersections at Adelaide Street and Bay Street West as well as King Street West and Bay Street. Approximately two thousand protestors remained at Queen's Park. There were skirmishes with police. Fenton gave the order to use a long range acoustic device ("LRAD"). At 5:46 p.m. it was used twice to tell protestors to disburse. Most did so. The strongholds stayed put. Objects were hurled at police, trying to do their jobs.

[97] At 5:52 p.m. the MICC received a radio call that a person with a gun was seen at Yonge Street and Isabella Street. Fenton told Marks to get the ETF to respond.

[98] At 5:59 p.m. another vandalized police car was set on fire at Queen and Spadina – the forth scout car torched in less than 3 hours.

[99] At 6:00 p.m., a group of protestors rushed police at Queen's Park. They ran up to the prisoner transport wagons that were on scene, and continued to throw objects at police.

[100] At 6:03 p.m. the earlier radio call regarding a person with a gun was updated. The MICC was advised that there was a male armed with a rifle on Isabella Street heading toward Yonge Street. Within ten minutes of the updated call, there were reports of

shotgun shell blasts in the area of Queen and Spadina. There is no suggestion the gun call and the blasts were connected, or that person with a gun existed.

[101] At a few minutes before 6:30 p.m. the computer system that allowed the IC and commanding officers to visualize the police resources across the city stopped working. It was up and running again long before decisions were made regarding the group of protestors at the Novotel.

[102] At 6:40 p.m. an estimated two thousand protestors were still at Queen's Park. Up to two hundred of them confronted and heckled police officers. At approximately 7:00 p.m. Marks told Fenton that he had adequate police resources in place and ready to make mass arrests at Queen's Park. Fenton ordered him to do so. The LRAD was to be used first, and arrests were to follow.

[103] A few minutes later, POU liaison Sadler made an announcement to all command officers on the ground in the downtown core. In scribe's notes, the following direction was attributed to Sadler: "Do not allow people to control the streets. Anyone who is masking up will be arrested if they do not leave the scene when asked". At the same time, arrests were occurring at Queen's Park, Queen Street West and Peter Street and King Street and Yonge Street. Police received reports that a contingent of black bloc protestors were at 16 Bancroft Avenue, a University of Toronto building.

[104] At 7:33 p.m. Fenton decided he was going to deviate from the chain of command and deal with Marks. At the same time, black bloc protestors were engaging police in the



area of Blue Jays Way and Wellington Street. Fenton was advised that the police there were outnumbered by the black bloc. Flat hats were fending them off. Fenton told Marks to get POU officers to the location. He also instructed an Operations Chief to broadcast a message telling police that people engaged in breaching the peace should be arrested. Fenton testified that he was referring to individuals engaged in black bloc tactics - that caveat was not articulated as part of the order. He did not want the flat hats waiting for the POU to arrive. He wanted arrests. The flat hats were left to deal with the black bloc, and presumably try to arrest them.

[105] At 7:51 p.m. a dynamic situation was unfolding at the intersection of Queen Street West and Peter Street. A police cruiser was set on fire. Hooligans took over the intersection. Police had to escort fire trucks to the blaze. Once the fire was out, police the fire department left the scene as quickly as possible to avoid being targeted by the protestors.

[106] At 8:10 p.m. the MICC was advised that protestors were concealing their faces at Queen's Park.

[107] At 8:34 p.m. POU officers were assaulted by protestors on Hoskin Avenue, east of St. George Street and west of Queen's Park Circle. At the same time, the MICC was told that a group of protestors were on Bloor Street at St. George Street, heading east toward Avenue Road. Deputy Chief Warr advised Fenton that the next target of black bloc protestors was Yorkville. The MICC received additional information suggesting that

black bloc protestors were going to congregate on Church Street, as a tactic to distract police from to distract police from other locations of activity later in the evening. The MICC was in panic mode.

[108] At 8:48 p.m. sections of POU officers were ordered to Yorkville. Marks told Warr that the POU was unable to attend immediately because they were engaging with protestors elsewhere. As luck would have it, protestors did not go to Yorkville. Crisis averted.

[109] Not long after 9 p.m. the UCC advised the MICC that a crowd of an estimated one thousand protestors was heading south of Bloor Street West and it planned to travel south on Yonge Street. Fenton was able to see the crowd by looking at stationary camera images that were available in the MICC. The protestors did moved south on Yonge Street. By the time group reached Yonge Street and Dundas Street, it included nowhere near a thousand people. The crowd walked at a leisurely pace. Unlike the crowd that had travelled up Yonge Street earlier in the day, the southbound crowd did not perpetrate damage to businesses.

[110] At 9:16 p.m. Fenton gave directions to stop the crowd. He did not want them to reach the fence. The Tribunal heard that Fenton ordered the deployment of police officers to stop them. Yet the crowd continued walking.

[111] At 9:20 p.m. Demkiw advised Fenton that anarchists were moving toward the security fence. He read it on Twitter. Fenton was told that they were setting or attempting to set fire to businesses at Yonge Street and Shuter Street too.

[112] Ten minutes later a small group of protestors made their way to Wellington Street West, at the security fence. They did not attempt to breach the fence. Police were present. It was uneventful. After a few minutes at the fence, the protestors left.

[113] As the protestors left the fence area, POU officers were engaged with a group of protestors at King Street West and Bay Street. Not a passive group simply sitting in the intersection. A POU commander's scribe notes described the interaction:

[A] crowd of hostile violent persons; ended up on King Street, hostile crowd throwing items, rocks, bottles, etc at officers. ARWEN deployed and used on male, white, 20-25 years. He picked up a bottle and threw it at officers; was struck with one round; he tried to pick it up again and was struck with a second round. Male ran away before he could be arrested.

[114] At 9:51 p.m. a crowd, which may have included individuals who had travelled from Wellington Street West and York Street, retreated northbound to King Street. Others joined in. Some of the crowd was peaceful. Others were more combative. The police contained the crowd briefly and provided an egress in a direction other than south. It worked. A number of protestors headed east toward Yonge Street while others scattered north and west.

[115] At 9:53 p.m., according to Marks, Fenton directed him to contain the crowd at Queen Street West and Bay Street and to make arrests, if possible. The group was

contained briefly and provided an egress. The crowd chose the egress and continued on its' way. No violence. No damage done. It appeared members of the crowd made their way to Yonge Street, such as complainant Vitali Kamenskikh, and joined the protestors heading south.

[116] By 10:10 p.m., a crowd, including at least a few of the protestors from the Yonge Street contingent, travelled east at Front Street to The Esplanade. They made their way to the front of the Novotel Hotel. A number of G20 trade delegates were staying at the Novotel, although it was not in the IZ.

[117] The MICC was advised that protestors at the Novotel were putting on masks. Video recordings taken by complainant Dave Steele, showed no one wearing masks. Video P107015V showed 2 individuals with cloths or bandanas partially covering their faces, twelve seconds apart. Defence photos 2210novotelbb1 and 2210novotelbb2 showed a male wearing a black cloth covering the lower half of his face. The Tribunal was advised that he was a black bloc protestor. However, most of the protestors captured in the videos appeared to be average Torontonians. Individuals one might see walking along a downtown street on a Saturday evening. Most were dressed in casual summer attire.

[118] In the face of POU officers dawning shields, many protestors at the Novotel sat down and sang "Give Peace a Chance". There was no vandalism. No protestors physically assaulting police. Remarks made to the police. There were only two routes of

exit – east and west. Before the order to arrest was made, the east and west sides of the street blocked.

[119] Not far from the Novotel protestors there was trouble. At between 10:10 p.m. and 10:20 p.m., a group of up to twenty people were behind the Novotel in a laneway. Dressed in dark clothing and brandishing sticks and other objects, they ran toward 2 police officers on ATVs. The group fled before reaching the officers, presumably after seeing ETF officers nearby. Where the group brandishing sticks originated, or where they went was a mystery.

[120] It was dark. At just after 10 p.m. it had rained. Fenton ordered the POU on scene at the Novotel to boxed in and arrest the protestors on scene for breach of the peace. At the time, many of the protestors were sitting on the ground making peace signs.

[121] By 10:17 p.m. POU officers at the Novotel completed the box formation, enclosing the protestors. There were police officers from London, Calgary, Alberta and the TPS involved.

[122] By 10:25 p.m. approximately two hundred protestors were boxed in. It was not a generous box. People were close together. By the time the box was formed the trapped individuals were within an arm's reach of each other. The MICC reiterated to commanders that the protestors were to be arrested. Video P1070160 showed the containment of the crowd. Individuals, some forcefully, were extracted from the crowd

by police from outside of Toronto. A number of protestors volunteered to be arrested, no doubt, to avoid extraction.

[123] At 10:27 p.m. Marks's scribe notes indicate that he advised the POU as follows: "Crowd not to be moved. They are to be arrested."

[124] Black bloc protestors Eva Botten was in the crowd at the Novotel. In court proceedings that followed the G20, the court found she was one of the protestors in the group at Queen's Park on June 26, 2010, and later at the Novotel. Botten was found guilty of criminal offences perpetrated during the G20 protests, unrelated to the Novotel. At the time Fenton gave the order to contain and arrest the protestors at the Novotel, he did not know that Botten was a Novotel protestor.

[125] At 11:26 p.m., the Operations Chief advised Fenton that a group of protestors being monitored appeared to be heading to the PPC. Fenton told him to keep an eye on them.

[126] By ten to twelve, an hour and a half after arrests at the Novotel began, the ground commanders advised the MICC that there were over fifty Novotel protestors not yet processed on scene.

[127] At 1:38 a.m. there were still twenty protestors remaining at the Novotel. By the end of the night, two-hundred and fifty people were arrested at the Novotel.

[128] Sometime on June 26, 2010, TPS officers attended at 114 Westmoreland Avenue. Four anarchists were arrested and a search was conducted. An ISU-JIG Intelligence Bulletin of June 27, 2010, detailing the events at the Westmoreland address was shared with Fenton and others at 1:52 a.m. The Bulletin contained photos of items seized, such as ball bearings; bull horns sling shots, goggles, gas masks, handcuffs, bear spray and other tools that may have been useful to black bloc protestors. There were detailed notes about G20 protest events found at the address. They included plans such as the importance of gaining the commitment of the “Montreal bike bloc” to act as scouts for the “Sunday Spokes” event.

#### **Sunday June 27, 2010 – Queen and Spadina**

[129] On June 27, 2010 at 12:15 a.m., over three hundred protestors were at Queen St. and Spadina Avenue. They were in the intersection. The protestors threw objects at the police, who were trying to restore order. It took the police over forty-five minutes before the majority of the crowd disbursed.

[130] At 1:40 a.m. the MICC was advised that individuals were observed crawling out the sewer system through manhole covers on the street in the area of Queen Street East and Jones Avenue. An investigation of the tunnels below ground took a number of hours.

[131] At approximately 5:00 a.m., a group of individuals wearing black clothing were seen taking photographs of a natural gas plant in the area of 300 Unwin Avenue. When police arrived the photographers fled. Again, there was no evidence that they were connected to the G20 summit.

[132] At approximately 5:20 a.m. the RCMP took over all policing functions in the IZ, freeing up approximately six hundred TPS officers for re-deployment.

[133] At close to 7 a.m. Fitzgerald advised Fenton that there were protestors at 16 Bancroft Avenue, the Graduate Students' Union of University of Toronto. His undercover officers had been involved in investigating persons coming and going from the location, as well as their attendance at G20 events on the 26<sup>th</sup> of June. Fenton told him to have the officers continue their investigation.

[134] Just after 7:00 a.m. Ferguson relieved Fenton as IC.

[135] Police were aware of a number of protest events planned for June 27, 2010 including a moving protest of over two hundred people on bicycles riding throughout the downtown core. The cyclist protest was referred to in intelligence documents including an ISU- JIG bulletin. It was scheduled to start at 1:00 p.m. at Bloor Street West and Spadina Avenue.

[136] Shortly after 9:00 a.m. sticks, bricks, bottles and golf balls were located in the shrubbery at the perimeter of Queen's Park and the University of Toronto. At the same



time, POU officers joined police already at the University of Toronto building at 16 Bancroft Avenue. A Montreal POU section assisted TPS investigating parties at the location. An order was given to police on scene, through a POU commander, to arrest all parties present for unlawfully assembly. Ultimately, the anarchists arrested at 16 Bancroft Avenue were charged with conspiracy to commit mischief and other offences.

[137] By early afternoon, police were monitoring a number of protests in downtown Toronto. A group of approximately eighty peaceful protestors marched west on King Street from Church Street. Upon reaching the intersection of King Street West and Bay Street the group performed a sit-in. They wanted to go to the fence. Police did not allow them to move south to the fence. They remained at the intersection and protested there instead.

[138] Just before 2:00 p.m., fifty black bloc protestors were believed to be at Queen Street West and Beverly Street. Police officers attended and arrested 3 individuals in possession of Molotov cocktails.

[139] At close to 3:00 p.m. the MICC was advised that a group of protestors were gathering in the vicinity of Queen Street West and Noble Street. A number of protestors were arrested.

[140] At approximately 4:00 p.m., the ETF attended in the area of Queen Street West and Cowan Avenue to investigate reports that a bus from Montreal containing chemicals has been stopped there. Nothing more was heard about the bus.

[141] At 5:00 p.m. police officers found lighter fluid, sticks and bags in backyards of homes close to Bruce Mackey Park. It was the location of a protest planned for 5 p.m. called "Fireworks for Prisons". The protest was slated as a noise demo in solidarity and attack, in which protestors would confront the prison apparatus. At 5:10 p.m. a handful of black bloc protestors were arrested at the Park. Soon after, incendiary devices were located on nearby railway tracks. The protest never came to fruition. No fireworks. No noise.

[142] At the same time, protestors travelling eastbound on Queen Street West were blocked by police at University Avenue as depicted in prosecution video 9 of exhibit twenty-one. The group chanted "Let us through!" Police obliged, and the crowd continued westbound.

[143] At approximately 5:00 p.m. a crowd of approximately seven hundred protestors (up from approximately eighty protestors in the early afternoon) were at King Street West and Bay Street. They moved north on Bay Street. The group was not homogenous. People joined in while others departed.

[144] Protestors headed west on Queen Street West to Spadina Avenue. The group included fifty to one hundred cyclists and an estimated fifteen to twenty visible black bloc protestors. The MICC was advised that the group planned on travelling south to the fence. A line of police officers with bicycles were positioned across the intersection of

Queen and Spadina. In prosecution video #9, members of the crowd at the intersection were heard yelling "Let us through". There would be no passage allowed.

[145] The police line spanned from the northwest corner of the intersection to the southeast corner. CRU officers Police stood shoulder to shoulder, stopping the protestors from advancing south on Spadina Avenue or west on Queen Street. The protestors did not retreat. They did not splinter, and head for the side streets or other southbound routes. The group did not physically attack the police. It was a stand-off of sorts.

[146] At 5:07 p.m. CCTV cameras located at Queen Street West and Bay Street captured police officers lining up across Queen Street. The line caused a crowd in excess of five hundred protestors to move north on Bay Street, ending up at Nathan Phillips Square. A few minutes later the CCTV showed police officers at Queen Street West and Bay Street stepping aside to let the remaining crowd pass, and continue marching east.

[147] At 5:08 p.m. Fenton arrived on the MICC floor. Ferguson told Fenton that intelligence information suggested that an attack on the fence was imminent. But it was unclear which fence was the target - the perimeter security fence or the fence surrounding the PPC. Given the "Fireworks for Prisons" protest was supposed to occur at Bruce Mackey Park, not far from the PPC, the PPC fence was logical target.

[148] As noted in Fenton's statement to the Office of the Independent Police Review Director ("OIPRD statement"), soon after he arrived on the MICC floor, Fenton told

command staff that they were going to take steps to restore order, which could include mass arrests. He instructed everyone to prepare for that eventuality.

[149] CRU officers holding the line at Queen and Spadina asked the MICC for POU assistance. Their requests turned to demands. CRU officers holding their bicycles to the front, were expected to maintain the line across 2 exit points of the major intersection with people numbering over two hundred in their midst. A number of the protestors wanted to travel south. The CRU was stopping them from doing so.

[150] At 5:24 p.m. members of the westbound crowd from Queen Street West and Bay Street reached the intersection on Queen Street West and John Street. The MICC was advised that black bloc protestors were at Queen Street West and John Street and at Queen Street West and Peter Street, which were both intersections between Spadina Avenue and University Avenue. The MICC was also told that crowds were headed to Dundas Street West and Spadina Avenue.

[151] At 5:26 p.m. the MICC was received information that protestors at the intersection of Queen Street West and John Street were running to the fence. Fenton's scribe notes indicate that at 5:27 p.m. Needles told him that Bruce Mackey Park was empty.

[152] At approximately 5:25 p.m. Fenton took over as IC, a half an hour before the start of Shift 2. At 5:32 p.m. Fenton's scribe notes indicate that an announcement was made in the MICC advising that Fenton was in command of the floor.

[153] At close to 5:30 p.m., a large crowd of protestors moved west along Queen Street West. Streetcars were stopped near Spadina Avenue. At the same time, Marks arrived on the MICC operational floor.

[154] There were still IPPs in Toronto although the G20 summit had ended.

[155] Fenton's scribe notes indicate that he directed Marks to box in the crowd at Queen and Spadina at 5:38 p.m. Fenton testified that was not the case. Rather, at 5:38 p.m. he instructed Marks to marshal police resources that were at Bruce Mackey Park. He asked for more CRU police officer to be moved to Queen and Spadina because as there was only 1 line of bicycle officers there. Fenton learned that there was a group of an estimated fifteen to twenty black bloc protestors in the center of the crowd at the intersection. The RCMP helicopter was flying above.

