PENALTY DECISION

NAME: D. Mark Fenton

RANK: Superintendent, Toronto Police Service

BADGE NUMBER: 3535

OFFENCES: Discreditable conduct x 1; Exercise of authority causing unlawful arrest x 2

SENTENCING DATE: June 15, 2016

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

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

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

COUNSEL FOR PUBLIC COMPLAINANTS: Adrienne Telford, Danielle Bisnar, Aminah Hanif – Cavalluzzo Shilton McIntyre Cornish LLP, Adrienne Lei – Dewart Gleason LLP

Circumstances of the Offences

[1] Superintendent D. Mark Fenton was found guilty of 3 counts of professional misconduct in contravention of the *Police Services Act,* R.S.O. 1990, c.P. 15. ("*PSA*"), which occurred during the G20 Summit on the weekend of June 26th, 2010. At the relevant times Supt. Fenton ("Fenton") was the Incident Commander. He was responsible for managing the event and had operational and tactical control of all policing units assigned to the Toronto Police Service ("TPS").

[2] Following a Tribunal hearing, he was found guilty of 1 count of professional misconduct for an unnecessary exercise of authority in ordering the unlawful arrest of the crowd gathered in front of the Novotel Hotel ("Novotel") on June 26, 2010. A second count of professional misconduct for an unnecessary exercise of authority for ordering the unlawful arrest of the crowd gathered in the intersection of Queen Street and Spadina Avenue ("Queen and Spadina") on June 27, 2016. Last, Fenton was found guilty of discreditable conduct for failing to monitor the detentions of the individuals within the containment at the intersection of Queen and Spadina during inclement weather. Due to the incident, the reputation of TPS was tarnished.

[3] During the G20 weekend, protestors gathered in downtown Toronto to exercise their rights to freedoms of expression, association and peaceful assembly, enshrined in the *Canadian Charter of Rights and Freedoms* ("*Charter*"). Protestors had no access to the G20 meetings, so they protested in various locations in the core of downtown Toronto. Among the peaceful protestors were individuals referred to as "black bloc" protestors. Much of the unprecedented property damage that occurred during the G20 in Toronto was perpetrated by the black bloc and others who joined in.

[4] The black bloc were interspersed among groups of peaceful protestors, which made it difficult for police to identify them. During the daytime on June 26, 2010, police officers were unable to stop the marauding groups of the black bloc as they roamed about the downtown core. Using bricks, street signs and anything that was not nailed down as weaponry, the black bloc and others caused millions of dollars of property damage and destruction.

[5] The mayhem and lawlessness was front and center in the mind of Fenton, and no doubt TPS command, as he assumed control as Incident Commander in the early evening hours of June 26, 2010. The impact that the violence and destruction had on the community cannot be underscored.

[6] In *R. v. McCormic*, [2014] O.J. No. 2406 at para. 38 (QL)(S.C.J.) Clarke J. adopted remarks of Sachs J. in *R. v. Botten*, [2012] O.J. No. 5053, 98 C.R. (6th) 328 at para. 66 (S.C.J.)(QL), as Her Honour explained her reasoning for not entering a stay of

proceedings involving a black bloc member charged with criminal offences including mischief:

> With respect to the community and its sense of justice to stay the prosecution against Ms. Botten would be to disregard the fact that the people who smashed store windows at the G20 also threatened the community's right to function in a free and democratic way.

[7] In *McCormic*, *supra*, at para. 38 Clarke J. commented on the situation that the police faced during the G20:

> Admittedly, it was the police who breached the applicant's rights and they have been justifiably criticized for some of their actions during that weekend. The fact remains, however, that much of the police response would not have occurred at all but for the perceived need to respond to lawlessness on an unprecedented scale. The general law abiding public was not only fearful.... [t]hey were also justifiably outraged at the actions of these hooligans.

[8] During the G20, there were no serious injuries or deaths of protestors or police. The arrests at the Novotel and Queen and Spadina were relatively peaceful. The Tribunal heard that Eva Botten, a black bloc member detained at the Novotel was afflicted with trench foot, which may or may not have been caused or exacerbated by her detention at the Novotel. Previous G20 meetings, such as the 2009 protests in London, England saw the death of a protestor and many others were seriously injured. The failings in the manner in which the G20 was policed must be kept in perspective.

