**CITATION:** Correa v. Ontario Civilian Police Commission, 2020 ONSC 133
**DIVISIONAL COURT FILE NO.:** 79/18
**DATE:** 20200203

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**
**DIVISIONAL COURT**

**Swinton, Lococo and Myers JJ.**

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|---|---|
| **BETWEEN:** | |
| IRWIN CORREA<br>Applicant | *Joseph Wilkinson*, for the Applicant |
| **– and –** | |
| THE ONTARIO CIVILIAN POLICE COMMISSION, OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR, TORONTO POLICE SERVICE and DANIEL ADAM MacISAAC<br>Respondents | *Matthew Peachey and Eli Fellman*, for the Ontario Civilian Police Commission<br>*Scott Childs and Pamela Stephenson Welch,* for the Office of the Independent Police Review Director<br>*Alexandra D. Ciobotaru*, for the Toronto Police Service<br>*Janani Shanmuganathan*, for Daniel Adam MacIsaac |
| | **HEARD at Toronto:** December 3, 2019; written submissions January 20 and 30, 2020 |

**Swinton J.**

**Overview**

[1] Irwin Correa, an officer in the Toronto Police Service ("TPS"), has brought an application for judicial review of a decision of the Ontario Civilian Police Commission (the "Commission") dated January 18, 2018. The Commission upheld one finding of misconduct by a Hearing Officer based on the unlawful arrest of the respondent Daniel MacIsaac in June 2010 during events surrounding the meeting of the G20 in Toronto.

[2] At issue in this application is whether the Commission erred in upholding this finding of misconduct despite the quality of the reasons of the Hearing Officer. Essentially, the applicant argues that the reasons were inadequate, and consequently, the Commission should not have upheld the one finding of misconduct. He also argues that the finding of misconduct was unreasonable.

[3] I would dismiss the application for judicial review. In my view, the standard of review in this application is reasonableness, and the applicant has not demonstrated that the Commission's decision was unreasonable, given the evidence and the applicable legal provision.

**The Statutory Framework**

[4] Pursuant to s. 80(1)(a) of the *Police Services Act*, R.S.O. 1990, c. P.15 (the "Act"), a police officer is guilty of misconduct if he or she commits an offence described in a prescribed code of conduct. Subsection 2(1) of the *Code of Conduct*, being the Schedule to O. Reg. 268/10, sets out acts of misconduct including paragraph (g):

> UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY, in that he or she,
>
> (i) without good and sufficient cause makes an unlawful arrest or unnecessary arrest,
>
> ...

[5] An officer like the applicant, who has been charged with misconduct, first has a hearing before a Hearing Officer, in this case a retired judge of the Ontario Court of Justice. He or she then has a right of appeal to the Commission from a finding of misconduct (Act, s. 87). Pursuant s. 87(8)(a), the Commission, on appeal, may confirm, vary or revoke the decision being made.

[6] There is no further right of appeal from the Commission's decision. As a result, the applicant must challenge the Commission's decision by way of an application for judicial review.

**Factual Background**

[7] Daniel MacIsaac was arrested by the applicant on Sunday, June 27, 2010 in the area of Bloor and St. Thomas Streets in Toronto. The applicant was the arresting officer. He was assisted by four other officers, who were also the subject of discipline. Mr. MacIsaac was arrested for obstruction of justice, breach of the peace, and causing a disturbance.

[8] Mr. MacIsaac is an independent videographer. On that day, he carried a pass from the "Alternative Media Centre." He was taking videos of police and citizen interactions that morning. His interchanges with the disciplined officers just prior to his arrest were captured on a video made by Mr. MacIsaac on his camcorder, as well as by another individual on her cell phone.

[9] A description of events is found in paragraphs 9 to 13 of the Commission's reasons (reported at 2018 ONCPC2 (CanLII)), which I quote:

> [9] Mr. MacIssac [*sic*] had received credentials from the Alternative Media Centre (the AMC) described by the Hearing Officer as an organization of "amateur

journalists and photographers who had an interest in covering the non-official and informal parts of the G20 meeting". As a member, Mr. MacIssac was given an AMC identification card with his photograph attached.