[156] At 5:40 p.m. Fenton ordered police officers to hold the south line at Queen and Spadina and not let the crowd move west or south. His scribe notes state that he used the radio and announced to the police officers, "Do not let the crowd through". Fenton testified that he wanted them to move north or east. Moments later Fenton directed Marks to "hold the line" and not let the crowd past the police line which was forming on the north side of the intersection. The Operations Chief was asked to ensure sufficient police resources were moved there to commence arrests. Police were blocking all sides of the intersection, including Spadina Avenue to the north.

[157] According to Fenton's evidence, at 5:50 p.m., less than a half an hour after taking command he ordered that police officers on scene to contain the protestors at Queen and Spadina within the box formation.

[158] At 5:53 p.m. Marks's scribe notes indicate that he told the POU at the intersection to "Box them in, no movement to occur". At the same time Fenton sought clarification from Martin regarding the appropriate criminal charge(s) for the protestors boxed in at Queen and Spadina. Fenton believed that the protestors were to be arrested for conspiracy to commit mischief and breach of the peace. He gleaned the information from an e-mail sent by Gauthier to Fenton and a handful of commanders.

[159] The parties at the Tribunal did not dispute the fact that conspiracy to commit mischief was an improper charge in the circumstances known at the time the order was made to arrest protestors. Fenton thought the Gauthier e-mail was about the protestors at Queen and Spadina. In fact, it referred to anarchists at 16 Bancroft Avenue. Due to the misunderstanding, Fenton gave the order to arrest the protestors at Queen and Spadina for conspiracy to commit mischief and breach of the peace. Martin also received the e-mail. She did not correct him. Neither did Gauthier. The wheels were set in motion.

[160] At 5:59 p.m., Marks's scribe notes indicate that the POU was told to announce the charges to the team. Martin told Fenton there was room for two hundred people at the PPC. Fenton asked that police divisions closest to the Queen and Spadina that they

should expect to receive arrests from the intersection. He was concerned that the PPC could not accommodate the Queen and Spadina arrests.

[161] At approximately 6 p.m. Marks and Fenton agreed that it was too late use the LRAD at Queen and Spadina. Fenton said he thought the crowd had been warned to disburse by the ETF using its' loud hailers. In his OIPRD statement, Fenton was asked to provide details about instructions given to warn the crowd at the intersection, or warnings to disburse that were made to the crowd at Queen and Spadina. In his response, Fenton made no mention of an ETF announcement to disburse having been made to the crowd.

[162] Within 5 minutes of his instruction, the crowd at Queen and Spadina was contained in a box formation. In his OIPRD statement Fenton wrote:

At 1756 I inquired from S/Insp Marks. Special Operations branch director if the ETF was available. I wanted police assets to ensure no movement of this group of protestors/terrorists. It was at this time that I decided that the arrest of this group of protestors/terrorists was required for the safety of all person (sic) in the down town core.

[163] At 6:05 p.m. Fenton ordered that Marks direct the POU to move in tighter. Within a few minutes, he said the same to Sadler. The direction was given. The box was made smaller. People were standing very close together within the box formation, at times touching each other.

[164] At approximately 6:11 p.m. at the behest of Fenton, all commanders were advised of the intent to arrest the persons within the box. This confirmed the order given to the POU indicating "once contained, commence arrests". OPP POU officers from Section H

were on the radio to the MICC asking the whether the people at Queen and Spadina had been advised that they were going to be arrested and whether arrests could commence.

The response from the MICC, as heard on the transmissions, was as follows:

You can start affecting arrests charges are conspiracy to commit mischief, mischief of all around, conspiracy to commit mischief is the charge 10-4.

[165] Fenton's OIPRD statement made reference to him having had only 1 conversation with Marks about discretion to arrest people at the intersection. It occurred at 6:37 p.m. on July 27, 2010, approximately a half hour after the order to make arrests at Queen and Spadina. Fenton explained it to the OIRPD as follows:

At 1837 hours S/Supt Marks and I had a conversation. I emphasised that I wanted discretion used with the arrests. I did not want to see people arrested that were not involved in the protest. S/Supt. Marks agreed and advised that he had already spoken with his leads on the ground. Staff Inspector Marks had instructed his leads to use discretion. He undertook to reemphasise this with the leadership on the ground. I recognized that exercising discretion is a difficult task as the tactic used by terrorist/protestors was to embed themselves in legitimate protests and use them as a vehicle to facilitate movement and attach. By design, while "greyed down" the terrorists were difficult to identify.

[166] Also at approximately 6:27 p.m. Martin told Fenton that there were approximately eight hundred people on scene at Queen and Spadina and they all want to be arrested. The information turned out to be incorrect.

[167] The hot and sunny summer afternoon quickly turned cold and dark. Just before 7 p.m. it began to rain. At the same time, the RCMP helicopter left the area due to the



storm. The rain was heavy at times. There was thunder. People stood in the contained area and waited. Some had umbrellas. Many did not.

[168] Fenton ordered the dispatch of a TPS video truck to Queen and Spadina. Images visible in the MICC from TPS stationary cameras were of poor quality due to darkness and the weather. The situation at Queen and Spadina was also being recorded by news stations, at least one of which had a live feed of the intersection, playing on television.

[169] In his OIPRD statement Fenton said that he instructed that the instruction “no one leaves the containment area” was to be broadcast on all radio bands at Queen and Spadina at 7:14 p.m. Fenton told Holt that the PPC should expect approximately three hundred arrests. Also in his OIRPD statement, Fenton said that at 7:17 p.m., the Operations Chief advised him that there were “about 200 people and we will need another wagon”. Fenton told him to hold the crowd until more wagons arrived.

[170] At 7:33 p.m. Marks’s scribe notes indicate that a request was made for flat hats to attend Queen and Spadina to assist with arrests, noting that two hundred people were to be arrested.

[171] Soaking wet police officers at Queen and Spadina made efforts to move soaking wet members of the crowd at Queen and Spadina under storefront awnings. Police officers had to complete paperwork in the rain.

[172] At 8:30 p.m. or thereabout, a search warrant was executed at 16 Bancroft Avenue. Items were seized including a large quantity of spray paint, logos, helmets, masks and banners.

[173] Ten minutes later, Deputy Chief Warr met with Fenton, Marks, their scribes, Martin and a loggist. Warr directed Fenton to release people from the PPC and Queen and Spadina, provided paperwork was completed. In his OIPRD statement, Fenton wrote that Deputy Warr believed that the breach of the peace had ended. He wanted people released unconditionally although there was significant processing of prisoners yet to be complete. Queen and Spadina prisoners at the PPC were to be released with a record of arrest form having been completed Warr's instruction pertained to breach of the peace arrests, not persons arrested and charged for criminal offences. Fenton was concerned that if protestors were released, "they may form up again if released and we might be chasing them all night", he wrote. Warr's instruction remained the same.

[174] The instructions to release unconditionally with paperwork were communicated to ground commanders at Queen and Spadina and the PPC.

[175] Before the instructions were issued, at least one police officer at Queen and Spadina exercised discretion and released people without paperwork. The police officers escorted them away from the crowd, making it look as though they were being arrested. The Tribunal heard that a small number of people who had been trapped in the box formation such as an elderly couple and two pre-teen girls were released without

permission from the MICC. The officers who did so believed they were defying the MICC's orders.

[176] At 9:43 p.m. the Chief of Police was unhappy with the situation and told Fenton to immediately release everyone unconditionally. At approximately 10:00 p.m. boxed in individuals, still at Queen and Spadina, and those who were in court vehicles and buses were released unconditionally. Many protestors and others from Queen and Spadina who had been transported to the PPC were not so lucky.

[177] Marks's scribe notes indicate at that 2:00 a.m. he was advised that two-hundred and forty-eight prisoners were at the PPC, almost all of whom had been booked in, and two hundred and fifteen had been released.

## **NOVOTEL – CIVILIAN WITNESSES**

[178] Abigail Deshman testified for the prosecution. She was not a complainant. At the time, she worked as the Acting Director of the Fundamental Freedoms for the Canadian Civil Liberties Association ("CCLA"). She was responsible for planning and implementing the CCLA monitoring program during the G20, along with her colleagues. She also supervised CCLA volunteer monitors, who were tasked with observing of police interactions with protestors, in keeping with the CCLA's mandate of protecting peaceful

protests and what she referred to as “fundamental freedoms”. The monitors’ observations were used by the CCLA to review and assess the police response to the crowds.

[179] During the afternoon of July 26, 2010 Ms. Deshman was riding her bicycle and monitoring a group of protests at Bloor Street West and Devonshire Place. There were over one hundred people participating in the march. She could not recall the exact route they took, although she remembered seeing buildings with broken windows on Yonge Street. Eventually the group made its way to King Street West just west of Bay Street, and finally stopped at the TD Center Plaza. From there, the group crossed the central square at the TD Center, to Wellington Street. She was able to see a small group of individuals at the fence. Ms. Deshman described a small group of police officers standing in front of the fence too. She watched. She did not see interaction between the protestors and police. The crowd left the fence and headed northbound to King Street at between 7:30 p.m. and 8:00 p.m.

[180] At King Street West and Bay Street there were more police than Ms. Deshman saw earlier at the security fence. At some point, the crowd including Ms. Deshman, was boxed in by police lines between York Street to the west, Bay Street to the east, and police officers and buildings to the south as well as the First Canadian Place to the north. Ms. Deshman said that the crowd was peaceful. She testified that a few of the spokes in her bike wheel were knocked out by an orange plastic projectile. She thought a male who she saw near the police line stepped forward toward police and was hit by a projectile. . Most people in the crowd were sitting down on the street. Ms. Deshman crouched down

while holding her bike. The brief containment of the crowd ended when police opened up the line and allowed the protestors to continue east on King Street toward Yonge Street. Not all members of the crowd headed east. Others, including Ms. Deshman left the area.

[181] Matthew Beatty and Dave Steele were Novotel complainants. Beatty, a high school teacher in the region of Durham, and Steele, a recent law school graduate, volunteered to act as legal observers with the Movement Defence Committee of the Law Union of Ontario. Beatty described their role as non-neutral. He testified that he believed his role was to serve and protect protestors. Specifically, he thought it was his job to collect evidence against police officers. He was not to collect evidence against protestors because it could fall into the hands of authorities, he said. Both Steele and Beatty wore orange baseball caps with the word "legal" across the front.

[182] They started their day on June 26, 2010, long before the incident at the Novotel. They walked about the downtown core together. Steele witnessed windows being smashed on Yonge Street including a brick thrown through a coffee shop window. He stated he would not characterize the behaviour he saw as violent. He testified that after travelling up Yonge Street and west on College, he returned to Queen's Park where people were just milling about.

[183] Beatty portrayed of himself as a dispassionate observer, not seeking out conflict, just watching. His evidence was devoid of descriptions of the destruction and violence that occurred along parts of the route that he walked with Steele. In cross-examination,

Beatty adopted a portion of his statement given to the OIPRD, in which he said that at Queen's Park he witnessed a bus shelter being smashed and "black bloc kid throw a brick at a cop." After his evidence before the Tribunal was finished, and the prosecution's case was closed, counsel for Fenton tendered video evidence of Matthew Beatty at Queen's Park. It showed Beatty involving himself in a disagreement between a black bloc attired protestor and a cameraman who was trying to film a group of black bloc protestors discarding their black clothing. The video showed an argumentative Beatty blocking the cameraman's view of the group, and cursing and arguing with the cameraman. Beatty was not wearing his orange cap.

[184] Beatty chose not to re-attend the Tribunal to answer questions about the video excerpt, which has not been afforded to him. Instead, Beatty responded in an e-mail to the prosecution dated January 11, 2015. Beatty acknowledged that it was him on the video, and he justified his behaviour saying that he believed the cameraman was trying to coerce the protestor into committing assault. He agreed that he was not wearing his orange baseball cap, which was supposed to alert others that he was a legal monitor.

[185] Ella Henry, a university student, testified about her experience as a protestor during the G20. She was a witness called by the CCLA complainants. She testified that she was opposed to the policies that were being discussed at the G20, in particular policies of austerity. It was important to her to make her views known. Henry and her brother stayed with her friend Dave Steele on the G20 weekend.

[186] On June 26, 2010, Henry participated in a number of protests, including the Free the Streets march. She testified that it was important to symbolically protest in close proximity to the G20 meetings. She disagreed with what she believed was a lack on public involvement in the G20 decision-making. In the early evening she was with a group of an estimated fifty protestors who travelled to the fence. She said that she took photographs. Others were chanting and singing. They were peaceful.

[187] After having dinner, Henry returned to the streets to protest, along with her brother, Beatty, Steele and friends. They joined a group of protestors marching on Queen Street West. The group were blocked by POU officers from continuing on, so they ran up St. Patrick Street to by-pass the police. Henry said that her group decided to call it a night. Somehow, they ended up on Yonge Street, behind a crowd travelling southbound. Henry said it was clearly a group of protestors, who were protesting together. She and her friends caught up with the group of and joined them. Their destination was the Novotel. They arrived there at approximately 9:30 p.m.

[188] In front of the Novotel, police lines formed quickly, close to the protestors. Approximately a half an hour after their arrival at the Novotel, Henry and her friends were boxed in. She testified that she heard police order protestors to disperse but she was unable to leave. Police officers were already blocking the street to the east and west. She heard police directing people who asked about leaving to exit from the opposite side of the street. The people told police they had already tried that. Henry did not see a way to out of the box formation.

[189] Beatty testified that when the police arrived, he was trying to get Henry and her brother "out of there". So was Dave Steele. The two said that they decided to hang around because they were not one hundred percent sure what was happening. Beatty's evidence was suspect, given that Henry was clear that she and her brother were completely contained before he was arrested.

[190] As Beatty would tell it, he was surrounded by detained civilians, such as 2 crying females and young man he helped make a telephone call. Not captured on David Steele's video. In addition, Beatty testified that in an effort to observe potential transgressions of police throughout the day he purposely tried to get close to the police officers holding shields, without actually getting caught by them. He was arrested for breach of the peace at approximately 11:10 p.m. Dave Steele was formally arrested over an hour later. Beatty was held for seventeen hours at the PPC. He said he was held in a cage-like cell with up to twenty-one people. He was provided with no access to the telephone and was not processed for over ten hours. Steele was held for twenty three nearly twenty-four hours at the PPC. Both were released unconditionally.

[191] Ella Henry testified about being trapped in the containment and witnessing the arrest of her brother. She was upset that he was arrested. She had promised her parents that would not happen. He was only seventeen years old. She asked a police officer to let her leave and was not allowed to because everyone was being arrested, she was told. She asked to go to the same detention center as her brother. She was upset. Soon after, Henry



and two female friends were led through the police line and told to leave right away. She was not searched or arrested. They had been at the Novotel for a few hours.

[192] Nathan Adler, a twenty-eight year old, stayed with his partner in the Toronto on weekends. On June 26<sup>th</sup>, 2010, he was in Toronto. He ventured out from his partner's residence to observe the G20. Adler was not a protestor, he said. Adler and a friend spent the afternoon wandering around the downtown core before parting ways. Adler, on his own, followed a crowd of marchers at Queen Street West and Bay Street, blocked in by police. After a brief period of time, police moved aside and allowed the group to continue marching. At approximately 10 p.m. Mr. Adler found himself with the crowd in front of the Novotel. By then it was dark.

[193] Nathan Adler thought the police outside of the Novotel would let the crowd pass as they had done earlier. He said that the crowd was hanging around, making noise and chanting. There was no dispersal order and he was not asked to leave. He did not attempt to leave by heading west, the direction he intended on going, because he saw people doing so were being arrested.

[194] He observed between ten or eleven people being physically removed from the containment by police. He assumed they were being arrested. He heard a police officer yell out "You will all be arrested. Please be patient." The police stopped snatching and grabbing people, he said, and the arrests continued. He waited. At approximately 1:30 a.m. he was arrested for breach of the peace. He was taken to the PPC. He was at the PPC

for many hours before he was not given an opportunity to use the telephone to contact a lawyer. Not long before his release, he was questioned by a police officer about whether he was a member of the black bloc. He said that he was not. The officer told Adler he would be released. At approximately 4:30 p.m. on June 27, 2010 Adler was unconditionally released from the PPC after being held there for an estimated seventeen hours.

[195] After watching the G20 events on television, Vitali Kamenskikh travelled from his parents' home in the suburbs to downtown Toronto. He wanted to see the G20 protests in person. In the early evening of June 26<sup>th</sup>, 2010 he drove to Yorkville, parked his vehicle, and walked south on Yonge Street. It was around 7:00 p.m., he said. As he walked he saw the damaged store fronts. Kamenskikh walked to Front Street and saw protestors. He testified that he did not plan on following the protestors. In fact, he tried to avoid them by taking a detour on The Esplanade. There were protestors in front of the Novotel. He decided to stay with there and watch the protest. There was no violence. He did not see any police. Many of the protestors were just sitting on the street. He did not see anyone wearing masks. Time passed. Police arrived. He continued to watch, he said.

[196] Kamenskikh decided to leave as police officers were blocking The Esplanade to the east and the west side of the street. The police moved in closer. He did not ask police to let him exit. He thought it was pointless.

[197] Over an hour passed. Kamenskikh joined a line of people and offered himself up for arrest. At approximately 1:00 a.m. he was arrested for breach of the peace. He was photographed, provided with rights to counsel and transported to the PPC. At some point he was asked if he had a lawyer. He said that he did not. The option of contacting duty counsel was not offered.

[198] Kamenskikh was held in a crowded cell that he described as cage. At first he was held with forty male prisoners in 1 cage. He was handcuffed with zip ties, which he was able to remove. Eventually approximately half of the males in his cell were moved elsewhere. There was one toilet in the cage, which was inside a port-o-let with no door. He testified that he saw women standing in front of the port-o-let in the female cell because there was no privacy. He was released unconditionally in the late evening of June 27, 2010 after being held for twenty-three hours.