The Police Services Act

[9] Section 42(1) of the *PSA* outlines the public duties of police officers. Included in the duties are: (a) preserving the peace; (b) preventing crimes and other offences, and providing assistance and encouragement to other persons in the prevention of crimes; (c) apprehending criminals and other offenders, and others who may lawfully be taken into custody; and, (d) performing the lawful duties that the chief of police assigns.

[10] The Declaration of Principles of the *PSA* provides guiding principles for police services in Ontario. Among the principles are: (1) the need to ensure the safety and security of all persons and property in Ontario; (2) the importance of safeguarding the fundamental rights guaranteed by the *Charter* and the *Human Rights Code*; and (3) the importance of respect for victims of crime and understanding their needs.

[11] Where a *PSA* disciplinary hearing results in misconduct finding(s), the penalty options are found in section 85(1) which provides the following:

> (a) dismissing the police officer from the police force;
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> (b) directing that the police officer be dismissed in 7 days unless he or she resigns before that time;
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> (c) demoting the police officer, and specifying the manner and period of the demotion;
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> (d) suspending the police officer without pay for a period not exceeding thirty days or two hundred and forty hours, as the case may be;
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> (e) directing that the police officer forfeit not more than 3 days or twenty-four hours pay, as the case may be;
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> (f) directing that the police officer forfeit not more than twenty days or one hundred and sixty hours off, as the case may be; or
>
> (g) imposing on the police officer any combination of penalties described in clauses (c), (d), (e) and (f) 2007, c.5, s.10.

[12] Section 85(7) of the *PSA* provides additional powers which may substitute or supplant the penalty (or penalties) imposed in section 85(1). A number of the options are reprimanding the police officer, directing the officer to undergo specified counselling, treatment or training and/or directing the police officer to participate in a specified program or activity, or any combination of actions described in the section.

The Discipline Proceedings

[13] It is important to keep in mind that the police discipline process is not a criminal proceeding. In *Burnham v. Metropolitan Toronto Police Association*, [1987] 2 S.C.R. 572, the Supreme Court of Canada adopted the following passage from the reasons of Morden J.A. in *Trumbley v. Toronto (Metro) Police Force*, [1986] O.J. No. 650 para. 64 (QL)(C.A.):

> In my view, a discipline proceeding is not a criminal or penal proceeding within the purview of s. 11 [of the Canadian Charter of Rights and Freedoms] ... A police discipline matter is a purely administrative internal process ... The basic object of dismissing an employee is not to punish him or her in the usual sense of this word (to deter or reform or, possibly, to exact some form of modern

retribution) but rather, to rid the employer of the burden of an employee who has shown that he or she is not fit to remain an employee.

[14] The proceedings before the Tribunal are not a public inquiry. There appears to have has been confusion at times, about the role of the Tribunal. The issue at hand is the appropriate punishment for an employee in an employment context. It is punishment to be meted out on behalf of Fenton's employer. There are other more appropriate forums to deal with many of the ancillary issues raised by counsel for the public complainants.

Principles of Penalty

[15] The key elements to be considered by the Tribunal in assessing penalty for misconduct are threefold: the seriousness of the misconduct; the ability to reform or rehabilitate the officer, and; the damage done to the reputation of the police force. A non-exhaustive list of other relevant factors may be considered, such as:

- the number of findings of misconduct;
- the officer's service record;
- the officer's rank and supervisory capacity;
- the need for progressive discipline;
- the officer's recognition of the seriousness of his/her misconduct;
- the remorse exhibited by the officer for his misconduct;
- the likelihood of rehabilitation;
- effect of publicity;
- consistency of penalty decisions; and,
- deterring similar conduct.

Overview Positions of the Parties

[16] This Tribunal has reviewed all of the principles above, and carefully considered the oral and written submissions of the parties, Fenton's employment record, and the relevant jurisprudence. A brief overview of the positions taken by the parties is sufficient for the purposes of sentencing.

[17] The prosecution provides that the appropriate penalty for Fenton is a demotion to the immediately inferior rank of Staff Inspector for 1 year. He would be reinstated as a Superintendent at the end of the demotion period.

