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: Fenton, Supt. Mark v. Toronto Police Service, 2017 ONCPC 15

Date: November 9, 2017
File Number: 16-ADJ-007

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

Between: Supt. Mark Fenton — Appellant/Respondent by Cross-Appeal

-and-

Toronto Police Service — Respondent

-and-

David Steele, Brenda Campbell, Shervin Akhavi and Jonathan Deshman — Respondents/Appellants by Cross-Appeal

-and-

The Office of the Independent Police Review Director — Intervener

DECISION

Panel: D. Stephen Jovanovic, Associate Chair
Karen Restoule, Member
Katie Osborne, Member

Appearances:
Michael Lacy and Bryan Badali, counsel for the Appellant
Sharon Wilmot, counsel for the Respondent Toronto Police Service

Sean Dewart and Adrienne Lei, counsel for Shervin Akhavi and Jonathan Deshman, Respondents and Appellants by cross-appeal

Philip Abbink and Danielle Bisnar, counsel for David Steele and Brenda Campbell, Respondents and Appellants by cross-appeal

Lynette D'Souza, counsel for The Independent Police Review Director

Hearing Location: Ontario Civilian Police Commission
250 Dundas Street West, Suite 605
Toronto, Ontario, Canada M7A 2T3

Hearing Dates: April 4 & 5, 2017

REASONS FOR DECISION

INTRODUCTION

[1] Superintendent David Mark Fenton, the appellant, has appealed the decisions of the Hon. John Hamilton, Q.C. (the Hearing Officer) dated August 25, 2015 and June 15, 2016.

[2] In the first decision, the Hearing Officer found the appellant guilty of three counts of professional misconduct contrary to the Code of Conduct, O. Reg. 123/98 (the Code) under the Police Services Act (the *PSA*). Two other charges under the Code were dismissed. All charges arose from the actions of the appellant in ordering the mass arrests of protestors during the G20 Summit in Toronto on June 26 and 27, 2010. The second decision dealt with the penalties imposed for the three convictions.

[3] The first conviction, under section 2(1)(g)(i) of the Code followed the Hearing Officer's finding that the appellant had committed misconduct for the unnecessary exercise of authority in ordering the unlawful arrest of a crowd of people, some of whom were protestors, in front of the Novotel Hotel in downtown Toronto on June 26, 2010. The penalty imposed was a reprimand.

[4] The second conviction under the same section of the Code was for the unlawful arrest of another crowd of people, some of whom were protestors, at the Intersection of Queen and Spadina on the evening of June 27, 2010. The penalty imposed for this offence was the forfeiture of ten days off.

[5] The third conviction, under section 2(1)(a)(xi) of the Code, followed the Hearing Officer's finding that the appellant committed discreditable conduct in that he failed to monitor the detention of those individuals arrested at Queen and Spadina, forcing them to suffer through the inclement weather. The penalty imposed for this third conviction was the forfeiture of 20 days off.

[6] David Steele and Brenda Campbell (the Novotel respondents) were among those arrested at the Novotel. They were granted leave by the Commission to appeal the penalty imposed. They are requesting that the appellant be dismissed from his employment with the Toronto Police Service (the TPS).

[7] Shervin Akhavi and Jonathan Deshman (the Queen/Spadina respondents) were among those arrested at Queen and Spadina. They were also granted leave by the Commission to appeal the penalties imposed and submit that the appellant should be dismissed from the TPS.

[8] The TPS takes the position that the appeals and cross-appeals should be dismissed. The Independent Police Review Director (the Director) takes no position on the orders sought by the other parties but has made submissions as to the scope of the penalties that a Hearing Officer or the Commission may make.

DISPOSITION

[9] For the reasons that follow, we dismiss the appeals from the three convictions. We vary the penalty for the conviction for the unlawful arrests of the Novotel protestors on June 26, 2010 to the forfeiture of 20 days off. The penalty for the conviction for the unlawful arrests of the Queen/Spadina protestors on June 27, 2010 is varied to the forfeiture of 20 days off. The penalty of the forfeiture of 20 days off for the conviction for discreditable conduct arising from the June 27, 2010 arrests is confirmed. All penalties are in addition to one another.

BACKGROUND

[10] The role of the police in providing the necessary security during the G20 Summit has been the subject of a number of investigations and reports. The Director released his report, *Policing the Right to Protest,* in May 2012. A collection of essays detailing what the authors said went wrong before, during and after the G20, focusing on the actions of the police, was published under the title *Putting the State on Trial: The Policing of Protest During the G20 Summit*, Beare, Des Rosiers and Deshman, UBC Press, 2015.

[11] This decision, however, focuses on the actions of the appellant based on the evidence before the Hearing Officer. The following summary of the facts is taken largely from the decision of the Hearing Officer.

[12] The appellant was an Incident Commander (IC) whose duties were described in the document titled: The Major Incident Command Centre (MICC) 2010 G20 Summit Roles and/or Responsibilities. It stated the following:

> The IC is responsible for overall management of the event, and shall have operational and tactical control of all units assigned to the TPS for the duration of the G20 Summit. For the G20 Summit, the IC will have a DIC [deputy] assigned to assist with operations. During the G20 Summit there shall only be one IC. The title of IC shall belong to the position occupied in the MICC of the TPS. This position shall have total command over all resources assigned to the G20 Summit.

[13] The appellant had previously served as an IC for other events in Toronto between November 2008 and the G20 Summit, including over a number of days during the Tamil protests. He received additional training specifically for the G20 in the months leading up to the Summit. In his twenty-two years with the TPS, as of the time of the Summit he served in various capacities including communications and professional standards in different divisions. However, he was not an experienced investigator never having worked as a detective in the Criminal Investigation Bureau.

[14] A training module prepared by the TPS indicated that the IC: 1) is responsible for overall co-ordination and direction of all responses; 2) sets objectives for the event and prioritizes tasks; 3) should be in the command post and; 4) delegates authority not responsibility.

[15] The RCMP was the lead police service responsible for co-ordinating the G20 security planning and operations. An Integrated Security Unit was established as part of its command structure and comprised various government and police agencies including the TPS.

[16] The RCMP was also responsible for providing security for two zones created for the Summit. The Controlled Access Zone covered an area that included the Toronto Convention Centre, the Intercontinental Hotel on Front Street and the Royal York Hotel. This zone was enclosed with a chain link fence atop a concrete barrier with a combined height of over nine feet. The Hearing Officer described this fence as the “buffer” between the political leaders attending the Summit and members of the public.