[199] Seasoned journalist Steve Paikin was covering the G20 Summit. He attended many demonstrations over the course of his career. He had RCMP and ISU accreditation, meaning he was able to attend the international media center and had media access to briefings and meetings. After a mundane day at the G20 media center, he decided to take a taxi to Queen and Spadina. Earlier on the news, he saw “trouble” at the intersection, including police cars on fire. When he arrived at the intersection, he testified that it was “more under control”.

[200] Looking for newsworthy activity, Paikin went to Queen's Park. He heard there had been trouble there too. By the time he arrived at approximately 6:00 p.m., there was nothing of interest going on. Then he saw what he described as a spontaneous gathering of at least one hundred people south of Queen's Park. He joined in. They marched a south on University Avenue, their numbers growing two or threefold along with way.

[201] Paikin spoke to a number of participants in the march. He heard that they wanted to make their way to the fence near the Metro Convention Center. Given the news coverage of the G20 he watched earlier in the day, and the violence that had occurred, Paikin thought that there was a possibility that someone might try to climb over the fence. The marchers arrived at the fence. There was shouting. Nothing more. They turned and walked north to King Street between the TD Center and First Canadian Place, stopping at the intersection.

[202] When Paikin arrived there was a large police presence at the intersection. There were police lines on the east and west sides of King Street. At one point, Paikin heard a noise he described as something "whizzing by" him. He thought it might have been a rubber bullet. He hid behind one of the columns in front of a building, peeking out every so often to see what was going on. Police began to close in on the crowd. There was no order to disburse. The police opened their line to the east, to let protestors pass.

[203] Unlike Ms. Deshman, who decided not to continue, Paikin and the "dynamic group" of marchers, "were not finished" he said. They headed east. A marcher told him

that G20 delegates staying at the Novotel. The march travelled east to Yonge Street and southbound. By the time they reached the Novotel, the group had thinned to approximately one hundred marchers. Based on his experience following demonstrations, Paikin believed that the Novotel group was not an orchestrated protest intending to cause trouble. It was a spontaneous gathering about the group's right to protest, not a particular G20 issue.

[204] The protestors were in front of the Novotel for less than a half hour when police arrived. Similar to the formation he witnessed at King Street West and Bay Street, police made a line formation at Novotel. Many protestors sat down and chanted "Peaceful protest".

[205] Paikin had a vague recollection of hearing a bullhorn announcement to the effect of, "It's time to clear the area. We're offering you the opportunity to walk away; otherwise you're going to be arrested." There were numerous requests asking people to disburse, but protestors remained seated on the street. Officers approached individuals and asked them to leave. The seated protestors did not oblige. However, Paikin testified that had the protestors wished to leave, they would have been unable to do so because the police lines blocked them in.

[206] Once police began to physically pick-up protestors and take them to court services vans, Paikin realized the protest was coming to an end. A police officer directed him to leave. Paikin showed his official G20 media accreditation and explained that he was not

getting in anyone's way. He was just doing his job. The police officer was not dissuaded and said he was under orders to get everyone out of the area. It would happen one of two ways, Paikin was told. He could leave on his own or be arrested. Paikin left.

## **NOVOTEL – POLICE WITNESSES**

[207] Defence witness TPS Police Constable Peter Eckersall, was assigned to the All-Terrain Vehicle Unit (“ATV Unit”) on June 26, 2010. He was wearing a police uniform, a bright jacket, and the ATV was adorned with police logo and reflective tape. He was working with a partner. Both rode ATVs.

[208] Between 10:00 p.m. and 10:30 p.m. Eckersall and his partner were in the area of Yonge Street north of Lakeshore Avenue, south of the train bridge. They were behind a line of officers blocking southbound travel on Yonge Street. Eckersall saw a large group of protestors coming his way. The group turned east on The Esplanade. With his partner, Eckersall travelled across Lakeshore Blvd East to Lower Jarvis Street, across a couple of less-travelled streets to a laneway to the rear of the Novotel. From the direction of the hotel, a group of up to twenty people appeared. They were wearing dark clothing, and were carrying poles and sticks. A few had their faces covered. The group ran toward the Eckersall and his partner, a few yelling “Fuck the pigs”.

[209] Eckersall was afraid of the crowd. He put his ATV in reverse and travelled as fast as possible, until he neared Church Street. ETF officers were there. The crowd turned back and scattered. Within minutes of 10:20 p.m. Eckersall broadcast the following radio

transmission, "a whole bunch of guys at the back of the Novotel and they just rushed us." When additional police officers arrived, a search for the people carrying poles and sticks was unsuccessful.

[210] In June 2010, Inspector Gerald Cashman had over 9 years of experience in POU, 7 years as a homicide investigator and many years of experience as a divisional officer. Throughout the G20 weekend, Cashman reported to and shared information with his Whittle or Needles. He often did so using a handheld radio or blackberry.

[211] Cashman was a POU ground commander. He testified that a number of the decisions he made during the G20 were a result of the direction he was given. Others were made alone or in consultation with other ground commanders.

[212] Cashman testified that on June 26, 2010, his team was sent downtown because there was a large protest snaking through the streets. The MICC asked his team to assist police who were already dealing with the crowd. Cashman described situations his POU unit faced in the downtown core at various hot spots throughout the late morning into afternoon. They dealt violent protestors. His team struggled to control crowds and spent time keeping protestors away from the security fence.

[213] At Queen Street and John Street his team were engaged with combative protestors. The team was unable was to assist a civilian hit by flying glass as windows were smashed near the Starbucks at Queen Street East. To do so would have meant breaking their line

formation blocking southerly access to an adjacent street. He described voices from the crowd yelling derogatory remarks about Starbucks as the store windows were shattered.

[214] Cashman's POU team was sent to HQ. He was advised it was under attack. Cashman's team arrived too late. They headed west and formed a line at College Street south of Queen's Park Circle, holding it in the afternoon heat for approximately 2 hours. Later they relocated to Queen's Park to help move protestors out of the area.

[215] Next, Cashman's team was sent to Bay Street and Wellington Street West. They were confronted by a large crowd of boisterous protestors. The crowd was travelling east to west. It started to turn north onto Bay Street but came face-to-face with a line of police officers blocking the roadway. The protestors chose not to go south, and continued in an easterly direction. He received direction to follow the crowd. Sometime between 10:30 and 11:00 p.m. his team was directed to the vicinity of the Novotel where the crowd had stopped.

[216] At the Novotel, Cashman's team joined other POU teams already on scene. The crowd was hemmed in and arrests were in progress. He testified that he believed a breach of the peace was occurring because the noisy crowd was blocking the street. The MICC gave the order to arrest people involved in the protest for breach of the peace. Once in custody, prisoners were to be held for up to twenty-four hours. Cashman understood the PPC was the holding location and the length of detention was their bailiwick.



[217] As arrests occurred Cashman was concerned about aggressive nature of the extractions were being carried out by the POU members from London Ontario. He spoke to their commander about it. Rather than using the extraction method to arrest people, Cashman felt that asking protestors to volunteer to be arrested was preferable. The London commander agreed and the extractions ceased.

[218] Cashman testified that he called the MICC to seek advice on the manner of arrests and to confirm whether the MICC was providing him with additional grounds for arrest he was unaware of. None were provided. He formed his own reasonable and probable grounds to arrest the members of the crowd for breach of the peace. His grounds pertained to the crowd in general, not specific individuals in it.

[219] Cashman testified that he followed orders from the MICC regarding arrests but he did so within the limits of his own discretion. When he formed his own grounds to arrest, he could do so absent any grounds provided by the MICC. Cashman did not know whether members of his team allowed people to leave the contained area, except media personnel with credentials who were allowed to leave the area boxed in by police.

### **Inspector Marks – Novotel & Queen and Spadina**

[220] In 2010, Marks was in his 4th decade serving Toronto as a police officer. He was a TPS POU commander at numerous demonstrations. As Special Operations Branch

Manager for Shift 2, Marks he had a substantial contingent of police officers under his command, including POU teams, mounted police, canine units, the ETF, and emergency medical services.

[221] Marks attended an RCMP-led meeting of G20 commanders, approximately 2 weeks before the G20. He said the message shared was clear: "We would have 1 chance and 1 chance only to prevent the fence from being breached. And if the fence was breached, all was lost. That being because the IPPS were inside the area". Protection of the fence was the priority of TPS's policing agenda for the G20 Summit.

[222] Throughout the G20 weekend, most of the orders from the MICC to the POU commanders on the ground were conveyed by the POU liaison. During shift 2, he received them from Marks, who received them from Fenton or Holt. Marks agreed that mass arrests during the G20 had to occur under his direction at the behest of Fenton. The communication between Marks, the IC and the DIC was in person, as they were all in the MICC. Communication from the MICC to the POU ground commanders was via of radio, telephone, blackberry or e-mail. Marks had a scribe. He did prepare contemporaneous notes. On July 6, 2010, over a week after the end of the G20 Summit, Marks made notes capturing details of his activities during the G20 which he thought were important to document.

[223] Before the start of his shift on June 26, 2010 Marks was informed that vandalism and violence were occurring in downtown Toronto. In fact, he was told not to report to the MICC for duty because it was not safe to do so. He reported anyway.

[224] In the MICC Marks was very busy. At one time or another, all 3 Deputy Chiefs made inquiries of him, he said. The seating plan in the MICC positioned Marks behind the RCMP, POU and ETF liaisons. On June 26, 2010 he moved up to sit closer to them because they were in constant communication.

[225] On June 26, 2010, Marks believed police were having difficulty keeping up with the protestors committing acts of violence and vandalism. The POU officers wore heavy equipment and often needed to be transported to various locations by bus or van. The protestors and others committing criminal acts were highly mobile.

[226] At the start of Marks's started shift at the MICC, he testified that the order of the day was "to bring peace back to the streets of Toronto and the strategy we were to deploy was to simply stop the vandals from moving". By providing groups of protestors an egress route, it allowed them to move on to new locations and continue committed acts of vandalism. During the day on June 26, 2010, protestors at King Street West and Bay Street and Queen Street West and Bay Street were stopped by police and allowed an egress route away from the direction of the security fence. Rather than continue on in the direction of the egress or stop protesting, Marks believed that the redirected protestors

continued snaking through the downtown core. Finally they made their way to the Novotel.

[227] In the late afternoon, the MICC was dealing with crowds of protestors heading southbound on Yonge Street and at King Street West and Bay Street. Fenton ordered Marks to box crowds and make arrests, if possible. Marks explained the rationale for plan as it related to the crowd at King Street West and Bay Street. The first objective was to prevent an attack on the fence. Boxing was required to stop the crowd from moving south. The second was to contain the crowd, again to stop them from going south. The third was to make arrests for breach of the peace, which would vitiate the risk they posed to the fence.

[238] Marks received the intelligence about the crowd that he would later say was the same crowd arrested at the Novotel. Before reaching The Esplanade, protestors were snaking through the downtown core. At 8:38 p.m. information originating from Twitter suggested that protestors planned on taking over the intersection of Bloor Street West and Bedford Avenue. Black bloc protestors were heading to Yorkville. At a few minutes after 9 p.m. Marks was advised of the crowd of a thousand were moving south on Yonge Street. He dispatched the ETF to Yonge Street and King Street to try to head off another crowd moving west across Richmond Street East. He didn't want any crowd moving south to the security fence.

[229] Just over an hour later, Marks ordered the containment and arrest of protestors at Queen Street West and Beverly Street and Queen Street West and Peter Street. At 9:16 p.m. he said that Fenton asked if arrests were occurring there. The crowds escaped the containment or were given an egress route, avoiding arrest. Fenton directed Marks to send POU officers to stop and contain the crowd on Yonge Street.

[230] Marks said that believed that the City of Toronto was experiencing a riot. He concluded that breach breach of the peace was in progress and it had to be stopped. At 9:53 p.m Fenton told Marks to box the crowd at King Street West and Bay Street and to begin making arrests if possible. The crowd was not successfully boxed in by the police. Marks believed that the protestors from King and Bay made their way to the Novotel.

[231] At between 10:05 p.m. to 10:07 p.m. Marks received information that protestors near Yonge Street and Front Street were putting on masks. There was a report that fires were being set at Yonge Street and Shuter Street. He did agree that fire trucks were not dispatched to the Yonge and Shuter location. Toronto Fire Services was under Marks's command.

[232] Once the crowd arrived at the Novotel, Marks tried to move POU officers there as quickly as possible. There were so many things going on in the downtown, Marks said, that he ran out of POU resources. At 10:25 p.m., Marks confirmed that the crowd in front of the Novotel was boxed in by POU officers. Proceeding with arrests was put on

hold for a brief period of time because Deputy Warr instructed him to confirm that hotel strikers were not within the police box formation.

[233] At 10:27 p.m. Marks gave the order that Novotel crowd was not to be moved. Marks testified that stopping the riot that was occurring meant a disbursal route would not be given to the crowd. They were all contained. He ordered arrests. His orders were conveyed to the POU commanders by the Sadler, on his behalf. Sadler had a direct line by radio to all of the POU ground commanders. Marks testified that he expected officers to use their discretion when deciding who to arrest. His expectation was not communicated as part of the order.

[234] Marks maintained that, throughout the G20 weekend, his instructions were to arrest people who were committing a breach of the peace, not to arrest the crowd. His assertion contradicts the wording of the orders to arrest noted by his scribe, who was tasked with noting what Marks said and what was said to him. Marks maintained that he wanted protestors arrested. He did not provide the POU commanders any criteria to distinguish between protestors and bystanders. He testified that he was relied on the police officers' abilities to observe people and act on what they saw and learned as a result. He said that the POU officers on the ground were able to communicate with people in the crowd, albeit conducting a fulsome interview of each person in the crowd was not feasible.

[235] Marks testified that he assured Fenton that police officers, “everyone” as he put it, at the Novotel knew that they were to use discretion when deciding who to arrest. Everyone knew that the only people who were to be arrested were the protestors who were breaching the peace.

[236] On June 27, 2010, by the time Marks was on the MICC floor, a crowd of protestors had congregated Queen and Spadina. Marks understood that Fenton did not want the crowd to get past police line across the south side of the intersection. He gave the order that the crowd was not to be allowed through the line. Marks complied. Marks explained that once the order was issued, in many respects he lost control because the POU commanders on the ground were responsible for the execution of orders.

[237] At 5:58 p.m. Marks was advised that there was a crowd carrying sticks and steel poles, not far from Queen and Spadina. Based on his independent recollection, he said an axe was found hidden in bushes on Queen Street west of Yonge.

[238] From the MICC, Marks was able to see what was happening at Queen and Spadina. Live video feed was available from cameras at the intersection and TPS had mobile camera operators too. Marks saw he was a contingent of people dressed in black at the intersection. He told the ETF to block in the parties at Queen and Spadina and use the loud hailer to advise the crowd of the intent to arrest. Having discussed the utility of using the LRAD at the intersection with Fenton, Marks said they agreed it was not required.

[239] A series of orders, including orders to arrest were communicated to the POU commanders at the intersection. According to Marks, arrests at Queen and Spadina began at 6:32 p.m. The orders originated with Fenton, were conveyed to Marks and delivered by Sadler to the POU commanders on the ground. Martin and Fenton told him the crowd was to be arrested for breach of the peace and conspiracy to commit mischief.

[240] Marks said that he had an extremely short conversation with Miles on June 27, 2010. The POU Section B Commander, Miles's team arrived at Queen and Spadina after the containment of the crowd was complete and no egress had been allowed. His team took over the northern boundary line across Spadina, and was ordered by TPS to hold the line. Marks said that Miles asked him if he was permitted to use discretion in dealing with the people contained in the box who did not appear to be protestors. Marks testified that he told Miles, "Absolutely, you're there I'm not." Marks was surprised Miles asked that question. He explained:

These were senior police officers. I can order a police officer to do something, to go somewhere and enforce whatever but it's up to him to have his own independent thoughts and it's up to him that he has to articulate what he did and why he did it.

Despite the request for clarification about his order to arrest, Marks testified that he did not think that there was any confusion that his order afforded officers the option of not arresting bystanders.

#### **QUEEN AND SPADINA – CIVILIAN WITNESSES**



[241] Shervin Akhavi, a complainant, was the only witness who identified as a protestor at Queen and Spadina. A civil engineer living in Toronto, Akhavi was concerned about environmental issues so he joined the G20 protest. He was with his roommate Erin MacPherson. She decided to venture go for a bicycle ride to the fence with Akhavi, out of curiosity.

[242] In the afternoon of June 27, 2010, they rode their bicycles to the fence. They stopped for a look at it, and rode back up Queen Street West. Both Akhavi and MacPherson testified that they arrived at Queen and Spadina and locked up their bicycles. MacPherson saw between two to three hundred protestors, mainly "hanging out" in the intersection. Akhavi said an estimated one hundred and fifty civilians and fifty protestors were there. They decided to join the group of protestors at Queen and Spadina.

[243] Within fifteen minutes of arrival the protestors, including Akhavi and MacPherson were contained by police standing in a box formation. The pair did not try to retrieve their bicycles and leave. MacPherson thought she may have asked an officer to leave, and received no response. Akhavi did not make try to leave. It was hard to talk to a person in "that gear", he explained. There was no way out. They wanted to leave but could not do so. The pair sat down. Neither MacPherson nor Akhavi heard a dispersal order. A police officer said that everyone was going to be arrested.

