TRIBUNALS ONTARIO **TRIBUNAUX DÉCISIONNELS ONTARIO**

Ontario Civilian Police Commission **Commission civile de l'Ontario sur la police**

Citation: Pais v. Toronto Police Service 2023 ONCPC 14
Lourenco v. Toronto Police Service 2023 ONCPC 14
B.A., M.M., Y.B. v. Toronto Police Service 2023 ONCPC 14

Date: 2023-06-28
File: 21-ADJ-006, 21-ADJ-007 and 21-ADJ-010

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

Between:

Adam Lourenco & Scharnil Pais — Appellants/Respondent

and

Toronto Police Services

and

B.A., M.M., Y.B. — Respondents/Appellants

DECISION

Panel: Laura Hodgson, Vice Chair
Emily Morton, Vice Chair
Colin Osterberg, Member

Participants: Lawrence Gridin, counsel for Adam Lourenco
Sara Little, co-counsel for Adam Lourenco
Joanne Mulcahy, counsel for Scharnil Pais
Jeff Carolin, counsel for Public Complainants
Nana Yanful, co-counsel for Public Complainants

Decision written by: L. Hodgson, E. Morton, C. Osterberg

INTRODUCTION

[1] These appeals concern the actions of two police officers when interacting with, and ultimately arresting, four Black teenagers outside of their Toronto housing complex on November 21, 2011. In a decision dated January 15, 2021, the Hearing Officer found Officers Lourenco and Pais of the Toronto Police Service guilty of disciplinary offences under the *Police Services Act* (PSA, or the *Act*).[1] Both officers now appeal from the Hearing Officer's finding that they were guilty of misconduct for unlawfully or unnecessarily arresting two of the youth for assaulting police (count one). Officer Lourenco further appeals from the finding that he was guilty of misconduct for excessive force for punching a third youth, B.A. (count three).

[2] The youth, who are public complainants, have appealed from the Hearing Officer's finding that Officer Lourenco was not guilty of discreditable conduct for pointing a firearm at Y.B. and M.M. (count two).

[3] The Office of the Independent Police Review Director (OIPRD) and Toronto Police Service (TPS), which prosecuted the officers at the hearing, chose not to participate in these appeals.

[4] For the reasons that follow, the Commission substitutes a finding of misconduct pursuant to section 87(8) of the *Act* with respect to Pais and Lourenco unlawfully arresting Y.B. and M.M. (count one). It confirms the finding of misconduct with respect to Lourenco's use of excessive force for punching B.A. (count two). The Commission revokes the Hearing Officer's finding that Lourenco was not guilty of misconduct by pointing a firearm at Y.B. and M.M. (count three) and substitutes a finding of guilt on this count.

FACTUAL BACKGROUND

[5] On November 21, 2011, at approximately 6:15 p.m., four youth aged 15 to 16 years - B.A. and B.H.A., who were brothers, and their friends Y.B. and M.M. - were leaving their Toronto community housing complex.[2] They had just left B.A.'s home where they had been playing video games and were walking to a youth event at a nearby community center.

[6] While the youth were still walking through their own housing complex, Lourenco and Pais pulled into the parking lot in an unmarked police car. The officers were detailed to the Toronto Anti-Violence Intervention Strategy (TAVIS), which had a mandate to, in part, have officer presence in communities with high rates of crime and enforce the *Trespass to Property Act* (TPA). They stopped their vehicle and immediately called out to the teens. The officers' evidence was that they were on the property to

[1] contrary to the Code of Conduct prescribed in Ontario Regulation 268/10

[2] Four complainants initially filed complaints to the OIPRD. The complainant B.H.A., withdrew his complaint prior to the hearing. Y.B., is now deceased.

enforce the TPA. There was evidence that the officers had also been briefed about two robberies in the area, but over two kilometers away from the housing complex.

[7] After exiting their vehicle, the officers immediately approached and spoke with the teens. Pais spoke briefly with B.H.A. before they joined the other teens who were speaking with Lourenco. The exact content of the conversation in this brief period is disputed. Within seconds, however, Lourenco physically separated B.A. from the group.

[8] It is not disputed that within thirty seconds of approaching B.A. Officer Lourenco grabbed him and placed him under arrest under the TPA for not identifying himself. The Hearing Officer found that B.A.'s initial response was not hostile but that the conversation quickly escalated to a physical confrontation (para. 203). The Hearing Officer concluded that Lourenco sought to exert control over B.A. and "escalated the situation unnecessarily" and "[t]here was a lack of reasonableness in his actions" (para. 209). The Hearing Officer found that Lourenco had exceeded his authority (para. 221) and that the TPA arrest was unlawful. The lawfulness of the TPA arrest was not the subject of a misconduct charge and is not in issue in these appeals.

[9] B.A.'s reaction to the initial arrest by Lourenco was disputed at the hearing. Lourenco, who did not testify, indicated in his notes and OIPRD interview that B.A. swore and then spat at him. On Lourenco's version, he then had reasonable and probable grounds to arrest for assaulting police and began the physical arrest process. B.A testified that he neither swore nor spat. The Hearing Officer was unable to conclusively determine if the spit, which formed the subject matter of B.A.'s arrest for assault, even occurred. He did conclude that if B.A. had in fact spat, spitting was not reasonable force to resist unlawful arrest but was for the purpose of assaulting an officer (para. 340). The Hearing Officer therefore found that the prosecution did not prove the unlawful arrest of B.A. for assault police.

[10] Count three in the Notice related to Lourenco's strikes against B.A. while effecting the arrest for assault. In his notes and statement, Lourenco acknowledged punching B.A. in his left side because he was resisting. The Hearing Officer concluded that a review of the video supported B.A.'s evidence that there were two strikes, one to B.A.'s body and one higher "to the area of the head" and that B.A. then fell to the ground (para. 348). The Hearing Officer found that B.A.'s resistance was not such that strikes were warranted and found Officer Lourenco guilty of discreditable conduct for using excessive force.

[11] In response to the sudden interaction between Lourenco and B.A., two of the other public complainants, B.H.A. and Y.B., moved towards them, asking Lourenco what he was doing. Pais called and reached out for them to stop. The characterization of the teens' movements was disputed at the hearing and again on appeal. The Hearing Officer concluded that the public complainants were spontaneously

expressing surprise at what they were witnessing happen between Lourenco and B.A. (para. 493).

[12] In response to the teens' movement, Lourenco drew his firearm and pointed it at the public complainants. He immediately re-holstered when they stopped moving. The Hearing Officer concluded that, in the circumstances, Lourenco's pointing of the firearm did not amount to discreditable conduct for using unreasonable force. This finding is the subject of the appeal by the public complainants.

[13] After assisting Lourenco with the handcuffing of B.A., Pais returned to the other complainants who were sitting on the ground as ordered and placed all three under arrest for assault police. The Hearing Officer ultimately concluded that the arrests by Lourenco and Pais of the remaining complainants was unlawful and without good and sufficient cause. The two officers appeal from this finding.

[14] As noted by the Hearing Officer this interaction was a "continuous sequence of events" that "became aggressive in a short period" (para.193). From the point that the officers approached the teens on foot to the point when all public complainants were on the ground, less than two minutes elapsed.

