



**HEARING DECISION
JUDGEMENT**

Name: Brian ARCAND, Irwin CORREA, Jermaine FULLER
Blair LIBURD, Sgt. Douglas ROSE

Rank: Police Constable

Badge Number: 9923, 4669, 9767, 10112, 3478

Case Number: 2012.43, 2012.44, 2012.45, 2012.46, 2012.47

Hearing Date: 2015.06.17

Hearing Officer: The Hon. Judge W. GONET

Prosecutor: Stockwoods

**Defence Counsel:
Or Representative** Mr. Peter BRAUTI

**IN THE MATTER OF
The Police Services Act, R.S.O. 1990, c.P.15, as amended**

**AND IN THE MATTER OF:
TO: Police Constable Brian Arcand (9923)
AND TO: Police Constable Irwin Correa (4669)
AND TO: Police Constable Jermaine Fuller (9767)
AND TO: Police Constable Blair Liburd (10112)
AND TO: Sergeant Douglas Rose (3478)**

HEARING DATES:

September 15, 16, 17, 18, 2014.

COUNSEL:

Prosecution: Brian Gover
 Fredrick Schumann

Defence: Peter Brauti

PART I: OVERVIEW

1. On Saturday, June 26, 2010, the meeting of the G20 was taking place in Toronto. There was extensive police presence in the financial area of Bay and King Streets. As a result of mob action there was widespread rioting in this downtown area resulting in extensive damage to private property, the burning of at least three police vehicles, and injuries to numerous police officers. It was said that this lawlessness was caused by an organized gang called the "Black Bloc".

2. There was police intelligence that on Sunday, June 27, 2010, this conduct would be repeated in the Yorkville area of the city causing greater financial damage. This area

included the streets of Bloor and St. Thomas. The police took an observational stand at this intersection.

3. During the G20 meeting, a number of individuals set up a media centre on Harbord Street and designated itself as the "Alternative Media Centre" ("AMC"). These individuals consisted of amateur journalists and photographers who had an interest in covering the non-official and informal parts of the G20 meetings. As such they had no official accreditation other than AMC accreditation and organization. Each member of the AMC was given an AMC media identification card with a photograph attached to it and a plastic cover for said card.
4. The review of the forthcoming evidence is a compilation of:
 - a. *Viva voce* evidence of the parties subject to cross-examination;
 - b. Written statements, such as given to the OIPRD and copy of notebook notes;
 - c. Showing of video discs produced by Mac Isaac (Exhibit 4) and Amy Miller (Exhibit 5).

It should be noted that Mr. Mac Isaac was filming throughout the period of his contact with the police until he was arrested and put to the ground. After Mr. Mac Isaac lost the use of his double cartridge camera (Exhibit 9), Amy Miller continued to use her video camera.

5. The detaining procedure was that if any person caught the attention of a police officer, that person was to be arrested and detained and a "Hot Sheet" with all of the facts was to be prepared and accompany the accused to the detention centre on Eastern Avenue where it was to be decided by other officers if there was sufficient evidence to hold the person for a particular charge or to be released if there was no evidence of criminal activity.

Part II: EVIDENCE

6. On Sunday, June 27, 2010, the complainant, Daniel Adam Mac Isaac, commonly known as Adam Mac Isaac, attended at the office of AMC to see what was happening. Mac Isaac is a photo journalist with extensive practice in the independent press.
7. Prior to noon on the 27th, he and a fellow photographer, Amy Miller, decided to go by bicycle to the holding facilities on Eastern Avenue to see if there was a story there. As they were travelling past the intersection of Bloor and St. Thomas Streets, they viewed the presence of a number of police officers and pedestrians on the corner. Mac Isaac, who was carrying a new large camera, decided to take pictures of the group congregating on the corner. As he approached the corner, he noted a police officer speaking to one individual who Mac Isaac recognized to also be a photo journalist by the name of, "Juan". "Juan" was identifiable by an AMC badge that he had on his person and this detail was indicated to the police officer. Mac Isaac continue to photograph the incident and moved as indicated and directed by the police.
8. At this time, Police Constable Correa arrived on the scene and asked Mac Isaac to back away from the scene with "Juan" on the sidewalk and Mac Isaac complied without challenge.
9. Police Constable Arcand exited a police vehicle and attended the sidewalk and immediately ordered Mac Isaac to "back off right now". Mac Isaac requested to retrieve his bac with camera equipment and was denied by Police Constable Arcand. During this time, Mac Isaac backed off. Police Constable Correa stated that the bag was going to be searched. At this time, Police Constable Correa had no authority to search the bag although Mac Isaac consented to the bag being searched after which, the bag was returned to Mac Isaac.

