ONTARIO CIVILIAN POLICE COMMISSION

Safety, Licensing Appeals and Standards Tribunals Ontario

COMMISSION CIVILE DE L'ONTARIO SUR LA POLICE

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

Citation: Nobody v. Adams, Donaldson, Fardell, Simpson, Toronto Police Service and the Office of the Independent Police Review Director

2018 ONCPC 8

Date: March 28, 2018
File Number: 15-ADJ-003

Appeal under section 87(1) of the *Police Services Act,* R.S.O. 1990, *c. P.15, as amended*

Between:

Adam Nobody — Appellant

and

Csts. Adams, Donaldson, Fardell, Simpson and Toronto Police Service — Respondents

and

Office of the Independent Police Review Director — Intervener

DECISION

Panel: D. Stephen Jovanovic, Associate Chair
John Kromkamp, Member
Katie Osborne, Member

Appearances: Adam Nobody, self-represented, appellant
Lawrence Gridin, counsel for Csts. Adams et al, respondents
Alexandra Ciobotaru, counsel for Toronto Police Service, respondent
W. Scott Childs, counsel for the OIPRD, Intervener

Place and date of hearing: Toronto, Ontario
December 6, 2017

INTRODUCTION

[1] Constables Adams, Donaldson, Fardell and Simpson, the respondent officers, were four of the Toronto Police Service (the TPS) officers involved in the arrest of Mr. Adam Nobody, the appellant, on June 26, 2010 during the now infamous G20 Summit in Toronto.

[2] The respondent officers were all charged with misconduct, contrary to section 2(1)(g)(ii) of the Code of Conduct (the Code) under the *Police Services Act (the PSA),* which reads as follows:

> 2(1) Any chief of police or other police officer commits misconduct if he or she engages in,
>
> (g) Unlawful or Unnecessary Exercise of Authority, in that he or she,
>
> (ii) uses any unnecessary force against a prisoner or other person contacted in the execution of duty;

[3] Following a hearing before the Honourable J. Douglas Cunningham (the Hearing Officer), in a decision dated May 28, 2015, all charges against the respondent officers were dismissed. The Hearing Officer found that the appellant was actively resistant during his arrest and that "the distractionary strikes administered by all of the subject officers were perfectly justified".

[4] The appellant, who was the complainant before the Hearing Officer, has appealed the dismissal of the charges to the Commission pursuant to section 87(1) of the *PSA.*

DISPOSITION

[5] For the reasons that follow, we confirm the decision of the Hearing Officer dismissing the charges of misconduct.

BACKGROUND

[6] The conflict between the duty of the police to provide security during the G20 Summit and the right of citizens to exercise their *Charter* rights to engage in peaceful protest has been the subject of a number of investigations, reports and previous decisions of the Commission. The appellant was one of over 1,100 people arrested during the weekend of the Summit and one of the 39 people who were injured while in police custody.

[7] The appellant was charged with “assault police” and “obstruct police” under the *Criminal Code*, but as was often the case with these arrests, the charges were eventually withdrawn.

[8] The Hearing Officer heard the evidence of the appellant, all of the respondent officers and three other police officers, including Staff Sgt. Stockfish an “expert” in the use of force by police. An Agreed Statement of Facts was also filed. Extracts from that Statement are as follows:

> 9. On June 26, 2010, between the hours of 6:00 p.m. and 7:00 p.m., Mr. Nobody was arrested in the Queen’s Park area by the subject officers.
> 10. Force was used against Mr. Nobody by the subject officers during the course of the arrest.
> 11. Mr. Nobody’s arrest was contemporaneously recorded in videos taken by three different members of the public who observed portions of the arrest.
> 12. There is no dispute between the parties as to the authenticity of the videos.
> 13. It is agreed that Mr. Nobody sustained the following injuries on June 26, 2010:
> a. Comminuted, displaced fracture of bilateral nasal bones;
> b. Fracture through the posterior aspect of the nasal septum with focal angulation apex left;
> c. Comminuted, displace fracture of the right zygoma [cheekbone];
> d. Non-displaced fractures of the bilateral medial walls of the maxillary sinuses;
> e. Diffused soft tissue swelling in the central face;
> f. Bruising of the ribs, torso and head;
> g. Concussion and post-concussion syndrome.
> 14. The cause(s) of Mr. Nobody’s injuries is/are disputed.

[9] The respondent officers, along with many others, were ordered to go to Queen’s Park on the afternoon of the 26th to deal with escalating violence. The Hearing Officer described the violence in the following words: “By this, I mean various projectiles were being hurled at the police, including rocks, bottles sometimes filled with urine, golf balls and feces”. Elsewhere in the decision, he described the scene of the arrest as a riot.