[17] The Restricted Access Zone was encircled with a fence that wound its way from Front and John Streets, south on Lower Simcoe to Lakeshore, then north to the CN Tower and back to where it began. The TPS had the responsibility of securing and policing all areas outside of these zones. The appellant testified that his priority was to ensure that the security fences were not breached.

[18] At any given time, there were at least one thousand members of the TPS on duty. The entire security contingent for the Summit included approximately five thousand RCMP staff and about seventy five hundred additional police officers and security personnel from other police services.

[19] The overall command hierarchy had a Unified Command Center with an RCMP IC in charge. Second in the command structure was the Toronto Area Command Centre stationed at Pearson Airport. Next was the MICC described as the central point of command, communications and information for the TPS.

[20] The MICC was under the command of Deputy Chief Warr. Staff Superintendents McGuire and Gauthier, were next in command overseeing Superintendent Ferguson, the shift 1 IC and the appellant, assigned to shift 2. Six different police units, including one Intelligence unit, reported to the IC on duty. Information was supposed to flow up from the IC to McGuire and Gauthier. The appellant had direct communications with the Toronto Area Command Centre and its senior officers.

[21] The MICC also had two DICs, a number of Bureau Chiefs and Directors in charge of police units. Two of the Directors, Superintendents Needles and Marks, were in charge of the Public Order Units (POU) and the Emergency Task Force (ETF) giving their units orders through Site Leads and Ground Commanders.

[22] The POU officers wore riot gear weighing about seventy pounds, were equipped with shields and batons and normally wore helmets. Their objectives were to 1) provide crowd management as required in Toronto; 2) maintain the peace; 3) prevent disturbances and other acts of violence; and 4) be deployed where required in any other emergent situations. The deployment of the POU was the responsibility of the IC through a Director who then passed on any orders to ground commanders.

[23] As stated by the Hearing Officer, the activities of the POU were central to the allegations against the appellant.

[24] Other police units were “flat hats”, wearing standard police uniforms, and the Community Response Unit (CRU), officers on bicycles usually wearing shorts, which did not provide them with much in the way of protection when facing projectiles.

[25] The RCMP also led the National Intelligence Unit that was responsible for gathering and then providing intelligence to the TPS Intelligence Units which information would then flow down to the ICs.

[26] The intelligence provided to the TPS included the risks of domestic extremism, cyber threats, threats to critical infrastructure, chemical, biological and other types of threats. The risk levels associated with these threats were to be continually reassessed. The TPS did receive intelligence that an anarchist group of up to 800 activists was expected to arrive in Toronto.

[27] Intelligence reports also warned about the presence of Black Bloc protestors, whose tactics were, according the Hearing Officer, a common feature of anti-establishment protests in Canada and abroad. Those tactics were simple but effective in allowing these protestors to avoid detection and arrest after committing acts of vandalism and violence.

[28] They would start out as participants in peaceful protests dressed to blend in with the crowd. At some point, they would change their clothing, often into black outfits, hide their faces with masks or bandanas, then engage in or incite acts of violence before changing back to nondescript clothing. The appellant was knowledgeable about these tactics and expected them to be used during the G20.

[29] The POU had an Operational Plan that defined its role in making individual and mass arrests. One relevant section of the plan read as follows:

> Arrests
>
> Officers should be prepared to respond to any acts involving violence, damage, public/private property and other Criminal Code offences requiring immediate arrest. Members of the POU should use discretion when determining to arrest and be mindful of such considerations as the seriousness of the offence, officer safety, public safety and the potential for increased violence. **Mass arrests shall be conducted only under the direction of the INCIDENT COMMANDER** [emphasis added].
>
> Mass Arrests
>
> Mass arrests shall only be conducted under the authority of the SPECIALIZED OPERATIONS DIRECTOR in consultation with the INCIDENT COMMANDER or OPERATIONS CHIEF. In the case of mass arrests, all personnel are to follow the Arrest Plan established for this event.

[30] A Prisoner Processing Centre (PPC) was established to deal any mass arrests. The PPC Operational Plan provided that it was "…designed to facilitate receiving and investigating a large number of prisoners. It is key that the facility be streamlined to ensure and [sic] effective and timely response from booking to release."

Friday June 25, *2010*

[31] A "Free the Streets" march began that afternoon at Allan Gardens where protestors had erected a tent city. The crowd grew to approximately one thousand marchers. About 200 protestors arrived by bus from Montreal including some in Black Bloc attire. Some were carrying "bags of liquid and backpacks filled with stones and bricks." TPS officers seized various protest related items.

[32] The "Free the Streets" march moved west along Carlton Street. Some Black Bloc protestors in the crowd were waving a black flag, carrying hammers while chanting, "Bomb the RBC." The crowd continued its march west on College Street towards the TPS Headquarters. Intelligence information indicated that some of the protestors were carrying Molotov cocktails.

[33] Protestors began to push police officers against storefronts. As back-up officers arrived, they were targeted with thrown glass bottles, liquids and even bicycles. The Black Bloc protestors were observed changing their clothing to again meld in with the peaceful protestors.

[34] These acts of violence and the outright disdain by the Black Bloc protestors for police officers performing their duties were a harbinger of what would happen the following day.

Saturday, *June 26, 2010*

[35] The "People First! We Deserve Better". March was scheduled to begin at 1:00 p.m. at Queen's Park. This was projected to be the largest organized demonstration during the Summit with about ten thousand participants expected. The organizers included various Ontario Labour groups, Greenpeace, Oxfam, the Canadian Peace Alliance and other non-government groups.

[36] Shortly before the march began, a number of Black Bloc protestors were arrested at 483 Bay Street preparing Molotov cocktails. Two other individuals

were arrested near a RBC branch at University and Dundas with “incendiary devices.”

[37] The marchers proceeded southbound in all lanes on University Avenue. About 100 Back Bloc protestors engaged in what the Hearing Officer described as “combat” with police officers from the POU. Inspector Cashman, a POU commander, testified that a crowd of about 100 protestors broke from the main marchers, changed into black clothing and began attacking his line of about 45 officers at Queen and John streets.

[38] His officers were pummeled with sticks, batteries, bottles, golf balls and ball bearings capable of penetrating their shields. They were pelted with bags of feces and containers of urine. Mounted officers were being hit with golf balls.

[39] As the main group of protestors continued west on Queen Street a large group of Black Bloc protestors broke away running east on Queen Street. POU officers used tear gas at Peter and Spadina in what proved to be a futile attempt to disperse the crowd there.

[40] The situation became so serious for the police that the IC on duty, Superintendent Ferguson, ordered all uniform and bicycle officers to retreat while making an urgent request for more POU officers who had to come in from Huntsville where they were stationed.