10. Police Constable Arcand again approached Mac Isaac and at this time said, "all right, give me your I.D.". On being asked why, Police Constable Arcand replied, "because I want your I.D.". Mac Isaac asked if he was being detained and on what charges to which Police Constable Arcand gave no reply and on cross-examination admitted that Mac Isaac had no reason to produce Identification as he had done nothing illegal. All this conversation was being conducted in a respectful manner.
11. Police Constable Liburd arrived on scene and asked Mac Isaac about the AMC Media Pass. Police Constable Liburd was suspicious about the card and about Mac Isaac's intentions. Police Constable Liburd began to question Mac Isaac about the pass and who issued it and whether it was an anarchist symbol, the symbol being a fist holding a pencil, and which media did Mac Isaac represent. When Police Constable Liburd was not satisfied with the answers, he removed the pass and plastic holder from where it was attached to Mac Isaac and walked away. This resulted in Mac Isaac yelling, "why did you just steal that, sir?" This question was repeated a number of times but Police Constable Liburd continued to a police vehicle to check the card and refused to return it to Mac Isaac.
12. In the notes and evidence of Police Constable Liburd, he stated that Mac Isaac turned his ??? towards him while holding the camera in both hands, which somehow indicated to Police Constable Liburd a form of consent to take the pass. This indication was belied by the fact that Mac Isaac is shown on tape and is heard shouting for the return of the pass and declaring it was stolen.
13. Police Constable Liburd attempted to get more information from the AMC office but there was no one there. After Mac Isaac was arrested and placed in an ambulance, Police Constable Liburd stated that he attended at the ambulance and gave the pass to some unknown officer or threw it at Mac Isaac. Police Constable Liburd attended to Mac Isaac at the hospital.

14. When Mac Isaac attempted to follow Police Constable Liburd to regain his pass, he necessarily had to step off the sidewalk. Police Constable Correa began to order Mac Isaac to get off the road while Mac Isaac was still filming.
15. It is pictured that Sergeant Rose came forward and attempted to push the camera with his hand. Police Constable Arcand joined Police Constable Correa and within two seconds, as shown on the time sequence on the camera, Mac Isaac is put to the ground by Police Constables Arcand and Correa and Sergeant Rose while still holding the camera. Sergeant Rose was cuffing Mac Isaac while Mac Isaac continued to complain of an injury to his hand and that he had a pacemaker.
16. Mac Isaac was arrested for Breach of Peace, Obstruct Police and Cause Disturbance. As a result of the arrest procedure, Mac Isaac sustained a broken finger and had to be taken to hospital.
17. Police Constable Fuller was dealing with other arrested persons south of the area where Mac Isaac was arrested. He saw the camcorder (Exhibit 9) lying on the ground and he picked it up for safety purposes. He failed to follow policy procedure in the bagging, labelling and identifying the property for safety and continuity. The camcorder was turned over to an intelligence officer not known to Fuller nor was the officer identified in Fuller's notebook. When Mac Isaac received the return of the camcorder, it was noted that one of the two cards was wiped and all data recorded was deleted.

Part III: Credibility of Witnesses

18. The matter of credibility and the test thereof is somewhat made easier when the trier of the facts not only has the benefit of hearing the examination and cross-examination of the witnesses, reading statements made prior to and after the fact, but also has a video of the whole incident both picture and sound taken by a principal of the interaction of all of the parties involved.

19. With this added advantage, where the evidence of the police officers is in conflict with that of Mr. Mac Isaac, Amy Miller, and the video being Exhibits 4 and 5, the evidence of the prosecution is accepted. I further find that the police evidence is too far in conflict with the content of the videos.

Part IV: Was the arrest of Mr. MacIsaac lawful?

Obstruct Police

20. During the trial of the matter, the defence admitted that there were no grounds for arrest on this charge.

Breach of the Peace

21. The basis of the arrest on this charge requires actual or threatened harm to someone. At the time of the arrest, Police Constable Correa stated that there were five or six pedestrians walking on the north side of Bloor Street, vehicular traffic was being controlled by parked police vehicles and fencing, and pedestrians were walking on the south side of Bloor Street behind Mr. Mac Isaac and the police officers. At the material time, Mac Isaac was demanding the return of his pass and was holding his camcorder with both hands. The statutory basis for an arrest for breach of the peace is in s.31(1) of the *Criminal Code* R.S.C. 1985 c.c-46:

ARREST FOR BREACH OF THE PEACE

31(1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists the police officer is justified in arresting any person who he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.

22. A breach of the peace was defined by Doherty J.A. in *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.) at paras. 73 & 79 & footnote 13 as follows:

A breach of the peace does not include any and all conduct which right thinking members of the community would regard as offensive, disturbing, or even vaguely threatening. A breach of the peace contemplates an act or actions which result in actual or threatened harm to someone. Actions which amount to a breach of the peace may or may not be unlawful standing alone. Thus, in *Percy v. D.P.P.* (1994), [1995] 3 All E.R. 124 (Eng. Q.B.) at 131, Collins J. observed:

The conduct in question does not itself have to be disorderly or a breach of the criminal law. It is sufficient if its natural consequence would, if persisted in, be to provoke others to violence, and so some actual danger to the peace is established.