[15] The discipline proceedings spanned 36 days over several years and included multiple pre-hearing and interlocutory motions. At the hearing on the merits, the Hearing Officer heard from Pais, B.A., M.M. and Y.B. who gave direct evidence of the interaction that evening. There was also video surveillance capturing the material parts of the interaction and a number of documentary exhibits, including the notes and transcripts of the officers' OIPRD interviews. The Hearing Officer, a retired Police Inspector, was faced with a web of complex common law and Canadian Charter of Rights and Freedoms arguments. His reasons are 111 pages in length, detailing the evidence called, submissions by counsel, the case law presented and ultimately his analysis of the alleged misconduct.

PRELIMINARY MOTIONS ON APPEAL

i) Officer Lourenco's Motion to Strike Portions of a Factum (Count One)

[16] In their original Notice of Appeal, the public complainant B.A. sought to appeal the Hearing Officer's finding under count one that the prosecution failed to prove the officers unlawfully arrested public complainant B.A. After the public complainants filed their appellants' factum, Lourenco brought a motion to strike the portions of the factum with respect to this ground. Lourenco argued that B.A. had no statutory authority to appeal from the finding with respect to B.A. on count one, when the officers were ultimately found guilty on this count for the unlawful arrest of Y.B. and M.M.

[17] In a decision dated December 28, 2022, the Commission agreed and granted the motion to strike the portion of the public complainants' appellant factum related to count one: *Toronto Police Service v B.A*., 2022 ONCPC 11 (CanLII).

ii) The Public Complainants' Motion to Argue a Specific Ground of Appeal (Count Two)

[18] Prior to the hearing of this appeal, counsel for the public complainants brought a motion for an order permitting them to argue all grounds raised in their factum with respect to count two, despite all grounds not being specifically listed in the complainants' notice of appeal. The public complainants raise as a ground of appeal that the Hearing Officer erred by relying on his own experience in concluding that Lourenco pointing his firearm was not unreasonable. Lourenco, in his responding factum, contended the Tribunal had no jurisdiction to make a determination on this ground as it was not listed in the public complainants' original Notice of Appeal.

[19] At a pre-hearing conference, counsel for Lourenco had specifically consented to the public complainants advancing this ground of appeal under count two. This concession is noted at footnote two of the Commission's December 28, 2022, motion decision, *Toronto Police Service v. B.A*., supra.

[20] In the circumstances of this case, where the public complainants are expanding on grounds raised in their original Notice of Appeal, appellant Lourenco has previously consented, and there is clearly no prejudice to his ability to respond, the Commission agreed that the public complainants could argue all grounds raised in their factum with respect to count two.

ISSUES ON APPEAL

[21] The issues with respect to the appeal by Officers Lourenco and Pais are as follows:

1. Did the Hearing Officer err by finding Officers Lourenco and Pais guilty of misconduct for unlawful or unnecessary arrest of Y.B. and M.M. for assaulting police, contrary to s. 2(1)(g)(i) of the *Code of Conduct*?

2. Did the Hearing Officer err in finding Officer Lourenco guilty of discreditable conduct for use of excessive force for punching B.A., contrary to s. 2(1)(a)(xi) of the *Code of Conduct*?

[22] The issue on the public complainants' appeal is:

1. Did the Hearing Officer err in finding Officer Lourenco not guilty of discreditable conduct for drawing and pointing his firearm at Y.B. and M.M., contrary to s. 2(1)(a)(xi) of the *Code of Conduct*?

STANDARD OF REVIEW

[23] The standard of review applied by the Commission when considering an appeal from the decision of a hearing officer is reasonableness on questions of fact and correctness on questions of law: *Ottawa Police Service v. Diafwila*, 2016 ONCA 627. Questions as to whether facts satisfy a legal test are questions of mixed fact and law and are to be reviewed on the standard of reasonableness unless there is an extricable question of law involved: *Floria v. Toronto Police Service*, 2020 ONCPC 6 (CanLII); *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 53. Findings of fact and credibility assessments made by a hearing officer are owed particular deference: *Toronto Police Service v. Blowes-Aybar*, 2004 CanLII 34451 (Ont. Div. Ct.).

[24] In *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364, the Court of Appeal for Ontario recently described the reasonless review in the following terms, at para. 43:

> Reasonableness review finds its starting point in judicial restraint and respect for the distinct role of administrative decision-makers. A reviewing court must pay "respectful attention" to the reasons offered for an administrative decision. This means focusing on the decision actually made by the administrative decision-maker and starting the analysis by developing an understanding of the decision-maker's reasoning process in order to determine whether the decision as a whole is reasonable. A reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker". In applying the reasonableness standard, the focus is "on the decision actually made by the decision maker, including both the decision maker's reasoning and the outcome." In addition, the reviewing court is not to hold the reasons up to a standard of perfection or conduct a "line-by-line treasure hunt for error". [Citations omitted]

ANALYSIS

Issue 1: Did the Hearing Officer err in finding the Officers guilty of misconduct for unlawfully arresting Y.B and M.M for the offence of assault police?

[25] The officers submit that the Hearing Officer erred in finding that they had authority to arrest the public complainants under section 495 of the *Criminal Code* but not for the offence of assault police. They ask the Commission to enter an acquittal. The public complainants submit that the Hearing Officer erred in his preliminary conclusion with respect to arrest powers under section 495. They argue however, that the Hearing Officer's ultimate conclusion that the officers unlawfully arrested

the complainants for the offence of assault police is reasonable and should be upheld.[3]

[26] As set out below, the Commission finds that the Hearing Officer erred in his assessment of the officers' authority to preventatively arrest under s. 495 of the *Criminal Code* – he failed to conduct an objective analysis and conflated the authority to stop with the authority to arrest. Ultimately, the Hearing Officer's conclusion that the officers had reasonable and probable grounds to arrest under section 495 is irreconcilable with his finding of misconduct for unlawful arrest for assault police. We agree that, because of this inconsistency, the Hearing Officer's decision on this count "lacks a rational chain of analysis", is unreasonable and cannot stand. In the circumstances of this case, however, the Commission would substitute its own finding of guilt against both officers for making an unlawful or unnecessary arrest for assault police without good and sufficient cause.

Section 2(1)(g)(i) of Code of the Conduct: "Unlawful or Unnecessary Arrest"

[27] The Hearing Officer found both officers guilty of discreditable conduct under s. 2(1)(g)(i) of the *Code of Conduct* for unlawful or unnecessary exercise of authority in that they "did without good and sufficient cause, make an unlawful or unnecessary arrest" of two of the public complainants for assaulting a peace officer.[4] The Commission has previously held that to establish misconduct under s. 2(1)(g)(i), two criteria must be established. First, the arrest must be unlawful or unnecessary, and second, it must have been made without good and sufficient cause: see *Correa v. Ontario Civilian Police Commission*, 2020 ONSC 133 (Div. Ct.) at para. 40, *Ardiles and Toronto Police Service*, 2016 ONCPC 01 at para. 23.

