

JUL 16 2014

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IN THE MATTER OF POLICE SERVICES ACT
R.S.O. 1990, C. P. 15, as amended:

POLICE CONSTABLE MICHAEL MARTINEZ (#87972) - REASONS FOR
DECISION

1. Pursuant to designation granted under various sections of the *Police Services Act*, the undersigned conducted a hearing in respect of the alleged misconduct by Police Constable Michael Martinez (87972).

2. The charge is as follows:

He is alleged to have committed misconduct in that he did use unnecessary force against a prisoner or other person contacted in the execution of duty, contrary to Section 2(1)(g)(ii) of the Schedule Code of Conduct of Ontario Regulation 123/98 and therefore, contrary to Section 80(1)(a) of the *Police Services Act*, R.S.O. 1990, as amended.

3. Particulars of the charge were delivered:

Being a member of the Toronto Police Service, attached to number 52 Division, he was assigned to uniform duties.

On Saturday, June 26, 2010, he was on duty working as part of the G20 summit development in the area of the Novotel Hotel. He came in contact with J.R. and used unnecessary force by striking J.R. with his fist and elbow.

In doing so, he committed misconduct in that he did use unnecessary force against a prisoner or other person contacted in the execution duty.

4. There is little factual dispute in respect of the incident in question with the exception of the issue of the extent of the force used by P.C. Martinez on June 26 2010.

5. P.C. Martinez is a 14 year veteran of Toronto Police Services and was part of the backup crew to the Public Order Unit (the "POU") of the Force who were in charge of crowd control at a protest taking place in the street in front of the Novotel Hotel during the G20 summit in Toronto on the evening of June 26, 2010.

6. It is to be noted that the night before the incident in question, there had been violence at various places of confrontation between protesters and police at or near the perimeter fencing for the summit and elsewhere in the downtown area with significant property damage and some personal injury.

7. At a time which is a little uncertain based on the testimony of various witnesses but which I estimate to be approximately 9:30 p.m. to 10:00 p.m., the backup crew, of which P.C. Martinez was part of, observed a crowd of people sitting on the roadway at the Esplanade in front of the Novotel Hotel.

8. Various estimates were given by the witnesses with respect to the size of the crowd which I take to be more than 100 and more likely several hundred.

9. For some time prior to the incident in question, the crowd, while peaceful, had been chanting; presumably to catch the attention of G20 delegates who were said to be staying at the Novotel Hotel.

10. Again it appears to be uncontested that at some point the crowd was informed by the POU that they were to disperse in an orderly fashion or face the likelihood of arrest for breach of the peace.

11. Neither P.C. Martinez nor the two other officers who testified, P.C. Lum and P.C. Mann, were responsible for the orders given, including the order that individuals failing to disperse would be under arrest for breaching the peace.

12. P.C. Martinez and his fellow officers from 52 Division, in downtown Toronto, were all experienced in dealing with protests and were present to back up the POU and to process those who became under arrest.

13. The charge arises from the complaint of Jesse Rosenfeld that he should not have been the subject either of arrest, in the first place, or of any force used against him

because he was a journalist and should have been recognized and accepted as such and that he was entitled to immunity from arrest in the circumstances.

THE WITNESSES

14. The first witness Steven Paikin is a well-known, respected and experienced journalist with TV Ontario. In his capacity as a journalist and with identification of accreditation from the G20 summit, he followed various crowd movements in the downtown Toronto area and ended up at the Esplanade where there was a crowd which, in his view, was around 100 peacefully chatting in front of the Novotel Hotel.

15. Mr. Paikin testified that at some point in time, around 9:30 p.m., a decision was made by police and protesters were advised that those who did not move on would be arrested and he saw a number of individuals escorted to waiting vehicles.

16. When Mr. Paikin was confronted by officers, he identified himself as a journalist with G20 summit credentials and was given the option of moving on or being arrested. He chose the former and the rest of his evidence was based on what he saw as he was being escorted out of the protest area.

17. As he was leaving the area, Mr. Paikin observed two officers on either side of an individual (this turned out to be the complainant Mr. Rosenfeld) who held the individual by the arms. Mr. Rosenfeld was facing Mr. Paikin who could not see the officers' faces as their backs only were visible.

18. Mr. Paikin testified that while moving, he overheard a conversation during which the individual (Mr. Rosenfeld) complained to officers that he was a journalist doing his job.

