BEFORE TORONTO POLICE SERVICE

HEARING OFFICER

IN THE MATTER OF the hearings of the discipline proceedings directed to be conducted by the Office of the Independent Police Review Director ("OIPRD"), arising from allegations of misconduct by Superintendent David Mark Fenton (3535) of the Toronto Police Service during the G20 Conference in Toronto on June 26-27, 2010, and in respect of the Novotel Consolidated Complaints and Queen and Spadina Consolidated Complaints pursuant to the *Police Services Act*, RSO 1990, c P.15, as amended.

AND IN THE MATTERS OF Supt. David Mark Fenton (3535), who is a member of the Toronto Police Service in relation of whom the OIPRD has directed that hearings be held, as further particularized in the Notice of Hearing in respect of the Novotel Consolidated Complaints and Queen and Spadina Consolidated Complaints.

FACTUM OF THE INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION

May 22, 2015

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PART I: OVERVIEW

1. Policing of protest and individual rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms* are fundamental issues of our times, affecting both public safety and public expression and participation in a free and democratic society.

2. The matter before this Tribunal raises the critical issues of a police officer's actions and responsibilities and relevant *Charter* rights and freedoms, in the context of the G20 protests in Toronto in 2010, and the mass arrests and detentions of non-violent civilians. These *Charter* issues will be vital to future courts and administrative tribunals addressing the intersections of the constitutionally protected freedoms of expression and peaceful assembly; the constitutional limits of police detention and arrest powers; and the legal standard for professional and creditable conduct by a commanding officer.

3. The Canadian Civil Liberties Association ("CCLA") has been granted leave to intervene, and does so to assist this Tribunal in resolving the constitutional and legal issues raised in the discipline proceedings under the *Police Services* Act, RSO 1990, c P.15, and to provide its expertise and unique perspective on these distinct issues.

4. The CCLA takes no position on any disputed facts in this case.

PART II: QUESTIONS IN ISSUE

5. The CCLA focuses its submissions on three distinct issues raised in this matter:

   i. The CCLA argues that a commanding officer is legally responsible for *Charter* breaches when he or she orders subordinates to violate the section 2(b), 2(c) or 9 rights of individuals;

   ii. The CCLA argues that established international legal principles on command responsibility, binding upon Canada, must inform the rights, responsibilities and liabilities of a superior officer in the domestic law enforcement context; and

   iii. The CCLA argues that a commanding officer's mistake of law is no defence.

PART III: ANALYSIS

A. The indiscriminate detention or arrest of individuals attending or observing a non-violent protest violates fundamental *Charter* rights

i. Freedom of expression under section 2(b)

6. The analysis of police conduct during civilian protests mandates consideration of the constitutional protection afforded to freedom of expression. The CCLA argues that police action disrupting a non-violent protest violates the *Charter* guarantee of freedom of expression under section 2(b).

7. Canadian courts have repeatedly affirmed that the free exchange of ideas and opinions is the lifeblood of democracy. If such exchange is stifled, democratic government itself is threatened. As Cory J stated in *Edmonton Journal,* "a democracy cannot exist without [the] freedom to express new ideas and to put forward opinions about the functioning of public institutions."

Edmonton Journal v Alberta (Attorney General), [1989] 2 SCR 1326, page 1336

8. The test for identifying violations of section 2(b) was first articulated by the Supreme Court in *Irwin Toy* and reiterated in *City of Montreal*. There are three key questions:

- Does the speech or conduct at issue have expressive content that brings it within the *prima facie* protection of section 2(b)?
- If so, does the method or location of this expression remove that protection?
- If the expression is protected by section 2(b), does the government action – either in purpose or effect – place a limit on that expression?

Irwin Toy Ltd. v Quebec (Attorney General), [1989] 1 SCR 927 ("***Irwin Toy***"), page 978
Montreal (City) v 2952-1366 Quebec Inc., 2005 SCC 62 ("***City of Montreal***"), paragraph 56

9. Without question, a demonstration on public streets, timed to coincide with a gathering of world leaders, falls well within the constitutional protection extended by section 2(b). As a result, police during the G20 Summit were constitutionally required to protect, to facilitate and not to unjustifiably violate the expressive rights of protestors.