[28] In assessing whether the arrest was unlawful or unnecessary, the Hearing Officer must first determine if there are "reasonable and probable grounds" for arrest. An officer must have a subjective belief that there are reasonable grounds, and these grounds must be justified from an objective point of view. A reasonable person placed in the position of the officer must be able to conclude that there were reasonable and probable grounds for the arrest. This framework, set out in *R. v. Storrey*, [1990] 1 S.C.R. 241 at para. 17 is frequently applied by the Commission when considering misconduct under s. 2(1)(g)(i): *Wong and Toronto Police Service*, 2015 ONCPC 15 (CanLII) at para. 21, Fenton, Supt. *Mark v. Toronto Police Service*, 2017 ONCPC 15 (CanLII) at para. 83.

[29] Though a finding that an arrest lacks reasonable and probable grounds will be dispositive of whether it was lawful, that would not necessarily result in a finding of misconduct. It must also be established that the arrest was without "good and

[3] The public complainants raise numerous alternative bases for a finding of guilt under this count that, because of our conclusions on this ground, are not necessary to consider.
[4] The Hearing Officer concluded both officers participated in the arrest of all public complainants and none of the parties quarrel with this aspect of his decision on appeal.

sufficient cause". This element is not as precisely defined in the jurisprudence. In Wong, supra at paragraph 27, the Commission noted that an assessment of this element requires a "more nuanced analysis". The Commission found that an officer acting in good faith will not necessarily satisfy the requirement of good and sufficient cause. The Commission has also held that, depending on the totality of the evidence, a separate analysis of whether an officer had good and sufficient cause to make the arrest is not required, where a finding that an arrest has been unlawful or unnecessary has been made. Fenton, supra, at paras. 105-106, *Wowchuk & Bernst v. Thunder Bay Police Service*, 2013 ONCPC 11 (CanLII) at para. 78. See also *Correa v. Ontario Civilian Police Commission*, 2020 ONSC 133 (Div. Ct.) at paras. 40-53.

Additional Factual Background to Arrest of Y.B. and M.M. for Assaulting Police

[30] In assessing the Hearing Officer's conclusions, the circumstances of the arrest are clearly important. Whether reasonable and probable grounds exist is a fact- based exercise. The totality of the circumstances must be considered: see Shepherd, at para. 21; *R. v. Beaver*, 2022 SCC 54 at para. 72, *R. v. Rhyason*, 2007 SCC 39 at paras. 18-19. Often, and in most of the cases referred to by the officers, a wide-lensed assessment assists the finding that police had reasonable grounds to arrest. This was not the case here.

[31] As noted by the Hearing Officer this was a random stop. There was no 911 call, no suspicious activity reported or observed, and the teens were not identified as suspects. When spotted by the police there was no indication they were doing anything other than walking down the sidewalk outside their home. There was no basis other than speculation to believe they were carrying weapons. The Hearing Officer properly observed that, in these circumstances, because the stop was random, the officers needed to exercise all due care in their investigation (para.193).

[32] Within seconds of approaching the youth, Lourenco physically separated B.A. from the group. By all accounts B.A. was not pleased to be stopped and, as was his right, did not provide identification when asked. The Hearing Officer observes that, in that 30-second interaction prior to B.A. being grabbed, a conversation or a TPA investigation could not possibly have occurred (para. 209). He goes on to note the public complainants' evidence that they asked the officers to speak to B.A.'s mother to confirm they had just left his home in the same complex. The Hearing Officer concludes that Lourenco "was not content to let B.A. leave even though there was nothing specific that B.A. did to give rise to a concern on Constable Lourenco's part that he was a trespasser." The Hearing Officer held that B.A. was unlawfully arrested under the TPA and that Lourenco used excessive force in punching B.A. However, the Hearing Officer also notes that the Notice of Hearing alleged an unlawful arrest in relation to assault police, and not the TPA, and thus declined to make a finding of misconduct (para. 221). This is the backdrop to the arrest of Y.B. and M.M. for assault police.

[33] While Lourenco was struggling to arrest B.A. for assault police, and with his back turned, B.H.A. and Y.B. moved toward him. The evidence established that M.M. did not move towards Lourenco. The Hearing Officer concluded (para. 490) that, regardless, Officer Pais reasonably believed M.M moved but was mistaken and the analysis of his arrest should be the same as that of Y.B. and B.H.A.

[34] While the movement of the two youth were not disputed, the parties disagreed as to the tone and demeanour of the public complainants. The public complainants testified that Y.B. and B.H.A. moved toward Lourenco in spontaneous reaction after he had taken B.A. to the ground. Y.B., on reviewing the video during his evidence, agreed that his arm was outstretched when he walked toward Lourenco and B.A.. They all testified that Y.B. and B.H.A. asked or yelled, "stop, why are you hitting [B.A.]?" and "why are you doing this?" B.H.A. yelled "what are you doing to my brother?"

[35] In contrast, the officers described a threatening and forceful approach by the youth. Pais testified that when Lourenco was struggling with B.A., he heard the other three youth yelling (e.g., "yo what the fuck don't touch my bro, you can't do that") and saw Y.B. and B.H.A. "rush" toward Lourenco. In his testimony (but not his notes or statement) Pais stated that Y.B. "bladed"[5] his body. Pais' evidence was he believed they were going to assault or "swarm" Lourenco. He testified he was able to lay a hand on B.H.A. but Y.B. moved forward with his hand outstretched until Pais grabbed his jacket. In his statement and notes, Lourenco said the youth moved toward him in a threatening, aggressive manner. He felt he was about to be attacked.

Hearing Officer's Reasons for Finding Unlawful Arrest for Assaulting Police

[36] At paragraph 480 of his reasons, the Hearing Officer sets out the correct test for determining whether an arrest was unlawful. He discusses the standard of "reasonable grounds to believe" stating "in brief, that an officer must subjectively hold reasonable grounds to believe which must be objectively justifiable". The Hearing Officer correctly notes that there must be an assessment of the reasonableness of an arrest from the viewpoint of a reasonable person placed in the position of the officer.

[37] The Hearing Officer's ultimate findings that the arrests were unlawful, and that misconduct had been committed, are found at paragraphs 493-494 of his decision:

> Constable Pais had testified that body language could be an act or gesture that could constitute an assault. He said he arrested the public complainants for Assault Police, by act or gesture. Though the public complainants unexpectedly

[5] "Blading is a term of art used by police to refer to when they believe persons are angling their bodies in such a way as to conceal something" R. v. Le, 2019 SCC 34 at para. 14. In this case Officer Pais used the term to indicate the adoption of a fighting stance by Y.B., with one foot forward and an arm on guard.

> approached Constable Lourenco while yelling things such *as 'that's my brother, yo what the fuck, don't touch my bro, you can't do that'* in objection to his actions, they did not make deliberate threats coupled with actions as in *Gardner*. They did not make any deliberate threatening gestures or threaten to apply force as in *Oawydiuk* or *Judge.* Y. B. and the other public complainants spontaneously expressed surprise and objected to what they saw occurring between Constable Lourenco and B.A. but I do not find that their actions rose to a level as to constitute a deliberate threat to assault Constable Lourenco. Y.B.'s gestures were limited to moving towards Constable Lourenco with an outstretched arm. When the video is viewed without stopping, it demonstrated Y.B. appeared to walk over in one fluid motion, without stopping to take a challenging or fighting stance (Exhibit 9, Clip 1). I do not find that the public complainants wilfully acted to threaten by act or gesture or had an intention to threaten.
>
> …
>
> Constable Pais had good and sufficient cause to take action to stop the public complainants from contacting Constable Lourenco to prevent the commission of a perceived offence. Once they sat down, they were no longer subjectively about to commit an offence. Their actions did not meet the threshold of deliberately threatening to apply force. A reasonable person standing in the officer's shoes would not conclude that there were objective grounds to believe the public complainants had committed an Assault by act or gesture. Constable Pais testified that after B.A. was handcuffed, he walked over to Y.B., [redacted] and M.M. and told them they were under arrest for Assaulting a Police Officer. Those subsequent arrests for Assault Peace Officer, however, were without good and sufficient cause and unnecessary. I find Count One for Constable Pais in relation to Y.B. and M.M. has been proven.