[41] Staff Sgt. Thompson eventually arrived downtown with his POU of approximately 40 officers. One TPS cruiser was already on fire. However, his officers were unable to control what had by mid-afternoon become a riotous mob, again pelting the officers with projectiles including bags of bleach and urine.

[42] Thompson decided that the intersection of Queen and Spadina was lost, ordering his officers to pull away. He had to deploy the ARWEN (Anti Riot Weapon Enfield) for protection while in retreat.

[43] At 3:12 p.m., a group of Black Bloc protestors vandalized a police cruiser while a TPS Staff Sgt. was still inside. A wooden pole was used to smash the driver’s side window. Storefront windows and an ATM were being broken. POU officers were engaged with what the Hearing Officer described as “aggression, violence and lawlessness at every intersection on Queen Street from Spadina to University Avenue.”

[44] A large crowd of protestors, including some from the Black Bloc, smashed the windows of a police car at King and Bay streets. Other police cruisers were abandoned while officers stood by “helpless”. More police cars were set on fire.

[45] A contingent of Black Bloc protestors, armed with sticks and even traffic signs, led a crowd estimated to have about 1,000 people marched north on Yonge

street towards Dundas. Some smashed store windows, looting as they marched along.

[46] At about 4:05 P.M. Deputy Chief Warr told the commanders at the MICC that he wanted the crowds “shut down” immediately. Within a few minutes, police officers that were still near Queen and Spadina reported to the MICC that they were under attack. They were ordered to leave the area.

[47] At about the same time, other protestors were pelting police officers guarding the TPS Headquarters with projectiles and smashing its front windows. Nearby, two more police vehicles were vandalized and one was torched. A video of this scene did not show any police in the area.

[48] The appellant came on duty as the second shift IC at about 5:24 p.m. Arrests were being made by some officers at Queen’s Park, Queen Street and King Street. Two more police cars were set on fire. Confrontations, sometimes violent, between protestors and various police units continued throughout the evening. Officers were being assaulted near Queen’s Park. The Hearing Officer described the MICC as being in “panic mode”.

[49] By 9:00 p.m. a crowd of about one thousand protestors, its origins unknown, began moving south on Yonge Street from Bloor. By the time it reached Dundas it had thinned considerably and no one appeared to be causing any property damage. The appellant was able to observe this crowd from cameras on the streets transmitting live video footage to the MICC.

[50] At the same time, however, POU officers in their full riot gear were dealing with other protestors at King and Bay streets. An officer’s notes described that scene in the following words:

> [A] crowd of violent hostile persons; ended up on King Street, hostile crowd throwing items, rocks, bottles, etc. at officers. ARWEN deployed and used on male, white, 20-25 years. He picked up a bottle and threw it at officers; was struck with one round; he tried to pick it up again and was struck with a second round. Man ran away before he could be arrested.

[51] The appellant ordered that other protestors at Queen and Bay Streets should be contained and arrested. This crowd was contained but was provided with egress and left peacefully. Some of these individuals apparently joined the crowd marching south on Yonge Street.

[52] By 10:00 p.m. a crowd, believed to be mainly from the Yonge Street marchers gathered near the Novotel Hotel on the Esplanade. Video introduced as evidence before the Hearing Officer did show two or three individuals covering their faces with cloths or bandanas. The Hearing Officer wrote the following:

> However, most of the protestors, captured in the videos appeared to be average Torontonians. Individuals one might see walking along a downtown street on a Saturday evening. Most were dressed in casual summer attire.
> In the face of POU officers dawning [sic] shields, many protestors at the Novotel sat down and sang “Give Peace a Chance”. There was no violence. No protestors assaulting police.

[53] In a laneway behind the Novotel, a separate group of about twenty individuals, wearing dark clothing and brandishing sticks ran towards two police officers but dispersed before reaching them. There was no indication that any of them joined the crowd in front of the Novotel.

[54] Shortly after 10:00 p.m., the appellant gave the order to box in and arrest the protestors at the Novotel for “breach of the peace” an offence under the Criminal Code. There was no egress through which anyone in the crowd could leave before being arrested. Approximately 250 people were arrested over the course of the next three and a half hours. The appellant’s shift ended at 7:00 a.m.

Sunday, *June 27, 2010*

[55] The TPS was aware of a number of additional protests scheduled for Sunday. Early that morning, police discovered sticks, bricks, bottles and golf balls hidden in some shrubbery at Queen’s Park. A number of “anarchists” were arrested nearby and charged with conspiracy to commit mischief and other offences.

[56] Protests and sporadic arrests continued throughout the day, but the City was spared the previous day’s violence and vandalism that had been shown on national and international television news outlets.

[57] There were, however, continuing threats of violence. Three individuals were arrested for possessing Molotov cocktails. A protest called “Fireworks for Prisons” was scheduled to begin at Bruce Mackey Park at about 5:00 p.m. Police found incendiary devices nearby and made additional arrests. The protest never materialized.

[58] Shortly after 5:00 p.m. a crowd of approximately 700 protestors began to march west on Queen Street towards Spadina. Some Black Bloc protestors were observed in this crowd. CRU officers were positioned at the intersection in an attempt to prevent anyone from marching south on Spadina towards the two security fences surrounding the RCMP controlled zones.

[59] The appellant arrived at the MICC at about 5:50 p.m. and was advised by Ferguson that an “attack” on the fence was imminent, although it was not clear which fence.

[60] The appellant, like other senior officers, was assigned a member of the TPS to act as a “scribe” to free him and the others from having to make contemporaneous notes while carrying out their duties. The notes of the appellant’s scribe indicated that the appellant gave the order at 5:38 p.m. that the crowd at Queen and Spadina should be boxed in, although the appellant in his evidence before the Hearing Officer denied having done so.

[61] However, by 5:40 p.m. various police units were in fact blocking all sides of the intersection, denying the protestors any escape points.

[62] The appellant, in a statement he gave to the Director during the course of his investigation, indicated that shortly after he arrived at the MICC he advised staff that he was going to implement steps to restore order, including the possibility of mass arrests.

[63] The appellant believed that the protestors could be arrested for conspiracy to commit mischief and breach of the peace. The parties before the Hearing Officer did not dispute that this would have been an improper charge based on the circumstances known at the time the order was made.

[64] On the order of the appellant, the POU officers at the intersection of Queen and Spadina moved in on the already contained crowd boxing in the protestors even tighter. Shortly after 6:00 p.m., the order came from the appellant that all of the protestors were to be arrested.