10. Indeed, the Ontario Court of Appeal recently held that one instance of police conduct during the G20 Summit unjustifiably violated a protestor's rights under section 2(b). The case involved a protestor who (along with some likeminded friends) was stopped by police in downtown Toronto on June 27, 2010. At the time, the protestor and his friends were clearly "engaged in expressive activity" – wearing T-shirts bearing slogans about animal rights, carrying a megaphone and a large placard, and handing out pamphlets. Of course, as Canadian courts have long recognized, "demonstrating is a well-established expressive activity." In *Figueiras*, the Court of Appeal explicitly added: "Demonstrating around the G20 site, including the area adjacent to the security fence, was a perfectly lawful – and indeed reasonably expected – activity."

Figueiras v Toronto (Police Services Board), 2015 ONCA 208 ("***Figueiras***"), paragraphs 69 and 71

11. The Court of Appeal in *Figueiras* concluded that the protestor's rights under the *Charter* and at common law were violated, since he was physically prevented from travelling down a public street to join a demonstration. Significantly, the Court also recognized that police misconduct may violate freedom of expression where it psychologically discourages protesters from engaging in expressive activity: "Mr. Figueiras and his friends were demonstrating in favour of animal rights when they were stopped by Sgt. Charlebois and his team... Not only was Mr. Figueiras prevented from carrying on his demonstration as intended, but he also felt sufficiently intimidated by the officers' conduct that he abandoned his demonstration altogether." In this way, unlawful and heavy-handed police conduct during demonstrations may result in negative layered obstructions of the freedom of expression: both by physically preventing individuals from voicing their message and by discouraging individuals from exercising their constitutional right to protest.

Figueiras, paragraph 67

12. *Figueiras* aligns with a long and consistent jurisprudence regarding freedom of expression. Canadian courts have consistently afforded section 2(b) extremely broad scope; "expressive activity" includes any activity that attempts to convey meaning in a non-violent form. Applying the first prong of the *Irwin Toy* test, our courts have long recognized that the *Charter* protects expressive activity in the form of protests, rallies and other public gatherings. Such expressive activity can include passing out literature, using sandwich boards or banners,

wearing distinctive clothing, chanting slogans, or merely an individual's presence at a demonstration or march, since all these activities are intended to convey meaning.

R v Sharpe, 2001 SCC 2, paragraphs 23 and 147
Weisfeld v Canada, 1994 CanLII 9276 (FCA), paragraph 30

13. Moreover, courts have noted that political speech – which is often expressed through public demonstrations – is intrinsically bound up with the values underlying section 2(b), including individual self-fulfillment, meaningful participation, and the political discourse fundamental to democracy. As the Ontario Court of Appeal has held, "the right to protest government action lies at the very core of the guarantee of freedom of expression." Just as significantly, the constitutional protection of free expression extends to unpopular, disruptive, or even offensive speech – for, as the courts have recognized, "[p]rotests are rarely polite."

Ontario Teachers' Federation v Ontario (Attorney General), 2000 CanLII 14733 (ONCA), paragraph 34
Ontario (AG) v Dieleman (1994), 20 OR (3d) 229 (Ont Gen Div), page 290

14. The Supreme Court has repeatedly found that assemblies that convey meaning in a non-violent way are protected under section 2(b). For instance, in *UFCW v Kmart Canada*, the Court struck down an injunction preventing a union from passing out leaflets at a secondary location (separate from their place of work). The Court reasoned that an injunction that extended to the peaceful distribution of leaflets was a violation of freedom of expression, and was not justified by the legislative goal of minimizing disruption to businesses. Crucial to the Court's reasoning was the absence of criminal or tortious conduct by participants in the peaceful leafleting.

UFCW v Kmart Canada, [1999] 2 SCR 1083, paragraphs 72 and 73

15. Turning to the second prong of the *Irwin Toy* test, when individuals are engaged in peaceful protest, nothing about the method or location of their expression is inconsistent with section 2(b). To the contrary, the location of many demonstrations – public streets, city parks, and other civic spaces – is particularly worthy of mention. The Supreme Court has recognized the historic and civic importance of public spaces as a venue for expression: "[T]he public square and the speakers' corner have by tradition become places of protected expression. [...] Streets are clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted." As Justice McLachlin (as she then was) explained in

Committee for the Commonwealth of Canada: "[T]he right of free speech has traditionally been associated with streets and by-ways and parks."

> *City of Montreal*, paragraphs 61 and 81
> *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 ("***Committee for the Commonwealth of Canada***"), page 449

16. City streets, the location for many protests during the Toronto G20 Summit, are critical public forums which serve as a linchpin of democratic freedoms. They offer an accessible and egalitarian venue for individuals and groups, even those with few resources, to make their voices heard. The state has a constitutional obligation to facilitate – not unreasonably suppress – protest in such venues.