[18] Counsel for Fenton and the public complainants are on the opposite ends of the spectrum when it comes to penalty. Counsel for Fenton seeks a reprimand for all 3 counts. If that is insufficient, counsel asserts that forfeiture of 3 days of pay would be the appropriate alternative.

[19] Public complainants Shervin Akhavi, Jonathan Deshman and Erin MacPherson want Fenton dismissed.

[20] The Novotel complainants, David Steele and Brenda Campbell, represented by the Canadian Civil Liberties Association ("*CCLA*") seek a series of punishments. They want Fenton demoted in rank to Inspector for 1 year. That would result in a demotion of 2 inferior ranks below his current rank. They want him suspended with pay for thirty days. He should also forfeit twenty-four days of pay and forfeit twenty days off. Pursuant to section 85(7) of the *PSA*, the Novotel complainants want more.

[21] They say that Fenton should also be reprimanded. He should be trained by the *CCLA* or another comparable organization, on safeguarding the fundamental freedoms guaranteed by the *Charter*, the *Human Rights Code* and the common law. He should participate in training on the law related to breach the peace and a peace officer's power of arrest in Ontario. They think that he needs training on the collection, collation, analysis, use and reliance on criminal intelligence. He should be trained on the need to corroborate intelligence if it is to be relied upon "in a pluralistic, multiracial and multicultural society like Ontario". They want Fenton re-trained on the duties and responsibilities of an Incident Commander. Until he has completed the above training, the Tribunal should recommend that Fenton is barred from acting as an Incident Commander.

[22] It doesn't end. The Novotel complainants ask the Tribunal to make recommendations to the Chief of Police. A recommendation that he create an administrative scheme to compensate "any Canadian for any losses they may have incurred as a result of their unlawful arrest and/or detention". This request was made in the face of *Good v. Toronto (City) Police Services Board,* [2016] O.J. No. 1748 (Q.L.) (C.A.)[1] which upheld the certification of 2 class actions against TPS involving the G20. The classes encompass individuals who were part of the mass arrest at Queen and Spadina, the Novotel, and those detained at the Prisoner Processing Center.

[1] Decision released April 6, 2016, with the *CCLA* acting as Intervenors.

The Misconduct

[23] This case is unique. A Superintendent dealing with an unprecedented situation. Under immense pressure. Fenton took the helm on both days following the failure of a more seasoned Incident Commander to stop the violence and mass destruction in the streets. The jurisprudence falls short. The Tribunal must look to general principles of disposition recognized in other cases, and consider the circumstances Fenton faced and the context in which the misconduct occurred.

[24] The Incident Commander was not responsible for the formulation of the policing plans for the G20. It became evident on June 26, 2010 that things had not gone according to plans. As Fenton began the second shift as Incident Commander, TPS command was wringing its' hands over the state of affairs. There was not a Plan B. Something had to be done to protect against a resurgence of violence. Deputy Chief of Police Tony Warr, senior in command to Fenton, gave him the direction to "Take back the streets".

[25] On consecutive days, when Fenton issued his orders, his superior officers knew what was happening. They were abreast of the orders via radio, computer and/or live video feed from the street.

[26] Fenton's decisions showed that at the time he made the orders, he did not grasp the importance of the fundamental freedoms of everyone in accordance with section 2(b) and (c) of the *Charter* or individual rights pursuant to sections 7, 8 and 9 of the *Charter*. The alternative is that he did, but issued the orders anyway. He was motivated by fear. He possessed a legitimate fear that the black bloc, and seemingly average protestors, would attack property and police. Violence had occurred quickly and without warning on June 25th and in the daytime hours of June 26, 2010. While the fear did not justify the actions taken, it is relevant to Fenton's motivation.

[27] The number findings of misconduct relate to two sets of orders made during the G20 events. They were not separate findings of misconduct over a long period of time, involving deception, insubordination or personal gain. Fenton's intent was protection of the public, property and the G20 delegates. He decided to make the orders and worry about the fallout later.

[28] The misconduct was purposeful. A means to achieve the end – clear the streets of the black bloc or individuals who could become unruly. The arrestees at the Novotel and Queen and Spadina were not investigated. An egress was not allowed. Everyone caught in the containments were slated for processing and transport to a detention center. Being there was all it took.