[10] Upon arriving at the intersection, Mr. MacIssac began to record an officer who was taking notes while interviewing "Juan". The recording shows Cst. Correa asking Mr. MacIssac to move away from the officer for safety reasons and Mr. MacIssac did so without incident. Mr. MacIssac then asked Cst. Correa to retrieve his bag which had been left on the sidewalk near "Juan". Cst. Correa did as he was asked.

[11] Cst. Arcand then approached Mr. MacIssac asking him to produce identification which he refused to do indicating that he was aware of his rights and asking why he had to show any identification. Cst. Luburd [*sic*] arrived a few moments later, questioned Mr. MacIssac about the AMC, then grabbed the AMC card and moved towards a nearby cruiser apparently to check the validity of the identification.

[12] The Hearing Officer did not accept Cst. Liburd's evidence that he thought he had Mr. MacIssac's consent to remove the AMC card as the recording clearly showed otherwise. Mr. MacIssac began to follow Cst. Liburd onto to [*sic*] Bloor Street but was ordered by Cst. Correa to get back onto the sidewalk. Sgt. Rose is then shown on the recording seemingly trying to grab Mr. MacIssac's recorder. Within seconds, Csts. Arcand and Correa as well as Sgt. Rose take Mr. MacIssac to the ground where he is eventually handcuffed by Sgt. Rose. The arrest is not clearly seen on the recordings.

[13] Following the takedown, Mr. MacIssac was arrested and charged with Breach of the Peace, Obstruct Police and Cause Disturbance .....

[10] The officers were charged with misconduct in connection with the arrest. A four-day hearing was held before the Hearing Officer in September 2014. At the hearing, the officers conceded that there had been no grounds to arrest for obstruction of justice.

[11] The Hearing Officer released his decision on June 17, 2015. He found the applicant and two other officers guilty of misconduct by making an unlawful arrest and using unnecessary force against a prisoner. He found two other officers guilty of discreditable conduct.

**The Commission's Decision**

[12] All of the officers appealed to the Commission, which allowed the appeals of the other four officers, as well as the applicant's appeal with respect to the charge of unnecessary force. The Commission did so because of the inadequacy of the reasons of the Hearing Officer. For example, with respect to the two officers who assisted the applicant in the arrest, the Commission set aside the finding of unlawful arrest because of the Hearing Officer's failure to make findings respecting what they saw or their knowledge (Reasons, para. 44).

[13] The Commission also pointed out that there was conflicting evidence respecting the allegation of the use of unnecessary force, yet the Hearing Officer failed to analyze the evidence and come to a conclusion about whether the grounding of Mr. MacIsaac was accidental or deliberate. Therefore, the convictions for unnecessary use of force could not stand (Reasons, para. 45).

[14] With respect to Constables Fuller and Liburd, the charge of discreditable conduct was set aside because there was no analysis of the basis for the finding of discreditable conduct (Reasons, paras. 48 and 49).

[15] However, the Commission upheld the finding of misconduct against the applicant based on unlawful arrest. The Commission expressed doubt that the applicant had raised the argument that he had "good and sufficient cause" for the arrest before the Hearing Officer. However, the Commission dealt with the argument that he had acted in good faith "in a potentially dangerous and dynamic situation," and that constituted good and sufficient cause. The Commission rejected the argument, stating that "having reviewed the Record and the videos, we see insufficient evidence to establish good and sufficient cause for the arrest of Mr. MacIssac [*sic*]" (Reasons at para. 33).

[16] The Commission then stated (Reasons at para. 34):

> The videos depict almost the entire interaction between the appellants and Mr. MacIssac, to the point where he was rushed and about to be grounded. His actions may have been annoying to the appellants, but we cannot see any basis for the argument that they had good and sufficient cause. In these circumstances, notwithstanding the failure of the Hearing Officer to deal with the second element of the offence of unlawful arrest, we would not allow the appeal on this basis.

[17] The Commission rejected the applicant's argument that the reasons were so inadequate as to preclude meaningful appellate review, stating that the reasons, "buttressed by the two videos are sufficient to dispose of the first two issues of credibility and whether there was good and sufficient cause for arrest" (Reasons at para. 39).