[65] Almost immediately after the order was given, an officer at the scene radioed the MICC asking if the protestors had been advised of the impending arrests and if those arrests should begin.

[66] The recorded radio response from MICC was as follows:

> You can start effecting arrests charges are conspiracy to commit mischief, mischief of all around, conspiracy to commit mischief is the charge 10-4.

[67] The estimate of the crowd size varied widely from as many as 800 to as few as 200. Heavy rain, punctuated by thunder, began to fall at about 7:00 p.m. drenching those individuals in the crowd, as they remained “kettled” in the intersection.

[68] Deputy Chief Warr directed the appellant at about 8:40 p.m. to order the release of any protestors who had been taken to the PPC and those still contained at the intersection once the necessary paper work had been completed. The Chief of Police at about 9:43 p.m. finally ordered that everyone should be released unconditionally. Those individuals still at the intersection

were released immediately while the 248 prisoners that had been taken to the PPC were released later.

[69] The evidence of the appellant and various witnesses about the foregoing events will be discussed below.

ANALYSIS

[70] Before turning to the issues raised by the parties, we would first make some comments about the role of the Commission on hearing an appeal from the decision of a Hearing Officer.

[71] It is now established that the standards of review to be applied by the Commission to decisions of Hearing Officers are reasonableness on questions of fact, correctness on questions of law and reasonableness on questions of mixed law and fact: *Ottawa Police Services v. Diafwila,* 2016 ONCA 627.

[72] 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 SCC 9. The Court in *Dunsmuir* also wrote, "In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process". These same principles apply to the Commission's review of a Hearing Officer's decision.

[73] An appeal to the Commission is an appeal on the record. Unlike the Hearing Officer, we do not have the advantage of hearing and observing the witnesses as they testify. Deference is owed to the Hearing Officer's findings of fact and assessments of credibility unless an examination of the record shows that the Hearing Officer's findings cannot reasonably be supported by the evidence: *Blowes-Aybar and Toronto (City) Police Service,* 2004 CanLII 34451 (Div. Ct.)

[74] The role of the Commission in reviewing a penalty decision was set out in *Karklins v. Toronto (City) Police Service,* 2010 ONSC 747 (Div. Ct.) at paragraph 10:

> The Commission's function is not to second guess the Hearing Officer or substitute our opinion. Rather, it is to assess whether the Hearing Officer fairly and impartially applied the relevant dispositive principles to the case before him or her. We can only vary a penalty where there is a clear error in principle or relevant material facts are not considered. This is something not done lightly.

[75] Similarly, in *Kobayashi et al and the Waterloo Regional Police Service*, [2015] ONCPC 12 CanLII*,* the Commission wrote the following:

> …the Commission is not permitted to reweigh the dispositional factors to come to a conclusion on penalty which it believes is more appropriate.

> Unless there has been an error in principle or relevant factors have been ignored the Commission cannot interfere with a decision on penalty, even if it might have come to a different conclusion if hearing the matter at first instance.

[76] Ultimately, within the above framework, the question to be decided is whether the penalty imposed was reasonable.

The Conviction Appeals

[77] The appellant has advanced the following four issues or grounds of appeal in submitting that the three convictions should be set aside:

I. The Hearing Officer erred in law in concluding that there were insufficient grounds to justify the mass arrests in this case.

II. The Hearing Officer erred in failing to consider whether the appellant's conduct, if unlawful, was nonetheless excusable based on" good and sufficient cause."

III. The Hearing Officer erred in failing to properly consider the ancillary powers doctrine.

IV. The Hearing Officer's conclusion that the appellant was guilty of discreditable misconduct [sic] for not taking heed of the inclement weather in relation to the Queen and Spadina detainees was unreasonable.

Issue I) The Hearing Officer's conclusion as to insufficient grounds for the arrests.

Issue II) The Hearing Officer's conclusion as to "good and sufficient cause."

[78] These two issues are intertwined and may be conveniently dealt with together.

[79] While the parties agree on the standards of review generally, they do not agree on how to characterize the question of whether the appellant had reasonable and probable grounds to order the mass arrests for the purpose of applying those standards. The appellant submits that this is a question of law attracting the standard of correctness.

[80] The appellant bases this submission on the following quotation from the Supreme Court of Canada decision in *R. v. Shepherd,* [2009] 2 S.C.R. 527 at paragraph 20:

> While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount *at law* to reasonable and probable grounds is a question of law. As with any issue on appeal that requires the court to review the underlying factual foundation of a case, it may understandably seem at first blush as though the issue of reasonable and probable grounds is a question of fact. However, this court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law….Although the trial judge's factual findings are entitled to deference, the trial judges ultimate ruling is subject to review for correctness.

[81] We agree that correctness is the proper standard of review on this issue.

[82] The appellant submits that the Hearing Officer committed three fatal errors of law in considering whether there were the requisite grounds to order the mass arrests. These alleged errors are as follows:

I. The Hearing Officer considered the existence of reasonable and probable grounds retrospectively, rather than from the appellant's perspective at the time.

II. The Hearing Officer analyzed the events at the Novotel and at Queen/Spadina in isolation from the context of the crowd dynamics at the G20 Summit; and

III. The Hearing Officer improperly interpreted what constitutes an "apprehended breach of the peace" too narrowly.

[83] The Supreme Court of Canada in *R. v. Storrey*, [1990] 1 S.C.R. 241 at paragraph 14 wrote the following in analyzing the requirements for or the constraints on police making arrests without a warrant:

> In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.

[84] The appellant cites *R. v. Cornell,* [2010] 2 S.C.R. 142 for the principle that any conclusion whether reasonable and probable grounds exist must be based on

facts known to the officer at the time of the arrest and not facts that were subsequently discovered.

[85] Neither of these decisions dealt the situation of mass arrests of hundreds of people most of whom were individuals simply exercising their *Charter* rights. Neither decision, in our view, assists the appellant. Our review of the Hearing Officer's decision on both the Novotel and the Queen/Spadina arrests follows. We do not find that he made the three errors alleged by the appellant.