[29] Many individuals at Queen and Spadina were clothed in summer attire one would expect to be worn on a hot summer day. As the afternoon turned to evening, the temperature dropped and the skies darkened. Fenton stuck by his order to arrest and transport all of the individuals contained at the intersection, even after the skies opened up. He did put a rush on the transport wagons. He did not reconsider his order. The situation was captured on live-media feeds, and live media reports which were broadcast internationally, brought discredit to the reputation of TPS.

[30] During his testimony, Fenton took responsibility for making the orders in question. He said that he believed what he did what was right. His orders were necessary to stop the violence which occurred in the daytime on June 26, 2010, or prevent an attack on the security fence on June 27, 2010. Preventative medicine. He also testified that he felt ill when he realized average civilians were contained, as he did not intend for people who were uninvolved in protests to be caught up in the containment.

[31] The Tribunal made a number of adverse credibility findings regarding Fenton's testimony. The findings are not akin to deceit, as counsel for Akhavi, Deshman and MacPherson suggest. He was not charged with misconduct involving deceit. Fenton's evidence did not meet the definition of deceit pursuant O. Reg 268/10 made under the *PSA* at section 2(d). A guilty finding for the offence of deceit in not the same as adverse credibility findings regarding testimony related to other charges. His conduct on June 26th and June 27, 2010 was not deceitful.

Penalty

[32] The issue at hand is deciding the appropriate punishment for Fenton as an employee of TPS. In *Burnham v. Metropolitan Toronto Police Association*, [1987] 2 S.C.R. 572, 574, a unanimous 7 judge court adopted the words of Morden J.A. reported: (1986), 55 O.R. (2d) 570, 589:

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

[33] In a system of progressive discipline, an employer applies increasingly serious sanctions to employee misconduct in an effort to correct the employee's behaviour.[2] Nevertheless, even in such a system, the particular misconduct of an employee may be so serious that dismissal is warranted, despite the absence of prior warnings or disciplinary action.[3] Criminal conduct does not necessarily result in dismissal.[4]

[34] As a starting point, the officer should be entitled to the most favourable disposition, in the circumstances, where possible.[5]

[35] One of the reasons that this case is exceptional is the fact that Fenton's conduct, *on both occasions, was condoned by his superiors. In fact, he was commended.* Internal Correspondence in Fenton's employment file dated December 1, 2010, read, in part:

> Although as Chief of Police the ultimate responsibility for the policing of Toronto lies with me, I only succeed in my role when you succeed in yours. Despite criticisms of our conduct from some quarters and very determined efforts of others to criminally *sabotage the G20 gathering the Summit was a success. You all deserve an* immense amount of gratitude and recognition for a job done very well under extremely difficult conditions.

[36] The prosecution pointed out that the correspondence was a general thank-you sent to every member of TPS involved in policing the G20 event. Regardless, it was issued to Fenton and remained in his personnel file at the time of sentencing.

[37] In the hours it took to arrest and transport the Novotel and the Queen and Spadina arrestees, Fenton's superiors remained silent. He was not told his orders were wrong, the offences alleged lacked an evidentiary foundation, or that he should change or cancel the orders. On June 27, 2010, individuals had been contained for hours before TPS senior command told Fenton to release everyone without completing the necessary paperwork. The order to release everyone demonstrated that his superiors were aware of what was happening at Queen and Spadina. Fenton immediately followed the order.

[38] TPS is a paramilitary organization. Orders are followed. Rank is respected. Had Fenton been told to change, cancel or retract his orders at any time during the incidents in question, there is no doubt that he would have complied immediately. At minimum, the second incident at Queen and Spadina would not have happened. In this sense, the

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[2] *Galassi v Hamilton (City) Police Service*, [2005] O.J. No. 2301 at para.32 (QL)(Div.Ct.).
[3] *Stewart and Calgary Police* (1994), 2 O.P.R. 613 at 615 (OPC).
[4] *Toronto Police Service v. Kelly,* [2006] O.J. 1758 (QL)(Div.Ct.).
[5] P. Ceyssens, *Legal Aspects of Policing,* (Saltspring Island, B.C.: Earlscourt Legal Press, 2012) at 5.10(a)(iv).

repetition of the orders is less aggravating than a repetition of misconduct that superior officers were entirely unaware of.