17. The third stage of the *Irwin Toy* test recognizes that government action – including police conduct – may violate freedom of expression either through its intent or effects. As such, in the context of public order policing, courts and tribunals must first consider whether police conduct was expressly intended to disrupt, disperse or prevent protestors from gathering and expressing themselves. Police conduct may also violate section 2(b) where it has the effect of stymying expressive activity. This would, of course, include forcefully dispersing a peaceful protest or physically blocking individuals from joining a protest. Yet it would also include more subtle means of discouraging protestors from engaging in constitutionally-protected expression. Arbitrary detentions or arrests at a protest, particularly if these detentions or arrests specifically target protestors, would undoubtedly have the effect of restricting and chilling free expression.

> *Irwin Toy*, pages 971 and 972

ii. Freedom of peaceful assembly under section 2(c)

18. The CCLA respectfully argues that an order authorizing unlawful detentions or arrests to disrupt a non-violent protest unjustifiably violates freedom of peaceful assembly.

19. Like freedom of expression, freedom of peaceful assembly – protected under section 2(c) of the *Charter* – is a fundamental democratic right and must be interpreted purposively. Freedom of assembly protects the right of individuals to come together and exchange or voice ideas among themselves and with others. The collective expression of dissent and political or social opinions must be respected and facilitated, as a way of ensuring accountability and an ongoing public discussion on issues deemed important to members of the public. For many

Canadians, public assemblies are an important means of political participation and self-realization.

Committee for the Commonwealth of Canada, page 426, per L'Heureux-Dubé J

20. Sections 2(b) and 2(c) are interrelated, yet conceptually distinct. The *Charter* guarantee of freedom of assembly recognizes the inherently collective nature of the activity it protects: the right to gather and express opinions *in concert with others*. To quote the Ontario Court of Justice: "Freedom of expression is the larger protected right from which the freedom of assembly derives its purpose. People assemble to demonstrate and advocate views or expression. If the expression is protected, it necessarily follows that the right to assemble to communicate this expression then is also protected."

R v Behrens, [2001] OJ no 245 (OCJ), paragraph 36

21. For these reasons, Canadian courts have generally taken the same analytical approach to freedom of assembly as freedom of expression. Indeed, many courts have subsumed issues related to freedom of assembly under the section 2(b) analysis.

Figueiras, paragraph 78
British Columbia Teachers' Federation v British Columbia Public School Employers' Association, 2009 BCCA 39, leave to appeal refused, [2009] SCCA No 160

22. While there may be cases in which a different approach is warranted, for the purposes of this hearing, the CCLA would adopt the same analysis under both sections 2(b) and 2(c) in cases involving the police disruption of protests. The CCLA submits that unlawfully disrupting a non-violent assembly constitutes a *prima facie* violation of freedom of peaceful assembly.

iii. Freedom from arbitrary detention under section 9

23. Section 9 of the *Charter* protects the individual's right not to be arbitrarily detained or imprisoned. The CCLA argues that the mass detention or arrest of individuals at a protest, where there are no grounds justifying each individual detention or arrest, is unlawful and arbitrary and therefore violates section 9. This includes the indiscriminate, mass detention of protestors and bystanders alike through boxing in or "kettling" techniques.

24. Before police may lawfully conduct an arrest without a warrant, police must have "reasonable grounds" to believe the individual in question has committed or is about to commit an offence. It is settled law that the test for reasonable grounds, first articulated by the Supreme Court in *R v Storrey* and reiterated in subsequent jurisprudence, involves both subjective and objective components:

- An arresting officer must have an honest belief that the individual being arrested has committed, or is about to commit, an offence; and
- It must be objectively established that reasonable and probable grounds exist to make an arrest.

R v Storrey, [1990] 1 SCR 241 ("***Storrey***"), page 250
R v Bernshaw, [1995] 1 SCR 254, paragraph 48
R v Stillman, [1997] 1 SCR 607, paragraph 28
R v Shepherd, [2009] 2 SCR 527, paragraph 17

25. In *Storrey*, the Court emphasized that the requirement for reasonable and probable grounds is vitally important to protect the liberty of individuals. As Cory J explained: "Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state." Indeed, the requirement that the grounds be *objectively reasonable* functions as "an additional safeguard against arbitrary arrest."

Storrey, pages 249 and 250

26. Not all police detentions will be accompanied by an arrest. Detention refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. In order to conduct an investigative detention, police must have reasonable suspicion that the individual is connected to a particular crime, and that the detention is reasonably necessary on an objective view of the circumstances. In *R v Chehil* and *R v MacKenzie*, the Supreme Court clarified the meaning of "reasonable suspicion" in the context of sniffer dog searches. To establish reasonable suspicion, police must point to particularized conduct or evidence of criminal activity. Mere "hunches or intuition" will not be sufficient.