[244] It began to rain. They volunteered to be arrested because it was rainy and cold. Akhavi was shivering. MacPherson was arrested for conspiracy to commit mischief at

approximately 8:00 p.m. Akhavi was arrested for the same. MacPherson was separated from him and moved under an awning and later, into a court services van. A police officer provided Akhavi with rights to counsel. He was told that he would be given an opportunity to exercise his rights at the detention center. Eventually Akhavi was moved onto a bus. After waiting for at least an hour, MacPherson and Akhavi were released unconditionally.

[245] Jonathan Deshman was a volunteer monitor for the CCLA. He was a neutral observer of protestor and police activity and interaction. He wore a white CCLA baseball cap. On Saturday June 26<sup>th</sup>, Mr. Deshman was watching the G20 coverage on the television and decided to go to the CCLA office near Queen and Spadina. He heard that there was a bicycle protest planned. Joined by 2 fellow monitors, he headed to Queen and Spadina.

[246] Mr. Deshman and company arrived at the intersection at 5:40 p.m. He saw a large stationary group of approximately two hundred people, mainly in the intersection. There were protestors in the middle of the group chanting and holding up signs. Others surrounded the protestors, including individuals with cellular phone cameras and media, taking photos and/filming the protestors. Mr. Deshman was standing on the north side of the Queen, an estimated eighteen metres north of the intersection.

[247] CRU police officers were in a diagonal line formation from the southeast corner of the intersection to the northwest corner, blocking passage to the south. There was a bus

on Spadina, over ninety metres north of the intersection. Police wearing hard-tac, marched south toward the intersection. Eventually they blocked the north side of the intersection. Mr. Deshman was trapped in the intersection.

[248] He did not hear a disbursal warning. He did hear a police officer shout, but could not make out what he said. Mr. Deshman described police officers moving closer, creating a smaller box formation. Then there was rain. The crowd trapped in the box got smaller and smaller over the course of close to 2 hours. He was separated from his colleagues when a traffic officer pointed at them and told them to "Come out".

[249] At just before 8:00 p.m. Mr. Deshman was arrested for conspiracy to commit mischief, read his rights to counsel, given a pat down search and handcuffed. He was taken to a bus. He was on the bus for twenty minutes before he was released unconditionally.

[250] Julia Croome, a lawyer, also acted as a volunteer CCLA monitor. Croome attended a CCLA training session prior to June 27, 2010, and was provided with a training manual. The key message of the training was neutrality and the importance of making factual notes of her observations.

[251] Croome lived at Bloor Street West and Ossington Avenue in Toronto. She and a woman named Rachel were with Mr. Deshman at Queen and Spadina. Croome's evidence mirrored that of Mr. Deshman regarding timing, location and the lead up to their arrests.

[252] When Croome, Mr. Deshman and Rachel, decided to leave the intersection, Croome testified that they were unable to leave. Police were at, or arriving at each side of the intersection. Croome was Queen and Spadina for approximately twenty-minutes before the crowd was boxed in by police. Once she was contained, she waited.

[253] An officer beckoned Croome to move toward him. She complied. He said she was under arrest for mischief. She was handcuffed with plastic zip ties and turned over to another police officer. She told the second police officer that she was a neutral observer. She explained that she was a CCLA legal monitor and not at the intersection to cause problems. She told him she had not heard an announcement or direction telling her to leave. It was her impression that the police officer wanted to release her. He spoke to another police officer on scene. Afterward he advised Croome that he could not let her go.

[254] Croome was transported to TPS 43 Division located in the borough of Scarborough along with 6 other women. Upon arrival, at approximately 10:30 p.m. they were released unconditionally. Her cellular telephone was not working and she was a forty-five minute drive from home. She asked to use a telephone at the division. She was told to leave or she would be charged with something else. Croome returned to Toronto by cab with other protestors who had been taken to 43 division of TPS.

[255] Lucius Dechausay, a complainant, was thirty years old in June 2010. He worked for a broadcaster in Toronto and lived at King Street West and Bathurst Street. After

watching the news on television, he and his partner Terra decided to walk around the city. They walked through the financial district. On their way home, at approximately 5:30 p.m., they stopped at Queen and Spadina.

[256] Duchausay saw an estimated one hundred and fifty people in the intersection. A few people were holding signs. It "clearly wasn't a protest" he said. Police officers with bicycles were blocking the west side of Queen Street West, the direction that Duchausay and Terra wanted to take to go home. He spoke to a CRU officer, who told him that the route was blocked, as was the southbound route on Spadina Avenue.

[257] Dechausay and Terra were standing by the McDonald's Restaurant on the northwest corner of the intersection. They turned to head north. They saw a line of police wearing hard-tac, marching down Spadina Avenue, banging their shields. The crowd in the intersection had grown to an estimated two hundred people, all of whom were blocked in, Duchausay and Terra included. Duchausay did not hear any direction from police. He said that the crowd seemed to be confused. He said the crowd had grown to include more bystanders, and they too were blocked in.

[258] It was dark. At 7:00 p.m. it started to rain. The temperature dropped. Duchausay was cold. He began to shake violently. He told a police officer that he wanted to leave and he lived 5 minutes away. He was not let out of the box. The police told the crowd that they were being arrested for breach of the peace. The crowd was asked to be patient.

Time passed. At approximately 10:00 p.m. Duchausay and Terra were released unconditionally from the intersection.

[259] In 2010, Tom Ross, a complainant, worked for a travel agency at Front Street and Yonge Street. On June 26, 2010 he watched the news on television and saw the property damage in the downtown core. The next day, he decided to travel by GO train to downtown Toronto to get a firsthand look at the damage and take photographs of it. He testified that he had thought the G20 was over.

[260] Ross left Union Station and walked toward Bay Street. He saw police officers and other people further up Bay Street. He decided to avoid them and walk across to Yonge Street. He ended up at Queen and Spadina. It was between 5:30 and 6:00 p.m. People were sitting in the intersection chanting and singing. Although Ross had not wanted to travel up Bay Street because he saw people and police officers, he decided to stay at the intersection that was filled with people.

[261] Spadina Avenue to the south was blocked by a line of police officers with bicycles. Within twenty minutes of Ross's arrival, officers wearing hard-tac replaced the CRU. Ross testified that he walked to the west, but could not exit in that direction because the line of officers curved across the south and west sides of the intersection. He could not exit to the east because that direction was blocked too. It just so happened that at the precise time he decided to exit by walking north on Spadina Avenue, a line of

police officers was moving south down Spadina, blocking his way out. At that point Ross asked a police officer if he could leave and was told he could not.

[262] As it started to rain, Ross found himself sharing an umbrella with a stranger. Sam Katz, was also downtown taking G20 related pictures. The two became acquainted. Others contained in the intersection formed a line to wait to be arrested. Ross did not join them. He testified that he had an umbrella. He decided to “wait and see what would happen in the end.” Ross was contained in the intersection for approximately 3 hours until he was released unconditionally.

[263] In 2010, Sam Katz was a twenty-two year old working for an organization that promoted educational trips abroad. He was an amateur photographer. Sunday June 27, 2010 was his second day in downtown Toronto, following G20 protests. On June 26<sup>th</sup>, 2010 he watched a police car set ablaze in the financial district. He witnessed black bloc protestors smash windows and vandalize businesses. He trailed behind a group of protests as they headed west from King Street West and Bay Street, and ended up going north on Yonge Street. Katz described watching people in the crowd pick up objects that weren’t nailed to the ground and throw them through windows. They left their mark with spray paint too – all the while he was right behind then taking photographs.

[264] He followed the same group of protestors across College Street west to Queen’s Park. One of the photographs Katz took, IMG2278, showed black bloc members removing their black clothing at Queen’s Park. Katz testified that he went home after

police made a dispersal order at Queen's Park. Most of Katz's photographs received by the Tribunal were images of police officers in hard-tac and the fence.

[265] The next day, Katz left his suburban home to return downtown. This time he wore a Kevlar vest he purchased over the Internet a few weeks earlier. He explained, "[B]ecause I wasn't sure if it was going to be violence and then after witnessing what happened Saturday, I decided to wear it on the Sunday". In hindsight, it was not a good idea, he testified.

[266] Katz stayed abreast of the location of protests activities by following Twitter. He headed to Queen Street West and Bay Street. A group of at least two hundred protestors were there, chanting and protesting. There was a large police presence at the intersection. The crowd moved west to Queen and Spadina. There were over five hundred people at Queen and Spadina. Half of the group were protestors and half were bystanders. Katz said he did not join the protest. He was taking pictures when the crowd was boxed in. His friends managed to leave before they were trapped in the containment.

[267] Katz testified that he was caught in the box. That was not his plan. He did not hear instructions to disburse. He said that he tried to leave. Katz saw news people he recognized. He called his father for advice. His father told him to stay with the media people because they would likely be given an opportunity to leave. The media people were allowed to leave. Katz and Ross were left behind.



[268] He decided to place a telephone call to one of his media contacts, a reporter from a City TV. After speaking with the reporter, Katz agreed to report live from the intersection, via telephone. For at least an hour, he was on the air, describing the scene at Queen and Spadina.

[269] Katz and Ross were released with the remaining crowd at the intersection at close to 10 p.m. There were not charged with any offences. Despite being soaking wet, Ross and Katz headed to the City TV station to participate in on-air television interviews.

[270] In 2010, Rodrigo Bravo was a twenty-nine year old designer working at Toronto media firm, located one block west of Queen and Spadina. On Saturday June 26, 2010 he watched the G20 protests on television. On Sunday, went downtown with his wife and a couple of friends. He wanted to see if his workplace was had been vandalized.

[271] The group walked from Spadina Ave and Dundas Street West to Queen and Spadina, arriving at between 5:00 p.m. and 5:30 p.m. Bravo testified that they followed a large group of protestors flanked by police officers on foot and on bicycle. The group stopped at Queen and Spadina and say down. They were chanting. Bravo and his group stood on the northwest corner of the intersection by the McDonald's restaurant.

[272] At first, the police officers on scene created a formation to block part of the intersection. They were replaced with police wearing hard-tac. Bravo watched as police officers eventually approached the intersection from all sides. At that point, he asked a

female police officer close by if his group could leave. He testified that the officer told him an exit route would be provided. Bravo said that never happened.

[273] By 6:30 p.m. the police had blocked all sides of the intersection. Bravo and his group were trapped along with an estimated two hundred people he described as “average Torontonians”. After 3 and a half hours waiting in the intersection, Bravo and his group were allowed to leave.

#### **QUEEN AND SPADINA – POLICE WITNESSES**

[274] In 2010 Norm Miles was an Inspector with York Regional Police, since retired. Miles was an experienced POU commander. He was working at the G8 in Huntsville, when his POU team was called to Toronto on June 26, 2010, to assist at the G20. He was in charge of an estimated two-hundred and fifty police officers including 2 units from the OPP, 1 unit from Sudbury, 1 unit from Calgary, officers from Newfoundland and a few from TPS.

[275] On June 26, 2010, Miles’s POU team assisted a TPS team of CRU officers cornered by an unruly crowd of protestors in the downtown core. His team performed extractions from the crowd. Later, they heard a loud explosion and came upon a plume of smoke 3 storeys high. Two police cars were ablaze. Miles and his team had to leave the area because a group of protestors had formed a line close to them. His POU officers were at risk of being surrounded by protestors.

[276] On Saturday evening Miles's team engaged with protestors at Queen and Spadina, along with other POU teams. The protestors hurled water bottles, hard objects and debris at them. It was a dangerous situation. Mounted police officers had to assist quelling the protestors, which did not occur until well into the night.

[277] On June 27, 2010 Miles's POU team was deployed to various locations in downtown Toronto including Queen and Spadina. They arrived at the intersection late in the afternoon. The crowd was already boxed in by police. Upon arrival, Miles met with other commanders on the ground. His team took up the line on the north side of the intersection and their order was to maintain it. They were not involved in making arrests, which to be carried out by TPS officers. Miles testified that he did not form grounds to arrest people within the box area. He did not speak to arresting officers about whether they formed their own grounds to arrest either.

[278] Miles believed that many people contained within the box formation were not protestors. He did not see anyone wearing masks. There was no violence. He understood that the order to arrest did not allow him, or members of his POU team, to exercise discretion to release people or allow an egress route. Miles testified as follows:

[W]e did not have discretion. Everybody that was there was under arrest and if you, when you consider the situation, they, Toronto Police was in command and they had made (sic) a decision to hold people and from us, as an agency that was assisting, we would be under the belief that they had lawful command of the situation and lawful authority to detain people for the purposes of making the arrests. And it wasn't a situation where we

actually saw people committing the offence because we came to support. So no, we didn't have any discretion there.

After it started to rain, Miles asked a Staff Inspector on scene to contact the MICC. He testified that once a connection was established, he asked to speak to the IC. Miles's request was denied and Miles was put through to Marks. Miles did not recall the time or exact details of the conversation but he was sure that he asked Marks to speak to the IC. He testified that he spoke to Marks about the need for buses to transport prisoners. He recalled speaking about the people trapped in the box who were not protestors, described by Miles as "the other people inside the crowd".

[279] Miles was asked for details of the conversation he had with Marks regarding the issue of discretion to release non-protestors from the containment. He explained, "[T]he conversation did not allow me discretion. If I had discretion I would have released many more people." Miles understood that he was ordered not to release anyone from the containment. He testified that he followed the order against his better judgment. However, he did not follow it to the letter, as he released a number of individuals he believed had nothing to do with the protest, including a couple, young girls and individuals walking their dogs.

[280] At 10:00 p.m. Miles received an order to release the crowd unconditionally, which was followed.

[281] OPP Inspector Paul Bedard has twenty-four years experience as a police officer in 2010. He was a POU commander from 2007 to 2010. During the G20 he had 3 OPP police units, police officers from Sudbury, York Region and the RCMP under his command, totalling forty police officers. He was a member of the police contingent ordered to attend Toronto to assist with the G20, on an emergency basis. His POU team also included a person recording much of their movements using a video camera. Recording began at 9:05 a.m. on June 27, 2010, outside of the Rogers Center in Toronto.

[282] Generally, Bedard received direction from the MICC via the radio or from the senior commanders on the ground. When instructions came from the MICC, they were given by a “communicator”, Bedard said, not directly from the IC. Bedard explained there was a radio channel that allowed the MICC and commanders to communicate with each other. OPP radio transmissions demonstrated that orders were conveyed to commanders from the MICC. Questions from the commanders were conveyed, and often answered by the MICC as heard on the radio transmissions. The Tribunal received a transcript of decipherable transmissions, without controversy.

[283] On June 27, 2010, Bedard’s POU team was at the intersection of King Street West and Bay Street for 3 hours dealing with protestors. The activities of protestors at King and Bay were captured on OPP video. At first a small group led by mature adults was singing, holding a banner that read “Don’t fence me out”, and engaging in a peaceful sit-in. By 4:55 p.m. a large mass of people is observed at the intersection, some chanting and heading toward the officers standing across the south side of the intersection. The chant

peaceful singing was replaced by the chant "Who's Streets? Our streets!" which was a refrain heard on June 26, 2010 by protestors, including those engaged in violence and vandalism. A large police presence was on scene.

[284] At 5:43 p.m. Bedard's team was instructed to go to Queen and Spadina to respond to an urgent officer assist call. At that time Bedard knew violence and damage had occurred during the G20, but he was not aware of the specifics of the situation at Queen and Spadina.

[285] They arrived at the intersection at 5:51 p.m. Initially, Bedard thought that he was in command of the POU resources there. He realized that he was incorrect, when he saw the police lines on the north and south side of the intersection moving closer to each other. He had not ordered them to do so. Bedard asked for them to stop. The officers told him that they received their order from the Branch Commander.

[286] Bedard saw CRU officers maintaining a line formation being pushed back by protestors. He did not see any police officer in dire need of assistance. His team took over for the bicycle police officers blocking the south side of the intersection from east to west. All captured on video. Bedard instructed the CRU to cover the west side of Queen in case the crowd tried to move behind his POU team.

[287] The OPP video shows a line of police officers in hard-tac marching south bound on Spadina Avenue toward the intersection. Within a few minutes, police were heard saying, "You're all being arrested for conspiracy to commit mischief". The

announcement followed the order from the MICC to box and arrest all parties for conspiracy to commit mischief, Bedard testified. He was advised that all parties chose not to leave the intersection when they had been given the opportunity to do so.

[288] Bedard asked Inspector Corrigan to clarify whether his team was supposed to box all parties within the intersection and arrest them or provide an egress route. Other POU commanders on the ground were asking the same questions. He was told that the order was to arrest everyone in the box with no egress route. Bedard said that he did not recall asking the MICC if an egress route was allowed. If everyone was being arrested, there was no way for them to leave on their own accord. Bedard did not form reasonable and probable grounds to arrest the people trapped in the box. He was following the MICC's order to arrest. He said that when police officers are given orders, they are followed.

[289] The scene at Queen and Spadina was chaotic. The crowd trapped in the box formation was being squeezed into a smaller box formation by police officers wearing hard-tac. People within the box formation were chanting "Peaceful protest". Others yelled questions and derogatory remarks at the police. Many people raised their hands in the air. CRU officers arrested members of the crowd, handing them off to small teams of police officers.

[290] When it began to rain heavily and the temperature dropped, Bedard became concerned about the well-being of the people trapped in the box, as well as his officers. Exasperated, he testified that he looked into a camera streaming live to the MICC, and

asked, "Are you seeing what I'm seeing?" He said he received the response "Yes we are". No one from the MICC asked Bedard to explain what he was referring to or what he meant by the question.

[291] OPP Staff Sergeant Bradley Thompson and his POU unit were sent to Queen and Spadina too. On June 27, 2010 he continued to report to Miles. Thompson had a blackberry, and 2 police radios. He used 1 radio to communicate with his team and the other with Miles. Before Thompson made decisions, he consulted with Miles.