Application of the Principles of Penalty

[39] The offending conduct in this case involved 2 incidents of arbitrary detention and the unlawful arrest of many individuals. The misconduct that flowed from the events in front of the Novotel was not a result of a well-thought out plan. Rather the evidence suggests that Fenton came up with the plan to detain and arrest everyone in short order, absent time to think it through.

[40] He chose a course of action designed to remove all of the individuals from the street, which resulted in many of them being subject to long periods of detention at the Prisoner Processing Center ("PPC"). It was under the command of a Superintendent who has since been promoted. Handling arrestees at the PPC was not Fenton's responsibility.

[41] Much of the information he received, framed as intelligence, was unsubstantiated and not supported by the video feed and information available from officers on the ground. Fenton expected the intelligence to be washed and reliable. It was not.

[42] It is aggravating that the misconduct pertaining to Queen and Spadina was a repeat of the misconduct that occurred the day before. On June 27, 2010, arrests were ordered for breach of the peace and conspiracy to commit mischief. Unlike the daytime events of June 26th, which were marred with vandalism and hooliganism, the morning on June 27, 2010 was relatively calm. The G20 summit was winding down with few visiting high ranking government officials remaining in the City of Toronto.

[43] Unlike the Novotel incident which occurred after dark and in a location with no stationary cameras, the Queen and Spadina incident began in the afternoon, and was broadcast live on television, garnering more public attention.

[44] Unlawful arrests on such a large scale strike at the heart of public interest and the public trust placed in police and enshrined in the principles underlying the *PSA*.[6] The number of individuals who were arbitrarily detained and unlawfully arrested heightens increases the seriousness of the conduct.[7] In *Blowes-Aybar and Toronto Police Service, supra*, the Commission suspended a police constable for 4 days

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[6] *Office of the Independent Police Review Director v. Darrin Rattie, Constable, Brantford Police Service* (March 26, 2015), Ontario (OIRPD) online: <http://www.oirpd.on.ca/Hearings/Pages/Results-of-Discipline Hearings.aspx, p.5.>

[7] *Blowes-Aybar and Toronto Police Service* (OCCPS 24, February 2003).

following an unlawful and unnecessary arrest of a motorist for public intoxication. The motorist was held overnight in a cell at a police division. While a reprimand was held to be within the acceptable range of penalty, it was not imposed. The Commission found that the officer's conduct escalated and became retaliatory, which is distinguishable from that of Fenton.

[45] In *Toronto Police Service v. Wong*, (2013)(#09/2012) aff'd in *Wong and the Toronto Police Service*, 2015 ONCPC 15, a police constable was found guilty of misconduct for unlawfully arresting an individual walking in downtown Toronto during the G20. During the arrest, the individual sustained an injury to his head. He was held in police custody for over twenty-four hours and released with no criminal charges. Wong had no prior disciplinary findings and had received police and public commendations before and after the G20 event. The Commission upheld the penalty of a 1 day suspension of the Hearing Officer and declined to impose the additional penalty of forfeiture of days off.

[46] None of the arrestees at the Novotel or Queen and Spading were injured during the arrests. The only infirmity referred to by counsel was Eva Botten's trench foot.

[47] Counsel for Fenton argues that it is not in the public interest for an institutional failing to be placed on the shoulders of Fenton. Further, counsel asserts that, "to the extent that there were errors in the policing response to the G20 riots, those errors were not only the result of a bad judgment call by Supt. Fenton, rather, a myriad of systemic failings". The Tribunal recognizes that the times were trying and Fenton inherited a challenging situation on June 26, 2010. Further, the parties have not provided the Tribunal with a single case in which a superior officer condoned misconduct committed by a subordinate officer and the subordinate officer alone was held responsible for it.

[48] However, the findings of misconduct recognize that Fenton must be held responsible for his decisions in the context in which they were made. Total responsibility for his decisions cannot be shifted upward to his superiors, any more than the blame for the arrests and containment of all of the people going about their business was shifted downward to the officers on the street.

[49] As Incident Commander he was "the top dog". He had an obligation to his subordinates to meet performance expectations commensurate with his rank and authority and to provide effective leadership. He did not do so.

