



ONTARIO CIVILIAN POLICE COMMISSION

DATE: By Written Submissions
FILE: ONCPC-16-03
CASE NAME: Michael Adams, David Donaldson, Geoffrey Fardell, Oliver Simpson and Adam Nobody and Toronto Police Service

In the Matter of an Appeal Under Section 87 (1) of the Police Services Act, R.S.O. 1990, c. P.15, as amended

BETWEEN:

POLICE CONSTABLE MICHAEL ADAMS #10086,
POLICE CONSTABLE DAVID DONALDSON # 10120,
POLICE CONSTABLE GEOFFREY FARDELL #9652,
POLICE CONSTABLE OLIVER SIMPSON #9878

Moving Parties

-and-

ADAM NOBODY and TORONTO POLICE SERVICE

Responding Parties

-and-

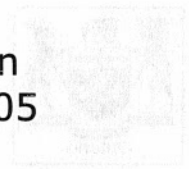
Office of the Independent Police Review Director

Intervener

DECISION

Panel: D. Stephen Jovanovic, Associate Chair

Hearing Location: Ontario Civilian Police Commission
250 Dundas Street West, Suite 605
Toronto, ON M7A 2T3



Written Submissions:

Lawrence Gridin and Deepa Negandhi, Counsel for the Moving Parties

Julian N. Falconer and Marc E. Gibson, Counsel for the
Responding Party, Adam Nobody

Sharon Wilmot, Counsel for the Responding Party, Toronto Police
Service

Miriam Saksznajder, Counsel for the Intervener

A. Introduction

1. This Decision arises from a Motion brought by the Moving Parties for:
 - i) An Order dismissing the Appeal of the Complainant, Adam Nobody, for failure to serve a Notice of Appeal within thirty days as required by section 87(1) of the *Police Services Act*, R.S.O. 1990, c.P.15 (the Act);

B. Ruling

2. For the reasons that follow, it is ordered that:
 - i) The Appeal is dismissed as being untimely.

C. Background

3. By way of a decision dated May 28, 2015, Justice Cunningham, in his capacity as an Adjudicator of the Toronto Police Service Disciplinary Tribunal, dismissed charges of misconduct brought under the *Act* against the four officers who are the Moving Parties, arising from their alleged conduct during the G-20 Summit.
4. All parties received Justice Cunningham's decision by e-mail on June 1, 2015. The Appellant's Notice of Appeal was received by the Commission by fax, on July 2, 2015.
5. Section 87(1) of the *Act* reads as follows:
 - (1) A police officer or complainant, if any, may, within thirty days of receiving Notice of the decision made after a hearing held under subsection 66(3), 68(5) or 76(9) by the Chief of Police, or under subsection 69(8) or 77(7) by the Board, appeal the decision to the Commission by serving on the Commission a written notice stating the grounds on which the Appeal is based.
6. The issues on this Motion are essentially twofold. First, was the Notice of Appeal served within thirty days, and second, if not, does the Commission have the authority or jurisdiction to extend the time for service on it of the Notice of Appeal.

D. Reasons

7. Service of a document is governed by the Commission's *Rules of Practice* and the *Act*. The Notice of Appeal was served by fax on the Commission at approximately 4:30 p.m. Rule 9.3(c) provides that service of a document is deemed to be effective, if by fax, if received on the day the document was faxed and on the next day if received after 4:00 p.m.
8. On a strict application of this rule, the Notice of Appeal would be deemed to have been received on July 3rd, which the parties agree is thirty-one days after the decision of Justice Cunningham was received. If this rule alone governs service of a document, the Commission, in all likelihood, would have, at the request of the Appellant, exercised its discretion under Rule 3.4, which provides that the Commission may, at any time, waive or vary any of the rules, including time limits, as the Commission considers appropriate.
9. The complication in this matter arises from subsections 96(1) and (2) of the *Act*, which read as follows:

96(1) Where a notice, referral, request or other document is required to be given to or served on a person or body under this Part, it may be given or served personally, by mail, by fax or other electronic

transmission, or by some other method that allows proof of receipt.

96(2) A notice, referral, request or other document is deemed to be received by the person or body as follows, unless the person or body establishes that the person or body did not, acting in good faith, through absence, accident, illness or other cause, beyond the person's or body's control, receive the notice as deemed:

1. In the case of mail, on the fifth day after the document is mailed;
2. In the case of fax or other electronic transmission, on the day after the document is sent, or, if that day is a Saturday or a holiday, on the next day that is not a Saturday or a holiday.