[10] The appellant was cross-examined at length about his interactions with police. He testified that he arrived at Queen’s Park, what he thought was a designated protest area, at about 5:00 p.m. He denied being antagonistic towards the police,

while admitting that he was one of those in the crowd chanting “get those animals off those horses”. According to the appellant there were officers who “were coming through us with horses and trampling over us, and hitting us with batons from horses”.

[11] He testified that the police, not the protestors, were the agitators and that in his interactions with the police he was simply questioning their “motives”. He denied hearing the police use the LRAD (Long Range Acoustical Device) ordering the crowd where he was situated to disperse. He added that he would have ignored the order had he heard it.

[12] According to the appellant, he was making up a protest sign when he saw an officer running towards him, so he began to walk away, then run briefly, at which point he was tackled, punched and kicked while laying on the ground, prone and compliant.

[13] Officer Lowe of the TPS was the first officer to apprehend the appellant. As he did so, the two of them fell to the ground and the appellant came down on his knees on top of Officer Lowe. The respondents reacted, to some extent, out of concern for officer Lowe.

[14] The appellant was turned over to two plainclothes police officers after his arrest. He testified that these two officers kicked and beat him while he was in their custody. In his booking video he was primarily complaining about the actions of these two officers.

[15] The Hearing Officer did not find the appellant to be a credible witness. He rejected the evidence of the appellant that the police were the “agitators, attacking innocent civilians”. He went on to term parts of the appellant’s evidence as “nonsense” that strained “credulity”.

[16] At paragraph 45 of his decision, the Hearing Officer wrote the following;

> I accept the evidence of those who testified that Mr. Nobody stood out in the crowd as a particularly agitated protestor, egging the crowd on and frequently charging at the police line before retreating into the pack. Mr. Nobody clearly knew he was risking arrest and I find as a fact that he was able to escape arrest on at least one other occasion that afternoon before he was finally curtailed.

[17] The Hearing Officer then wrote the following at paragraph 46 of his decision:

> I find as a fact, based on the evidence I accept, that Mr. Nobody knew he was being pursued by the police when he decided to run away just before

his capture. I accept that he heard “him, him, him” several times. I also find that several of the officers shouted “stop” (Fardell), “you are under arrest” (Donaldson), and eventually “stop resisting”, “give me your hands” and “you’re under arrest” (Adams). I further find that Mr. Nobody heard the officers’ commands and in spite of that he failed to comply.

[18] Importantly, for reasons that will be explained below, the Hearing Officer could not determine when the appellant sustained his injuries.

ISSUES

[19] The appellant was not represented by counsel on the appeal, but we did have the benefit of a comprehensive factum prepared by his former counsel setting out the issues. The broad issue raised by the appellant was whether there was clear and convincing evidence that the four respondent officers committed misconduct by using unnecessary force in effecting his arrest. He further submitted that the Hearing Officer made errors when he considered irrelevant evidence and failed to analyze the evidence of Cst. Adams. Finally, he submitted that the decision of the Hearing Officer was not reasonably supported by the evidence.

[20] The Independent Police Review Director adopted a neutral position on these issues but did provide a number of authorities for our consideration of the issues.

[21] The Toronto Police Service (TPS) and the respondent officers submitted that the appeal should be dismissed as there were no errors of law, or otherwise, made by the Hearing Officer.

ANALYSIS

[22] It is now well established that the standard of review to be applied by the Commission to a decision of a Hearing Officer is reasonableness on questions of fact and correctness on questions of law: *OPP v. Purbrick,* 2013 ONSC 2276 (Div. Ct.) and *Ottawa Police Service v. Diafwila,* 2016 ONCA 627.. Questions of whether the facts satisfy a legal test are questions of mixed fact and law and are also to be reviewed on the standard of reasonableness unless there is an extricable question of law involved: *Dunsmuir v. New Brunswick,* 2008 SCC 9 (CanLII) at para. 53.

[23] In assessing the reasonableness of a decision, the question to be asked is whether there is “justification, transparency and intelligibility within the decision-

making process" and whether the "decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir* at para. 47

[24] Before dealing with the specific issues raised by the appellant, it would be useful to set out portions of the Hearing Officer's analysis of the law. Section 25(1) of the *Criminal Code* reads as follows:

> 25(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (b) as a peace officer or public officer,
>
> Is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[25] The Hearing Officer then wrote the following:

> Obviously if more force is used than necessary that amounts to an assault. Proportionality, necessity and reasonableness are the constraining principles. The police do not have the unlimited power to inflict harm in the execution of their duties.

