ONTARIO CIVILIAN POLICE COMMISSION

COMMISSION CIVILE DE L'ONTARIO SUR LA POLICE

Safety, Licensing Appeals and Standards Tribunals Ontario

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

Ontario

Citation: Rose, Arcand, Liburd, Correa, Fuller v. Toronto Police Service and Adam MacIsaac and Office of the Independent Police Review Director, 2018 ONCPC 2

Date: January 18, 2018
File Numbers: 16-ADJ-005 and 16-ADJ-010

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

Between:	Sgt. Douglas Rose, Csts. Brian Arcand, Blair Liburd, Irwin Correa, Jermaine Fuller	Appellants
	and	
	Toronto Police Service	Respondent
	and	
	Daniel Adam MacIsaac	Public Complainant
	and	
	Office of the Independent Police Review Director	Statutory Intervenor

DECISION

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

Appearances: Joseph Wilkinson, counsel for the Appellants.
Marianne Wright, counsel for the Respondent.
Jean lu, counsel for the Statutory Intervener

PLACE AND DATE OF HEARING: TORONTO, ONTARIO
APRIL 27, 2017

INTRODUCTION

[1] These appeals arise from the decision of the Hon. Judge W. Gonet (the Hearing Officer) dated June 17, 2015 wherein he convicted the appellants of various charges under the *Police Services Act (*the *PSA)* and the *Code of Conduct (*the *Code*). The charges and convictions arose from the appellants' involvement in the arrest of Adam MacIssac on Sunday, June 26, 2010 during the now infamous G20 Summit in Toronto.

[2] Sgt. Rose, Cst. Arcand and Cst. Correa were each convicted of the following two counts of misconduct under section 2(1)(g)(i)(ii) of the *Code*:

> Unlawful or Unnecessary Exercise of Authority, in that he or she,
> (i) Without good and sufficient cause makes an unlawful or unnecessary arrest, or
> (ii) Uses any unnecessary force against a prisoner or other person contacted in the execution of duty;

[3] Cst. Fuller was convicted of misconduct under section 2(1)(a)(xi) of the *Code* which reads:

> Discreditable Conduct, in that he or she,
> (xi) acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the police force of which the officer is a member;

[4] The particulars of the charge were, in part, that Cst. Fuller took custody of property belonging to Mr. MacIssac, did not account for continuity of that property and failed to submit it and the proper records in relation to the seizure of that property in a timely manner.

[5] Cst. Liburd was convicted of discreditable conduct under the same section of the *Code.* The particulars of the charge were, in part, that Cst. Liburd without consent removed an Alternate Media Pass from Mr. MacIssac and failed to return it to him.

DISPOSITION

[6] For the reasons that follow we revoke the convictions against Sgt. Rose, Cst. Arcand, Cst. Fuller and Cst. Liburd. We confirm the conviction against Cst. Correa for unlawful arrest but revoke the conviction for the use of unnecessary force.

OVERVIEW

[7] The civil disobedience and rioting faced by the police during the G20 Summit have been detailed in a number of previous decisions of the Commission and in a comprehensive report prepared by the Independent Police Review Director titled Policing the Right to Protest, issued in May 2012. Accordingly, we see no need to detail those events again, other than to acknowledge that the police were faced with, for Toronto, unprecedented acts of violence and destruction of property including to their own vehicles and headquarters.

[8] This matter involves the actions of the appellants in reacting to the presence of Mr. MacIssac and his camcorder at the corner of Bloor Street and St. Thomas on Sunday, June 27, 2010, the last day of the Summit. Much, but not all, of Mr. MacIssac's interactions with the appellants were captured on his recorder or that of his friend Amy Miller.

[9] Mr. MacIssac had received credentials from the Alternative Media Centre (the AMC) described by the Hearing Officer as an organization of "amateur journalists and photographers who had an interest in covering the non-official and informal parts of the G20 meeting". As a member, Mr. MacIssac was given an AMC identification card with his photograph attached.

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

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

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

where he is eventually handcuffed by Sgt. Rose. The arrest is not clearly seen on the recordings.

[13] Following the takedown, Mr. MacIssac was arrested and charged with Breach of the Peace, Obstruct Police and Cause Disturbance. At some point, Cst. Fuller picked up Mr. MacIssac's camcorder and gave it to an unidentified intelligence officer, failing to follow the TPS policy on bagging and identifying seized property for safety and continuity. When the camcorder was eventually returned to Mr. MacIssac two of its memory cards or drives were wiped of images but there was still video on the hard drive.