**The Issues on this Application for Judicial Review**

[18] The applicant argues that the Commission erred in upholding the one count of misconduct. First, he submits that the Commission applied the wrong standard of review in the appeal. Given that the Commission was hearing an appeal, it should have applied an appellate standard of review, rather than conduct a review for reasonableness. He submits that the Commission erred in law in failing to overturn the decision of the Hearing Officer because the reasons were inadequate.

[19] Second, he argues that the Commission's decision was unreasonable, because the Hearing Officer had failed to consider one element of the offence – whether the applicant lacked good and sufficient cause for arrest – and the Commission did not discuss the interpretation of this element of the offence. Moreover, he submits that the Commission improperly reversed the burden of proof with respect to this element of the offence, requiring him to prove that the arrest was with good and sufficient cause.

**The Standard of Review in this Application for Judicial Review**

[20] The applicant argues that the standard of review is correctness in this application for judicial review. He alleges that an administrative tribunal like the Commission, which exercises an appellate function, must be correct in its choice of standard of review. He also argues that the Commission's conclusion on the burden of persuasion was a question of law of general application, on which it must be correct.

[21] I disagree. The standard of review to be applied by this Court in reviewing the Commission's decision is reasonableness. This is clear from *Ottawa Police Services v. Diafwilla*, 2016 ONCA 627, where the Court of Appeal stated that the standard is reasonableness on questions of fact and mixed fact and law, as well as on questions of law related to the interpretation of the Commission's home statute (at para. 52).

[22] The Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 confirms that the standard of review is reasonableness. There is nothing in the statutory framework that rebuts the presumption of reasonableness (at para. 25). In particular, there is no appeal to the courts from a decision of the Commission.

[23] This application for judicial review raises no general question of law of central importance to the legal system as a whole. The determination of the adequacy of the reasons required the Commission to assess the Hearing Officer's reasons and the record to determine whether it could meaningfully exercise its review function. In the criminal law context, the Supreme Court of Canada observed in *R. v. Sheppard*, [2002] 1 S.C.R. 869 that an appellate court is in the best position to determine if the reasons are so inadequate as to prevent appellate review, stating at para. 28:

> The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination.

[24] The Commission's conclusion that the applicant had committed misconduct required it to apply the *Code of Conduct*, a home statute, as well as to review the findings of fact made by the Hearing Officer and to consider the evidence in the record. Deference is owed to the Commission's decision on these questions, as well as its conclusion about the adequacy of the reasons.

[25] Accordingly, as set out in *Diafwilla* and in accordance with *Vavilov*, the standard of reasonableness applies in this application for judicial review.

**Analysis**

***The adequacy of the reasons***

[26] The Commission set out the standard of review to be applied to the Hearing Officer's decision as reasonableness for questions of fact and mixed fact and law and correctness for

questions of law (see para. 18 of the Commission's Reasons). That was fully consistent with what the Court of Appeal had stated in *Diafwilla* at paras. 53-62.

[27] The applicant now argues that the Commission erred in its choice of standard of review, given *Vavilov*. He submits that the Commission should have applied appellate standards – that is, palpable and overriding error for questions of fact and correctness for questions of law. Instead, the Commission is said to have improperly focussed on reasonableness in assessing the adequacy of the reasons of the Hearing Officer.

[28] The applicant submits that the adequacy of the reasons of the Hearing Officer is a question of law. He relies on the decision of the Court of Appeal in *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193, where the Court stated that the failure of a Hearing Panel of the Law Society to give adequate reasons was an error of law (at para. 94).

[29] The applicant takes issue with the fact that the Commission quoted from the more recent decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708. The Commission quoted para. 16 of that decision:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.If the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[30] The Supreme Court also stated that in assessing reasonableness,

> Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive (at para. 18).

[31] In my view, the Commission reasonably concluded that the reasons of the Hearing Officer were adequate. In reaching that conclusion, it did not conduct a reasonableness review of the reasons or the decision. Rather, it determined whether the reasons were sufficient to permit meaningful review and found that they were adequate. Hence, there was no error of law.