[38] If this were the extent of the Hearing Officer's analysis we would likely have no basis to interfere. However, elsewhere in his reasons the Hearing Officer makes certain findings regarding the officer's authority under s. 495 of the *Criminal Code*, including that the officers' decision to arrest the complainants to prevent an offence was reasonable. The Hearing Officer's analysis of section 495 is problematic and his inconsistent findings cannot be reconciled. As a result of these errors, we find that the Hearing Officer's decision is unreasonable and must be set aside.

The Hearing Officer's Assessment of arrest powers under s.495(1)(a) of the Criminal Code

[39] As noted above the Hearing Officer cited the correct test and also grappled with the second branch of the test—whether the officers had good and sufficient cause to make the arrests at several points in his reasons. This he was required to do. Prior to this, however, the Hearing Officer made other findings with respect to s.495 arrest powers that taint his misconduct analysis.

[40] At the outset of his assessment of this misconduct charge (para. 479), the Hearing Officer notes that Pais stopping the public complainants from contacting Lourenco is a separate issue from his decision to arrest them for assault. Pais was required to stop the youth and used his authority appropriately in doing so. This was not disputed at the hearing – both the prosecution and the public complainants agreed that Pais had authority to stop the complainants in these circumstances. In the public complainants' view, Pais was, in fact obligated at that time to deescalate the situation.

[41] The Hearing Officer makes the following findings, at paragraph 483 and 485:

> I agree with Ms. Mulcahy that Constable Pais had a duty to protect as well as good and sufficient cause to stop the public complainants from contacting Constable Lourenco. His actions were in response to those of the public complainants unexpectedly approaching his partner and he separated them from him. He had indicated that he believed they might commit an offence and as such, he had good and sufficient cause to stop them.
>
> I also agree with Ms. Mulcahy's submission that Constable Pais reacted to prevent an offence from occurring. Paraphrased in the CC ss. 495(1), a peace officer may arrest without warrant a person who they believe is about to commit an indictable offence (Exhibit 54). Constable Pais had described his grounds to believe that the public complainants were about to commit an offence. He had noted that he believed that the public complainants were going to swarm Constable Lourenco or assist their friend (Exhibit 14). He testified that he had been trying to describe in his notes that they were going to attack or assault Constable Lourenco or stop the arrest. <u>As such, he was authorized under CC ss. 495(1) to arrest the public complainants to prevent an offence. The actions Constable Pais took to stop the public complainants were expected of him in the circumstances. His belief that they were about to commit an offence was reasonable. He could not know what was in their minds and he was honestly mistaken about M.M. moving forward. However, an arrest for being about to commit an indictable offence, does not lead to a charge.</u> It is a preventative intervention. Once the public complainants had been arrested and stopped, then the next action should have been to release them once there was no longer the potential for an offence to occur. There is a difference between the public complainants being about to commit an offence to them actually having committed one. [Emphasis added]

[42] Even after paying respectful attention to the Hearing Officer's reasons, the Commission finds his analysis with respect to s. 495 arrest powers is incomplete, incorrect and inconsistent with the Hearing Officer's other findings. Firstly, the Hearing Officer's analysis under section 495 arrest authority is not clear. He injects an analysis of whether Pais' duty to stop the complainants amounted to "good and sufficient cause". Of greater concern is the Hearing Officer's finding (para. 485) that Pais was authorized under section 495(1)(a) of the *Criminal Code* to arrest the public

complainants to prevent the commission of an offence without an objective assessment if there were reasonable grounds.

[43] Section 495(1)(a) of the *Criminal Code* empowers a peace officer to arrest a person without a warrant if, on reasonable grounds, they believe the person has committed or is about to commit an indictable offence. The same subjective/objective analysis applied by the Commission in s. 2(1)(g)(i) cases regarding the lawfulness of an arrest applies when determining whether an officer had grounds for arrest under s. 495: *R. v. Beaver*, supra at para. 72; *Wowchuk*, supra at para. 89. While the Hearing Officer assessed Pais' subjective belief that there were reasonable grounds to arrest under s. 495(1) he did not assess whether these grounds were justifiable from an objective point of view.

[44] Based on the facts the Hearing Officer did accept the Hearing Officer could not have concluded that grounds for arresting the youth for being about to commit assault under this provision could be justified from an objective point of view; this is inconsistent with his clear findings the gestures and words of the youth did not amount to an offence. The Hearing Officer concluded (at para. 493) that the teens' actions were that of spontaneous surprise and could not be characterized as challenging or fighting. A reasonable person in the officers' shoes would not conclude, based on the totality of the circumstances, that the public complainants were about to commit an offence. A finding to the contrary would be unreasonable.

[45] The Hearing Officer also errs by conflating the police authority to stop the public complainants to prevent the situation from escalating with the authority to arrest created by s.495(1)(a) of the *Criminal Code*. The Hearing Officer refers to Pais physically stopping the public complainants as a "preventative intervention". We agree with that characterization. A brief intervention by Pais to stop the youth as they questioned the arrest of B.A. was authorized to preserve the peace and ensure this already unnecessarily fraught interaction did not escalate any further: *R. v. Mann*, 2004 SCC 52 (CanLII) at para. 25. As noted above, s.495 authorizes a police officer to arrest someone if they have reasonable grounds to believe that a person has committed or is "about to" commit an offence. Officer Pais clearly had authority to stop the complainants as the events were unfolding. That, however, does not automatically generate reasonable grounds for arrest. The power to arrest has a more serious impact on the rights of the individual and gives police broader investigative powers (*R. v. Griffith*, 2022 ONSC 3558 (CanLII) at para. 27).

[46] The public complainants Y.B., M.M. and B.H.A. were arrested for assault police after Pais and Lourenco handcuffed and subdued B.A. The Hearing Office erred by: when determining whether Pais had reasonable grounds to believe that the public complainants were about to commit an indictable offence, only assessing from the subjective perspective of the officer and by treating Pais' authority to stop the moving public complainants as authority under section 495 to arrest the public complainants. There was nothing in the facts as accepted by the Hearing Officer or

available on the evidence that would support the conclusion that a reasonable person in the shoes of the officers would believe that the public complainants had committed or were about to commit an indictable offence. At its highest, the circumstances permitted Pais to stop the public complainants from proceeding towards Lourenco and B.A.