[14] Mr. MacIssac was placed in an ambulance as he suffered a broken finger during the takedown. Cst. Liburd testified that he went to the ambulance and either threw the AMC card to Mr. MacIssac or gave it to an unidentified officer inside the back of the ambulance. The card was eventually returned to Mr. MacIssac and all of the charges against him were eventually withdrawn.

[15] The Hearing Officer, in very brief reasons, and relying heavily on the two videos convicted the appellants of the charges as set out above. He did dismiss one other charge of Discreditable Conduct against Cst. Correa.

ISSUES

[16] The appellants submitted the following four issues or grounds of appeal in support of their position that the convictions should be set aside or in the alternative that a new hearing should be ordered:

I) The Hearing Officer provided insufficient reasons and failed to properly assess Mr. MacIssac's credibility versus the appellants.

II) The Hearing Officer failed to consider a necessary element of the offences.

III) The Hearing Officer improperly considered evidence from a non-witness.

IV) The Hearing Officer failed to consider the roles of Cst. Arcand and Sgt. Rose as assisting officers.

[17] The TPS and Mr. MacIssac submit that the appeals should be dismissed while the Director takes no position on the ultimate result of the appeals. These submissions focused on the convictions against Sgt. Rose, Cst. Arcand and Cst. Correa. At the conclusion of our analysis we shall deal with the convictions

against Cst. Fuller and Liburd.

ANALYSIS

[18] The standards of review to be applied by the Commission to a decision of a Hearing Officer are now settled. The standard is reasonableness on questions of fact and correctness on questions of law: *Ontario Provincial Police v. Purbrick,* 2013 ONSC 2276, at paras. 14-16 (Div. Ct.); *Ottawa Police Service v. Diafwila,* 2016 ONCA 627, at paras. 53-63. Questions of whether the facts satisfy a legal test are questions of mixed fact and law, which are also to be reviewed on the standard of reasonableness unless there is an extricable question of law involved: *Dunsmuir v. New Brunswick,* 20008 SCC 9, at para. 53

[19] Findings of fact and credibility assessments are owed deference by the Commission unless an examination of the Record shows that the Hearing Officer's findings cannot reasonably be supported by the evidence: *Toronto Police Service v. Blowes-Aybar,* 2004 CanLII 34451 (Div. Ct.).

[20] In assessing the reasonableness of a decision, the question to be addressed is "Does the decision fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and law?" See *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190. The Court in *Dunsmuir* also wrote, "In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility with the decision-making process".

[21] We now turn to our examination of the issues.

I) The Hearing Officer provided insufficient reasons and failed to properly assess the complainant's versus the appellants' credibility.

[22] The submission as to insufficient reasons will be dealt with below as part of the argument that the Hearing Officer failed to consider a necessary element of the offence of unlawful arrest.

[23] The appellants submitted that "there was a significant volume of evidence detracting from the credibility and reliability of the complainant's evidence, including unclear memory, argumentativeness and evasiveness in testimony, inconsistent statements, and blatant fabrication".

[24] The Hearing Officer's only comments about the credibility of the parties were as follows:

> 18. The matter of credibility and the test thereof is somewhat made easier when the trier of 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 the parties involved.
>
> 19. With this added advantage, where the evidence of the police officers is in conflict with that of Mr. MacIssac, 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 video.

[25] The Hearing Officer obviously relied in large part on the two videos to convict Sgt. Rose, Cst. Liburd and Cst. Arcand of the charges related to what he found was the unlawful arrest of Mr. MacIssac. He did not explain where the police evidence was "too far in conflict with the content of the video".

[26] We acknowledge that it would have been preferable for the Hearing Officer to have further explained what he considered to be the conflicts in the evidence of the appellants compared with what he viewed on the videos. However, in our view he was justified in using the videos, to the extent of what they actually depicted, as being determinative of the facts upon which to then consider whether the offences had been proved on clear and convincing evidence. We would not give effect to this ground of appeal.

II) The Hearing Officer failed to consider a necessary element of the offences.

[27] The Hearing Officer's analysis of the evidence is set out at paragraphs 6 to 17 of his decision. His analysis of the lawfulness of the arrest of Mr. MacIssac is dealt with at paragraphs 20 to 26 of his decision.

[28] The Hearing Officer found that there were no reasonable grounds to believe that Mr. MacIssac was committing a breach of the peace; that the conduct of Mr. MacIssac did not amount to the offence of causing a disturbance and as

conceded by the defence at the hearing there were no grounds to arrest for obstructing the police.