[50] There is a public interest in demonstrating confidence in the police discipline process.[8] Police officers are sworn to uphold the law. Public trust in police officers is

[8] *Schofield and Metropolitan Police* (1984), 2 OPR 613 at 615 (OPC).

grounded in respect. In *Schaeffer v. Wood* 2013 SCC 71 at para. 52, citing Sir Robert Peel, Doherty J.A. wrote:

> [T]he police are the public and...the public are the police... The wisdom of this statement lies in its recognition that public trust in the police is, and always must be, of paramount concern.

[51] It is important that police officers are conscientious in the application of their powers or arrest and detention, and when these rights are abused the police system is brought into disrepute and its effectiveness is threatened.[9]

[52] Fenton's misconduct occurred in part, as a result of his lack of preparedness for the job of Incident Commander. The limited training he received in the months before the G20 meant he was not sufficiently trained for the responsibilities of an Incident Commander of a large-scale multi-day event where violence and unrest was a strong possibility.

[53] The daytime Incident Commander possessed far more experience commanding public order events than Fenton and was incapable of executing orders to stop the destruction and looting that occurred on June 26, 2010. Fenton, a less experienced Incident Commander, was given a vague directive by Deputy Chief Warr. The Tribunal considers "Take back the streets" a directive to take action. Rid the streets of problem individuals. Fenton was not given a blue print to follow.

[54] When it became clear that corralling and arresting protestors and others on mass was the plan he chose, it should have been stopped by his superiors. That never happened. Given the Tribunal did not hear from any of Fenton's superiors and there is no mention of the G20 incidents in his evaluations from his immediate superiors, the Tribunal finds Fenton was never told that his orders were wrong.

The Ability to Reform or Rehabilitate the Officer

[55] In 2010, Fenton had been a police officer employed by TPS for going on twenty-two years. He has an exemplary service record, with no previous disciplinary findings. In 2010, he completed Bachelor of Arts, majoring in criminal justice. He has served the public in 6 police divisions across the City, as well as in non-divisional police units, such as Communications. His performance evaluations were favourable.

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[9] *Office of the Independent Police Review Director v. Craig Wiles*, Constable, Durham Regional Police Service (7, Dec, 2014) Penalty Decision, OIRPD on-line: < http://www.oiprd.on.ca/EN/PDFs/Wiles,Craig-OCPCAppealDecision-11.03.13.pdf at para. 21>.

[56] Fenton's service record contains thirty-nine acknowledgements, dating back to 1989. Thank-you letters from community members, awards, and recognition of his role in various police investigations demonstrate his commitment to serving the community as a police officer.

[57] Following the G20, Fenton continued to act as Superintendent at 32 division until he was moved to 43 division. As pointed out by his counsel, it is one of the largest police divisions in Toronto. The reference letters from his subordinates at 43 Division show that Fenton is a fair, supportive and respected leader. Notably, reference letters were provided by sixteen police constables, eleven sergeants or detectives, 4 staff sergeants and 1 inspector. Community members including the President of the Optimist Club of Rouge Valley, a Director of the Mornelle Court Community Coalition, and 4 members of the 43 Division Community Police Liaison Committee provided Fenton with references as well. His contribution to the community was recognized by The Honourable John McKay, MP and the Toronto City Councillor for Scarborough East. It is clear that Fenton continues to make a valuable contribution to TPS and the community at-large.

[58] Fenton had virtually no experience acting as Incident Commander of large-scale demonstrations. He acted in various capacities including Incident Commander at a large protest in 2009, which was not comparable to the G20 events. He had never been a member or leader of a public order unit, a specialty investigative unit, or on a team tasked with conducting large scale investigations involving the use of intelligence. During the G20, the other members of his command team tasked with investigative leadership and intelligence-planning failed miserably. Fenton did not have personal experience to rely on. Yet, his superior officers had confidence in his abilities as a leader and assigned him the role of Incident Commander.

[59] Fenton received glowing performance evaluations from his superior officers including in 2010 and 2013. In the aftermath of the G20, he was not suspended, re-assigned to desk duty or relieved of supervisory responsibilities. By all accounts, Fenton has continued to make a positive contribution to TPS and the communities he has served since 2010. His subordinates described him as "leading by example", appreciative of their efforts, hard-working and having "the best interests of the community at heart."

[60] He is not entitled to the mitigation that comes with a guilty plea. At the same time, he is not to be punished for defending the charges.