[47] Even if the Hearing Officer did not err in his assessment of section 495 powers of arrest, his conclusions are inconsistent and irreconcilable. The Hearing Officer's conclusion, that we find tainted with error, that the officer had a reasonable belief that the public complainants were about to commit an assault within the meaning of section 495 would preclude the Hearing Officer from finding, as he did, that the officers then committed misconduct by arresting the complainants for the offence of assault police. The Commission is satisfied that these findings cannot be reconciled and demonstrate an internally inconsistent chain of reasoning that renders the Hearing Officer's decision unreasonable.

The Commission Substitutes a Finding of Misconduct

[48] Having found the Hearing Officer's decision regarding s. 495 of the *Criminal Code* to be unreasonable, the Commission substitutes a finding of guilt against the appellants on count one. Remitting the matter for a new hearing is clearly a remedy also available to the Commission. The incident at issue here, however, occurred over a decade ago. Given the excessive delay to date, it would not be in public interest to prolong this matter any further.

[49] The Commission has broad powers of appeal including to substitute its own decision (PSA s. 87(8)(b), *Wong and Toronto Police* 2015 ONCPC 15 at para. 39). Subject to our comments above, we accept the Hearing Officer's findings of fact relating to this charge. We also accept his findings of credibility. The Commission has reviewed and considered the transcript, the evidence, and importantly, the video that captured the entire interaction that is the subject of the dispute. We would exercise our discretion under the *Act* and substitute our own finding of misconduct against Pais and Lourenco under count one.

[50] In our view, the Toronto Police Service satisfied the burden of proof for the two elements of s. 2(g)(i) of the *Code of Conduct*. First, the Commission finds (and also based on the factual findings set out in the Hearing Officer's decision) that "a reasonable person standing in the officer's shoes would not conclude that there were objective grounds to believe the public complainants had committed assault by act or gesture". On review of the evidence, we agree with the Hearing Officer's characterization of the public complainants as simply spontaneously expressing surprise when moving towards Lourenco. Their actions, even considering their comments and Y.B.'s outstretched arm, do not constitute assault or attempt assault. Considering the events from the officer's viewpoint, we do not think the belief that the public complainants committed or were attempting to commit assault is

objectively reasonable. This conclusion is fully supported by the evidence and the Commission finds the first element of unlawful arrest proven on clear and convincing evidence.

[51] Policing can be dangerous and challenging, and officers often put their lives and safety at risk. When assessing reasonable grounds for arrest courts will often note that decisions are made in volatile, dynamic circumstances (*R. v. Golub*, 1997 CanLII 6316 (ON CA), *R. v. Beaver*, supra). In our view, the latitude shown to officers making an arrest in reaction to difficult and exigent circumstances has limited application here. As the Hearing Officer found, it was the officers who "escalated the situation unnecessarily".

[52] Pais was authorized to stop B.H.A. and Y.B., who were shocked by the sudden and violent interaction between B.A. and Lourenco, from continuing to approach. As noted by the public complainants, however, he was also required to deescalate the situation. The Hearing Officer found Lourenco escalated the situation; the public complainants simply reacted and were stopped by Pais. We agree. Following this spontaneous reaction which the Hearing Officer found did not amount to an assault and was quelled by Pais' intervention, there was no legal authority for the officers to arrest the remaining public complainants for assault police.

[53] The Commission does not accept the officers' submissions on appeal that they had grounds for arrest that satisfy the objective standard. The officers point to facts that Lourenco was struggling with B.A., had his back to the public complainants, and that the public complainants objected to the punching and arrest of B.A. by yelling as they moved towards him, as grounds to arrest the youth for attempting assault or being about to commit assault. The Commission disagrees. In the circumstances of this case, the public complainants' reaction cannot reasonably be characterized as threatening, and the Commission finds that a reasonable person in Lourenco's or Pais' shoes would not have perceived it as threatening.

[54] Additionally, Lourenco submitted that he did not know whether the public complainants "were armed". In the circumstances of this random stop of teens outside their home, there is no basis for a reasonable person in Lourenco's position to believe they were armed.

[55] The officers also point to the fact that the Hearing Officer found Lourenco justified in pointing a firearm as indicia of reasonable grounds. In its reasons allowing the appeal on count two, the Commission concludes that the Hearing Officer erred in his assessment that Officer Lourenco's use of force was reasonable. Therefore, the Hearing Officer's finding regarding Lourenco's reaction of drawing his firearm provides no basis for concluding there were reasonable grounds to arrest the youth for assault police.

[56] Second, the Commission finds, as did the Hearing Officer, that in the circumstances of this case the arrests were without 'good and sufficient cause'. As noted by the Hearing Officer, the officers' subjective perception is only part of the analysis of 'good and sufficient cause'. In the circumstances here, where Pais stopped two surprised teens from proceeding, there was no basis to find that, after the youth had stopped, were on the ground and in full compliance, there was good and sufficient cause to arrest for assault police.

[57] Again, we have reviewed the video, transcripts and exhibits in respect of this matter. We do not see any basis for a finding that there was good and sufficient cause to make the arrests given the findings made above: see *Wowchuk v. Thunder Bay Police Service,* 2013 ONCPC 11 at paras. 79 – 83). As already noted, the latitude extended to officers making an arrest in difficult circumstances has limited application in circumstances such as this where the officers escalated the situation unnecessarily.

Additional Grounds Under Count One

[58] Lastly, we note that, in addition to the ground discussed above, the officers submit that among other things, the Hearing Officer misinterpreted the elements of the offence. This includes as it relates to attempting an assault by act or gesture as defined in s. 265(1)(b). The Commission disagrees.

[59] Given our conclusion that the Hearing Officer erred in his analysis of section 495 and our decision to substitute a verdict we will only address this briefly. We would simply note that the officers effectively ask the Commission to interfere with the Hearing Officer's clear findings that the actions of the youth could not form reasonable grounds to arrest for assault. The Hearing Officer, who heard the witnesses and reviewed the video evidence alongside the testimony, was best placed to make a factual assessment of whether the movement and words of the youth constituted reasonable and probable grounds. Our review of the evidence, including the video, shows no error in this assessment. The Hearing Officer, a non lawyer, could have been more careful in his description of the elements of s.265(1)(b). The findings of fact made by the Hearing Officer, however, support his conclusion that the officer's grounds to arrest the youth on the basis that their brief movement was an attempt to assault were not reasonable. We would see no reason to interfere with the Hearing Officer's findings in this regard.

Issue 2: Did the Hearing Officer err in finding Officer Lourenco guilty of discreditable conduct for use of excessive force for punching B.A., contrary to s. 2(1)(a)(xi) of the Code of Conduct?

[60] The Hearing Officer found Lourenco guilty of discreditable conduct for using unreasonable force on B.A. by punching him. Lourenco appeals the Hearing Officer's finding on the grounds that:

> the tribunal made an unreasonable finding of fact in determining that B.A. was punched in the face; and
>
> the tribunal erred in finding excessive force when the only evidence before the tribunal was that the use of force fell within the appropriate range given B.A.'s level of resistance.

The Punch to the Face

[61] The parties agree that, during the course of B.A.'s arrest Lourenco punched him in the abdomen. B.A. alleged that Lourenco also punched him in the face, a fact which Lourenco denied. The Hearing Officer found as a fact that Lourenco punched B.A. twice, once in the abdomen and once in the face.