The Novotel arrests

[86] The Hearing Officer conducted a comprehensive review of the events leading up to the appellant's decision to order the arrests of the Novotel protestors. He began his analysis of the lawfulness of those arrests at paragraph [385] of his decision where he wrote the following:

> [385] By the time Fenton arrived on the MICC floor on June 26, 2010 [he] said that he thought that a riot was progressing in the downtown corner [sic]. Distinguishing between black bloc protestors and bystanders or non-violent protestors was at times difficult, if not impossible, for police. Warr told him to take back the streets, and it was up to Fenton [to] make it happen. Fenton did not ask how. He did not seek direction. I find that he was appalled by the state of affairs on the streets and frustrated that wide-spread arrests had not taken place. I find that he decided to shut the protestors down by way of mass arrests.
>
> [391] At the time Fenton decided to contain and mass arrest the protestors at the Novotel, there is no evidence he was able to identify one person present who engaged in black bloc protest tactics earlier in the day. Fenton's belief was not subjectively or objectively reasonable.
>
> [392] I find that Fenton's decision to arrest the Novotel protestors was made before they reached the Novotel. He wanted the protest shut down, which is why neither Fenton nor Marks requested police make an announcement warning protestors to leave or face arrest. For the same reason, no egress was provided.

[87] The appellant submitted that requiring him to have identified Black Bloc protestors or those who had engaged in acts of violence or property damage was "completely inappropriate and not legally supported."

[88] On a fair reading of the Hearing Officer's decision, it is clear that he made the finding that the appellant's belief was not subjectively or objectively reasonable

on the totality of the evidence and not just because no Black Bloc protestors were identified.

[89] The Hearing Officer reviewed the evidence of the civilian witnesses involved in the Novotel protest at paragraphs [178-200] of his decision. The evidence of the police witnesses was reviewed at paragraphs [207-233]. His conclusion that the appellant did not have reasonable and probable cause to arrest hundreds of protestors was based on this evidence.

[90] The Hearing Officer made the following findings:

- I find that Fenton's decision to arrest the Novotel protestors was made before they reached the Novotel. He wanted the protest shut down, which is why neither Fenton nor Marks requested police make an announcement warning protestors to leave or face arrest. For the same reason, no egress was provided.
- I find that at the time he ordered the mass arrest at the Novotel, Fenton had not sufficiently turned his mind to whether he had reasonable and probable grounds to arrest anyone at the Novotel for breaching the peace.
- I find that Fenton's decision to order the mass arrest of the crowd at the Novotel was an unnecessary and unlawful exercise of his authority. It need not have occurred. The arrests of the complainants, including Nathan Adler, Matthew Beatty, Dave Steele and Vitali Kamenskikh were unlawful.

[91] Mr. Kamenskikh, one of the witnesses who gave evidence, was arrested at the Novotel. He testified that he wanted to see the G20 protests in person and made his way down to the Novotel the evening of the 26th. When he arrived there, he initially didn't see any police, no one wearing masks, no violence, just protestors sitting on the street. Once police arrived, he decided to leave but he was blocked by police from doing so. He was arrested for breach of the peace at 1:00 a.m. and taken to the PPC. Twenty-three hours later he was released unconditionally.

[92] The evidence of Mr. Kamenskikh and others as accepted by the Hearing Officer was the foundation for the finding that the appellant did not have reasonable and probable grounds for the arrests at the Novotel. We see no error of law in the Hearing Officer's conclusion.

The Queen/Spadina arrests

[93] The Hearing Officer's conclusion as to the lawfulness of order made by the appellant to conduct the second mass arrests of the crowd of people at the Queen/Spadina intersection began at paragraph [406] of his decision where he wrote the following:

> [406] The violence and vandalism of June 26, 2010 did not repeat itself on June 27, 2010. The arrest of the organizers of Saturday Night Fever led to its cancellation. The group of protestors at Queen and Spadina were disbursed between midnight and 1:00 a.m. The "Fireworks for Prisons" event did not materialize. The G20 meetings were over. The autonomous direct actions did not begin at dawn, as anticipated. The protest events during the daytime were uneventful. Thompson's POU team was sent to a non-G20 event, which was not even in the downtown core.
>
> [407] Yet, Fenton testified that late in the afternoon of June 27, 2010 an attack on the fence was imminent. I find there was no imminent attack on the fence, and Fenton had insufficient evidence to support a belief that there would be an attack on the fence.

[94] The Hearing Officer made a number of observations about the events that happened that afternoon at Queen and Spadina, contrasting them to the actions of the appellant. Some of these observations were as follows:

- The OPP video belies the notion that the crowd of protestors were violent, or aggressively trying to move through the police across Spadina to the south.
- Fenton's assertion that the crowd was pushing south and was not deterred from trying to move down Spadina is not supported by the evidence. Any effort to push south stopped when the POU officers replaced the CRU.
- Fenton was able to see the crowd on a live-video feed for at least forty-five minutes before the arrests were underway. Police at the intersection were not overwhelmed.
- Fenton ordered the POU to start squeezing the box just after 6:00 p.m. demonstrating that he could see the box formation before he gave the order to tighten the box. The decision to do so was not made by ground commanders.

- I find Fenton gave the order to box the crowd at 5:38 p.m. He intended on arresting them soon after.
- I find that there was no evidence provided to the Tribunal to warrant arrests of the crowd for conspiracy to commit mischief.
- I find there was no breach of the peace or an iota of evidence that a conspiracy or conspiracies to commit mischief were afoot.
- Fenton had no regard to the rights of peaceful protestors on the street, regardless of criminal activity that occurred earlier in the weekend.
- Fenton ordered the mass arrest without adequate consideration of whether the legal requirements were satisfied. He decided to worry about the legal consequences later.

[95] As set out above, the appellant argued that the Hearing Officer analyzed the issue of reasonable and probable cause retrospectively, failed to consider the crowd dynamics of the Summit and improperly considered what constituted an "apprehended breach of the peace."

[96] In our view, the Hearing Officer did consider the existence of reasonable cause for both days' mass arrests in accordance with the correct legal principles. He conducted a detailed, sometimes minute-by-minute, review of the events leading up to the arrests and the actions of the appellant. We do not agree with the submission that the Hearing Officer considered whether the appellant had reasonable and probable cause retrospectively, in isolation of the context of the crowd dynamics.

[97] Again, a fair reading of the entire decision shows that the Hearing Officer was acutely aware of the Black Bloc tactics; the violence and property damage that occurred on Saturday; the lawlessness that plagued downtown Toronto; the inability of the police to protect even themselves and; the mob behaviour that included repeated assaults on the police and the torching of at least four of their vehicles.

[98] Nor do we accept the appellant's submission that the Hearing Officer improperly interpreted what constituted an "apprehended breach of the peace."

[99] The appellant and the Novotel respondents cited the Court of Appeal decision in *Brown v. Regional Municipality of Durham Police Service,* [1998] 43 O.R. (3d) 223 as setting out the applicable law as to breach of the peace. The Hearing Officer relied on the following passage from *Brown:*

> The apprehended breach must be imminent and the risk that the breach will occur must be substantial. The mere possibility of some unspecified breach at some unknown pointy in time will not suffice…the police officer must have reasonable grounds for believing that the anticipated conduct, be it the breach of the peace or the commission of an indictable offence, which will likely occur if the person is not detained.