[32] Whether in an administrative law setting or a criminal law setting, reasons do not have to be perfect. The question is whether they are adequate to permit the reviewing body or the appellate body to fulfill its role. That is a contextual and functional inquiry. The adequacy of reasons, even

in a criminal law setting, is not a freestanding ground of review (*R. v. R.E.M.*, [2008] 3 S.C.R. 3 at para. 25).

[33] As described above, in the quote from *Sheppard*, the appellate body is in the best position to determine the adequacy of the reasons to permit meaningful appellate review. Similarly, the Commission in the present case is best suited to determine the adequacy of the reasons of the Hearing Officer.

[34] In my view, the Commission engaged in the proper analysis to determine whether the reasons permitted meaningful appellate review. While the Commission made reference to the *Newfoundland Nurses* case, it did so when considering the applicant's argument that the reasons were so inadequate as to prevent meaningful appellate review in an administrative law setting (see Reasons, paras. 29 and 35). It was alive to the argument made by the applicant.

[35] Its approach to its task of assessing the adequacy of reasons was consistent with both *Newfoundland Nurses* and *Neinstein,* as well as the more recent decision in *Vavilov.* A determination of the adequacy of reasons is functional and contextual, both in an administrative law setting and a criminal law setting. As the Court of Appeal stated in *Neinstein* (at para. 62):

> A determination of whether reasons fulfill their purpose and admit of effective appellate review can only be made by examining those reasons in the context of the proceedings that give rise to the reasons. Context includes the nature of the issues raised before the tribunal, the evidence adduced and the submissions made.

[36] In the present case, the Commission examined the reasons of the Hearing Officer in light of the record, particularly the videos. Those reasons were brief and left much to be desired. With respect to the allegations against the officers other than the applicant and with respect to the discreditable conduct charge against the applicant, the Commission found that the reasons were inadequate, as the Hearing Officer failed to make necessary findings of fact or to explain the basis for his conclusions. As a result, the findings of misconduct were set aside.

[37] However, the Commission concluded that with respect to the charge of unlawful arrest against the applicant, there was no basis for appellate intervention. It concluded that it was able to fulfill its supervisory role based on the findings that were made by the Hearing Officer, as well as its own review of the videos and other evidence in the record (Reasons at para. 39).

[38] That was a reasonable conclusion by the Commission in the circumstances of this case, and this Court should not substitute its view on the adequacy of the reasons, thereby engaging in a correctness standard of review. This is not a case like *Neinstein*, where key findings of credibility and the treatment of conflicting evidence were unexplained by the Hearing Panel.

***The finding of misconduct was reasonable***

[39] The Commission's determination with respect to the misconduct finding is subject to review on a standard of reasonableness by this Court.

[40] The Commission correctly stated that the offence with which the applicant was charged has two elements: the arrest must be unlawful or unnecessary, and it must have been made without good and sufficient cause. The applicant submits that he and the other officers had argued that there was good and sufficient cause for the arrest because they acted in good faith in a potentially dangerous and dynamic situation, and the Hearing Officer failed to consider this element of the offence.

[41] The Commission pointed out in its reasons that it was not clear that this argument was raised before the Hearing Officer. As the Supreme Court stated in *Vavilov* at para. 127 and the Court of Appeal in *Neinstein* above, one of the considerations, in assessing the adequacy of reasons, is a consideration of the submissions made by the parties.

[42] The officers' submissions to the Hearing Officer do not clearly state that good faith equates with good and sufficient cause. Rather, there is an argument made about the application of s. 25(2) of the *Criminal Code*, which deals with a defence of good faith where a person is required or authorized by law to execute a process or to carry out a sentence. There is also a submission that the assisting officers acted in good faith, and that is a defence. I note that the prosecutor's reply argued that s. 25(2) did not apply here, where the applicant was not required or authorized by law to execute a process or carry out a sentence. That argument does not appear to have been raised before the Commission.

[43] Nevertheless, despite the observation about the submissions made to the Hearing Officer, the Commission decided to deal with the argument that there had been good and sufficient cause and rejected it. The applicant argues that the Commission's conclusion is unreasonable because it did not articulate what constitutes "good and sufficient cause."