[62] Although in his factum Lourenco concedes that the standard of review with respect to these findings is reasonableness, in his oral argument, he takes the position that the Commission does not owe deference to the factual findings of the Hearing Officer on this issue as they are premised on a failure to consider relevant evidence, consideration of irrelevant evidence, or misapprehension of evidence. He asserts that the Hearing Officer committed a number of errors in reconciling the various pieces of evidence he heard on the issue. He also argues that the Commission is in as good a position to determine the number of punches thrown and whether one of the punches was to the face since we are able to view the video recording of the incident. He cites *Purbrick v. Ontario Provincial Police*, 2011 ONCPC 7 (aff'd 2013 ONSC 2276 (Div. Ct.)) ("*Purbrick*").

[63] In our view, the proper standard of review is reasonableness, and we are required to give deference to the Hearing Officer's findings with respect to the number and location of the punches. Nowhere in *Pubrick* does the Commission suggest that findings of fact should be reviewed on a standard other than reasonableness. The Divisional Court found (at para. 25) that the Commission, as it was required to do, was determining whether the Hearing Officer's reasons could support the reasonableness of his decision and that this analysis is supported by the principles established under *Dunsmuir and Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62.

[64] As noted above, the standard of review to be applied by the Commission on an appeal from the decision of a hearing officer is reasonableness on questions of fact and correctness on questions of law, *Ottawa Police Service v. Diafwila*, supra at paras. 61-63. The standard of reasonableness is to be applied to questions of mixed

fact and law unless there is an extricable question of law involved: *Dunsmuir v. New Brunswick*, supra at para. 53.

[65] The Hearing Officer did not fail to consider relevant evidence, consider irrelevant evidence, or misapprehend evidence with respect to the punch to the face. The Hearing Officer's conclusion that Lourenco punched B.A. in the face was supported by the evidence at the hearing and was reasonable. Unlike the Hearing Officer's findings above, the finding that Lourenco struck B.A. in the face is not fundamentally inconsistent with other findings he made. Having reviewed the record before us, including the video, the Commission is not satisfied that the Hearing Officer made any errors in finding that Lourenco punched B.A. in the face or that the conclusion is otherwise unreasonable.

[66] The Commission disagrees with Lourenco's submission the Hearing Officer erred by failing to consider Y.B.'s evidence he did not see a punch to the face. The Hearing Officer notes Y.B.'s evidence that he had a clear view of the punches and saw B.A. punched in the torso but did not remember a punch above the shoulder. The Hearing Officer also says, at para. 362, that Y.B. testified that he could not remember what was happening at particular points. While the Hearing Officer does not specifically state in his reasons that Y.B. did not remember seeing a punch to the face, in our view this was unnecessary. The failure of Y.B. to specifically remember seeing a punch to the face is not conclusive as other evidence was available, and we do not think the Hearing Officer's decision is unreasonable for not referring to it.

[67] Lourenco argues the video evidence shows that there was no punch to the face. In his submission it shows Lourenco punched B.A. once in the abdomen and then reached toward B.A.'s upper body, grabbed him, and pulled him to the ground. Lourenco argues that, since Lourenco's arm remains outstretched after it is seen moving toward B.A.'s face or head, the Commission should conclude that the movement was not a punching action, but a grabbing action.

[68] The Hearing Officer's factual finding, at paragraph 348 of his decision, that Lourenco struck B.A. in the abdomen and in the face was based on the evidence of B.A. and a review of the video. Lourenco's argument his arm remains outstretched after it moves toward B.A.'s head and face indicate a grab rather than a punch is unconvincing. The movement depicted on the video appears to be a punch, and we find that the Hearing Officer's conclusion to that effect is reasonable.

[69] Nor do we accept Lourenco's argument that the Hearing Officer misapprehended evidence with respect to the punch to the head. In his reasons, the Hearing Officer thoroughly reviewed the relevant evidence with respect to the interaction between B.A. and Lourenco, including the evidence of Y.B. and the video. He found as a fact that Lourenco punched B.A. twice, once in the abdomen and once in the face. There was ample evidence to support this finding and we find that it was reasonable.

The Appropriate Range for Use of Force

[70] The Hearing Officer found that B.A.'s level of resistance was not such that it would justify Lourenco striking B.A. Lourenco argues that the only evidence on the appropriate use of force with respect to the arrest of a resisting person is that empty hand strikes are within the appropriate range of force that may be used. That was the evidence of Lourenco, Pais, and is consistent with the Toronto Police Service's use of force policy, which was filed in evidence at the hearing.

[71] In his factum, Lourenco argues that the entirety of the Hearing Officer's analysis on the reasonableness of the force used was as follows, at paragraph 348 of his reasons:

> The video did not demonstrate that the resistance used by BA was such that strikes were appropriate. They occurred approximately 25 seconds after Constable Lourenco started to push BA away from the group. Other than not providing his hands and pulling back, there was no greater resistance.

[72] The Commission does not agree that this is the "entirety" of the Hearing Officer's analysis. Starting at paragraph 347 of his decision, the Hearing Officer reviews the evidence of the events leading to the punches, including the evidence of Lourenco, B.A. and the video of the encounter. He also discusses the context in which the altercation took place and made factual findings with respect to the level of resistance to his arrest being offered by B.A.

[73] We do not accept the implication of Lourenco's argument that any act of resistance on the part of a person being arrested will justify an officer punching that person. In our view, the Hearing Officer reasonably considered all the evidence at the hearing in determining whether Lourenco's actions amounted to discreditable conduct.

[74] For example, at paragraph 345 of his reasons the Hearing Officer considers the context, including that Lourenco acted unreasonably in his TPA investigation, (incorrectly) advising B.A. that he had to identify himself, not allowing B.A. to leave when it was lawful to do so, taking hold of B.A. and arresting him without good and sufficient cause after failing to properly investigate. The Hearing Officer considers when resistance might justify distractionary strikes and concludes, based on all of the evidence, including the video, that the circumstances involving B.A. did not warrant distractionary strikes.

[75] The Hearing Officer finds that Lourenco's actions were cavalier and did not demonstrate good faith, and that his actions from the beginning of his interactions with the public complainants indicated his intention to continue to effect the arrest of B.A., whose resistance at that point did not warrant being struck.

[76] The Hearing Officer then considers whether Lourenco's conduct in striking B.A. amounts to discreditable conduct when measured against the expectations of the community and the extent of the potential damage to the reputation and image of the service should the action become public knowledge. The Hearing Officer states the following at paragraph 350:

> This event did become public knowledge and was the subject of widespread media coverage including print and the video of the event. It had the potential to damage the reputation and image of the Service in the eyes of the public as evidence by the testimony heard. Constable Lourenco's actions, when viewed objectively from the position of a reasonable person, did not meet the reasonable expectations of the community. When Constable Lourenco struck B.A. in those circumstances, it rose to the level of Discreditable Conduct.

[77] In our view, the Hearing Officer's findings in this regard were reasonable and were supported by the evidence at the hearing. We find that it was open to the Hearing Officer to conclude, as he did, that there was clear and convincing evidence that the appellant's use of force, including punching B.A., constituted discreditable conduct. The finding of guilt for discreditable conduct in count three is confirmed.