23. In this instance, I find that the police officers had no reasonable grounds to believe that a breach of the peace was being committed or about to be committed by Mr. Mac Isaac.

Cause Disturbance

24. The offence of causing a disturbance is created by section 175(1)(a)(i) of the *Criminal Code*:

175.(1) Every one who

- (a) Not being in a dwelling-house, causes a disturbance in or near a public place,
 - (i) By fighting, screaming, shouting, swearing, singing or using insulting or obscene language,

is guilty of an offence punishable on summary conviction.

25. In *R. v. Kukemuller*, 2014 ONCA 295, paragraphs 16-17, 22-25, the Court held:

(16) The leading case interpreting s.175(1)(a) is *R. v. Lohnes*, [1992] 1 S.C.R. 167. McLachlin J., writing for a unanimous court, stated at p. 171 that there are two elements to this offence, first the commission of one of the enumerated acts; and second, that the commission of those acts caused a disturbance in or near a public place.

(17) There is no doubt that by yelling and swearing at the police, the appellant committed one of the enumerated acts. The question is whether those acts “cause disturbance in or near a public place”.

(22) *Lohnes* was applied by this court in *R. v. Swinkels*, 2010 ONCA 742, 103 O.R. (3d) 736 where the accused was part of a group yelling obscenities outside a bar at closing time. The police heard the yelling, proceeded to investigate and the accused came towards them yelling further obscenities and holding out his arms with his middle fingers up. The police charged the accused with causing a disturbance and he was convicted. There was “evidence that the appellant’s conduct fired up the crowd”: see Lang J.A. dissenting, at para. 35. This is very similar to the trial judge’s finding in this case that the appellant’s conduct had “contributed to raising the tension at the scene”.

(23) The majority (LaForme J.A., Feldman J.A. concurring) allowed an appeal from conviction, holding that even where the shouting is done and a crowd gathers, the Crown must still prove more to establish the second element of the offence, namely, that the conduct caused an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public. The majority stated, at para. 18: “Generally speaking...shouting obscenities at police officers is not a disturbance in and of itself”. The majority added, at para. 28: “...a ‘public disturbance’ requires more than a crowd observing – or even shouting anti-police sentiments at – police officers in the course of arrest.”

(24) As the majority in *Swinkels* noted, there are several cases rejecting the proposition that merely yelling obscenities at the police amounts to the offence of causing a disturbance.

(25) In my view, the trial judge and the summary conviction appeal judge erred in law by concluding that the appellant’s conduct satisfied the second element of the offence – causing a disturbance in or near a public place – as defined in *Lohnes* and *Swinkels*. There was no evidence and no finding that the appellant’s conduct interfered with the public’s normal activities or with the ordinary and customary use by the public of the place in question. Contributing to raising the

tension at the scene of an interaction between the police and the public does not amount to the kind of disturbance that is required for this offence to be made out.

26. The conduct of Mac Isaac does not meet the requirement for arrest under section 175(1).

The Standard of Proof

27. According to the Police Services Act, it is statutorily recognized that in Ontario, “evidence must always be sufficiently clear, convincing and cogent”. This was accepted by the majority in *Penner v. Niagara (Regional Police Services Board)*, [2013] S.C.R. 125 at para. 60. It is this standard that this trier is following.

Part V: Conclusion


28. On the basis of the foregoing findings:

- a. Sergeant Rose, Police Constable Arcand and Police Constable Correa are guilty of misconduct in arresting Mac Isaac without having the requisite grounds to do so, thereby making an unlawful arrest.
- b. Sergeant Rose, Police Constable Arcand and Police Constable Correa are also guilty of misconduct in that, in arresting Mac Isaac, they used unnecessary force against a prisoner.
- c. As no evidence was called by the prosecution, the charge of misconduct on the part of Police Constable Correa for acting in a disorderly manner will be dismissed.

- d. Police Constable Fuller is guilty of committing misconduct in that he did not ensure the safety, care of records, or continuity of property seized from Mac Isaac contrary to the requirements of the Toronto Police Services.
- e. Police Constable Liburd is guilty of committing misconduct in that he removed property from the person of Mac Isaac, refusing to return it when asked by Mac Isaac and not making certain that such property was every returned to Mac Isaac.

29. A date for hearing and oral submissions on penalty may be arranged by counsel.

DATED at Toronto, this 17th day of June, 2015.

A handwritten signature in black ink, appearing to read "W. S. Gonet", written over a horizontal line.

Walter S. Gonet
Hearing Officer