R v Mann, 2004 SCC 52 ("***Mann***")
R v Chehil, 2013 SCC 49, paragraph 43
R v MacKenzie, 2013 SCC 50

27. The Supreme Court has recognized that an individual may be detained by police even where his or her liberty is not physically constrained. Psychological detention is established where a reasonable person would conclude that his only option was to comply with a restrictive request or demand. In other words, police conduct that effectively signals to individuals that they are not free to go will constitute detention, and must be grounded in reasonable suspicion.

R v Grant, 2009 SCC 32, paragraph 33

28. The section 9 right to be free from arbitrary detention mandates that preventive detentions or arrests must meet a stringent standard. The CCLA submits that, in order for reasonable grounds to exist justifying a warrantless detention or arrest, a specific risk to public safety must be identified. The *Charter* most emphatically does not authorize indiscriminate restrictions on liberty targeted at a wide swath of individuals in the name of crime prevention.

29. The power to restrict a person's liberty for the *prevention of crime* – as opposed to the investigation of a specific offence – must be narrowly construed. In *Brown v Durham*, the Ontario Court of Appeal addressed the limitations on the police power to effect *preventive* detentions or arrests. The case involved a police roadblock near the gathering point of a motorcycle club believed to be involved in wide-scale criminal activities. Doherty JA identified the power claimed by the Durham police as "to arrest or detain a person *who is about to commit* a breach of the peace."

Brown v Durham (Regional Municipality) Police Force, [1998] OJ No 5274 (ONCA) ("***Brown v Durham***")

30. Doherty JA outlined two crucial limitations on the police power to detain or arrest, in order to prevent an apprehended breach of the peace: "The apprehended breach must be imminent and the risk that the breach will occur must be substantial. The mere possibility of some unspecified breach at some unknown point in time will not suffice." These two crucial requirements – imminence and substantial risk – are vital to ensure that the police power to effect preventive detentions or arrests is not abused.

31. The imminence requirement bears close analysis. As Doherty JA observed, the police power to conduct arrests or detentions, in order to prevent breaches of the peace, is not "meant as a mechanism whereby the police can control and monitor on an ongoing basis the comings and goings of those they regard as dangerous and prone to criminal activity." A "generalized apprehension" of a potential breach will be insufficient. Without this criterion, police checkpoints

could be set up in any crime-ridden street corner where, it could be said, harm would be certain to result to someone at some point.

32. Indeed, in *Figueiras*, the Court of Appeal discussed the imminence requirement specifically in the context of G20 policing:

> In the present case, the application judge found that there was an "imminent" threat of a repeat of the previous day's violence and that it was the duty of the police deployed that day to prevent it. While I accept that finding for the purpose of this appeal, I note that the application judge's definition of "imminent" would appear to be more generous than the one this court adopted in *Brown*. Although there was a legitimate concern that the previous day's breaches of the peace would be repeated, there were no indications that any breach of the peace was ongoing or imminent in the area of King and University.
>
> *Figueiras*, paragraph 97, emphasis added

33. Turning to the second *Brown v Durham* criterion, it is clear that preventive powers only adhere where there is a *substantial risk* that an apprehended breach will occur. Again, this criterion guards against the dangers of an overly elastic expansion of police powers – the breach may, if it will occur at all, be imminent, but the risk may be so low that infringements of civil liberties cannot be constitutionally justified. Consider, for instance, the case of a wholly unreliable tip that a serious public disturbance will imminently occur. Surely, the barest of risks would not justify a sweeping restriction on individual liberty in that area.

34. In the case of mass arrests, the CCLA submits that the *Brown v Durham* standard must be met for every individual detention or arrest. In the context of policing protests, a generalized concern that a public disturbance may arise cannot justify the preventive detention or arrest of large, undifferentiated groups of protestors and bystanders. As the Court of Appeal held in *Brown v Durham*: "[T]he police officer must have reasonable grounds for believing that the anticipated conduct... will likely occur if the person is not detained." For instance, in *Figueiras*, the Court of Appeal, applying *Brown*, found that the detention of *Figueiras* and his friends was insufficiently particularized because it involved stopping activists and demonstrators on the basis of generalized "lifestyle" concerns and then searching them with or without "particularized grounds to justify a search." The Court of Appeal reasoned that the target group for the stop and search—which was restricted to activists and demonstrators and did not include observers or bystanders—was too broad and amorphous to authorize the detention of Mr. Figuerias and his friends.