[29] The appellants submit that the reasons of the Hearing Officer are so deficient that meaningful appellate review has been foreclosed. They also submit that he failed to consider a necessary element of the offence under section 2(1)(g)(i) of the *Code* which reads as follows:

> (g) Unlawful or Unnecessary Exercise of Authority, in that he or she,
>
> (i) without good and sufficient cause makes an unlawful or unnecessary arrest.

[30] The Commission has previously held that in order to establish misconduct under this section, two criteria must be satisfied by the prosecution. The arrest must be both unlawful and unnecessary and it must be without good and sufficient cause: *Ardiles and Toronto Police Service,* 2016 CanLII 2434 (OCPC); *Sequin and Wallace v. Toronto Police Service, 2016 ONCP* 2 (CanLII). The Hearing officer did not deal with the second criteria.

[31] However, in *Wowchuk and Thunder Bay Police Service,* 2013 CanLII 101391 (ONCPC) the Commission wrote the following:

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

[32] In reviewing the Record, it appears that the thrust of the appellants' submissions before the Hearing Officer was that the arrest of Mr. MacIssac by Cst. Correa was lawful. The Hearing Officer, albeit in brief reasons, rejected that argument. It does not appear that the appellants made submissions that they had good and sufficient cause to make the arrest if it was found to be unlawful.

[33] The appellants, or at least the three arresting officers, now submit that their "good faith performances in a potentially dangerous and dynamic situation" constitute good and sufficient cause. Assuming that we should now deal with an argument not made before the Hearing Officer, having reviewed the Record and the videos

we see insufficient evidence to establish good and sufficient cause for the arrest of Mr. MacIssac.

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

[35] The appellants' submission that the reasons of the Hearing Officer are so deficient as to preclude meaningful appellate review applies to this issue and the fourth issue.

[36] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 3 S.C.R. 768 the Supreme Court of Canada wrote of the restraint appellate tribunals must show when reviewing the reasons of administrative tribunal where a party has alleged inadequacy of reasons. At paragraph 16 the Court wrote the following:

> Reasons may not include all arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion…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 reasonable outcomes, the *Dunsmuir* criteria are met.

[37] The *Dunsmuir* criteria refers to the existence of justification, transparency and intelligibility within the decision-making process that makes a decision reasonable, i.e. whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. The Court in *Newfoundland* accepted that "perfection is not the standard" for reasons and that a reviewing court should ask whether "when read in light of the evidence before it and the nature of its statutory tasks, the Tribunal's reasons adequately explain the bases of its decision".

[38] The Court in *Newfoundland* also stated the following:

> When reviewing a decision of an administrative tribunal on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.

[39] In our view, the reasons of the Hearing Officer, as buttressed by the two videos, are sufficient to dispose of the first two issues of credibility and whether there was good and sufficient cause for the arrest.

III) The Hearing Officer wrongly considered evidence from a non-witness.

[40] The Hearing Officer referred to the "evidence" of Amy Miller, who did not testify at the hearing. It is clear to us that the Hearing Officer was in reality referring to the video recording she made which was entered as an exhibit at the hearing. In our view, nothing turns on this error in the decision.

IV) The Hearing Officer erred by failing to consider the roles of Cst. Arcand and Sgt. Rose as assisting officers.

[41] A contentious issue before the Hearing Officer was the status of Sgt. Rose and Cst. Arcand during the arrest of Mr. MacIssac. Cst. Correa acknowledged that he was the arresting officer and that Sgt. Rose was not part of the arrest, although he did apply the handcuffs. Cst. Arcand testified that Cst. Correa was the arresting officer. Mr. MacIssac testified that Sgt. Rose had moved away from him at the time of the arrest, while Sgt. Rose was the only one of the appellants who did not testify.

[42] In *Rose v. Toronto Police Service,* 2016 CanLII 84144 (OCPC) the Commission acknowledged that there was a distinction to be drawn between an arresting officer and an officer who merely assists. The Commission adopted the following passage from *R. v. Debot,* [1986] O.J. No. 994 (ONCA), affirmed [1989] 2 S.C.R. 1140:

> Frequently, in modern times, the particular officer making the arrest or conducting a search is not the only officer concerned in the investigation

> out of which the search or arrest arose. It seems to me to be unrealistic and incompatible with effective law enforcement and crime prevention, when a police officer is requested by a superior or fellow officer to arrest or search a person suspected of the commission of a crime and to be fleeing from the scene, to require that police officer to obtain from his or her superior or fellow officer sufficient information about the underlying facts to enable him or her to form an independent judgment that there are reasonable grounds upon which to arrest or search the subject. A dangerous offender might escape in the interval.