[292] Before attending at the intersection of Queen and Spadina, his team was sent to St. Clair Avenue West and Dufferin Street for a World Cup soccer event. It was uneventful.

[295] At just before 6:15 p.m. Thompson's team marched down Spadina Avenue to Queen Street West, to relieve police officers holding a line across Spadina at the north side of the intersection. When Thompson's team arrived at Queen and Spadina, the crowd was not contained by police, although the intersection was partially blocked. His team relieved officers holding the line across Spadina. Miles told him to have his team hold the line as people within the box formation would be dealt with by TPS officers. They would be arrested and walked through the police lines.

[293] Thompson testified that OPP crowd control tactics involved "moving bodies of people in the direction we want them to go in to", not boxing in crowds and physically extracting them one-by-one. The people in the crowd at Queen and Spadina were



“considerably different” that crowd on Saturday, Thompson said. Once it began to rain, he described the people trapped in the box as sad-looking.

[294] It continued to rain and the temperature dropped, Thompson was worried about the health and well-being of individuals trapped at the intersection. There were 3 medical personnel on scene, tasked with caring for police officers, not members of the crowd. Thompson tried repeatedly to reach Miles by radio, to share his concerns. At 7:39 p.m. Thompson saw him, and explained his concerns. People were at risk of experiencing medical distress. Miles told him to quietly remove individuals with medical issues from the box, and to keep it quiet. Thompson released a number of individuals from the box formation, including two pre-teen girls.

[295] Special Operations Branch Director Marks was in MICC before the start of his shift on June 27, 2010. Marks described the situation in the MICC as intense. Fenton and Holt gave him verbal orders. A crowd had gathered at Queen and Spadina. At 5:27 p.m. the MICC was advised that protestors were headed to the fence.

[296] Within minutes, Fenton ordered that officers hold the line at the intersection. At 5:32 p.m. a crowd of protestors was stopped at the line going south on Spadina Avenue. At 5:35 p.m. the ETF was dispatched to the intersection. At 5:38 p.m., Marks officially started his shift.

[297] Marks testified that Fenton ordered the crowd to be stopped from passing the police line across Spadina Avenue to the south of the intersection at 5:40 p.m. Once a

command came from the MICC, Marks said that in many respects, he handed off control to the POU ground commanders to execute the order. He received the orders from Fenton, and communicated them through Sadler, who had a direct line to the commanders on the ground. At times when Sadler was busy, Marks bypassed Sadler and communicated directly with commanders, often via phone, blackberry or text messages.

[298] At 5:46 p.m., Marks was advised that there were fifteen to twenty black bloc at Queen and Spadina. Marks could see a contingent of individuals wearing black at the intersection on the live video feed playing in the MICC. Within a few minutes, Marks told the ETF liaison officer to use a loud hailer to notify people in the intersection of the intent to arrest them and block the intersection. Two minutes later, Marks said that he received information from the radio that a crowd was gathering on west of Yonge Street on Queen Street West carrying sticks and steel poles, information missing from his scribe's notes.

[299] Fenton advised Marks of the grounds for arresting the protestors at Queen and Spadina. The grounds originated from Gauthier and Martin and were conveyed to Fenton. Gauthier, in consultation with others, was responsible for determining whether conduct of specific group of protestors warranted arrest and/ or criminal charges. There is no dispute that an e-mail was sent on June 27, 2010 at 3:47 p.m. by Gauthier to Warr, Fenton, Ferguson, Jerry Wiley and McGuire, stating in part, "conspiracy to commit mischief will be the charge covering the two day period". Fenton misinterpreted the e-mail, believing it applied to protestors at Queen and Spadina. On two occasions, at 5:53 p.m. and 5:58

p.m., Fenton asked Martin to clarify the charge of conspiracy to commit mischief. At 5:59 p.m. she confirmed it was correct.

[300] At 5:59 p.m. the charge was announced to the POU teams on the ground at Queen and Spadina. At 6:11 p.m. all commanders were advised of the intent to arrest. No one was allowed to pass police lines.

[301] Miles spoke to Marks about the order to arrest the crowd and whether the POU officers had discretion to release people contained in the box. Marks testified that Miles asked him if he was able to use discretion and release people from within the contained area. Marks said that he replied, "Absolutely. You're there, I'm not." Further Marks expressed surprise that Miles ask that question. He explained:

These were senior police officers. I can order a police officer to do something, go somewhere and enforce whatever, but it's up to him to have his own independent thoughts and it's up to him that he has to articulate what he did and why he did it.

Marks did not ask Sadler to repeat the order with clarification. Not one police officer testified that s/he was told to arrest only the individuals that *she/he* believed were committing a breach of the peace or conspiring to commit mischief were to be arrested.

[302] At approximately 8:40 p.m. Deputy Warr expressed concern about the situation at Queen and Spadina. He wanted arrested parties released unconditionally. As a result, Warr's immediate steps were taken to release people from the box once necessary paperwork was completed. An hour later, Chief Blair attended the MICC floor, and interrupted a business cycle meeting to speak to Fenton. Following the conversation,

Marks said that the remaining crowd at Queen and Spadina and arrestees taken to police divisions were released unconditionally.

#### **EVIDENCE OF SUPERINTENDENT MARK FENTON**

[303] In 2010, Superintendent Mark Fenton had been serving as a TPS police officer for twenty-two years. He rose up the ranks to become a Superintendent. During his ascension he acted in various capacities, including in communications, professional standards and worked in police divisions in 4 different jurisdictions in Toronto. He also completed a Bachelor of Arts in Justice Studies from the University of Guelph.

[304] Fenton received training as early as 2008 on the British Columbia Incident Command System, and the IMS. Fenton explained that the IMS structure design has a clear chain of command with each police officer reporting to 1 supervisor. The approach, he said, was designed to avoid miscommunication. It would not be the norm for a commander to by-pass a supervisor and deal directly with the supervisor's subordinate, or vice versa. Between April and June 2010, Fenton received additional G20-specific training.

[305] Between November 2008 and 2010, Fenton acted as IC for events in Toronto including an Ontario Coalition Against Poverty demonstration. In 2009, he was the IC for a multiple days of the Tamil protest. He acted as IC for a number of large scale events none of which involved any significant protests. He had not, however, worked at any demonstrations or protests as a POU officer or commander on the ground.

[306] Fenton was not an experienced investigator. He had never been a member of a police squad or branch such as Hold-Up, Drug Squad, Intelligence or Homicide. He had never acted as a Detective in a divisional Criminal Investigation Bureau.

[307] Fenton attended intelligence briefings before and during the G20. He received written reports from the ISU-JIG and TPS Intelligence, highlighting specific planned G20 protest events. Along with the details of the events, Fenton received an assessment of the likelihood of criminal activity associated with the events. In addition, information about the leadership and on-going investigations related to anarchists and protestors of interest was also given to him.

[308] Fenton understood the origins of black bloc protest tactics. He was knowledgeable about the use of black bloc tactics and black bloc activities at previous protest events and those expected to be employed at the G20. Black bloc protestors and anarchists intended on travelling to Toronto to protest the G20, from locations far and wide. The Southern SOAR was actively planning G20-related protest activities. CLAC planned on sending members from Montreal to Toronto. Intelligence reports suggested that black bloc members would “come to Toronto” intending on killing a police officer, Fenton said. For the G20, anarchist groups joined forces and planned a co-ordinated systemic attack on the City of Toronto and its’ corporate entities, Fenton explained. The attack was going to be executed during the G20.

[309] The RCMP set the priorities for the G20. Fenton testified that his priority as IC was to ensure that the security fence surrounding the CAZ and the RAZ was not breached.

[310] Fenton knew that anarchists planned their G20 activities well in advance of the Summit. Social media was a key means of communicating planned and spontaneous anarchist activities. A roaming dance party called Saturday Night Fever was scheduled to occur during on the night of June 26, into the morning hours of June 27 2010. Anarchists planned to block off a section of Church Street. The hub was 519 Church Street, a location Fenton was told would be a meeting spot for black bloc organizers. They intended on fanning out from 519 Church Street in small groups comprised of like-minded anarchists, and attacking corporate buildings in the downtown core. Once the damage was done, the groups would return to the party to disappearing into the crowd of revellers. Intelligence documents including the June 23, 2010, TPS Daily Situational Report indicated that the dance party would involve “the most violent actions during the G20”.

[311] The SOAR would lead anarchist groups, particularly during the People First march in the afternoon of June 26, 2010. It was a march of thousands, organized by labour and the anti-poverty movement. Fenton said that anarchists planned on infiltrating the march and employing block bloc tactics as the march moved through the city. Intelligence provided to Fenton suggested that once the march reached Queen Street West, anarchists would break away head south to attack the fence.

[312] Fenton said that in early June, 2010, the TPS's intelligence operation was still "in its' undercover mode". Commanders were being provided with information about intelligence activities on a "need to know" basis. In his statement to the OIPRD, Fenton explained that the OPP and the ISU-JIG were in-charge of the OPP undercover operation during the lead-up to the G8/G20 Summit. TPS Intelligence liaised with the JIG-OPP units. Prior to the G20 Summit, Fenton explained that TPS Command officers received information from the JIG-OPP unit and TPS intelligence which, on occasion, partnered with other police forces in G20 policing activities.

[313] On June 26<sup>th</sup> and June 27, 2010, before Fenton's shifts in the MICC, he read electronic communications including those contained in the Brief of Intelligence Documents provided to the Tribunal. He spoke with DIC Jones from shift 1 and received an update on what was happening in the streets. On both days Fenton, dressed in civilian attire, left his hotel approximately 2 hours before the start of his shift to meet with DIC Holt. They ate breakfast and walked around outside to survey the situation on the streets before work.

[314] On June 26, 2010, before meeting with Holt, Fenton spoke to Jones. He was told that criminals were roaming downtown streets, committing acts of violence and vandalism. Fenton heard about various incidents of criminality, some of which were depicted in the slide presentation of images and videos shown to the Tribunal. Fenton and Holt left their hotel and walked along Wellesley and north to Queen's Park Crescent. They witnessed people throwing objects at POU officers at University and College. They

observed a damaged blue minivan at the same location, and people taking items from the trunk. Fenton could hear screams, glass breaking and sounds of property being damaged. He felt unsafe. The city looked like a war zone. By that point, the police on the ground were being outrun and out manoeuvred by protestors and individuals –which has been occurring for a number of hours.

[315] He testified that TPS had been caught flatfooted. The POU could not keep up with the black bloc protestors. The anarchists did not have a fixed target, other than the 3.4 kilometre fence. Many of the activities forecast in the intelligence reports had occurred. He testified that as the day progressed, there was a sense of lawlessness on the streets of Toronto. People wearing black clothing and non-black bloc protestors engaged in looting, vandalism and violence toward police. It was difficult for police to distinguish between black bloc protestors and civilians.

[316] Upon entering HQ, Fenton heard glass breaking in the police museum at the front of the building. Upon arrival in the MICC, Fenton was summoned to a conference room for a closed-door meeting of senior members of TPS. Attendees included Deputy Chief Warr, the Chief of Police, Ferguson, Martin, and McGuire. Others may have been in attendance. Fenton asked why people were not being arrested. A good question, he was told. Warr pointed at him and said “Take back the streets”. Warr said that the RCMP needed to be told to take over the IZ to move the TPS officers in the IZ onto the streets. Fenton’s scribe was not taking notes for him during the meeting since it happened before his shift started.



[317] Fenton told command staff to prepare to take back the streets. He took over as IC half an hour before his regular start time of 6:00 p.m. As noted in his OIPRD statement, Fenton told Marks that as soon as he was ready, they would be implementing steps to restore order and that it might include mass arrests. Fenton was advised that the POU wanted to be stationed in one spot and left there. Leave us alone, was the message given to IC Ferguson. The POU request was unacceptable to Fenton. He explained the predicament he faced when he assumed the role of as IC:

I had to develop on the fly a procedure or methodology of addressing a very mobile, violent crowd that the public order could not keep up with.

[318] Soon after telling commanders to prepare to take back the streets, Fenton ordered the commencement of arrests at locations across the city. At approximately 5:30 p.m. he ordered prisoner wagons sent to locations such as University and College Street West. All of day shift, police officers were told to continue working at the end of their shift. Fenton needed as many police on the ground as possible. In fact, it was not until 9:20 p.m. that Fenton allowed all of the day shift officers to be released for the day.

[319] In the first half hour that Fenton was IC, he was in communication with commanders asking for additional police resources for the downtown core. He needed the estimated time of arrival of the RCMP and OPP officers that were on their way from Huntsville, Ontario. At 5:41 p.m. Fenton asked Martin if TPS assets were able to start making arrests in the vicinity of King Street West and Bay Street. He wanted arrests to be made right away. At that point, he did not know if there would be mass arrests.

[320] At 5:46 p.m. he ordered Marks to have the POU officers push north on University at College. Fenton wanted to restore order to that area. Within forty-five minutes, Fenton understood that mass arrests for breach of the peace were happening at King Street and Yonge Street Queen Street West and Peter Street and at Queen's Park.

[321] In the MICC, Fenton was visually tracking a group of protestors travelling south on Yonge Street. He thought they originated at Queen's Park, where they ignored two dispersal warnings before continuing on. They moved across Bloor Street, and headed southbound on Yonge Street. In his OIPRD statement, Fenton wrote about the warning to the protestors at Queen's Park prior provided at 7:03 p.m. as follows:

I gave Tactical Dispatcher (TAD) Bloom my BlackBerry, I advised her that POU were using the Lrad at Queens Park warning the protestors at that location that if they did not disperse they would be arrested for breach of the peace.

[322] The situation on the streets of Toronto was dynamic. Fenton saw protestors at Queen Street West and Peter. Martin told him that the black bloc had returned to 16 Bancroft Avenue. He asked that plain clothes officers remain there and he requested police back-up. At 7:35 p.m. Fenton ordered that commanders advise all police officers in the OZ that "all parties out there are in breach of the peace." Fenton said that he meant that all people "engaging in black bloc" tactics or being violent toward police were to be arrested for breach of the peace.

[323] A snake march of protestors was travelling down side streets. Participants moved south down Bay Street, and through the streets near King Street West and Bay Street. Some or all of the protestors made their way to the security fence at Wellington and York Street. Fenton believed that the protestors did not cause trouble at the fence because they were deterred by the police presence.

[324] Just after 9:00 p.m. Fenton heard that the crowd moving down Yonge Street numbered over a thousand protestors. He said that he saw glimpses of the crowd on the video feed in the MICC. He believed that protestors from the crowd from King Street West and Wellington Street travelled eastbound, after he ordered them boxed in. They merged with the Yonge Street protestors.

[325] Fenton was told that the crowd was starting to burn stores at Yonge Street and Shuter Street. Demkiw advised him of a Twitter message posted by an anarchist that read, "Taking Dundas Square then to the fence finale". Fenton was concerned. The fence was the target. He believed the Twitter posting suggested that the anarchists were heading from Dundas Square to the security fence. He testified, "[A]t this point I made up my mind this crowd not only had to be stopped, it had to be contained" and the members of the crowd would be charged with breach of the peace.

[326] Fenton testified that he did not want to lose the crowd. He did not have camera views east of Yonge Street. There were crowds gathering at Yonge Street and Front Street. A crowd was moving east on King Street West, after a stop at the fence. Fenton

asked that the CRU be moved to assist tracking the crowds. The Yonge Street crowd was moving southbound on Wellington Street towards Front Street, the location of the Novotel.

[327] He believed that the Novotel was a vulnerable location. Over two hundred and fifty G20 trade delegates were staying there. Novotel workers were in a strike position, although the union had agreed not to picket during the G20 weekend. On June 24, 2010 a male was arrested as a result of items found in a vehicle near the Novotel. It contained G20 literature, gasoline hatchets and a cross-bow. Fenton said that he considered the intelligence information about Saturday Night Fever and the violent activities planned by anarchists. He believed that the people in the group heading to the Novotel were the same people who were at Queen's Park earlier in the day, and had participated in the snake march throughout the downtown core. He was worried about the fires being set near the Novotel and he believed that the Twitter posting about the finale at the fence confirmed his belief that the anarchists intended on breaching it. All of which Fenton relied on to form his belief that the crowd heading to the Novotel was a danger - a threat to the Summit.

[328] Within fifteen minutes of Fenton's order to box the Novotel crowd, the order had been executed and arrests for breach of the peace were underway. By between 10:30 pm. and 11:00 p.m. Cashman's POU team was at the Novotel, and arrests were underway based on Marks' order to the POU at 10:27 p.m. not to move the crowd and arrest them.

[329] Fenton said he was following Warr's order to take back the streets. Boxing the protestors stopped them from moving on to a new location to perpetrate damage and commit acts of violence. Each time the POU was brought in, the crowd would move on and commit damage and violence at a new location. He believed the protestors at the Novotel were part of the same group of protestors from Queen's Park earlier in the day. So did Marks. The LRAD was used twice at Queen's Park, yet prolonged efforts by police to restore order followed.

[330] Fenton said he told Marks that police officers at the Novotel were to use their discretion when deciding who to arrest. Fenton told Marks that he did not want "people on bikes, old people and people going about their business" to be arrested. Individuals who did not appear to be a threat to the Summit would be spared. Fenton expected Marks to communicate his direction, along with the order to arrest with discretion. The actual order communicated by Marks was an order to box in the crowd and arrest for breach of the peace. Marks communicated the order to Sadler who conveyed it to the POU commanders at Novotel.