Brown v Durham, page 249
Figueiras, paragraphs 127-132

35. The requirement that the apprehended threat to public safety be concrete and specific is a common thread running through the Supreme Court's *Charter* decisions delineating common law police powers. In *Mann*, the Court concluded that an investigative detention requires reasonable grounds to support "the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence." Any accompanying search "cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition."

Mann, paragraph 40

36. Whether an officer has reasonable grounds to order detentions and arrests requires a fact-sensitive inquiry into the circumstances and the information available to the officer. Reasonable grounds must always be assessed in light of the totality of circumstances. In evaluating the sufficiency of information for establishing reasonable grounds, the Supreme Court has emphasized three separate factors:

> First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? Each factor does not form a separate test. Rather, it is the "totality of the circumstances" that must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two.

While information provided by a credible source, such as information provided directly by a police officer or police department, can be a positive factor in establishing reasonable grounds, it is not always dispositive. Even information that is provided by a police officer or police department can be discounted if it is insufficiently compelling or corroborated, such as if it is unclear, lacks detail, or is "based on mere rumour or gossip." Conflicting or contradictory evidence should be viewed as less reliable than evidence that presents a coherent account, and contradictory information from a single source should discredit the source of the information.

R v Debot, [1989] 2 SCR 1140, page 215
R v McComber, 29 OAC 311, paragraph 12
R v Shepherd, [2009] 2 SCR 527, paragraph 17 and 21
R v Smellie, [1994] BCJ No 2850, paragraph 26
R v Bernabe, 2014 ONCJ 628, paragraphs

37. Whether a duty to corroborate exists is always a fact-based exercise dependent upon all the circumstances of the case and the totality of the circumstances. An officer must take into account all available information and can disregard information only if he or she has good reason to believe the information is unreliable. Conflicting or unreliable information can trigger a duty to verify or corroborate information prior to making a detention or arrest. The need for verification or corroboration is higher where police rely on information whose credibility cannot be assessed or when an informant provides fewer details and the risk of innocent coincidence is greater. Moreover, the need to seek corroborating information confirming the reliability of a source is higher in the context of secondhand information as compared to a police officer making a detention or arrest based upon a complaint from a witness who can be questioned directly.

Storrey, pages 250-51
R v Debot, [1989] 2 SCR 1140, paragraphs 60 and 70
R v Golub, [1997] O.J. No. 3097 (C.A.), paragraph 19

38. Finally, a superior officer's order to a subordinate to make an arrest or series of arrests does not absolve the superior officer's duty to investigate when the superior is aware or should be aware of circumstances that require further investigation. As stated by the Ontario Court of Appeal in *R v Debot*, an officer may be "entitled to rely upon a request of his superior officer [to search or arrest]... provided that the superior officer had reasonable grounds" to order the search or arrest. Thus, a superior officer has a persistent duty to abide by the *Charter* when ordering an arrest or detention; a superior officer must ensure that their orders meet the test of reasonable grounds dictated by section 9 of the *Charter*.

R v Debot, [1986] OJ No 994, paragraph 25

iv. The indiscriminate and arbitrary exercise of police powers during protests cannot be saved under section 1

39. The CCLA respectfully argues that an order authorizing mass detentions or arrests to disrupt a peaceful protest, where there are no particularized grounds justifying the detention or arrest of each individual affected, cannot be saved by section 1 of the *Charter*. The justification analysis under section 1 requires government action to have a pressing and substantial objective. Most significantly, the means chosen to achieve that objective must be rationally connected, minimally intrusive and proportionate. Arbitrary, indiscriminate arrests and detentions will, by definition, fail to be rationally connected to the objective of securing public safety – nor will they be minimally intrusive or proportionate.

B. Command responsibility

40. The CCLA respectfully argues that a superior can be held responsible for *Charter* breaches of subordinate officers when (a) he gives orders to breach the *Charter* rights of civilians or (b) where he knew or consciously disregarded information that his orders would cause subordinates to breach the *Charter* rights of the civilians, and the commanding officer took no steps to prevent, suppress or report and prosecute the offences of his subordinates.