10. The Moving Parties submit that on a plain reading of section 96(2) the Notice of Appeal was "deemed" to have been received on July 3rd notwithstanding the fact that it was physically at the Commission's Office after a faxed transmission on July 2nd.

11. The Appellant submits that the structure of section 96 is such that subsection (1) applies exclusively to the serving party, while subsection (2) applies exclusively to the receiving party. He further submits that section 96(2) does not address the timing of effective service for the purposes of the serving party. It only addresses the

commencement of any obligations on the recipient that are the consequence of effective service.

12. The Appellant further submits, in essence, that because the Commission's administrative staff "accepted" service of the Notice of Appeal on July 2, 2015, that is the effective date of service rather than the deemed date prescribed by section 96 (2).
13. The Independent Police Review Director and the Toronto Police Service take no position on the Motion or the Order requested.
14. The Moving Parties rely, in particular, on two previous decisions of the Commission, which they submit are virtually identical to this matter. In Orr v. York Regional Police Service, OCCPS, June 29, 2001, the decision being appealed was received by the Appellant on September 22, 2000. The Appellant had thirty days under the then section 70(1) of the *Act* to serve the Commission with a Notice of Appeal, which would have been with the 30th day being October 23, 2000.
15. The Notice of Appeal was faxed to the Commission on October 23, 2000. Section 77(3) of the *Act* at that time stated:

77(3) Service by electronic transmission or by telephone transmission of a facsimile shall be deemed to be received by the person, Board or Commission **on the day after it is sent** [emphasis added], or, if that day is a Saturday or holiday, on

the next day that is not a Saturday or holiday, unless the person, Board or Commission establishes that the person, Board or Commission did not, acting in good faith, through absence, accident, illness or other cause beyond the person's, Board's or Commission's control, receive the notice on that day.

16. The Commission applied this section holding that the Notice of Appeal was therefore served on October 24, 2000, one day beyond the thirty-day Appeal period. The Commission also decided that it did not have inherent jurisdiction to extend or vary time periods set out in the *Act*, nor could its rules be used to, in effect, amend the *Act*.
17. The second decision is *Borda v. Waterloo Regional Police Service, OCPC, October 7, 2014*. There, the Notice of Appeal was filed by fax with the Commission on January 8, 2013 with the Appellant having received the decision under Appeal on December 9, 2013 [incorrectly stated as 2014]. The Commission applied section 96(2)2 of the *Act*, held that the Notice was therefore received on January 9, 2014, one day beyond the thirty day timeline, and accordingly, dismissed the Appeal.
18. The Commission also held that it had "no authority to extend delays or to waive or amend time periods set out in the *Act*" and that statement is not disputed.

19. The interpretation by the Commission of section 96(2) and its predecessor section may produce a result that appears to be unfair or even illogical in the circumstances of this matter. Nevertheless, no jurisprudence has been provided by the Appellant that would lead to a different result. The word "deemed" may mean "determinative" or "conclusive" or unless proved otherwise. No particular legal definition was proposed by the Appellant.

20. One purpose that can be ascribed to section 96 (2) is to provide some certainty as to the date of service. For example, if a person actually receives a document, which was served by mail, on the second, third, or fourth day following mailing what is the date that triggers that person's obligation to take whatever steps are required? Section 96(2) provides that the time for that person to take such steps would not begin on the day the document was actually received but on the fifth day after mailing, thereby creating some necessary certainty.

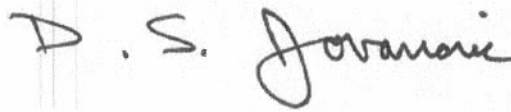
21. As indicated above, the Appellant also submitted that because the Commission's administrative staff "accepted" the Notice of Appeal on July 2, 2015, that act somehow overrides the deemed service section of the Act. No authority has been cited for this submission. If the Commission does not have the authority to extend the time for Appeal, neither does the administrative staff.

E. Decision

22. The Commission therefore orders:

- i) The Appeal is dismissed as being untimely.

DATED AT TORONTO THIS 4th DAY OF FEBRUARY, 2016



D. Stephen Jovanovic
Associate Chair