19. When one of the officers responded that the journalist's claim had to be checked out, Mr. Rosenfeld, according to Mr. Paikin, became chippy and argumentative but not

resistive because he was being held.

20. According to Mr. Paikin, Mr. Rosenfeld must have "punched the button" of a third officer who then punched Mr. Rosenfeld in the stomach and as Mr. Rosenfeld fell, he was hit hard in the middle of his back. While Mr. Rosenfeld appeared incapacitated, he did not go to the ground.

21. Mr. Paikin further explained that his full G20 summit accreditation, which was accepted, gave him access to all G20 summit events within the perimeter fencing. In his view, his accreditation was neither necessary or relevant to being on a city street, but he decided not to oppose leaving the protest area.

22. In cross-examination, Mr. Paikin conceded that he did not hear the conversation between Mr. Rosenfeld and officers-was unaware of any force of the two officers holding Mr. Rosenfeld or of resistance by Mr. Rosenfeld as everyone appeared to be standing still.

23. He was unable to identify P.C. Martinez or clearly describe the nature of the force used and whether or not it was an open hand as opposed to a fist, but he did believe the hit was forceful and that he had a strong recollection of the entire incident.

24. While I accept Mr. Paikin was attempting to be as honest and as helpful as possible, I do know that like any other witness testifying some years after the event, without reference to notes, that memory may not be always precise, particularly, when subjective conclusions are involved with respect to events taking place in a very short time period.

25. By the way of example, Mr. Paikin identified what turned out to be P.C. Martinez as wearing a short sleeve blue shirt, shorts and high black knee socks. Other witnesses confirmed that P.C. Martinez wore a yellow rain jacket throughout.

26. The only issue for this tribunal arising from Mr. Paikin's testimony relates to his observation regarding the degree of force used as it is clear that he only heard a portion of Mr. Rosenfeld's argument and not what any officer responded. I also note that Mr. Paikin interviewed Mr. Rosenfeld on his T.V. show to review the events surrounding his arrest.

JESSE ROSENFELD

27. Mr. Rosenfeld testified by way of Skype video from Egypt that on June 26, 2010, he was a freelance journalist on assignment for the UK newspaper, *The Guardian*. He is a graduate of McGill University in Montréal.

28. Mr. Rosenfeld did not have a State Accreditation Pass (apparently Canada does not issue such). He did not have an official G20 Accreditation Pass. He apparently applied for one through the RCMP which he testified never came through but was never denied.

29. Mr. Rosenfeld identified a copy of what is said to be an Alternative Media Pass which he showed to officers and was told it would not be accepted. Mr. Rosenfeld apparently tried but was unsuccessful in accessing on his mobile device, what he claimed to be, a letter claiming his appointment with *The Guardian*. According to Mr. Rosenfeld, soon after his Alternative Press Card was not accepted, he was not accorded the opportunity to leave as were those, like Mr. Paikin, with the G20 Passes but rather was subject to arrest as were the other protesters at the Novotel site.

30. Mr. Rosenfeld described what he was wearing: A pair of jeans, a brown plaid shirt with sleeves rolled up and in his backpack he acknowledged he had a bandanna, goggles and a bottle of vinegar for what he anticipated might be the use of tear gas by the police.

31. Mr. Rosenfeld agreed that from the first moment of contact with police, he was

complaining about the non-recognition of his credentials and expected further negotiation on the topic. Instead, as Mr. Rosenfeld described, he received without warning, a blow at the bottom of his chest that wounded him and a hit between the shoulder blades that knocked him to the ground.

32. Mr. Rosenfeld stated that prior to the blows, he had been grabbed by two officers aggressively and that in no time was he resisting. He stated that prior to the blows he was not resisting even when the officers had chimed in to "stop resisting".

33. Mr. Rosenfeld described his injuries as being a twisted ankle, a bruise on the face and a cut on the leg, all of which took place "while they were beating me and I became incapacitated".

34. He further said that it was not until later when his stuff was searched that he was told that he had been arrested for breach of the peace. He was detained for some 16 to 17 hours and not charged with anything.

35. Mr. Rosenfeld identified the officer pictured in Exhibit 6 as the officer who had punched him. It is to be noted that Exhibit 6 is a picture of officer Lum, not P.C. Martinez who is the officer who applied force.

36. Mr. Rosenfeld stated that the officers who grabbed him were also the ones who questioned him but was unable to specifically identify those officers or precisely what they were wearing.