[331] The order to box protestors at the Novotel was not the only time Fenton ordered boxing of a crowd on June 26, 2010. He told Marks to box the moving group of protestors at Queen Street West and Peter Street and make arrests if possible. In the afternoon, he ordered police to block in protestors Adelaide Street and Bay Street. As it turned out, both attempts at containing the crowds were unsuccessful. As it turned out, four hours earlier, the Queen and Peter group either escaped the box or was provided an

egress. Fenton believed that a number of the protestors who were at Queen and Peter, were in the crowd at the Novotel.

[332] Fenton expected that prisoners from the Novotel would be taken to the PPC. When an unexpected situation occurred, such as the lockdown of the PPC in the early morning hours of June 27, 2010, it was brought to his attention. On occasion Martin consulted with him about possible releases from the PPC. His mantra was "release". He was not consulted about the release of each prisoner. Decisions about releases were the responsibility of Martin and the PPC Untot reaching down to the function of officers below him in rank, causing Fenton to become an ineffectual IC.

[333] During the early morning hours of June 27, 2010, Fenton received intelligence reports and updates on the state of affairs on the downtown streets. He was advised that there were "autonomous direct actions" scheduled to begin as early as 6 a.m. on June 27 2010, and continue throughout the day. Police arrested black bloc protestors and seized property at 16 Bancroft Avenue, causing the cancellation of Saturday Night Fever. During the search of the address, police seized handwritten notes detailing plans for Sunday Spokes, the protest of cyclists planned for Sunday June 27, 2010. The notes referred to the need to secure the agreement of the Montreal bike bloc to act as scouts and U-Haul drivers for trucks that the anarchists were going to use throughout the day. Fenton received information that U-Haul trucks would be used to take down the fence. Fenton was concerned about a possible breach of the security fence and a continuation of the violence and vandalism that occurred in the previous twenty-four hours.

[334] When he arrived at the MICC on June 27, 2010, Fenton was advised that an attack on the fence was imminent. It was not clear, he was told, which fence was going to be attacked – the summit fence or the fence surrounding the PPC. A rather important detail. Fenton believed it would be the summit fence. Sunday was the “last opportunity for anarchists to fulfil their stated goal of taking down the fence”, he explained. Fenton was advised that there were over five hundred and fifty police officers at his disposal in the area between College Street and Dundas Street, between Yonge Street and Bay Street.

[335] Fenton was advised that protestors would be leaving Toronto from Dufferin Grove Park, in the west end of the City. At the same time he heard that a large group of protestors were heading to Queen and Spadina. Fenton hoped they would leave the city from Dufferin Grove Park too.

[336] At approximately 5:10 p.m. Fenton saw a live video feed at Queen and Spadina. He saw a large mass of protestors concentrated at the south side of the intersection, facing a line of bicycle police officers. Queen and Spadina was not just the location where the People First march ended, Fenton said, it was also the jumping off point for well over a thousand anarchists began their rampage through the city.

[337] While listening to the police radio, Fenton said that he heard CRU officers forming the line across Spadina Avenue were demanding the assistance of POU officers. Fenton thought the protestors were trying to push through the southerly line. He ordered POU to the intersection, because he was afraid that the integrity of the line of bicycle

officers blocking Spadina Avenue was at risk of being compromised. The CRU officers stood in a line described as a half-moon formation. It spanned from the south east corner of Queen and Spadina to the northwest corner. The formation was a common formation used by police officers to direct crowds, Fenton said. He hoped the protestors at the intersection would go north on Spadina, which was a direction of travel to Dufferin Grove Park.

[338] At 5:38 p.m. Fenton spoke to Marks. He wanted POU officers in position at Queen and Spadina to box in the protestors. He did not order the protestors to be boxed in at that time, he said. He wanted the 2 POU teams at Bruce Mackey Park moved to the intersection. At 5:39 p.m. Fenton used the radio to tell police officers at Queen and Spadina to hold the line.

[339] Within minutes, Fenton testified that he was watching a video feed in the MICC and observed a U-Haul vehicle at Adelaide Street West and University Avenue. He ordered it stopped and investigated.

[340] At approximately 5:45 p.m. TPS Intelligence advised Fenton that there were ten to fifteen black bloc members in the middle of the crowd at Queen and Spadina. Marks told Fenton that a POU team was on the way to the intersection. Three minutes later Fenton was listening to the radio and heard a police officer reporting that a crowd of protestors was northbound on Queen Street from Adelaide Street, carrying wooden sticks and metal



poles. At 5:48 p.m. Marks told Fenton that he was sending the ETF to Queen and Spadina there to warn the crowd of pending arrests.

[341] At close to 6 p.m. a Twitter posting which suggested people go to “1266 Queen and/or the fence” was brought to Fenton’s attention. Fenton thought that the message meant that anarchists willing to engage with police were to go to the summit fence. Others were to meet at the Parkdale Legal Clinic, located on Queen Street West.

[342] At the same time, Fenton told Marks that to arrest protestors at Queen and Spadina for the breach of the peace and conspiracy to commit mischief. Fenton thought that the charges referred to in Gauthier’s email of June 27, 2010 at 4:47 p.m., were applicable to the protestors at the intersection. Others misinterpreted the email too, he said. Determining the reason for the arrests was not Fenton’s concern. He explained:

In my mind when I read this email it was totally – I didn’t care. I truly did not care. My concern was the here and now, I wasn’t concerned about a year from now when this – these matters got to court. I was concerned with June 27, how was I going to maintain the safety of the streets of Toronto. That was my concern.

[343] There was a constellation of information Fenton relied on to justify arrests for breach of the peace at Queen and Spadina. He explained that the protestors disobeyed direction from police officers that were on scene. The half-moon formation of police officers blocking the south and westerly directions, which was a common method used by police to direct a crowd, was being ignored. Protestors were occupying and obstructing

the use of a major intersection. The crowd was warned of pending arrests. He believed that the ETF had been sent to the intersection to issue a disbursal warning. The crowd was pushing the police line, trying to proceed south to the summit fence. Black bloc protestors were in the crowd. A breach of the fence was a real danger – those who were a threat to the Summit were to be arrested.

[344] At approximately 6:00 p.m. a TPS Intelligence officer told Fenton that the crowd at Queen and Spadina intended on moving southbound to the fence. It was at this time that Fenton said that he told Marks that the crowd needed to be boxed in as quickly as possible.

[345] Due to number of pending arrests, Fenton was concerned that the PPC would not be able to accommodate the prisoners from Queen and Spadina. At his behest, telephone calls were made to a number of police divisions to advise them to expect arrivals. Martin confirmed that prisoners arrested for breaching the peace were being released from the PPC. As a result, there was room for approximately two hundred prisoners at the PPC. From the aerial view of the intersection, Fenton saw what he described as “200 or less involved in this protest actively trying to push south”.

[346] By 6:07 p.m. the crowd was boxed in. Fenton watched the live video-feed in the MICC. Approximately two hundred protestors were boxed in at the intersection. Fenton testified that he spoke to Marks and had the “almost identical conversation” as the night before about arrests at the Novotel. Fenton testified that he told Marks:

I do not want young kids on bikes, and I used the specific illustration, I don't want old people, I don't want people going about their daily business arrested. We're arresting here (sic) protestors. We're arresting people who are a threat to the Summit.

[347] Marks told Fenton that he would convey the instruction. Fenton was left with no doubt that Marks would pass the information on to ground commanders at Queen and Spadina.

[348] Within fifteen minutes, Fenton was advised that there were a two hundred people, give or take, to be arrested at the intersection. There was a shortage of prisoner wagons on scene. Martin was to arrange for more wagons. Based on the visuals and information he had received, Fenton anticipated the arrest of two hundred people. By quarter to 7, Fenton received new information from Martin. At the intersection there were eight hundred people, all wanting to be arrested. Fenton was perplexed. He spoke to Marks for again about the use of discretion. Only those who were a threat to the summit and were engaged in protests were to be arrested. Fenton told him to ensure that discretion was being exercised. Again, Fenton described the sort of people he did not want arrested. Once again Marks assured Fenton that he had already shared the direction with the police officers at the intersection, and he would repeat it.

[349] By 7:15 p.m. there was rain. Pounding rain. The RCMP helicopter left the area. Fenton could also see what was happening in the intersection from the stationary cameras due to the rain and darkness. The Operations Chief advised Fenton that one hundred people had been arrested and were in transport vehicles, and there were another two

hundred people remaining in the intersection to be processed. Soon after, Martin and Fenton spoke about the space for prisoners at the PPC. Fenton was concerned that it would be "close", however, he was left with the impression that there were far fewer than eight hundred people at the intersection.

[350] By twenty to eight, Sadler advised Fenton that there were three hundred people remaining at the intersection, waiting to be processed. Fenton testified that Martin told him the PPC was on the verge of reaching capacity. As a solution, Martin suggested releasing small groups of protestors from the scene. Fenton and Marks disagreed with Martin. They feared releasing the protestors at the intersection would "set themselves up" for a night of chasing the protestors around the city. Instead, prisoners would be transported to 23 Division and 43 Division, at the opposite ends of the City. Fenton testified that he believed people arrested for breach of the peace were released immediately, upon completion of their paperwork was complete.

[351] For each person arrested during the G20, a record of arrest and supplementary report was completed on scene. It was TPS policy. In some cases, a field information report was required too. The Chief of Police was only person able to relieve an officer of the obligation to complete the arrest paperwork. Police on scene did their best to fill in paperwork while standing under awnings of the buildings adjacent to the intersection. The arrests continued, as did the driving rain.

[352] At approximately 8:40 p.m. Martin, Marks, Fenton, scribes and a loggist attended a meeting with Warr. Fenton was instructed to immediately release individuals arrested for breaching the peace from the intersection or the PPC. Warr was concerned about the negative media coverage TPS was receiving. Martin undertook to convey the message to the PPC. Marks agreed to communicate the direction to the ground commanders. Fenton testified that he was not surprised by the direction because only the Chief of Police had the authority to relieve police officers of the obligation to complete paperwork. He believed that Warr was not alleviating police officers of their paperwork obligations. Rather, Warr was simply directing to release from the scene instead of transporting prisoners to the PPC or divisions, prior to release.

[353] Despite the new direction to release individuals, the paperwork requirement was causing delays. Time marched on. Fenton left the MICC operational floor for the regular business cycle meeting. At 9:36 p.m. the Chief of Police summoned him. The Chief ordered the release of everyone at the intersection and the PPC without paperwork. Within 5 minutes of receiving the order, Fenton conveyed it to the MICC commanders.

## GOVERNING PRINCIPLES

[354] There is no dispute that on June 26, 2010 protestors and bystanders in front of the Novotel were ordered arrested for breach of the peace. Further, on June 27, 2010 protestors and bystanders at the intersection of Queen and Spadina were ordered arrested for breach of the peace and conspiracy to commit mischief.

### Power to Arrest

[355] Section 495(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. S.31(“Code”) provides the power of the peace officer to lawfully arrest a person without a warrant:

A peace officer may arrest without a warrant (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence; (b) a person whom he finds committing a criminal offence; or (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal in any form set out in Part XXVIII in relation, thereto, is in force within the territorial jurisdiction in which the person is found.

[356] Reasonable grounds to arrest have a subjective and objective component. The officer must believe that s/he has reasonable grounds to arrest. The officer’s belief, in all of the circumstances, must be objectively reasonable. That is to say, a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest, *R. v. Storrey*, [1990] S.C.R. 241 at para. 17.

## Charges

[357] Section 31 of *Code* is the source of authority to arrest and detention for breach of the peace. Breach of the peace is not an offence. It provides:

- (1) Every peace officer who witnesses a breach of the peace and everyone who lawfully assists the peace officer is justified in arresting any person whom he finds committing a breach of the peace or who, on reasonably grounds, the peace officer believes is about to join or renew the breach of the peace.
- (2) Every peace officer is justified in receiving into custody any person who peace officer is given into custody any person who is given into his charge as having been a party to a breach of the peace by one who has, or who on reasonable grounds the peace officer believes has, witnessed a breach of the peace.

[358] In 1950, a breach of the peace was described as occurring where there is an actual assault, public alarm, or an excitement caused. A mere annoyance or insult to an individual, stopping short of actual personal violence, is not a breach of the peace. An essential ingredient is something in the nature of a riot, tumult or actual violence. The core notion of a breach of the peace is a violent disruption or disturbance of the public tranquility, peace or order, *Frey v. Fedoruk* (1950), 97 C.C.C. 1 (S.C.C.).

[359] The statute does not authorize detention and arrest for an apprehended breach of the peace. It is conduct that poses a threat to harm or does harm another that is up to muster. Police do not have to point to statutory authority for every action they take in furtherance of their duties, such as preserving the peace and preventing crimes, *R. v. Dedman*, [1985], 2 S.C.R. 2 at para. 66. The police possess the common law power to

arrest and detain to prevent an apprehended breach of the peace, however, the apprehended breach of the peace must be imminent and there must be substantial risk that a breach will occur. The apprehended breach of the peace warranting arrest is described by Doherty J.A. in *Brown et. al. v. Regional Municipality of Durham Police Service Board* (1998), 43 O.R. (3d) 233 at p. 18:

The mere possibility of some unspecified breach at some unknown point in time will not suffice. These features of the power to arrest or detain to avoid a breach of the peace place that power on the same footing as the statutory power to arrest in anticipation of the commission of an indictable offence. This is not to say that the two powers are co-extensive. Many indictable offences do not involve a breach of the peace, and, as indicated above, conduct resulting in a breach of the peace need not involve the commission of any offence. Both powers are, however, rooted in the recognition that intervention is needed to avoid the harm which is likely to flow in the immediate future if no intervention is made. To properly invoke either power, the police officer must have reasonable grounds for believing the anticipated conduct, be it a breach of the peace or the commission of an indictable offence, will likely occur if the person is not detained.

[360] Section 430 of the *Code* defines the offence of mischief. Section 430(1) provides that everyone commits mischief who wilfully: (a) destroys or damages property; (b) renders property dangerous, useless, inoperative or ineffective; (c) obstructs, interrupts, interferes with the lawful use, enjoyment, or operation of property; or, (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

[361] Section 465(1)(c) of the *Code* provides that everyone who conspires to commit an indictable offence (subject to exceptions) is liable to the same punishment as that which



an accused is guilty of that offence would, on conviction be liable. A conspiracy among a group of people requires an agreement between the persons, and the person charged is a member of the conspiracy. *R. v. O'Brien*, [1954] S.C.R. 666 at p. 669. In deciding whether a conspiracy exists, the trier of fact, or arguably the police officers contemplating laying a charge involving conspiracy, must consider the actions and words of the alleged members of the conspiracy – what they did or did not do, how they did or did not do it, and what they said or did not say. The acts may be evidence of an agreement, *R. v. Alexander* (2005,) 206 C.C.C (3d) 233 (O.C.A.) at para. 47, leave to appeal to the S.C.C. refused [2005] S.C.C.A. No. 526 (*QL*).

### **Misconduct & the Standard of Proof**

[362] The *Police Services Act*, RSO 1990, c.P.15m s. 80(1)(a) provides that a police officer is guilty of misconduct if he or she commits an offence described in a prescribed code of conduct. The *Police Services Act*, O. Ontario Regulation 123/98 General, provides that a police officer commits misconduct if s/he engages in:

- (a) Discreditable conduct in that he or she,
  - (xi) acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force
- (g) Unlawful or Unnecessary Exercise of Authority, in that he or she,
  - (i) without good and sufficient cause makes an unlawful or unnecessary arrest.

[363] Section 84(1) of the *PSA* provides that the standard of proof in determining whether a police officer has committed misconduct is “clear and convincing evidence”. The standard has been accepted to mean “weighty, cogent and reliable evidence upon which the trier of fact, acting with care and caution, can come to the fair and reasonable conclusion that the officer is guilty of misconduct”. *Allan v. Munro*, Ont. Bd. Inq., 27 July, 1994 cited in *Canadian Civil Liberties Association v. Ontario (Civilian Commission on Police Services)* (2002), 61 O.R. (3d) 649 (CA) at 664 (“*CCLA*”).

[364] The standard of proof for civil cases, including administrative cases, is the balance of probabilities. The case of *F.H. v. McDougall*, [2008] 3 S.C.R. 41, was an appeal in civil case dealing with historic allegations involving tortious conduct of assault and battery and sexual assault. The Court opined that “the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not the event occurred.” Inherent probability, the Court explained, will always depend on the circumstances, *McDougall*, at paras. 41 and 47.

[365] In *R.C. v. McDougall*, [2005] B.C.J. No. 2358 (S.C.J.) (*QL*) the trial judge’s decision turned on the credibility and reliability of the evidence of the plaintiffs and the defendant, with few legal issues at play. During the incidents in question, the defendant worked for the Order of Oblates at the residential school attended by the plaintiff. The trial occurred in 2004, thirty-four years after the defendant left his employment an Oblate Brother. The trial was not a disciplinary hearing. The liability was monetary in nature. It is noteworthy that the courts in *McDougall* did not consider the *CCLA* decision, or

specifically address police discipline hearing matters. In *Burnham v. Metropolitan Toronto Police Association*, [1987] 2 S.C.R. 572, the Supreme Court of Canada adopted the following passage from the reasons of Morden J.A. in *Trumbley v. Toronto (Metro) Police Force*, [1986] O.J. No. 650 (C.A.) (*QL*) at para. 64:

In my view, a *Police Act* discipline proceeding is not a criminal or penal proceeding within the purview of s. 11 [of the Canadian Charter of Rights and Freedoms] ... A police discipline matter is a purely administrative internal process ... The basic object of dismissing an employee is not to punish him or her in the usual sense of this word (to deter or reform or, possibly, to exact some form of modern retribution) but rather, to rid the employer of the burden of an employee who has shown that he or she is not fit to remain an employee.