[61] In a criminal trial, where a court rejected the offender's testimony that he was innocent of the charge, the finding that the offender lied was not an aggravating

circumstance on sentence. [10] Similarly, it would be an error in principle to treat an accused person exercising his right to a hearing and plea of not guilty as an aggravating factor on sentencing.[11] Where an offender acknowledges guilt, accepts responsibility and apologizes to the victim, he receives credit for doing so. Fenton's public apology, which was delivered soon after the findings of misconduct, was a genuine indication of remorse.

[62] The Tribunal's findings related to Fenton's credibility are not aggravating factors on sentencing either. Police officers have a right to a hearing where misconduct is alleged. Adverse findings of credibility did not in this case, rise to the level of a finding that Fenton held back information that was pertinent to the matters at issue.

[63] His conduct is not akin to that of the subject officer in *MacFarlane v. Cristiano* June 14, 1983 (Board of Inquiry) whereby the Board found that Cristiano's testimony before a criminal trial court was inconsistent with his testimony before the Board about the same events. Unlike Fenton, Cristiano testified negligently and wilfully in a deceitful manner during a criminal trial. Cristiano was demoted, with a recommendation for a review for promotion in 3 months. Fenton's evidence before the Tribunal was dissimilar to the intentional deception perpetrated by Cristiano, who gave untruthful evidence in a criminal matter, as a police witness.

[64] Fenton's long and exemplary service record and his work in the community speak to his commitment to public service. The findings of this Tribunal are black mark on an otherwise commendable career.

[65] In *Ontario Provincial Police v. Favretto*, [2004] O.J. No. 4248(QL) (C.A.) the Court recognized that every attempt should be made to consider the possibility of rehabilitation, particularly where an officer has a good employment record, unless the offence is egregious and unmitigated. Often egregious conduct relates to criminal conduct, misconduct committed for personal gain or improper motive.

[66] Multiple disciplinary findings of misconduct often garner more punishment that a single finding. That makes sense. The finding of discreditable conduct for Queen and Spadina related to the same incident but captured a different consequence than the misconduct finding.

[67] Prolonged or repeated misconduct may be evidence of a pattern of offending behaviour. The prosecution and the public complainants assert the repetition of the orders is an aggravating factor on sentencing. It is undisputed that there was less than a

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[10] See: *R. v. Bradley* 2008 ONCA 179, [2008] O.J. No. 955, at paras. 15 and 16 (QL) (C.A.); *R. v. Kozy*, [1990] O.J. No. 1586 at paras. 4 -6(QL)(C.A.); *R. v. Bani-Naiem* 2010 ONSC 1890, [2010] O.J. No. 1234, at para. 13(QL)(S.C.J.).

[11] *R. v. K.A.*, [1999] O.J. No. 2640 at para. 48 (QL)(C.A.).

twenty-four hour gap in time between the orders. The time between the two sets of orders should have afforded time to reconsider the legality and appropriateness of the Novotel orders. However the misconduct does not represent a pattern of offending behaviour in the circumstances. Of particular significance was the lack of intervention by superior officers on June 26, 2010 and the short time frame in which all 3 findings occurred.

[68] In a system of progressive discipline, an employer applies increasingly serious sanctions to employee misconduct in an effort to correct the employee's behaviour. Even where an officer was found guilty in multiple criminal proceedings, and served time in jail, he was not immediately dismissed on the basis of findings of guilt and convictions. It would have been inappropriate to do so absent consideration of the other principles of punishment.[12]

Damage Done to the Reputation of the Toronto Police Service

[69] The incidents garnered unfavourable public attention and scrutiny. Much of the Queen and Spadina incident was broadcast live on television. The images of many of the individuals trapped in the containment, crying and pleading to be released are not soon to be forgotten. In June 2011, TPS issued the After Action Review[13] recognized the problematic nature of the containment techniques, the lack of an egress route or formal warning announcements made to the crowds. There were other reports addressing policing issues during the G20, as well as many public comments made by politicians at various levels of government.

Effect of Publicity

[70] The publicity surrounding the incidents on June 26th and June 27, 2010 tarnished TPS's reputation. Fenton was also hurt by the publicity related to the charges. There has been relentless media coverage of the every aspect of the Tribunal proceedings. The findings of the Tribunal have caused damage to his professional reputation, which was established over many years. During the 6 years following the G20, Fenton has been ineligible for promotion. His health has suffered. His marriage of many years fell apart. Yet, he continued to go to work every day and serve the people of Toronto.