37. Mr. Rosenfeld's main complaint seems to be that he was not accorded the same opportunity to leave the area as were other journalists, like Mr. Paikin, because the two officers rejected his credentials as a journalist.

38. Mr. Rosenfeld conceded that he continued to make the officers aware of what he believed were his rights as a journalist and they were not prepared to have him leave in

the same way as other journalists and when he was given no further options, he was quickly and aggressively assaulted.

39. Under cross-examination, Mr. Rosenfeld conceded that he did not receive any long-term injury, did not complain of any injury and could not identify any marks to his face on the photo (Exhibit 6). Mr. Rosenfeld conceded that he has done a lot of interviews about how he was treated because, in his view, it is an important issue for frontline journalists.

40. Mr. Rosenfeld, unlike Mr. Paikin, tended to embellish his evidence where it suited his cause as a complaint. Use of the words “beaten”, “knocked to the ground”, “facial bruising”, and “cut leg” all go well beyond the evidence of Mr. Paikin and the officers who testified about the uses of force. Mr. Rosenfeld made no complaint of injuries at the time or indeed any time after, until his testimony.

41. I conclude that Mr. Rosenfeld’s main complaint is that he was subject to arrest and not accorded, what he believed were, his rights as a journalist and it was in that context that he should not have been subjected to any force because he should have been accorded the opportunity to continue to complain about the lack of recognition of his position as a journalist.

THE DEFENCE

42. The first defence witness was P.C. Martinez himself, a 14 year veteran of Toronto Police Services. He comes from a police family and from his years at 52 Division, in downtown Toronto, was familiar with issues relating to protests.

43. P.C. Martinez was trained in and familiar with issues of the use of police force on the night of June 26, 2010, when he was part of a back *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206up crew to assist the Public Safety (order) Unit. He was aware of the issues of violence associated with the G20 the previous night.

44. P.C. Martinez was at the Esplanade to assist in escorting individuals who were subject to arrest once the order was given. P.C. Martinez testified that following having heard the order with respect to Mr. Rosenfeld being "under arrest", he turned around and saw Mr. Rosenfeld trying to get away from being held by two officers who he couldn't see and turned out to be P.C. Lum and P.C. Mann. He heard one or other of the officers say to Mr. Rosenfeld, "stop resisting" and that the later was not being compliant with both fists and teeth clenched.

45. P.C. Martinez described Mr. Rosenfeld as being "active resistant". A term referred to in Exhibit 8, a chart called the "Force Wheel", to assist officers gauge the appropriate force to use in these circumstances. P.C. Martinez did not classify Mr. Rosenfeld as assaultive and, therefore, used an open hand hit to the chest to avoid injury. A closed fist is used when greater force is required.

46. Since the initial blow was not effective, he intended a "brachial stun" but given Mr. Rosenfeld's movement, this turned out to be a blow that hit the back. Mr. Rosenfeld was placed on the ground by other officers and P.C. Martinez grabbed his legs.

47. P.C. Martinez confirmed that throughout he wore his yellow rain coat and acted on his own, not in response to any other request or orders. It was his judgment that Mr. Rosenfeld was resisting and it was important to move him along.

48. In cross-examination, the Constable confirmed he has not previously been subject to a disciplinary complaint. He was aware that Mr. Rosenfeld was never charged with a criminal code offense, and was simply arrested for breach of the peace.

49. The officer rejected the suggestion that he reacted to a long 12 hour day in anger and frustration after several long days. He reiterated that the force used was within level to deal with someone who appeared to be resisting arrest.

P.C. LUM

50. P.C. Lum is a 29 year veteran of Toronto Police Services and, while currently a fraud investigator, is very familiar in policing protests in the downtown area. He confirmed his role as support for the POU with instructions to process individuals who were under arrest for breach of the peace at the Esplanade on the evening of June 26, 2010. One of his police roles was to check press credentials. Mr. Rosenfeld confirmed he did not have an official G20 Pass, apparently, as Mr. Rosenfeld believed the RCMP didn't like him.

51. P.C. Lum had seen Mr. Rosenfeld the day before at another protest and as he and P.C. Mann tried to walk Mr. Rosenfeld out of the area, he resisted and tried to break out of their grasp. P.C. Lum described Mr. Rosenfeld as actively resistant and argumentative as he felt he had a right to be there.