[366] In *Trumbley* and *Burnham* the issue at bar was the applicability of section 11(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") to police discipline proceedings. At paragraph 73, in *Trumbley* Morden J.A. noted that police discipline proceedings are not regarded as criminal proceedings, therefore the standard of proof is not proof beyond a reasonable doubt. His Honour further provided, "This does not mean that within the civil standard there would not be some variation and that, accordingly, depending on the seriousness of the allegations and of the potential consequences, the application of the civil standard may require clear and convincing evidence for a case to be regarded as proven."

[367] The Court in *McDougall* rejected the proposition that clear and convincing evidence requires more than a proof on a balance of probabilities. Relying on *McDougall*, and rejecting *Penner* as applicable to police disciplinary hearings, in the

judicial review in *Ottawa (City) Police Service v. Ottawa (City) Police Service*, [2015] O.J. No. 2689 (S.C.J. Gen. Div.) (QL) (“*Jacobs*”), the prosecution asserts that I should adopt *Jacobs* as an affirmation of *McDougall* and apply a balance of probabilities standard as “clear and convincing” evidence.

[368] As noted in *Greater Sudbury (City) Police Service v. Greater Sudbury (City) Police Service*, [2010] O.J. No. 793 (S.C.J. Gen. Div.)(QL) at para. 99, Hill J., for the majority opined:

At para. 39 in the *McDougall* decision, Bastarache J. recognized that an existing interpretation of the “clear and convincing” language was “[an] intermediate standard of proof between the civil standard and the criminal standard”. Although as a matter of common law, the *McDougall* case rejected the clear and convincing approach as importing the intermediate *standard of proof* into civil litigation, in favour of clear and convincing as simply a description of the *quality* of the evidence, it does not necessarily follow that the same approach should apply to proof of disciplinary infractions in an administrative law context where the relevant statute required a finding of liability only on clear and convincing evidence.

[369] In 2013, the Supreme Court of Canada provided that the standard of “clear and convincing evidence” by virtue of section 84(1) of the *PSA*, is a higher standard than a balance of probabilities, *Penner v. Niagara Regional Police Services Board*, (2013) SCC 19 at para. 60. In *Penner*, the Court found that issue estoppel did not preclude a civil claim following an acquittal in a police disciplinary proceeding. The determination related to issue estoppel in *Penner* was directly linked to the standard of proof in police disciplinary hearings, contrary to the Court’s assertion in *Jacobs*.

[370] Prior to *Penner*, the Ontario Court of Appeal in *CCLA* found that the “clear and convincing evidence” standard is not simply a balance of probabilities, but a slightly higher standard. The Court addressed the distinction between the standard applied by the Chief of Police for ordering a hearing, and the standard for determining whether the police officer committed misconduct. A Court requiring the Chief to have “reasonable and probable grounds” to have cause to find a misconduct hearing was warranted would be too close to the “clear and convincing evidence” standard, *CCLA* at para. 50.

[371] The Honourable Patrick J. LeSage Q.C., “Report on the Police Complaints System in Ontario” (April 22, 2005) at p. 77 spoke to the appropriate standard of police discipline hearings as follows:

In my view, the standard of proof used at a hearing should not be compared with the standard of proof used in a civil proceeding. There are different types of proceedings and one could argue that a different standard of proof should apply for PSA hearing. While the argument for a standard of proof fluctuates with the alleged seriousness of the misconduct may be attractive, I believe that this really masks the underlying need for the revision of the substantive offences in the code of conduct.....That being said, I am of the view that the “clear and convincing evidence” standard is not a standard that is referred to in Ontario statutes other than the PSA, but it has been accepted as the relevant standard in the misconduct hearings of many professional bodies.

[372] I note that findings of misconduct in the context of police disciplinary proceedings have far-reaching consequences, albeit not penal in nature. For example, findings of misconduct against a police officer may be disclosed to accused persons with no

involvement in the matters related to the findings, *R. v. McNeil*, [2009] S.C.J. No. 3 (*QL*) at paras. 53 – 54.

[373] I find that the standard of proof in police discipline proceedings, following *Penner* has not been displaced by *Jacobs*. It requires more than a balance of probabilities, that is, a slightly higher standard to meet the test of “clear and convincing” evidence.

### **Discreditable Conduct – the law**

[374] The *Police Services Act*, Ontario Regulation 123/98 lists a host of police conduct that may be deemed discreditable. It cannot be said that a breach of an individual’s rights pursuant to the *Charter* due to conduct of a police officer is *ipso facto* a disciplinary offence. The officer’s conduct must be analyzed as a whole, on context, having regard to all of the sources defining acceptable police conduct, *Allen v. Alberta (Law Enforcement Review Board)* [2013], A.J. No. 533 (C.A) ABCA 187 at para. 33- 24, 553 AR 140, leave to appeal denied sub. Nom. *Engel v. Allen*, [2013] S.C.C.A. No. 347, Dec. 5, 2013, SCC # 35500.

### **Duties of Police Officers**

[375] Included in the Declaration of Principles in the *PSA* are the following principles: (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 *Charter* and the *Human Rights Code*; and (3) the need for sensitivity to the pluralistic, multiracial, and

multicultural character of Canadian society. The legislative purpose of the *PSA* is “demonstrably to increase public confidence in the provision of police services”, *Brown v. Ontario Civilian Police Commission on Police Services*, [2001] OJ No 4573 (CA) (QL).

[376] Section 42(1) of the *PSA* sets out the duties of police officers, which include preserving the peace, crime prevention, laying charges, completing training, apprehending offenders, assisting victims and carrying out other lawful duties assigned by the Chief of Police. In addition police possess common law duties, such as the duty to preserve life, protect against serious injury and protect property, *R. v. Sanderson*, (2003) 64 O.R. (3d) 257 (CA); *R. v. Godoy*, [1999] 1 SCR 311. Section 42(3) of the *PSA* acknowledges the common law duties and power of constables, which for the most part, are found in section 42(1).

## **THE LAW APPLIED TO THE FACTS**

### **PARTICULARS**

[377] Of the thirteen complainants listed in the Notice of Hearing in relation to Novotel, the Tribunal heard viva voce evidence from Matthew Beatty, Dave Steele, Nathan Adler and Vitali Kamenskikh.

[378] I was advised that fourteen public complainants filed complaints with the OIPRD regarding the Novotel and thirty-seven public complainants filed complaints about Queen and Spadina. Counsel for Fenton conceded that the complainants were contained in the box formation and arrested at Novotel and Queen and Spadina. The only complainants referred to in the Notices of Hearing are named in charge 3 relating to the Novotel. I am not prepared to make any additional findings pertaining to the complainants who chose not to testify before the Tribunal. In addition I am not prepared to make additional findings about Hendrik Bruyn, based on the evidence of his mother. She was neither present at the Novotel or the PPC.

### **THE EVENTS LEADING UP TO THE NOVOTEL**

[379] During the day on June 26, 2010, black bloc protestors and average citizens joined in to cause considerable destruction and disorder in the downtown core. The behaviour of the black bloc protestors and others who decided to join was an affront to democratic values. It served no purpose but to undermine any support their ideals may have garnered



from reasonable Canadians. The use of black bloc tactics by individuals undermined the messages that peaceful protestors were trying to convey.

[380] The black bloc tactics TPS had been warned about came to fruition. It was no surprise that the POU officers were outrun – with heavy equipment and the summer heat, they could hardly expected to chase down roving packs of hooligans.

[384] Substantial intelligence information was available to TPS in advance of the G20. The Tribunal heard little about TPS's advance planning for the G20 involving a preventative strategy to curtail the ability of the black bloc to take to the streets. Once the black bloc got a foothold in the downtown core, TPS appeared to have no measured plan to isolate and arrest individual and groups of highly mobile black bloc protestors. The police on the ground were often outnumbered and overwhelmed.

[381] Lawful protest is a cornerstone of a democratic society. It is protected under sections 2(b), 2(c), and 7 of the *Charter*. Protestors may gather in groups to express dissent. Some people may find their messages unwanted or even offensive. Protestors are not required to be friendly or polite. Protests often take place in public streets. Demonstrating in an area that is open to the public, absent invitation or permission is lawful, *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005], 3 S.C.R. 141 at para. 81. Protestors should be expected on public streets and sidewalks are in close proximity to government activity.

[382] During the evening and overnight hours of June 26 and 27 2010, Fenton was the TPS G20 policing commander responsible for the downtown core, outside of the security fence surrounding the G20 meeting venues. It was a huge responsibility. He took it seriously. On both days, he assumed control of the MICC knowing the unfettered destruction and violence had occurred in the daytime under the command of a far more experienced IC. As stated earlier, the TPS plan to curtail the black bloc and facilitate peaceful protest failed. It seems that the Planning Chief, Investigative Chief and other commanders in the MICC had no plan B, so to speak. Fenton was left to figure one out.

[383] According to RCMP, protection of the fence was the paramount concern. The MICC adopted the same view. A meaningful attempt or success on the part of anyone breaching the security could have led to violent interaction between police and the persons involved in the breach. It would have been an embarrassment to TPS. It would have signalled a failure on the part of TPS to hold up its' end of the bargain.

[384] To the protestors, the fence was a symbol of all that was wrong with the G20. The decision-makers were cloistered behind it, discussing important issues related to the global economy, which have been the subject of public debate. Protesting at the fence was the next best thing to protesting at the meetings. The natural consequence of pushing protestors away from the fence was gatherings of protestors at other sites in close proximity to access to the fence. In front of the Novotel and Queen and Spadina, on public streets, were two such locations.

**NOVOTEL – UNLAWFUL AND UNECESSARY ARREST**

[385] By the time Fenton arrived on the MICC floor on June 26, 2010, said that he thought that a riot was progressing in the downtown corner. Distinguishing between black bloc protestors and bystanders or non-violent protestors was at times difficult, if not impossible, for police. Warr told him to take back the streets, and it was up to Fenton make it happen. Fenton did not ask how. He did not seek direction. I find that he was appalled by the state of affairs on the streets and frustrated that wide-spread arrests had not taken place. I find that he decided to shut the protestors down by way of mass arrests.

[386] Unlike the IC of shift 1, Fenton was going to be pro-active. His decision is evidenced by his words and actions upon his he return to the MICC floor and confirmed in his statement to the OIRPD. Mass arrests using containment was his procedure developed on the fly, so to speak. His decision was known to his superiors, either at the time it was made or soon after. There is no evidence before the Tribunal that suggested his superiors disagreed with his decision to make mass arrests at the Novotel. The same conclusion applies to the Queen and Spadina arrests.

[387] I find that Fenton decided boxing in protestors was the most effective means of stopping them from continuing to protest at other locations in the downtown core. He believed that allowing egress routes enabled the protestors to continue on snaking about the city. Within the first hour of his shift in the MICC on June 26, 2010, Fenton expected

that police would attempt to box protestors and make arrests at 3 locations in the downtown core.

[388] In the late afternoon, Fenton ordered the LRAD used to make disbursal warnings. He believed that many of the protestors at Queen's Park disbursed and continued on protesting at other locations, including King Street West and Bay Street. On more than one occasion they were boxed in and either escaped or were allowed to move past police lines. By early evening, Fenton ordered that everyone protesting downtown was "arrestable" for breach of the peace. I find that he thought that that insufficient arrests were occurring as groups of black bloc protestors were still actively engaging police.

[389] The MICC was in reactionary mode. TPS ground forces, despite reinforcements, had been on the run for the better part of twelve hours. Fenton was peppered with speculative and ambiguous information from commanders, such as the report that fires being set at Shuter Street and Yonge Street. However, as IC, he decided what action, if any, he would take based on the information that he received. He was not obliged to confirm intelligence because it was supposed to be washed. It was open to Fenton to dismiss information that was not corroborated or give it little weight, particularly information that he was provided with in real-time, from sources other than the JIGG-ISU or resulting from actual police investigations.

[390] Although the finale at the fence turned out to be little more than a pit stop for the protestors wanting to sing a song or two, Fenton maintained that the summit was at risk.

He repeatedly maintained that that the Novotel crowd was a danger because of their conduct earlier in the day and the on-going information about their movement. I believe thought that the protestors at the Novotel were not going to stop protesting across the city, not that they posed a risk to the summit. Ms. Deshman, Mr. Paikin and Ms. Henry's evidence supports his assertion that a members of the crowd at the Novotel travelled south on Yonge on their way, but did so in a peaceful manner. They were a spontaneous group.

[391] At the time Fenton decided to contain and mass arrest the protestors at the Novotel, there is no evidence that he was able to identify one person present who engaged in black bloc protest tactics earlier in the day. Fenton's belief was not subjectively or objectively reasonable.

[392] I find that Fenton's decision to arrest the Novotel protestors was made before they reached the Novotel. He wanted the protest shut down, which is why neither Fenton nor Marks requested police make an announcement warning protestors to leave or face arrest. For the same reason, no egress was provided. I find that individual officers did unofficially tell a number of the protestors to leave, not knowing that the other police line was not allowing an egress or simply as a means of getting the protestors to move back. Ella Henry heard police officers telling protestors to disburse. On a number of occasions, Steve Paikin heard the crowd being told to leave. As Henry explained, after she heard the announcement, she was unable to leave because police officers were already blocking the street to the east and west.

[393] The same information Fenton relied on to justify that the protestors at the Novotel were a danger to the summit was information he relied on to support his position that there was a breach of the peace occurring at the Novotel. Fenton and Marks believed a riot was occurring in the downtown core, despite no riot proclamation. Fenton said the protestors at the Novotel were also engaged in a breach of the peace by yelling, chanting, blocking a public street, and refusing to leave. Cashman thought that such conduct amounted to a breach of the peace too.

[394] Fenton misapprehending the law of breach of the peace. Even where a police officer acts in good faith, a misapprehension of the law does not save an officer from a finding of misconduct for arresting an individual without sufficient reasonable and probable grounds, *Wowchuk v. Thunder Bay Police Service*, OCPC #13-11 at para. 76. I find that there was no apprehended or actual breach of the peace at the Novotel.

[395] I find that at the time he ordered the mass arrest at the Novotel, Fenton had not sufficiently turned his mind to whether he had reasonable and probable grounds to arrest anyone at the Novotel for breaching the peace.

[396] Arrests were well underway when Cashman and his team arrived at the Novotel. He said he formed reasonable and probable grounds to arrest the group for breach of the peace, not individuals within it. Cashman's assertion that he formed his own reasonably and probable grounds is irrelevant. He did not have the authority to order a mass arrest and he too misapprehended the legal definition of breach of the peace.

[397] Fenton and Marks said that they wanted bystanders excluded from the mass arrest and that is what they expected to happen. They understood that black bloc protestors often discarded their black clothing for street clothing. Both of them knew, or should have known, the POU officers lacked effective means to distinguish between bystanders and protestors. They were not provided with reasonable and probable grounds for arrest. Rather they were ordered to box and commence arrests.

[398] Marks testified that he expected officers on the ground to make observations of individuals in the containment and act on what they saw. He expected them to communicate with individuals and act on what they learned. He said that assured Fenton the officers would make their own decisions about who should or should not be contained and arrested. If Marks and Fenton's evidence were accepted, the containment and arrests of bystanders was a result of the POU ground commanders and/or the POU officers. They failed to question every one of the over two hundred people caught in the box and determine why individuals were at the intersection. Or the POU officers failed to make observations to identify individuals who were a threat to the summit.

[399] Their evidence about discretion is illogical. I do not believe that Fenton expected discretion to be used. I do not believe Marks told Fenton he would ensure discretion was used or conveyed the message to the POU commanders to do so. I find that Fenton did not want officers to exercise discretion, and that is why he did not allow an egress. Fenton's evidence is not consistent with the language of the orders documented in his scribe's notes. It is not consistent with the actions of the POU officers on the ground,

based on their understanding of the order communicated to them in plain language. It is not consistent with the notes of their scribes.

[400] I find Fenton was aware of the number of individuals arrested at the Novotel. As the night progressed, the number of arrestees waiting to be transported increased. Had discretion been exercised, one would have expected the numbers of arrestees to decrease.

[401] I find Marks's evidence on the issue of discretion equally unbelievable. As the Special Operations Director with 4 decades of experience in policing and as a POU commander, I find he understood the distinction between discretion exercised by officers during a mass arrest versus individualized arrests, as defined in the POU Operational Plan.

[402] I find that Marks and Fenton tried to abdicate responsibility for the containment and arrest of innocent bystanders resulting from the orders from the MICC by blaming the POU commanders and officers on the ground.

[403] I find that Kamenskikh and Adler were following protestors. They were not protestors. At the Novotel Kamenskikh passively watched the demonstration. Adler walked alongside with protestors earlier in the day. He was a curious observer.

[404] Steele and Beatty minimized the criminal behaviour they witnessed on June 26, 2010. At the Novotel, they wanted to be part of the action. On Steele's video from the Novotel, one of them was heard badgering a police officer. Beatty's anti-police agenda



was evident in the manner in which he framed his testimony and the language of the e-mail he sent to the prosecution. I find that they had no intention of leaving the Novotel after the police boxed the crowd. They wanted to stick around and see what was going to happen. They were not protesting. At the same time, their conduct was lawful. Trying to assist protestors at the Novotel did not constitute breaching of the peace.

[405] I find that Fenton's decision to order the mass arrest of the crowd at the Novotel was an unnecessary and unlawful exercise of his authority. It need not have occurred. The arrests of the complainants, including Nathan Adler, Matthew Beatty, Dave Steele and Vitali Kamenskikh were unlawful.

#### **QUEEN AND SPADINA – UNLAWFUL OR UNNECESSARY ARREST**

[406] The violence and vandalism of June 26, 2010, did not repeat itself on June 27, 2010. The arrest of the organizers of Saturday Night Fever led to its' cancellation. The group of protestors at Queen and Spadina were disbursed between midnight and 1:00 a.m. The "Fireworks for Prisons" event did not materialize. The G20 meetings were over. The autonomous direct actions did not begin at dawn, as anticipated. The protest activities during the daytime were uneventful. Thompson's POU team was sent to a non-G20 event, which was not even in the downtown core.