[100] The Hearing Officer concluded that there was no apprehended or actual breach of the peace at the Novotel. He concluded that there was no evidence that a breach of the peace was in progress at Queen and Spadina. In our view, he correctly applied the law as stated in *Brown,* based on his findings of fact. The Hearing Officer correctly interpreted what constituted an apprehended breach of the peace.

[101] The appellant relied on the decision in *Diallo v. Benson,* [2006] O.J. No. 91 to justify the order for the mass arrests. At page 32 of the decision the court wrote the following:

> It is clear that the duties of a police officer include preserving the peace and that in attempting to preserve the peace police are authorized to disperse large and unruly groups and to arrest any person who interferes with those attempts.

[102] In our view, this decision does not assist the appellant. Central to the Hearing Officer's conclusions was that the appellant wanted the crowds contained so that the mass arrests could take place. There was no suggestion that any of the protestors were being arrested for interfering with police attempts to disperse the crowd.

[103] The second issue raised by the appellant is whether the Hearing Officer erred in failing to consider if the appellant's conduct, if unlawful, was nonetheless excusable based on good and sufficient cause.

[104] The Commission has previously decided that there are two components to the offence under section 2(1)(g)(i) of the Code. The arrest must be unlawful or unnecessary and it must be without good and sufficient cause: *Wong and Toronto Police Service,* 2015 ONCPC 15 (CanLII).

[105] The Hearing Officer set out the above section of the Code but did not make a specific finding as to whether the appellant had good and sufficient cause for the arrests. However, in *Wowchuk and Thunder Bay Police Service,* 2013 CanLII 101391 (ON CPC), the Commission held that depending on the totality of the evidence a separate analysis whether an officer had good and sufficient cause is not required.

[106] In our view, the Hearing Officer's reasons do show that he in effect concluded that the appellant did not have good and sufficient cause to order the arrests. The Hearing Officer's findings set out in paragraph [94] above and elsewhere throughout his decision are more than adequate to show he was satisfied that the appellant did not have good and sufficient cause for either of the mass arrests of individuals exercising their *Charter* rights.

[107] The appellant also submitted that the Hearing Officer erred in rejecting the proposition that an officer's good faith could ever excuse an unlawful or unnecessary arrest.

[108] In support of that submission, the appellant cited the following passage from *Allen v. Alberta (Law Enforcement Review Board),* 2013 ABCA 187 that good faith is a consideration to be taken into account in considering whether an officer is guilty of misconduct.

> It cannot be the case that a Charter breach is ipso facto a disciplinary offence, because it would mean that mere errors in judgment or carelessness would inevitably rise to the level of discreditable conduct….there must be some meaningful level of moral culpability in order to warrant disciplinary penalties.

[109] The Hearing Officer dealt with this argument at paragraphs [394-395] of his decision. He noted that even where a police officer acts in good faith, a misapprehension of the law would not be sufficient to save him or her from a finding of misconduct for arresting an individual without reasonable and probable grounds.

[110] The findings of the Hearing Officer were clear and simply do not support the submission that the appellant was acting in good faith. The appellant's orders cannot be characterized as mere errors of judgment or carelessness, given those findings.

[111] The appellant was the IC with all of the responsibilities that this position entailed. The training module referred to earlier in this decision clearly stated that an IC could delegate authority but not responsibility. The appellant ordered the mass arrests. He did not seek permission.

[112] The appellant next submitted that the actions or inactions of his superiors as well as the institutional or organizational failings should have been considered in the context of whether he had good and sufficient cause for ordering the arrests. We do not accept this submission.

[113] There were no doubt some overall failings by the TPS and others, whether in their planning, training or execution of duties, that could have affected the appellant's mindset and the resulting decisions he made. However, the Hearing Officer found that the appellant's misconduct was "…purposeful. A means to an end…He decided to make the orders and worry about the fallout later".

[114] In our view, the appellant cannot avoid taking responsibility for issuing the orders by blaming others. Any institutional failings could, however, properly be taken into account when considering the appropriate penalties.

Issue III) The Hearing Officer erred in failing to properly consider the ancillary powers doctrine.

[115] The powers and duties of police officers arise from both common law and statute. Certain common law duties have now been codified in sections 42(1) and (3). The ancillary powers doctrine refers to those residual powers existing at common law. The doctrine was described in *R. V. Mann,* [2004] 3 S.C.R. 59 at paragraph 24.

> The test for whether a police officer has acted within his or her common law powers was first expressed by the English Court of Criminal Appeal in *Waterfield*…..From the decision emerged a two-pronged analysis where the officers conduct is prima facie an unlawful interference with an individual's liberty or property. In those situations, courts must first consider whether the police conduct giving rise to the interference falls within the general scope of any duty imposed on the officer by statute or at common law. If this threshold is met, the analysis continues to consider secondly whether such conduct, albeit within the scope of such duty, **involved an unjustified use of powers associated with the duty [emphasis added].**

[116] In order for a police power to be justifiable in a given context, "[t]he interference with liberty must be necessary for carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference." See *Dedman v. R.,* [1985] 2 S.C.R. 2 at page 35.

[117] The Hearing Officer did conclude at paragraph [426] of his decision that "…the ancillary powers doctrine is not applicable to the issue before the Tribunal. Fenton derived his power to order the arrest of the protestors at the Novotel and Queen and Spadina from statute, not the common law."

[118] However, starting at paragraph [428] of his decision the Hearing Officer went on to consider the Court of Appeal decision in *R. v. Figueiras* (2015), 124 O.R. O.R. 3(d) 208 where the Court did consider the common law powers of police to arrest during the G20.

[119] The Hearing Officer wrote the following at paragraph [430]:

> In *Figueiras* accepting a breach of the peace was imminent the Court went on to find that the police exercise of power to arrest was not in accordance with common law duties. Further, in *Figueiras*, the police intrusion in the protestors' rights was minimal in comparison to the unlawful arrests of the individuals in this case.

[120] The Hearing Officer did not refer to the *Waterfield* test as set out in *Mann,* above. However, a fair reading of his decision can only lead to the conclusion that the mass arrests "involved an unjustifiable use of powers associated with the duty" of a police officer whether by statute or at common law.

[121] Accordingly, in our view even if the Hearing Officer was wrong in finding that the ancillary powers doctrine did not apply, it could not have been used by the appellant to justify the mass arrests taking into account the overall findings of the Hearing Officer.