[26] He then adopted the following quotation from *R. v. Nasogaluak,* [2010] 1 S.C.R. 206:

> Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances.

[27] The Hearing Officer also acknowledged that the onus rested on the prosecution to prove the charges on a "balance of probabilities" and that there had to be clear and "convincing evidence" to satisfy himself that the allegations were true.

[28] We shall now deal with the issues raised by the appellant.

Was there clear and convincing evidence that the respondent officers committed misconduct by using unnecessary force in arresting the appellant?

[29] The Hearing Officer clearly answered this question in the negative. But he did so after analyzing the evidence of each of the respondent officers and contrasting

that evidence with the testimony of the appellant who he found was not credible. He wrote the following at paragraph 48 of his decision:

> I accept the evidence of the subject officers that Adam Nobody was non-compliant, not only by running away but also once he was tackled to the ground. At that point I am satisfied he became actively resistant in several ways. First, he would not go to the prone position and second he refused to give up his arms when ordered to do so. In fact, he held his arms tightly under him causing much of the tugging and pulling by [the subject officers]….Given the active resistance by this large male, the distractionary strikes administered by all of the subject officers were perfectly justified.

[30] The Hearing Officer heard evidence from Sgt. John Stockfish, the Section Head of the TPS in-service training for new and existing officers, a witness called by the defence. In reviewing the transcripts we note that there was some discussion between the parties as to whether Sgt. Stockfish should be qualified as an expert witness. The prosecution ultimately consented and the Hearing Officer did qualify him as an expert witness. More will be said about this qualification later in these reasons.

[31] Sgt. Stockfish testified about a Use of Force Wheel developed to train officers in how to respond to levels of behaviour of individuals, including during the course of an arrest. These techniques include communication, soft action, physical control, hard action and lastly lethal force.

[32] The Hearing Officer wrote the following about the evidence given by Sgt. Stockfish:

> The act of fleeing, this witness testified, could be active resistant behaviour and him being on top of the arresting officer [Lowe] gravely concerning. By not giving up his hands and not going prone in spite of being ordered to do so would in his view clearly be active resistance. In these circumstances, holding his hands close to his body and resisting, distractionary knee strikes would not only be appropriate, this is what is taught. Asked if an officer perceived he was about to be bitten whether fist strikes would be appropriate, the witness said they would, again, active resistance requiring physical control and hard use of force.

[33] The Hearing Officer heard the evidence and observed the videos. We are not satisfied that he made any error in concluding that as the appellant was actively resistant, the strikes administered by the respondent officers were justified.

Was the decision of the Hearing Officer reasonably supported by the evidence?

[34] In essence, this issue involves the same analysis as the first issue dealing with clear and convincing evidence. For the reasons set out above, we find that the decision was reasonably supported by the evidence.

Did the Hearing Officer consider factors outside of the proper context of the arrest?

[35] The considerations that the appellant submitted were irrelevant included the following:

- The LRAD warning to the crowd to disperse was clearly heard, including by Mr. Nobody, who knew he had no right to be in Queen's Park.
- Police were not agitators, and did not attack innocent civilians.
- Mr. Nobody was aware the protests "were likely to become explosive" and stood out in the crowd as a "particularly agitated protestor".
- Mr. Nobody knew he was risking arrest and had been able to escape arrest at least one other occasion that afternoon.

[36] According to the appellant, these considerations were irrelevant because they did not go to the issue as to whether the force used during the arrest by the respondent officers was necessary. In our view, these comments or findings made by the Hearing Officer were both part of the narrative and were relevant to his assessment of the credibility of the appellant. Much of the evidence was not objected to when introduced. We see no error on the part of the Hearing Officer in dealing with this evidence.

[37] In addition, the Hearing Officer was entitled to consider the all of the circumstances surrounding the arrest. As stated in *R. v. Dacosta,* 2015 ONSC 1586 "Judicial review of the use of force in the context of an arrest requires an assessment of the reasonableness of the forcible arrest in all of the circumstances".

Did the Hearing Officer fail to analyze the credibility of Cst. Adams?

[38] During oral argument, the appellant focused his submissions on the actions of Cst. Adams while indicating he was not concerned with the involvement of Cst. Fardell. The appellant submitted that given the inconsistencies in the evidence of Cst. Adams, the reasons of the Hearing Officer as to his credibility "fail to provide sufficient guidance to allow for meaningful appellate review". He relies on the decision in *D.M. Drugs (Harris Guardian Drugs) v. Barry Edward Bywater (Parkview Hotel),* 2013 ONCA 365 (CanLII).