41. With respect to the first form of legal responsibility, the CCLA argues that liability attaches to the willful issuing of unlawful commands in breach of *Charter* rights. Police officers are liable for a constitutional tort, in violation of *Charter* rights, when there is "wilfulness or *mala fides* in the creation of a risk or course of conduct that leads to damages." Moreover, it is a well settled principle of Canadian law that superior officers are legally responsible and can be civilly liable for unlawful orders. As a general rule, superior servants of the Crown are not vicariously liable for tortious conduct of subordinate servants of the Crown since both are properly servants of the Crown. However, as Peter Hogg notes in *Liability of the Crown*, a superior servant – such as a commanding officer – is legally responsible if the superior servant orders the commission of a tort, because in such cases "the superior [is] directly liable for his or her own act". It follows that liability of law enforcement officials extends to conduct that directly causes *Charter* violations, including orders to breach the *Charter* rights of civilians.

Ferri v Root, 2007 ONCA 79, paragraph 108

Geoffrey Creighton, "Superior Orders and Command Responsibility in Canadian Criminal Law" (1980) 38 UT Fac L Rev 1 at 20

Peter W Hogg, Patrick J Monahan & Wade K Wright, Liability of the Crown, 4th ed (Toronto: Thomson Reuters Canada Limited, 2011) at 276

42. For instance, in *Phillips v Nagy*, the Alberta Court of Appeal upheld an award of damages, including punitive damages, against Staff Sergeant James Kirk, a police officer with the Edmonton Police Services, for authorizing unlawful searches and false imprisonment. Although Kirk did not conduct the search or imprisonment personally, he was held liable as "supervisor of police operations on the day in question, [who] was responsible for all actions taken by members of the Edmonton Police Service in their dealings with" the plaintiff.

Phillips v Nagy, 2006 ABCA 227, paragraph 55

43. Several U.S. appellate courts have also found supervisors directly liable for unconstitutional commands or their unconstitutional participation in the conduct of their subordinates. In *Larez v City of Los Angeles, et al*, the Ninth Circuit upheld a jury's verdict finding LAPD Chief Gates liable in his individual capacity for constitutional injuries resulting from excessive use of force and for the constitutional infringement of the plaintiff's First Amendment rights of free speech and free association. The court reasoned that although a '"supervisor will rarely be directly and personally involved in the same way as individual officers who are on the scene inflicting constitutional injury", they are not shielded from individual liability, as their "participation may involve the setting in motion of acts which cause others to inflict constitutional injury". In this case, Chief Gates was found to have "condoned, ratified, and encouraged the use of excessive force and failed to sustain complaints and discipline the officers for beating up a family".

Larez v City of Los Angeles, et al, 946 F (2d) 630 (9th Cir 1991) at para 76
L. Cary Unkelbach, "Chief's Counsel: Beware: Supervisor Individual Liability in Civil Rights Cases" The Police Chief (July 2005), online: The Police Chief Magazine <http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=648&issue_id=72005>

44. Similarly, in *Gutierrez-Rodriguez v Cartagena, et al*, the First Circuit found an on-scene supervisor liable for participating in his subordinates' constitutional violation of deprivation of liberty without due process of law. The Court argued that the supervisor "directed and participated in the acts that led to the shooting" of the plaintiff, who, as a result, became a paraplegic, even though the supervisor did not shoot the plaintiff or order the shooting. In finding

the supervisor to be a participant in the constitutional violation, the court reasoned that every complaint was directed to the supervisor, and the supervisor had sole authority to discipline officers on site; his failure to reprimand officers, despite receiving multiple complaints, led to a finding that he was "affirmatively linked to the shooting", a link that was buttressed by "his employment of a disciplinary system that was grossly deficient in a number of significant areas".

Gutierrez-Rodriguez v Cartagena, et al, 882 F (2d) 553 (1st Cir 1989) at para 45 and 105

45. With respect to the second form of legal responsibility, the CCLA argues that the international law of command responsibility – which Canada has affirmed in the crimes against humanity and war crimes context and indeed took a leadership position in upholding on the international stage during the Rome Conference – logically extends to domestic law enforcement scenarios regarding superior and subordinate officers.

46. The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, has made the need to make domestic law enforcement liable for subordinate actions explicit:

> Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), article 24

47. Canada has expressly incorporated command responsibility for military and non-military commanders into its criminal law via its implementation of the *Rome Statute of the International Criminal Court*. As a signatory to the *Rome Statute of the International Criminal Court*, Canada has committed itself, and voluntarily assumed binding legal obligations, with respect to command responsibility in the crimes against humanity and war crimes context. The *Crimes Against Humanity and War Crimes Act*, implementing and codifying the *Rome Statute*, defines the criminal offence of breach of responsibility of a superior:

> (2) A superior commits an indictable offence if
>
> (*a*) the superior

> (i) fails to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 4 [crimes against humanity or war crimes within Canada], or
>
> (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 6 [crimes against humanity or war crimes outside of Canada];
>
> (*b*) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person;
>
> (*c*) the offence relates to activities for which the superior has effective authority and control; and
>
> (*d*) the superior subsequently
>
> (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
>
> (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

As the above passage makes clear, there are three basic elements to command responsibility: an effective superior-subordinate relationship; a *mens rea* of knowledge or conscious disregard of information that at least one subordinate committed or was about to commit unlawful acts; and a failure to take necessary and reasonable measures to prevent, suppress or report and prosecute such acts. A commanding officer cannot absolve himself or herself of command responsibility by engaging in willful blindness. If an officer is willfully blind as to the actions of his subordinates, he will satisfy the *mens rea* of knowledge.

> *Rome Statute of the International Criminal Court*, UN Doc A/CONF 183/9
>
> *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24
>
> Jamie Allan Williamson, "Some considerations on command responsibility and criminal liability" (2008) 90:870 *Int'l Rev Red Cross* 303, page 308
>
> *R v Briscoe*, 2010 SCC 13 at para 21

48. An extension of command responsibility to domestic police services is of pressing concern. There are several reasons to ensure that command responsibility is available in cases of police misconduct. First and foremost, command responsibility helps ensure the integrity of, and public confidence in, law enforcement agencies by ensuring that police superiors set model

practices for subordinate officers and by ensuring that police superiors take an active role in regulating the attitudes and conduct of the rank and file. Second, a robust regime of command responsibility ensures an efficient and effective means of instilling *Charter*-compliant conduct within a police force by disciplining officers who give illegal orders or tolerate illegal practices. Finally, command responsibility serves as a deterrent to superior officers who might contemplate scapegoating subordinate officers in an attempt to escape liability for unlawful conduct. These principles are consistent with those underlying s. 24(2) of the Charter, which seeks to ensure that the administration of justice is not brought into disrepute by the conduct of the state.

> Geoffrey Creighton, "Superior Orders and Command Responsibility in Canadian Criminal Law" (1980) 38 UT Fac L Rev 1 at 20-22
> Jamie Allan Williamson, "Some considerations on command responsibility and criminal liability" (2008) 90:870 Int'l Rev Red Cross 303 at 312
> *R v Grant*, 2009 SCC 32, at para 67-71

C. Mistake of law is no defence to unconstitutional arrests

49. The CCLA argues that a mistake of law is no defence to a misconduct charge stemming from orders authorizing unconstitutional arrests.

50. It is well established that an order to arrest without warrant or to arrest for breach of the peace requires reasonable grounds. An order to a subordinate is reasonable if it meets both the subjective and objective prongs of reasonable grounds: an honest belief that the particular individuals being detained or arrested have committed, or are about to commit, an offence or breach of the peace; and objectively reasonable grounds to support this subjective belief.

51. An order to arrest without warrant or to arrest for breach of the peace that is based upon a mistake of law is, by definition, objectively unreasonable. A reasonable person in the position of a superior officer would not order an arbitrary arrest. As Geoffrey Creighton argues, law enforcement officers or superiors "must be presumed by their extensive training to know what is or is not an illegal police practice". For this reason, an order that is based upon a mistake of the law of arrest necessarily fails to meet the second prong of the test for reasonable grounds.

> Geoffrey Creighton, "Superior Orders and Command Responsibility in Canadian Criminal Law" (1980) 38 UT Faculty L Rev 1, page 31

52. Whether an officer committed *Charter* violations or police misconduct are distinct inquiries. However, the CCLA respectfully argues that an arrest that does not meet the constitutional requirement of reasonable grounds is misconduct under the Code of Conduct found in Ontario Regulation 123/98 of the *Police Services Act* RSO 1990, c P15. Under the Code of Conduct, a police officer commits the misconduct offence of "Unlawful or Unnecessary Exercise of Authority" if he or she "without good and sufficient case makes an unlawful or unnecessary arrest". For instance, in *Wowchuk v Thunder Bay Police Service*, the Ontario Civilian Police Commission found that an arrest made without reasonable grounds was made "without good and sufficient cause", and that good intentions or good faith could not cure an arrest made without reasonable grounds.

> *Police Services Act*, General, O Reg 268/10, Section 2(1)(g)(i)
> *Wowchuk v Thunder Bay Police Serves*, OCPC #13-11, paragraphs 74 - 84

53. The CCLA respectfully submits that an arrest made or ordered with good and sufficient cause must always meet the constitutional standard of reasonable grounds. For this reason, an error of law with respect to arrest is not a defence to a misconduct charge under section 2(1)(g)(i) of the *Code of Conduct*.