[407] Yet, Fenton testified that in the late afternoon of June 27, 2010 an attack on the fence was imminent. I find that there was no imminent attack on the fence, and Fenton had insufficient evidence to support a belief that there would be an attack on the fence.

The Twitter message directing protestors to the fence, (or a legal clinic) was ambiguous. I find that it was equally plausible it referred to the PPC fence. The night before, the PPC was locked down due to threats posed by protestors in the vicinity of the PPC. The purpose of Fireworks for Prisons was to demonstrate against imprisonment. Bruce Mackey Park, the location where it was supposed to occur was a few minutes away from the PPC on foot. In addition, Fenton knew protestors planned on leaving Toronto on June 27, 2010, from Dufferin Park, which is not in the downtown core.

[408] Soon after he arrived on the MICC floor, Fenton's scribe notes indicate that he wanted additional resources moved to Queen and Spadina. The line of CRU officers standing across the south side of Spadina were in trouble. The protestors wanted to pass. A U-Haul truck had been spotted nearby. There were a handful of black bloc protestors in the middle of the crowd. People were seen moving in the direction of Queen and Spadina holding sticks and poles. He was told a breach of the peace was imminent by an intelligence officer. No questions asked. There were black bloc protestors in the crowd at the intersection.

[409] The Tribunal heard nothing about efforts to extract and arrest the ten to twelve black bloc members identified in the crowd. Strange, given the black bloc were difficult to identify and in this case, the RCMP specifically advised there were black bloc in the middle of the crowd at the intersection. Black bloc tactics were not employed by protestors at Queen and Spadina. The prosecution video and OPP videos depicted a disorganized crowd interspersed with people who appeared to be protesting. A handful

of people were engaging in recognizable protest activities such as holding placards. Others were milling about. Many were hanging around, haranguing police officers and taking photos or video of the lines of police. The OPP video belies the notion that the crowd of protestors were violent, or aggressively trying to move through the police across Spadina to the south.

[410] At 5:43 p.m., Bedard's team arrived at the intersection to find all 4 sides of the intersection were not blocked. Had protestors been intent on heading south, they could have left the area and headed to a side street, just as Henry and her friends did when they wanted to avoid a police line. Fenton's assertion that the crowd was pushing south and was not deterred from trying to move down Spadina Avenue is not supported by the evidence. Any efforts to push south stopped when the POU officers replaced the CRU.

[411] Fenton was able to see the crowd on a live-video feed for at least forty-five minutes before arrests were underway. Police at the intersection were not overwhelmed. I find that the MICC had the ability of viewing the activity at the intersection after the rain started too. Bedard's verbal exchange with the MICC regarding his observations on scene occurred after it began to rain. TPS had mobile camera operators. Fenton ordered the POU to start squeezing the box at just after 6 p.m. demonstrating he could see the box formation before he gave the order to tighten the box. The decision to do so was not made by the ground commanders. Fenton ordered the use of a specific crowd control tactic. He did not allow the POU commanders to decide which crowd control tactics to use.

[412] Of the Tribunal witnesses, Rodrigo Bravo was the first civilian witness on scene at Queen and Spadina. He arrived at the intersection sometime after 5:00 p.m. with a group of protestors flanked by police. The others arrived after Bravo, and before 6:00 p.m. Mr. Deshman arrived at the intersection with others, including Julia Croome, at 5:40 p.m. She testified that they were contained in a box formation within twenty-minutes of arrival. Duchausay explained that all sides of the intersection were blocked by 6:15 p.m.

[413] I find that Fenton gave the order to box the crowd at 5:38 p.m. He intended on arresting them soon after. He confirmed the charges provided to him in the Gauthier e-mail sent at 4:47 p.m. that day. He reviewed of the e-mail after he gave the order to box the crowd which demonstrates he wanted the crowd contained and arrested.

[414] Martin confirmed conspiracy to commit mischief was the appropriate charge applicable to the boxed crowd at Queen and Spadina. It is shocking that the Investigative Chief believed there were reasonable and probable grounds to arrest up to two hundred people at the intersection for the offence. I find that there was no evidence provided to the Tribunal to warrant arrests of the crowd for conspiracy to commit mischief.

[415] In his OIRPD statement, Fenton wrote that he decided the arrest of the protestors was necessary at 5:56 p.m. As stated above, I find that he did so before that time. His OIRPD statement made no mention of a warning issued to the crowd, telling them they must leave of face arrest. He chose not to use the LRAD to warn the crowd to disburse, which was effective at Queen's Park on June 26, 2010.

[416] Both the TPS G20 Operational Plan and the TPS G20 Training presentation of June 2010 noted the importance of warning the crowd before police action. At page 92 of the latter, on the slide entitled “Perimeter/Banner/Use of Force Warnings” the following points were listed: (1) provides a clear message to the crowd; (2) other methods are contradictory confusing and ineffective; and (2) position of the police and actions taken are more defensible if warning is given clearly from LRAD.

[417] I believe that Fenton thought the ETF were sent to the intersection to advise the crowd that they were going to be arrested. I find that Fenton’s decision not to use the LRAD was indicative of his plan to arrest everyone at the intersection. Witnesses testified that the ETF were directed to warn the crowd of pending arrests at approximately 5:50 p.m., not to warn them to leave or face arrest. Dechausay and Bedard’s evidence confirms that the crowd was told they were going to be arrested. Tom Ross, Dechausay and Bravo asked police to allow them to leave the intersection. Shervin Akhavi heard police say that everyone was going to be arrested. He did not hear an announcement telling people to leave. Julia Croome identified herself and explained her role as a CCLA monitor to a police officer. She wanted to leave and was not allowed to do so.

[418] I find that there was no breach of the peace in progress or an iota of evidence that a conspiracy or conspiracies to commit mischief were afoot. I find that the charges attributable to the crowd were an afterthought. Fenton’s goal was to rid the streets of protestors and others gathering in large groups in the downtown core. In Fenton’s mind, clearing the streets was making them safe. I find that Fenton was focused on the here and

now. He has no regard for the rights of peaceful protestors to protest on the street, regardless of the criminal activity that occurred earlier in the weekend.

[419] Fenton's testimony about the Gauthier e-mail is telling. As he said, "I wasn't concerned about a year from now". The charge was a means to an end. I find that Fenton's remark demonstrates his lack of insight into requirement that formulating reasonable and probable grounds is a pre-requisite to arrest. He ordered the mass arrest without adequate consideration of whether the legal requirements were satisfied. He decided to worry about the consequences later.

[420] Fenton testified that his order to arrest at Queen and Spadina contained the exact same caveat as the Novotel arrest order. The caveat was not captured in his scribe's notes. Marks's purported response to Fenton was not captured in his scribe's notes either. Fenton claims that he expected his order with discretion to be followed by POU officers on the ground. Marks said he expected senior officers with independent thoughts to use their discretion in deciding who to arrest at the intersection. Miles testified that Marks told him he did not have discretion to release individuals from the box. An order he followed against his better judgment. Had Miles been advised he was afforded discretion, he would have released more people from the containment area. He would have told Thompson he did not need to ask Miles for permission to release bystanders.

[421] I find Fenton's evidence that on two occasions, on consecutive dates, he gave an order to arrest over two hundred protestors with a caveat to use discretion and his order

was not followed. Moreover, his assertion that did not know his purported order was not followed on either occasion, and did not know until long after the G20 was over, is absurd. At Queen and Spadina there was live-video feed available to him as well as other commanders in the MICC. The prosecution video evidence from the scene provided clear images of the situation at the intersection. News feed was available in the MICC after it began to rain. If disbelieve Fenton's evidence that the CP24 live footage playing in the MICC was turned off at his behest. Marks remembered it was on. I find that Fenton said it was turned off because he did not want to acknowledge that he was able to see the bystanders at Queen and Spadina contained in the box formation.

[422] The MICC was also able to see the weather conditions at the intersection using other means such as a mobile camera operator. The MICC had direct radio communication with ground commanders who were able to communicate what was occurring. Fenton's evidence suggesting he did not see the activity at the intersection after the rain started lacks a ring of truth. I find that he knew the RCMP helicopter left the area because it was unsafe. I find that knew arrestees and his officers were standing in the pouring rain. I find that the rain and drop in temperature did not put a damper on his order to arrest and move prisoners to the detention facilities.

[423] It is obvious from the video evidence that the concise order Fenton made, with no caveat to use discretion, was followed. Martin suggested releasing people from the scene in small groups after paperwork was completed, Fenton balked. Into the evening, the PPC was nearing capacity and he did not authorize releases from the scene. Croome was not

taken to a TPS police division in downtown Toronto. She was taken to Scarborough. I find Fenton wanted people removed from the scene before being released, which was in keeping with his desire to clean up the streets. I find that he did not want anyone from the containment released at the scene and only did so after he was ordered to by the Chief of Police.

[424] I find Fenton chose not to take meaningful steps to provide immediate shelter or protective clothing to the arrestees at Queen and Spadina, over and above ordering a rush on buses needed to transport prisoners. He was obliged to do so as IC.

[425] A consequence of the mass arrest order at Queen and Spadina was the unlawful and unnecessary arrests of complainants including Shervin Akhavi, Lucias Duchausay, Tom Ross, Rodrigo Bravo and Sam Katz. Croome and McPherson were unlawfully and unnecessarily arrested too. I find that there is clear and convincing evidence that Fenton is guilty of committing misconduct, in charge 5, by ordering the unnecessary and unlawful exercising his power as IC to order the mass arrest of the complainants, Croome and Ms. McPherson.

## **INVESTIGATIVE DETENTION**

[426] Contrary to counsel for Fenton's submissions, I find the ancillary powers doctrine is not applicable to the issues before the Tribunal. Fenton derived his power to order the arrest of the protestors at the Novotel and Queen and Spadina from statute, not the common law.



[427] In this case, police did not detain or search protestors in furtherance of their common law duties. The mass arrest was ordered, albeit wrongly, in furtherance of police duties including preserving the peace and preventing crimes. The arrested complainants were not subject to a brief investigative detention and allowed to walk away. Police were not investigating a group of individuals in the vicinity of a reported crime, such as a call for a person with a gun at the intersection. In this case, there were mass arrests of targeting individuals based on a belief they belonged to an identifiable group – namely protestors.

[428] In *R. v. Figueiras* (2015), 124 O.R. (3d) 641(C.A.) at 208, the Court considered the common law powers of a police officer, during the G20. On his own accord, a police officer stopped a protestor and questioned him. The officer refused to allow a protestor to move south on downtown street unless he submitted to a search. The protestor was not arrested. The protestor refused to comply with the search and left the area. The Court defined the power exercised by the officer at para. 62. as follows:

The power of individual police officers to target demonstrators and, where no crime is being investigated or believed to be in progress, but with the intention of preventing crime, to require that they submit to a search if they wish to proceed on foot down a public street.

[429] The Court found that the police officer's conduct fell within the common law duty of preservation of the peace and prevent damage to persons and property. However, the Court found that the means the officer used were not rationally connected to the

performance of that duty and was not effective in accomplishing the duty. They included the stop of Mr. Figueiras on a public street because he was a protestor, demanding to search his backpack for weapons and refusing to allow him to travel in his direction of choice on a public street.

[430] The defence suggested that *Figueiras* stands for the proposition that the failure of a breach of the peace to materialize at the Novotel, or Queen and Spadina, has no bearing on whether the containment of the crowd at the Novotel was justified at common law. In *Figueiras*, accepting a breach of the peace was imminent, the Court went on to find that the police exercise of power was not in accordance with police common law duties. Further, in *Figueiras*, the police intrusion on the protestor's rights was minimal in comparison to the unlawful arrests of the individuals in this case.

#### **DETENTION AT QUEEN AND SPADINA**

[431] At Queen and Spadina, the torrential downpour and drop in temperature added to the misery of the arrestees at the intersection. Shervin Akhavi and Lucius Duchausay were soaking wet and shivering. Thompson was so concerned about the well-being of people waiting to be processed, he sought and received permission from Miles to release a handful of individuals. Miles told him to make it look like they were being arrested. For protestors and others waiting to be arrested or waiting to be relocated to a vehicle for transport, the torrential downpour and drop in temperature added to their misery. Shervin Akhavi and Duchausay were soaking wet and shivering. Thompson was so concerned

about the well-being of people waiting to be processed, he sought and received permission from Miles to release a handful of individuals.

[432] The MICC was aware of the deteriorating conditions in the MICC. I find Fenton had video-feed from the intersection was access to live news coverage at Queen and Spadina. Bedard's query, "Are you seeing what I'm seeing?" garnered no questions from the MICC. The answer was the affirmative. I find that Fenton was aware of that well-over one hundred protestors were at the intersection standing or sitting in the torrential downpour, along with police officers, trying to fill in required paperwork in the rain.

[433] Not enough was done to alleviate the conditions the arrestees and contained at Queen and Spadina, after it began to rain. Fenton did not request dispensing with any of the paperwork. He disagreed with the option of releasing small groups of individuals from the scene because he didn't want his officers chasing them all night. While he did continue to press Martin to move prisoner transport vehicles to the intersection, he allowed the arrestees to stand in the cold darkness for up to 3.5 hours. Warr became concerned when he became aware of the media coverage of the situation at Queen and Spadina, and wanted people moved from the intersection quickly. Fenton maintained that the paperwork requirement was causing the delays, yet he refused to release anyone from the scene with paperwork which may have freed up vehicles to house arrestees waiting for paperwork.

[434] Aside from Warr's intervention over an hour and a half after the rain started, I find Fenton received no direction indicating that his decision to allow protestors to stand on the pouring rain and wait to be processed was inappropriate. However, I find that having made the order, being aware of the conditions at the intersection, Fenton was obliged to both the arrestees and the police officers at the intersection to make immediate efforts to alleviate the risks to their health and safety caused by the weather conditions.

[435] I find that there is clear and convincing evidence that Fenton is guilty of charge 4, discreditable conduct. The inclement weather and the lack of adequate shelter or protective attire afforded to the arrestees, left standing in the dark, and was conduct likely to bring discredit to the reputation of TPS.

[436] I do not find that Fenton committed misconduct alleged in the particulars of charge 2 or discreditable conduct in charge 3, involving the continued detention of the arrestees at the Novotel. They were not subject to unduly harsh conditions. Further, I do not find you committed misconduct alleged in the particulars involving containing the crowd at Queen and Spadina.

## **KETTLING**

[437] The boxing in or containing a crowd by police has been described as "kettling". This is not a case about the practice of kettling. It is not illegal. Kettling is not prohibited in TPS policy and procedure. It is well-established that police containment of a crowd of protestors, with an egress route, is legal in countries such as the United Kingdom, *Austin*

*et al. v. Commissioner of Police of the Metropolis*, [2009] UKHL 5 at para. 34; *Mengesha v. Commissioner of Police of the Metropolis*, [2013] EWHC 1695 (Admin) at para. 2. In the U.K. cases, the tactic was used where a justifiable expectation of violence and disorder existed or a breach of the peace was occurring and a funnel or egress is made available.

[438] I find Fenton did not commit misconduct by kettling, as alleged in the particulars of charge 1, and 2 and 5 related to kettling of the arrestees at the Novotel or Queen and Spadina. Nor did he commit discreditable conduct particularized in charge 3 or 4 as they pertain to the kettling of the crowds. At the time that Fenton ordered the containment and boxing of the protestors at the Novotel and Queen and Spadina, there is not clear and convincing evidence kettling was an unnecessary or unlawful exercise of authority.

## **DETENTION AT THE PPC**

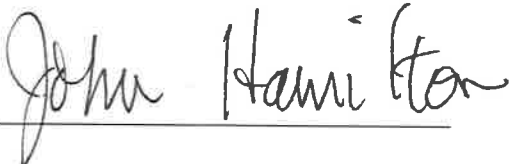
[439] The PPC was not merely a processing center. It was a detention center absent the necessary infrastructure and services to meet the basic needs of arrestees. Individuals taken to the PPC were not investigated immediately. Nathan Adler was not spoken to by an investigator until he had been at the PPC for over thirteen hours. Beatty said that he was not removed from the cage for processing until ten hours had passed. When Kamenskikh told police he did not wish to call a lawyer, he was not offered the option of contacting duty counsel. The complainants who testified about their detention at the PPC were all held there for an excessive period of time, for no good reason.

[440] Superintendent Martin was responsible for the PPC. The Commander of the PPC was a senior officer as mandated in the PPC Operational Plan. Operational control of the PPC was the responsibility of the OICs, Ferrar and Ruffolo. They were under the command of Martin and Callaghan. The processing of prisoners, including paperwork, access to counsel, and the number of individuals in a cell at any given time was under their charge. Fenton was advised of the approximate numbers of prisoners at the PPC. He was not asked for permission to lock-down the PPC, halting the movement of prisoners in and out of the center. He was told about it. When he was advised that the PPC was reaching capacity, he made arrangements for arrestees were taken elsewhere.

[445] Martin was equal in rank to Fenton. She received information about capacity at the PPC from her subordinates and conveyed it to Fenton, when necessary. Arranging for prisoner transport wagons was part and parcel of Martin's function. As the Investigative Chief, she was in-charge of investigations of the arrestees, which were conducted at the PPC.

[446] I find that Fenton there is not clear and convincing evidence that Fenton is guilty of the relevant particulars in charge 2. He did not direct the continued detention of the complainants for twenty-four hours or commit misconduct by failing to monitor their detention at the PPC.

August 25, 2105

  
Hon. John Hamilton, Q.C.