Issue IV)* Was *The Hearing Officer's finding on Discreditable Conduct Unreasonable?

[122] The Hearing Officer concluded "…the inclement weather and the lack of adequate shelter or protective clothing afforded to the arrestees left standing in the dark, was conduct likely to bring discredit to the reputation of TPS."

[123] The appellant submitted that this conclusion was unreasonable as it was based on the Hearing Officer's finding that the appellant "chose not to take meaningful steps to provide immediate shelter or protective clothing to the arrestees." According to the appellant, there was no evidence of any meaningful actions that he could have taken in the circumstances.

[124] In our view, this submission is based on too narrow a reading of the decision. The Hearing Officer made the following findings:

- Fenton was aware that well over one hundred protestors were at the intersection standing or sitting in the torrential downpour, along with police officers trying to fill in required paperwork in the rain.

- Not enough was done to alleviate the conditions of the arrestees…Fenton did not request dispensing with any of the paperwork.
- Fenton allowed the arrestees to stand in the cold darkness for up to 3.5 hours.
- The torrential downpour and drop in temperature added to the misery of the arrestees.

[125] The appellant cites the decision in *Gillespie v. Shockness,* Ont. Bd. Inquiry, 27 September 1994 as providing some guidance as to when an officer's actions may amount to discreditable conduct. At page 14 the Board wrote the following:

> Further, the Board finds that community standards (which are an element of the test of whether an officer's actions bring discredit upon his or her police force) require that there must be some element of subjective misconduct by an officer before making a finding against that officer. 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 force. At the same time, bad faith need not be proven in every case either, as in many cases recklessness or a high level of negligence may be sufficient.

[126] The appellant was convicted under section 2(1)(xi) of the *Code* which provides that an officer commits Discreditable Conduct when he or she "acts in a disorderly manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force of which the officer is a member."

[127] Based on the findings of the Hearing Officer, the mass arrests that occurred that Sunday afternoon stretching into the late evening were much more than "a technical breach of the law made in good faith." It was not unreasonable for the Hearing Officer to conclude that the appellant was responsible for the containment of a large group of citizens, the vast majority of whom had committed no crimes, in deplorable weather conditions and that in doing so he was guilty of discreditable conduct.

The Penalty Appeals

[128] The Hearing Officer imposed the penalty of a reprimand for the first unlawful arrest; the forfeiture of ten days off for the second unlawful arrest; and the forfeiture of twenty days off for the discreditable conduct.

[129] The appellant submits that we should vary the penalties for both of the convictions arising from the Queen/Spadina arrests to reprimands. The

Queen/Spadina respondents submit that we should order the dismissal of the appellant from the TPS. The Novotel respondents also seek the dismissal of the appellant or in the alternative a reduction in rank and a number of subordinate penalties.

[130] The TPS asked that the appeals be dismissed while the Director made submissions as to the jurisdiction of the Hearing Officer and the Commission to order some of the subordinate penalties sought by the Novotel respondents.

[131] The Queen/Spadina and Novotel respondents stress the seriousness of the appellant's conduct resulting in breaches of the *Canadian Charter of Rights and Freedoms.* In particular they submit that their rights under section 2(b) freedom of thought, belief, opinion and expression; section 2(b) freedom of peaceful assembly and; section 9 the right not to be arbitrarily detained or imprisoned were violated.

[132] The submissions of the Novotel respondents may be summarized as follows:

1) The penalty of a reprimand was grossly disproportionate to the severity of the misconduct, i.e. the repeated and sustained violations of the *Charter* rights of those detained.
2) The Hearing Officer breached the rules of natural justice when he found that the appellant's superiors condoned his actions while refusing to allow the evidence of Chief Blair and Deputy Chief Warr.
3) The Hearing Officer improperly relied on the lack of evidence of injuries to those arrested, while not allowing questions that could have elicited evidence of such injuries.
4) The Hearing Officer relied on improper considerations to mitigate the penalty including i) that the misconduct was unprecedented; ii) an absence of publicity for the Novotel arrests; iii) the absence of disciplinary actions by the appellant's superiors; iv) placing reliance on what was in effect a form letter in the appellant's employment file commending him for his work and; v) failing to consider that the appellant's order was not a momentary lapse of judgment.

[133] The submissions of the Queen/Spadina respondents may be summarized as follows:

1) The Hearing Officer made inappropriate findings of fact and credibility that were irreconcilable with the evidence before him and

with his own findings of fact and failed to provide reasons for doing so.

2) The Hearing Officer failed to consider relevant evidence and instead considered irrelevant evidence.

3) The Hearing Officer erred in law in relying on conduct of the appellant's superiors when there was no evidence of that they condoned his actions.

4) The Hearing Officer erred in his assessment of aggravating and mitigating factors.

5) The Hearing Officer erred in law in disregarding adverse credibility findings against the appellant.

[134] We begin our analysis regarding the penalties imposed by the Hearing Officer with reference section 1 of the *PSA* which reads as follows:

> Declaration of principles - Police services shall be provided throughout Ontario in accordance with the following principles:
>
> I. The need to ensure the safety and security of all persons and property in Ontario.
>
> II. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code.*

[135] It would appear that the appellant violated the second principle in what proved to be his ill-advised attempt to uphold the first. Although he cannot escape responsibility for his actions, we do not find that they warrant his dismissal from the TPS.

[136] The Hearing Officer set out what have been in the past considered to be the three key elements in assessing an appropriate penalty for misconduct: 1) the seriousness of the offence; 2) the ability to reform or rehabilitate the officer and; 3) the damage done to the reputation of the police force. The Hearing Officer wrote that he took the following factors into account in arriving at his penalty decision:

- 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/her misconduct;
- The likelihood of rehabilitation;
- Effect of publicity;
- Consistency of penalty decisions; and
- Deterring similar conduct.

[137] In our view, the Hearing Officer's decision to issue a reprimand for the mass arrests of the people at the Novotel was not reasonable. In deciding on a reprimand, the Hearing Officer committed a number of errors in principle that require that the penalty for these unlawful arrests be varied. In particular, he erred in his consideration of the seriousness of the offences, the appellant's recognition of the seriousness of his misconduct, the remorse exhibited by the appellant and the disregard for consistency with other penalty decisions.

[138] It is difficult for us to conceive how convictions for the mass arrests, found to be unlawful, of hundreds of individuals in contravention of their Charter rights are not at the more serious end of the spectrum of misconduct. Approximately 250 people were subjected to unlawful arrests at the Novotel. Another 200 were unlawfully arrested at Queen and Spadina. A reprimand and the forfeiture of 10 days off in these circumstances amount to a figurative slap on the wrist, especially in view of the findings made by the Hearing Officer.