[44] The Commission quoted from another decision, *Wowchuk and Thunder Bay Police Service*, 2013 CanLII 101391 (ONPC), which stated at para. 78:

> In the context of the Hearing Officer's specific findings and conclusions on whether there were "reasonable and probable grounds" for the arrest, and in the absence of any other evidence which might have somehow given the Appellants good and sufficient cause to make the unlawful and unnecessary arrest, a separate and more detailed analysis of "good and sufficient cause" was not required.

[45] The Commission took a similar approach in the present case. It knew that the Hearing Officer determined that there was no lawful basis to arrest Mr. MacIsaac for causing a disturbance or breach of the peace. In reaching his conclusion, the Hearing Officer set out the elements for each *Criminal Code* offence, and no issue has been taken with this aspect of his decision.

[46] To commit the offence of causing a disturbance pursuant to s. 175(1), an individual must cause a disturbance in or near a public place by fighting, screaming, shouting, swearing, singing or using insulting or obscene language. According to case law cited, the conduct must interfere with the public's normal activities or the ordinary and customary use of the place in question by the police. The Hearing Officer concluded that Mr. MacIsaac's conduct did not meet the test.

[47] With respect to breach of the peace, there must be acts or actions which result in actual or threatened harm to someone. The Hearing Officer held that the police officers had no reasonable and probable grounds to believe that Mr. MacIsaac was committing a breach of the peace or about to commit the offence.

[48] The Commission concluded that this finding of misconduct by the applicant was justified, despite the Hearing Officer's failure to refer to "good and sufficient cause". Although the Commission did not articulate the meaning of "good and sufficient cause," it rejected the argument that the applicant acted in good faith "in a potentially dangerous and dynamic situation," and that was enough to constitute good and sufficient cause. The Commission held that there was no evidence to support such a finding of good and sufficient cause.

[49] That was a reasonable conclusion in the circumstances of this case, based on the videos as well as the applicant's own testimony. The Commission was entitled to consider the evidence in order to determine whether the Hearing Officer erred in finding misconduct.

[50] The videos show that the interchange between Mr. MacIsaac and the applicant and the other officers was very brief. Mr. MacIsaac was not loud and disruptive in the few minutes leading to the arrest, although undoubtedly his conduct was annoying to the officers, as the Commission observed.

[51] Just prior to the arrest, Mr. MacIsaac was told to get off the street. Within a few seconds, he was rushed by the officers, and he fell to the ground. There was no opportunity given to him to comply, even though he had been compliant with an earlier request to move away. Indeed, the applicant and another officer conceded in cross-examination that there was one second between the order to get off the street and the move to arrest Mr. MacIsaac.

[52] It was reasonable for the Commission to conclude, on this evidence, that there was not good and sufficient cause for the arrest in the circumstances. Even if the applicant was acting in good faith, as he asserts, the evidence does not support the claim that the arrest was made in the context of a potentially dangerous and dynamic situation.

[53] In reaching its conclusion, the Commission did not reverse the burden of proof, as the applicant alleges. Rather, it considered all the evidence, and particularly the videos, and concluded that there was no evidence to establish good and sufficient cause for arrest.

[54] The applicant submits that *Vavilov* has imposed a more robust reasonableness review. I disagree. The majority in *Vavilov* gave guidance as to how to conduct a review for reasonableness, drawing on its past jurisprudence (see *Radzevicius v. Workplace Safety and Insurance Appeals Tribunal*, 2020 ONSC 319 (Div. Ct.) at paras. 56-57). In the present case, there is a line of analysis that supports the Commission's conclusion, and the outcome was reasonable, given the evidence and the law.

**Conclusion**

[55] Accordingly, there is no basis for judicial intervention, and the application for judicial review is dismissed. The parties are agreed that there will be no order as to costs.

K. Swinton J.

Swinton J.

I agree R Lococo J.

Lococo J.

I agree

Myers J.

**Released:** FEB 0 3 2020

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Respondents

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**REASONS FOR JUDGMENT**

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Swinton J.

**Released: February 3, 2020**