[43] The Hearing Officer in that *Rose* decision found that even though another officer was the principal one making the arrest, Rose was in the immediate vicinity of the arrest, saw the events leading up to it, but saw nothing to justify the arrest. The Commission, accepting the facts as found by the Hearing Officer, upheld the conviction for unlawful arrest.

[44] In the matter before us, the Hearing Officer did not deal with this issue in his decision even though it was argued. He made no findings of fact for us to accept or find reasonable. In our view, even though Sgt. Rose and Cst. Arcand were in the vicinity of the arrest, the evidence as to what they saw or their knowledge of what was happening is not so “clear and convincing” to support their convictions for the unlawful arrest of Mr. MacIssac by Cst. Correa. The Convictions should be set aside.

The convictions for use of unnecessary force.

[45] There is no analysis in the decision of the Hearing Officer as to whether unnecessary force was used by any of Sgt. Rose, Cst. Arcand or Cst. Correa during the course of the arrest of Mr. MacIssac, but rather he simply makes the conclusion that it was unnecessary. There was conflicting evidence as to whether the grounding of Mr. MacIssac was accidental or deliberate. Cst. Correa testified that he did not intend to take Mr. MacIssac to the ground. In our view the reasons of the Hearing Officer are deficient in failing to provide such an analysis and the convictions of Sgt. Rose, Cst. Arcand and Cst. Correa for using unnecessary force cannot stand.

The convictions against Cst. Fuller and Cst. Liburd.

[46] The Hearing Officer’s review of the evidence concerning Cst. Fuller was

essentially contained in paragraph 17 of his decision where he wrote the following:

> Police Cst. Fuller was dealing with other arrested persons south of the area where MacIssac 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 tagging, 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 MacIssac received the return of the camcorder, it was noted that one of the two cards was wiped and all data recorded was deleted.

[47] Cst. Fuller admitted before the Hearing Officer that he did not follow all of the TPS policies regarding the handling of the camcorder. He testified that he worked an inordinate amount of hours during the G20 Summit and given the tumultuous, rapidly changing circumstances the police were facing that weekend, TPS policies were not always being followed. He testified that he did the best he could under these circumstances.

[48] There is no analysis in the decision of the Hearing Officer to show if Cst. Fuller's actions rose to the level of discreditable conduct. Not all breaches of a policy automatically give rise to a conviction. The test for Discreditable Conduct is an objective one to be considered from the viewpoint of a dispassionate, reasonable person fully apprised of the facts: *Mulville and Azaryev and York Regional Police Service,* 2017 CanLII 19496 (ONCPC). A technical breach of the law made in good faith would not be found by any reasonable person in the community to bring discredit upon that officer's police force: See *Gillespie v. Shockness.* (September 27, 1994 Bd. Of Inquiry).

[49] Cst. Liburd was involved in the violent events of the day before in downtown Toronto and had the windshield of his cruiser smashed. He took the AMC card from Mr. MacIssac in an attempt to verify its authenticity. He clearly did so without the consent of Mr. MacIssac. The Hearing Officer's decision contains no analysis as to the basis for the conviction of Cst. Liburd. As is the situation with Cst. Fuller, he was entitled to some reasoning from the Hearing Officer as to why his conduct rose to the level of discreditable conduct.

[50] For these reasons we find that the convictions against Csts. Fuller and Liburd should be set aside.

[51] The events giving rise to these proceedings occurred over seven and a half years ago. The evidence will not improve with the passage of time. Given that passage of time we do not believe that it would be in the interests of justice to order a new hearing. Further, we do not believe that a simple review of the transcripts should now be carried out to, in effect, retry any of the appellants. A Hearing Officer has the distinct advantage of observing the witnesses while they give their evidence. There was certainly conflicting evidence given by the parties and it is difficult to assess that evidence without the advantage given to a Hearing Officer of observing their evidence.

ORDER

[52] Pursuant to section 87(8) of the *Police Services Act,* the conviction of Cst. Correa in relation to making an unlawful arrest is confirmed while the conviction for using unnecessary force is revoked. The convictions of Sgt. Rose and Cst. Arcand relating to the unlawful arrest are revoked as are their convictions for using unnecessary force. The convictions of Cst. Fuller and Liburd for discreditable conduct are revoked.

Released: January 18, 2018

D. Stephen Jovanovic

John Kromkamp