Issue 3: Did the Hearing Officer err by finding Officer Lourenco not guilty of discreditable conduct for using unreasonable force by pointing his firearm and Y.B. and M.M?

[78] The Hearing Officer found Lourenco not guilty of discreditable conduct for using unreasonable force on M.M. and Y.B. by pointing his firearm at them. He considered conflicting evidence of what occurred in the moments leading up to Lourenco's decision to draw his firearm and point it at the youth, which is summarized above in relation to count one. The reasons for this count of misconduct revolve largely around what Lourenco's subjective perceptions were and what Lourenco did not know at the moment he drew and pointed his firearm at the youth. The Hearing Officer found Lourenco's conduct was reasonable because:

- In the preceding moments his attention was on his struggle with B.A. and when he saw more than one male moving toward him "[h]e could not know what their intentions were" and was "entitled to take steps to ensure his own safety.";

- Relying on authorities dealing with reasonable and mistaken perceptions, the Hearing Officer concluded he was required to consider whether Lourenco, even if mistaken, acted reasonably. On this basis the Hearing Officer found Lourenco "in that moment, he could not know if, there was a potential threat, if the males were armed or what their intentions were. As a result, the Hearing Officer concluded that pointing the firearm was "justified" even if beyond "necessary";

- Lourenco's actions "were in keeping with his training";

- Even in hindsight, it was arguable whether pointing the firearm was the "most appropriate choice in the circumstance";

- Based on the Hearing Officer's "own knowledge and experience" Lourenco's actions were in keeping with his training and he acted reasonably.

[79] The Commission concludes the Hearing Officer's analysis is infected by significant errors that taint his conclusion that count two was not proven. First, the Hearing Officer erred by failing to contend with the relevance of s. 9 of the *Equipment and Use of Force Regulation*, RRO 1990, Reg. 926 ("Regulation 926") within the unreasonable use of force or discreditable conduct analysis. Second, he improperly relied on his own experience. Third, it was an error to fail to consider the circumstances surrounding Lourenco's decision to draw and point his firearm. Interwoven with these errors was the Hearing Officer's failure to apply the test for whether discreditable conduct contrary to s. 2(a)(xi) had been proved to the requisite standard and focused almost exclusively on Lourenco's subjective perceptions leading up to his drawing and pointing his firearm. Finally, the Commission also finds it was open in principle for the Hearing Officer to rely on social context evidence to draw inferences about the encounter between Lourenco and the racialized youth, but for the reasons given below, declines to engage in this analysis on appeal.

Regulation 926/TPS Use of Force Policy and Procedure

[80] Regulation 926 provides that a member of a police force shall not draw a handgun, point a firearm at a person or discharge a firearm unless he or she believes "on reasonable grounds, that to do so is necessary to protect against loss of life or serious bodily harm." At the hearing, the prosecutor and the public complainants drew the Hearing Officer's attention on the Use of Force section of the *TPS Policy and Procedure Manual*,[6] which replicates s. 9 of Regulation 926 concerning drawing, pointing or discharging a firearm, in submitting Lourenco used unreasonable force. The Use of Force Procedure was made an exhibit at the hearing.

[81] The Hearing Officer's decision on the reasonableness of use of force is flawed as it does not contain any analysis of whether, based on Lourenco's description in his OIPRD interview and notes, the complainants' approach toward him created even a subjective perception that it was necessary to draw and point his firearm to protect against loss of life or serious bodily harm. Lourenco's OIPRD statement indicates

[6] Policy and Procedure Manual, s. 15-01, Use of Force (issued R.O. 2011.08.11-0879). Section 15-01 of the Use of Force Procedure also sets out "intermediate force options" for use of intermediate weapons (e.g., baton, OC spray or conducted energy weapon). These can be used to, among other circumstances, prevent members from being overpowered when violently attacked, disarm an apparently dangerous person armed with a weapon or to control a potentially violent situation where other use of force options are not available.

that he believed he was outnumbered, the youth were aggressive, and he was about to be attacked. Even taking these subjective statements at face value, and without considering the video evidence or the evidence of the public complainants, this is far from a reasonable belief there was a risk of death or serious injury because he perceived the youth intended to gang up on him to interfere with B.A.'s arrest.

[82] On appeal, Lourenco argues this error, if it exists, is immaterial as he was not charged with breaching a regulation, nor do the particulars allege breaches of the regulation or the TPS Use of Force Procedure. Rather, he was charged with discreditable conduct, contrary to s. 2(1)(a)(xi) of the Code of Conduct and the charge is particularized as using force that was unreasonable by pointing the firearm.

[83] The Commission disagrees and finds the Hearing Officer's failure to grapple with the test set out by the legislature regarding use of force, though not dispositive of the discreditable conduct analysis, reflects a fundamental error in his reasons on this count. Lourenco was charged with discreditable conduct for using unreasonable force by pointing his firearm at the youth. The Hearing Officer was required to engage with whether a dispassionate reasonable citizen who is aware of the applicable rules and regulations and fully apprised of the same facts and circumstances in the same situation finds discreditable conduct has been proven on the requisite standard: *Mulville and Azaryev and York Regional Police Services*, 2017 CanLII 19496 (ON CPC) at para. 45, citing *Toy v. Edmonton (City) Police Service*, [2014] A.J. No. 1191 at para 11; *Biring v. Peel Regional Police Service*, 2021 ONCPC 2 (CanLII) at para. 30. The concept of discreditable conduct requires application of a primarily objective test, which measures the conduct in question against the reasonable expectation of the community: *Susan Mancini and Constable Marin Courage of the Niagara Regional Police Service,* 2004 CanLII 76810 (ON CPC) at para. 92.

[84] Though a violation of Regulation 926 and TPS Use of Force Policy would not necessarily result in an automatic finding of misconduct, any reasonable consideration of whether Lourenco's actions constituted discreditable conduct must have wrestled with whether the officer's conduct complied with the test in s. 9 of Regulation 926. This is particularly so where both the prosecutor and the public complainants squarely raised this as an issue before the Hearing Officer. As a result, the Hearing Officer was required to consider whether Lourenco had a reasonable belief that pointing his firearm was necessary to prevent loss of life or grievous bodily harm. The fully informed citizen would be aware of the legislated requirement that drawing the firearm is a preventative measure used when necessary to protect against loss of life or grievous bodily harm. The Hearing Officer does not wrestle with the test of reasonable grounds to believe drawing the firearm was necessary to protect against loss of life or serious bodily harm. He reiterates the fact the prosecutor referred to this test, and states it is "arguable" whether Lourenco made the appropriate use of force choice in the circumstances. He instructs himself he is

not to make this decision in hindsight and should remain focused on whether pointing the firearm constituted unreasonable force. There is no analysis, based on the evidence and submissions the Hearing Officer received at the hearing, about the clear test set out the regulation. The Commission is satisfied that his failure to wrestle with this central issue that was put before him by the prosecution and public complainants constitutes an error of law and renders his decision unreasonable.