[139] One such finding was that the appellant's misconduct was purposeful. The arrests that the appellant ordered were simply based on an individual's presence in the area. As the Hearing Officer wrote, "Being there was all it took."

[140] The Hearing Officer also wrote the following about the *Charter* violations committed by the appellant:

> 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 sections 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.

[141] Later in his reasons the Hearing Officer wrote the following:

> Unlawful arrests on such a large scale strike at the heart of public interest and the public trust paced in police and enshrined in the principles underlying the *PSA.* The number of individuals who were

> arbitrarily detained and unlawfully arrested increases the seriousness of the misconduct.
>
> It is important that police officers are conscientious in the application of their powers of arrest and detention, and when these rights are abused the police system is brought into disrepute and its effectiveness is threatened.

[142] There appears to be little or no relationship between the obvious seriousness of the misconduct and the penalty imposed. A comparison of other police discipline decisions underscores the unreasonableness of the penalty of a reprimand. In *Wong and the Toronto Police Service,* 2015 ONCPC 15 the Commission upheld a penalty of a one-day suspension for an officer who unlawfully arrested one G20 protestor.

[143] In *Rose and Ferry and Toronto Police,* 2016 CanLII 84144 (ON CPC) the Commission dealt with a case where one Sergeant was given a reprimand for an unlawful arrest during the G20 and the other Sergeant was given a one month demotion. In our view, given the circumstances of this matter, it is not possible to reasonably consider that a reprimand or short-term demotion would be an appropriate penalty to impose on the appellant. It would defy the principle of consistency of penalties to allow the reprimand to stand.

[144] The appellant testified before the Hearing Officer that he would not have done anything differently. He gave this evidence almost five years after the G20. The Hearing Officer found that the appellant's actions undercut public confidence in policing. There was no compelling evidence that the appellant had in fact demonstrated remorse to any degree, had reflected on his actions or took the nature and scale of his misconduct seriously. An expression of remorse through counsel after a finding of guilt is to be expected for sentencing purposes. However, such an expression, so long after the fact and not supported by any other evidence or by actions of the appellant is of very little weight.

[145] Given the time that has elapsed since the G20, and the completeness of the Record before us, it would be in the best interests of the parties for us to decide the appropriate penalties especially in light of the extensive submissions from counsel for the parties.

[146] The crescendo of violence that scarred Toronto, literally and figuratively, during the G20 Summit began on Friday, June 25, 2010. The siege of large parts of downtown by Black Bloc protestors, in reality criminals in disguise, continued the next day when the acts of violence and vandalism had the police in almost constant retreat. Over twelve thousand police officers and other security

personnel could not exert control over the mobs that roamed the streets of Toronto. Nor could police personnel always distinguish between peaceful protestors and those bent on committing acts of violence.

[147] The police could barely protect their own Headquarters, let alone the businesses on Yonge Street. The seriousness of the situation in downtown when the appellant took over as the IC Saturday afternoon should not be ignored. Nevertheless, it was the appellant's responsibility, first as a police officer and then as the IC to arrest only those who were committing crimes or where there were apprehended breaches of the peace or mischief.

[148] The IC during the day shift, with all of the resources available to him, could not control the rioting. The appellant inherited an out of control state of affairs. His actions and his misconduct have to be assessed in that light.

[149] The Novotel and the Queen/Spadina respondents submit that it was unfair and an error of law for the Hearing Officer to have concluded that the appellant's conduct was condoned by his superiors while not allowing the subpoenas to compel the attendance of the Chief and Deputy Chief. However, in our view, this was a fair inference for the Hearing Officer to make on the evidence.

[150] The Hearing Officer wrote the following:

> In the hours it took to arrest and transport the Novotel and Queen Spadina arrestees, Fenton's superiors remained silent. He was not told his orders were wrong, the offences 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 that order.

[151] As much as the Queen and Spadina protestors were left out in the cold for hours to fend for themselves, so too to an extent was the appellant, by his superiors. In reading the decision of the Hearing Officer, it appears that the Chief of Police was missing in action until he ordered the immediate release of the Queen and Spadina protestors late Sunday night. This is a relevant factor to be considered in determining an appropriate penalty.

[152] The Hearing Officer repeatedly stated that the appellant's misconduct was serious, that his orders impacted many people and also caused his subordinates to conduct unlawful arrests. The Hearing Officer also wrote, "The findings of this Tribunal are [a] black mark on an otherwise commendable

career.” The Hearing Officer also noted that the appellant had an exemplary service record over twenty-two years of service with no previous disciplinary findings.

[153] Taking all of the factors into account, we find that the appropriate penalty for the unlawful arrest of the Novotel protestors would be the forfeiture of 20 days off. We further find that the same penalty should be imposed for the Queen/Spadina arrests. There is no basis for it to be any less, but we do not find that it should be any more. The same *Charter* rights were violated on Sunday.

[154] In so finding, we accept that the principle of progressive discipline is generally appropriate. However, in this matter the second act of misconduct occurred within a matter of hours of the first with no intervention by the appellant’s superior officers. The inference that the ordering of the arrests at the Novotel was condoned by these superior officers was reasonable, if not inescapable.

[155] The appellant was convicted of two counts of misconduct for the Sunday orders. We see no error in principle in the penalty imposed for discreditable conduct. The totality of the sentences is also a factor to be taken into account.

[156] As has been stated many times before, sentencing is more of an art than a science. This was an unusual case with an unprecedented set of circumstances. Having found the original penalty imposed by the Hearing Officer for the Novotel arrests did not sufficiently recognize seriousness of the offence, especially the Charter breaches, and was not reasonable we are of the view after balancing all of the disparate interests in this matter the penalties we propose are the appropriate ones.

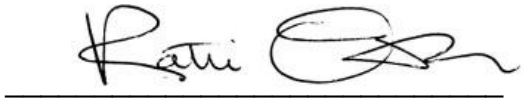
ORDER

[157] The Commission varies the penalty of a reprimand for the conviction for the unlawful arrests of the Novotel protestors on June 26, 2010 to the forfeiture of 20 days off. The Commission varies the penalty of the forfeiture of 10 days off for the conviction for unlawful arrests of the Queen/Spadina protestors on June 27, 2010 to the forfeiture of 20 days off. The Commission confirms the penalty of the forfeiture of 20 days off for the conviction for discreditable conduct arising from the Queen/Spadina arrests. All penalties are in addition to one another.

Released: November 9, 2017

D. Stephen Jovanovic

Karen Restoule



Katie Osborne