PART IV: SUBMISSIONS AS TO COSTS

54. The CCLA does not seek any costs and asks that no costs be awarded against it.

PART V: ORDER REQUESTED

55. The CCLA respectfully requests leave to present oral argument at the hearing of this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 22, 2015

Paul J.J. Cavalluzzo (Counsel for CCLA - Novotel)

Sean Dewart (Counsel for CCLA - Queen and Spadina)

LIST OF AUTHORITIES

1. *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, page 1336
2. *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 ("***Irwin Toy***"), pages 971, 972, and 978
3. *Montreal (City) v 2952-1366 Quebec Inc.*, 2005 SCC 62 ("***City of Montreal***"), paragraph 56
4. *Figueiras v Toronto (Police Services Board)*, 2015 ONCA 208 ("***Figueiras***"), paragraphs 67, 69, 71, 78 and 97
5. *R v Sharpe*, 2001 SCC 2, paragraphs 23 and 147
6. *Weisfeld v Canada*, 1994 CanLII 9276 (FCA), paragraph 30
7. *Ontario Teachers' Federation v Ontario (Attorney General)*, 2000 CanLII 14733 (ONCA), paragraph 34
8. *Ontario (AG) v Dieleman* (1994), 20 OR (3d) 229 (Ont Gen Div), page 290
9. *UFCW v Kmart Canada*, [1999] 2 SCR 1083, paragraphs 72 and 73
10. *City of Montreal*, paragraphs 61 and 81 *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 ("***Committee for the Commonwealth of Canada***"), page 449
11. *R v Behrens*, [2001] OJ no 245 (OCJ), paragraph 36
12. *British Columbia Teachers' Federation v British Columbia Public School Employers' Association*, 2009 BCCA 39, leave to appeal refused, [2009] SCCA No 160
13. *R v Storrey*, [1990] 1 SCR 241 at paras 16 and 17
14. *R v Bernshaw*, [1995] 1 SCR 254 at para 48
15. *R v Stillman*, [1997] 1 SCR 607 at para 28

16. *R v Shepherd*, [2009] 2 SCR 527 at para 17

17. *R v Mann*, 2004 SCC 52 at para 40

18. *R v Chehil*, 2013 SCC 49

19. *R v MacKenzie*, 2013 SCC 50

20. *R v Grant*, 2009 SCC 32, paragraph 33

21. *Brown v Durham (Regional Municipality) Police Force,* [1998] OJ No 5274 (ONCA) ("***Brown v Durham***"), page 249

22. *R v McComber*, 29 OAC 311, paragraph 12

23. *Her Majesty the Queen v Crooke*, 2012 ONSC 5923, paragraph 26

24. *R v Smellie*, [1994] BCJ No 2850, paragraph 26

25. R v Debot, [1989] 2 SCR 1140, paragraph 60

26. R v Golub, [1997] O.J. No. 3097 (C.A.), paragraph 19

27. R v Debot, [1986] OJ No 994 at para 25

28. Jamie Allan Williamson, "Some considerations on command responsibility and criminal liability" (2008) 90:870 Int'l Rev Red Cross 303 at 308

29. *Ferri v Root*, 2007 ONCA 79, paragraph 108

30. Geoffrey Creighton, "Superior Orders and Command Responsibility in Canadian Criminal Law" (1980) 38 UT Fac L Rev 1 at 20-22 and 31

31. Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Thomson Reuters Canada Limited, 2011) at 276

32. *Phillips v Nagy*, 2006 ABCA 227 at para 55

33. *Larez v City of Los Angeles*, et al, 946 F (2d) 630 (9th Cir 1991) at para 76

34. L. Cary Unkelbach, "Chief's Counsel: Beware: Supervisor Individual Liability in Civil Rights Cases" *The Police Chief* (July 2005), online: The Police Chief Magazine <http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=648&issue_id=72005>

35. *Gutierrez-Rodriguez v Cartagena, et al,* 882 F (2d) 553 (1st Cir 1989) at para 45 and 105

36. *R v Briscoe*, 2010 SCC 13 at para 21

37. UNHR, Office of the High Commissioner for Human Rights, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (September 1990)

38. *Wowchuk v Thunder Bay Police Serves*, OCPC #13-11 at paras 74 - 84

LIST OF STATUTES AND TREATIES

1. The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11
2. Police Services Act, General, O Reg 268/10, Section 2(1)(g)(i)
3. *Rome Statute of the International Criminal Court*, UN Doc A/CONF 183/9*
4. *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24