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[12] *Carson v. Pembroke Police Service,* [2007] O.J. No. 5392 para. 20 (QL)(S.C.J.-Div.Ct.).
[13] TPS After Action Review, (Toronto: 2011).

DISPOSITION

[71] Through counsel, the Queen and Spadina public complainants assert that Fenton's character is "hopelessly flawed". They further submitted that there is "no realistic possibility to reform or rehabilitate Supt. Fenton". The Tribunal disagrees. Moreover, the comments made about his character, and counsel's submission that Fenton is a perjurer demonstrate the often personal nature of the criticism he has faced. It was both unfair and unacceptable in the context of an employment hearing.

[72] Dismissal would be an inappropriate disposition. Fenton's career and worth as a police officer should not be judged based on 2 events over 1 weekend, in an extremely trying situation with no meaningful guidance or direction from his superiors. The penalty of dismissal would not serve the interests of the public or TPS. Years of investment have been made into the training and development of Fenton and he is highly likely to continue to make a valuable contribution to TPS and the community. Further, in the circumstances, his misconduct does not rise to the level of egregiousness to warrant dismissal.

[73] Contrary to the submissions of the Novotel public complainants, the *Statutory Powers Procedure Act* RSO 1990, c.S.22 does not empower this Tribunal with the authority to make a recommendation for a compensative scheme. The Tribunal would not make the recommendation requested, even if it had the power to do so.

[74] Public criticism and media attention of criminal conduct by police officers has been found to satisfy general deterrence in sentencing.[14] The effect of the publicity and the intense focus on Fenton's misconduct, combined with the findings made by this Tribunal serve to satisfy the principle of deterrence in this case. And given the reports and recommendations which followed the G20 policing, it is likely that future Incident Commanders of large-scale events will be adequately prepared for the challenge of the job and be given proper support and supervision from superior officers.

[75] Fenton's misconduct was serious. There is a public interest in recognizing misconduct by police as police are in a position of both trust and power. His orders impacted many people, and also caused his subordinates to conduct unlawful arrests at his direction. The factual findings made regarding the orders have gone a long way in recognizing the seriousness of the misconduct, and punishment must take into account the steps taken outside of the Tribunal via reports and reviews of the G20, which deal with the public interest aspect of ensuring the same conduct does not occur again.

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[14] *Kelly*, *supra* note 4 at paras. 46 and 67.

[76] His misconduct occurred under the noses of his superiors, so to speak, which is a key factor in assessing penalty. He was found guilty of the offences related to June 27, 2010. Those offences would not have occurred had his superior officers stepped in and regrouped when command was turned over to Fenton on June 27, 2010. It is aggravating that Fenton made the same order twice on consecutive days, however, the repetition is far less concerning than multiple findings of premeditated misconduct committed for personal gain or advantage, absent the knowledge of superior officers.

[77] Fenton accepted the findings of the Tribunal and immediately issued an apology. The Tribunal has confidence that Fenton is truly remorseful for the events of June 26th and 27th, 2010. He has demonstrated that he has made and continues to make a positive contribution to TPS.

[78] Demoting Fenton for any period of time is not necessary to satisfy the principles of punishment. It is not required to ensure a message is sent to other police officers who might someday consider committing similar misconduct, particularly in light of the commitment to TPS to address the issues that contributed to the incidents it identified in the TPS After Action Review.[15] It is hard to imagine any police officer who would ever wish to find him or herself in Fenton's situation over the past 6 years. Demotion would punish Fenton's subordinates. They would lose the benefit of Fenton as the commander of 43 Division. By all accounts he has been a strong and supportive leader there.

[79] In all of the circumstances, the penalty for Supt. D. Mark Fenton is:

Count #1: (Novotel misconduct) Reprimand.

Count #2: (Queen and Spadina misconduct) Forfeiture of 10 days off.

Count #3: (Queen and Spadina – discreditable conduct) Forfeiture of 20 days off.

All counts to be consecutive J.H.

[15] *Supra* note 13 at 61 – 63.

June 15, 2016

Honourable John Hamilton, Q.C.