52. Given the way he and P.C. Mann were walking and concentrating, he did not see any blows. P.C. Lum confirmed that a force of the type described by P.C. Martinez was a valid technique and that to his observation, Mr. Rosenfeld did not have any injury, nor did he complain of any injury.

P.C. MANN

53. This officer, 50 years of age, is a 17 year veteran of Toronto Police Services and while now with the sexual assault unit, he was on duty on June 26, 2010 in attendance as part of the crew of officers from 52 division at the Esplanade.

54. P.C. Mann is experienced in dealing with protests and confirmed his role was to process individuals under arrest for the Public Service Unit. It was in this context that he came into contact with Mr. Rosenfeld.

55. P.C. Mann was told that Mr. Rosenfeld was under arrest, was asked to check him for press credentials, which he did and did not find valid or appropriate identification. He was familiar with G20 Press Passes.

56. P.C. Mann described the resistance of Mr. Rosenfeld to being arrested, his complaint about his credentials not being accepted and the need that the officers had to control Mr. Rosenfeld by the arms. P.C. Mann on one hand and P.C. Lum on the other side.

57. As a result of this activity, P.C. Mann did not see what force caused Mr. Rosenfeld to be on the ground. Mr. Rosenfeld was struggling because he wouldn't give up his hands and the level of struggle was described as "active resistant" as set out in Exhibit 8.

58. In the view of the officer Mann, the degree of force used was reasonable in the circumstance as Mr. Rosenfeld was yelling and pulling away. No complaints or injuries were made by Mr. Rosenfeld of which P.C. Mann was aware, other than a request to use the washroom.

59. Under cross-examination, P.C. Mann confirmed that when he was checking credentials, Mr. Rosenfeld was already under arrest and that the pass he tendered was not proper.

60. The officer denied the suggestion that the resistance could be regarded as passive since the words used by Mr. Rosenfeld, "no way you were going to arrest me", and his level of struggle were more than passive.

61. Like P.C. Lum, P.C. Mann remembered seeing Mr. Rosenfeld the day before at a protest on Spadina Avenue in the same attire as on June 26, 2010.

ANALYSIS

62. It is common ground that the test for determination of the offense is “clear and convincing evidence”. The charge is one of using unnecessary force.

63. The major complaint of Mr. Rosenfeld is that he was arrested in the first place and that given his role as a journalist, he should have been exempt from the arrest.

64. None of that background was known to or important to P.C. Martinez. His concern and that of this tribunal was in the use of force and whether it was necessary.

65. All three officers were aware of the extent of violence that had occurred at the G20 protests in downtown Toronto the night previous. The officers were there to assist the POU and were given an order to process those who were told they were under arrest.

66. I conclude on the evidence before me that Mr. Rosenfeld was resisting after having been informed he was under arrest.

67. The testimony of all three officers as well as Mr. Paikin confirms the degree of resistance. Mr. Rosenfeld’s testimony exaggerated the conduct of the officers and underplayed his own role, which was both verbal and physical, and he was mistaken as to which officer hit him.

68. The question is, was P.C. Martinez justified in using force in the circumstances and was any force necessary?

69. There may well be other circumstances in which what was done by P.C. Martinez could be deemed unnecessary, but I can conclude on all of the circumstances that existed on the night of June 26, 2010 that he faced, the force was in fact reasonable.

70. The purpose of his presence, as well as his fellow 52 Division officers, was to back up and assist the POU to process those under arrest to ensure that things did not get out of hand as they had on Spadina Avenue the night before.

71. I am of the view that it was reasonable for officer Martinez to intervene when he heard and saw Mr. Rosenfeld both physically and verbally resisting his arrest.

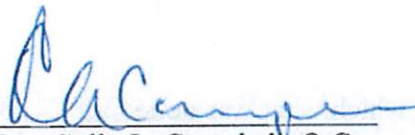
72. I accept the evidence of P.C. Martinez and conclude that the nature of the force used was appropriate to achieve the compliance he obtained which, in my view, in the circumstances was necessary.

73. Even if one accepts the subjective conclusion of Mr. Paikin that there was a stiff blow landed, the purpose of the blow was to obtain compliance without injury, which I find was in fact accomplished.

74. The test set out by the Supreme Court of Canada for the use of force by police officers is "proportionality, necessity and reasonableness" (See *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206).

75. I have concluded that the test is met on the facts of this case and therefore the charges are dismissed.

DATED at the City of Toronto, in the Province of Ontario, this 15th day of July, 2014.


The Hon. Colin L. Campbell, Q.C.