[39] The following two statements from that decision neatly summarize an appellate court's, or in this case the Commission's, approach to sufficiency of reasons:

> Reasons are sufficient if they are responsive to the case's live issues and to the party's key arguments. Their sufficiency should be measured not in the abstract but as they respond to the submissions of what was in issue.
>
> As long as the reasons of the trial judge demonstrate why he arrived at his conclusion, the court will not interfere.

[40] Similarly, in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62*,* Abella J. wrote the following:

> A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion. 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 [citations omitted].

[41] The Hearing Officer summarized the key portions of Cst. Adams' testimony at paragraphs 30 and 31of his decision where he wrote the following:

> 30. As a result of the tumble, Mr. Nobody ended up on top of Officer Lowe. P.C. Adams' priority, he stated, was to get Mr. Nobody off. Giving verbal commands to stop resisting and "you are under arrest", Officer Adams was able to pull Mr. Nobody off P.C. Lowe. His goal was to get Mr. Nobody in a prone position so he could be handcuffed. Mr. Nobody resisted and kept holding his arms beneath him. Officer Adams tried distractionary strikes to the right shoulder without success. He then tried pushing and pulling Mr. Nobody's arms and at one point observed Mr. Nobody about to bite him.
>
> 31. At this point P.C. Adams hit Mr. Nobody with three quick strikes to the right side of his face. This stopped Mr. Nobody's attempted bite. He has no doubt that otherwise he would have been bitten. These blows, he stated were completely in accordance with his training as Mr. Nobody's behaviour was at all times actively resistant.

[42] Sgt. Stockfish had been asked if an officer perceived that he was about to be bitten would fist strikes be appropriate and he answered that they would as active resistance required physical control and the hard use of force. Accordingly, the case of Cst. Adams turned on his perception that he was about to be bitten. The Hearing Officer, after hearing the evidence and viewing the videos, accepted that

this was a reasonable perception both subjectively and objectively. Notably, he did not conclude that the appellant was in fact trying to bite Cst. Adams, which the appellant strongly denied. On this point, there was no credibility issue between the appellant and Cst. Adams, so the Hearing Officer was not required to fully explain why he believed Cst. Adams' perception.

[43] The Hearing Officer's reasons do answer the question "why" he found the actions of Cst. Adams justified. A Hearing Officer, like a trial judge, is entitled to accept all of, some of or none of a witness' evidence. Cst. Adams did give some contradictory evidence when compared to some earlier statements he made, but at the end of the day we cannot say that the Hearing Officer's conclusion as to the perception of Cst. Adams was unreasonable.

[44] While the above reasons are sufficient to dispose of the appeal some additional comments are warranted. In our view, Sgt. Stockfish should not have been qualified as an expert witness in this matter. He clearly lacked the independence that is fundamental to being qualified as an expert witness. It is incongruous that a superior officer of those officers "on trial" could then give expert evidence that their actions were justified. While it was open to him to describe the training as to use of force given to TPS officers, he was asked questions that were not so hypothetical, but clearly meant to elicit answers dealing specifically with the actions of the respondent officers.

[45] The Hearing Officer obviously placed considerable reliance on his evidence, particularly in the situation of Cst. Adams striking the appellant in the face while being subdued by four other officers. Allowing this expert evidence certainly does not serve to inspire public confidence in a police disciplinary hearing involving allegations of the use of unnecessary or excessive force.

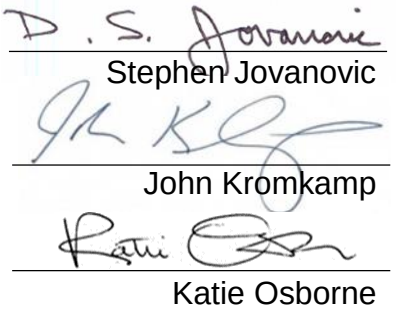
[46] However, the appellant did not raise this as a ground of appeal nor did his counsel object before the Hearing Officer so it does not affect the outcome of the appeal.

[47] The appellant has been described as the face of the G20 Summit. Looking at his injuries, he would more aptly be described as the battered face of the G20 Summit. On the evidence before him, the Hearing Officer could not, correctly in our view, make a finding as to how, when or under what circumstances the injuries were caused. The appellant gave conflicting evidence as to how, when and by whom they were caused while implicating other TPS officers. Nevertheless, it remains a disturbing aspect of this matter that no one has been held accountable for those injuries.

ORDER

[48] Pursuant to section 87(8) of the *Police Services Act,* the Commission confirms the decision dismissing the misconduct charges against the respondent officers.

Released: March 28, 2018



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