Hearing Officer's Improper Reliance on his Own Experience

[85] This error is compounded by the Hearing Officer's breach of procedural fairness by substituting his own experience in the absence of any evidence on Lourenco's training on reasonable use of force. In deciding the use of force was reasonable, the Hearing Officer wrote:

> I also draw upon my own knowledge and experience at this point. I had participated annually in the full mandated TPS in-service training for approximately three decades. As part of the firearms training portion of the program, officers must respond to an immediate and unknown potential threat without having time to assess the nature thereof. In this occurrence, as in the training, Constable Lourenco responded immediately to a perceived threat by drawing his firearm and issuing the police challenge, without having the time to assess what was unfolding. When Constable Pais pulled the public complainants back, there was no longer a potential threat and Constable Lourenco then re-holstered his firearm. Pointing his firearm was a defensive action and was a response available to him. I cannot say that he deliberately used unreasonable force.

[86] As the Commission most recently confirmed in in *Siriska v. Ontario Provincial Police*, 2022 ONCPC 8 (CanLII) at paragraph 36, hearing officers may use their experience to evaluate the evidence. This is consistent with the Commission's approach that hearing officers bring to disciplinary proceedings both their practical and specialized knowledge of the workings of their police services to interpret the evidence before them: *Schmidt v. Ontario Provincial Police*, 2011 ONCPC 11 at para. 42. However, hearing officers are not permitted to use their experience to fill in gaps in the record or to make essential findings of fact. The hearing officer must base essential findings of fact on evidence. See also, *Stevenson v. York Regional Police Service*, 2013 ONCPC 12; *Carter v. Ontario Provincial Police*, 2018 ONCPC 10.

[87] In this case, the Hearing Officer crossed this line. The Commission is satisfied that he substituted his experience to fill in an essential evidentiary gap in the record. The issue of Lourenco's training was a live one at the hearing. Lourenco was not required to give evidence at his discipline hearing and the burden of proof did not shift to him. However, that did not make it permissible for the Hearing Officer to use his own experience, as he did in these circumstances, to find that the use of force was reasonable.

[88] The lack of evidence about use of force training was highlighted in closing submissions. Lourenco forcefully submitted at the hearing there was no evidence about proper use of force. He pointed out that the prosecutor did not call a use of force expert and criticized the prosecution for, in Lourenco's submission, attempting to supplement the factual record about use of force training in his submissions. He also pointedly cautioned the Hearing Officer about relying on his own experience as a substitute for a lack of evidence of Lourenco's training or TPS officer training more generally.

[89] Lourenco submits this error, if it exists, is immaterial because the portions of the Hearing Officer's reasons that drew on his own experience were superfluous to his analysis that Lourenco acted reasonably by pointing his firearm at the youth. The Commission disagrees. The substitution of his own experience undermines the reasonableness of the Hearing Officer's overall conclusion the prosecution had not proved the discreditable conduct on the clear and convincing evidence standard. The issue of training on use of force was not a peripheral matter in this hearing or in the decision's analysis. The Hearing Officer was required to consider whether a reasonable citizen, apprised of all facts and circumstances including applicable rules and regulations, would find the conduct discreditable.

[90] Further, earlier in the Hearing Officer's analysis, he makes a finding that Lourenco's actions were consistent with his (Lourenco's) training. Though the burden never shifted to Lourenco, it was not proper for the Hearing Officer to substitute his own training on this point.

[91] The misplaced use of the Hearing Officer's experience compounds the effect of his first error of failing to contend with Regulation 926 and the TPS Use of Force Procedure, after hearing submissions on the importance of both and having the TPS Use of Force Procedure made an exhibit at the hearing. The Hearing Officer was required to conduct an analysis of the reasonableness of Lourenco's use of force from the objective perspective of a fully apprised community member. Lourenco's subjective perception of the danger he faced was only one factor in this analysis; it was not determinative and thus could not solely govern the outcome, which is to be assessed based on reasonable expectations of community members.

Failure to Consider all Circumstances Leading to Use of Force

[92] The Commission finds the Hearing Officer's analysis of Lourenco's subjective perception of the danger he faced in the moment he drew his firearm is flawed as it fails to consider the circumstances, or backdrop, to the teens' movement toward him. The Hearing Officer was required to assess the reasonableness of the use of force in "all the circumstances.": *R. v. Dacosta*, 2015 ONSC 1586; *R. v. Genest*, 1989 CanLII 109 (SCC) at para. 89.

[93] The Hearing Officer's analysis on this count begins from the moment Officer Lourenco was attempting to arrest B.A. and had his back to two public complainants, who moved toward him and questioned what he was doing. In his analysis of "all the circumstances" the Hearing Officer does not relate the random nature of the stop and the officers' own evidence there was no reason to suspect the youth had done anything suspicious, violent or criminal when they stopped them. The Hearing Officer found the situation became fraught when Officer Lourenco himself "unnecessarily escalated" it. The statements that Lourenco could not know whether the youth were armed are based on nothing other than speculation that the youth, along with any other member of the public walking a short distance from their home in Toronto, could be armed. This is in distinction to cases where the background circumstances indicate dangerous conduct on the part of individuals against whom force is being applied, and this forms part of the analysis of the officer's subjective beliefs when analyzing the reasonableness of the use of force: *R. v. DaCosta*, supra.

Role of Social Fact Evidence of Racial Bias in the Count Two Analysis

[94] The public complainants submit the Hearing Officer erred further by failing to take notice of and apply social fact evidence regarding the context of the encounter between police and racialized youth when reaching his conclusions on counts one and two. It is not necessary to address this argument in the context of count one as the Commission has substituted its own finding of guilt. On count two, though the Commission agrees it was open in principle for the Hearing Officer to consider the social context of the interaction as part of the factual matrix when assessing whether there was clear and convincing evidence pointing the firearm was discreditable conduct, it is not necessary to engage in this analysis on appeal to conclude the hearing officer's decision on count two was unreasonable.

[95] In his reasons, the Hearing Officer did conduct a limited analysis of any role racial bias may have played in the interaction. He wrote:

> The initial stop of the public complainants was the starting point for this encounter and I will first deal with issues of racial profiling and detention. I acknowledge that systemic racism exists in every area of our society. That has been acknowledged by our institutions and in our laws. Systemic racism undermines public trust and erodes the faith people have in those institutions, including our police services.

[96] Citing *R. v. Brown*, 2003 CanLII 52142 (ONCA) and *Peart v. Peel Regional Police Services Board*, 2006 CanLII 37566 (ONCA), the Hearing Officer considered whether a racial profiling claim could be made out on the evidence, direct or circumstantial, before him. He conducted this analysis over the objection of the officers, who alleged it was unfair and improper to look at this issue as conscious or unconscious racial bias had not been particularized in the Notices of Hearing. Nor, they argued, had the TPS charged these officers with biased or discriminatory behaviour (i.e., s.(2)(a)(i) of the *Code of Conduct*). The prosecution took the position

at the hearing that it was not advancing any claims of racial profiling as in its view there was no evidence to support that claim.

[97] The Hearing Officer concluded that, though bias or discrimination was not particularized in the Notices, he could not "ignore the issue of racial profiling". He focused his analysis of any racial bias on the initial stop of the public complainants. The Hearing Officer had permitted leeway with respect to the youth giving evidence about their prior interactions with police and also permitted their counsel to ask questions of police witnesses about being more likely to stop young Black men. The Hearing Officer ultimately concluded he did not find that this evidence "shed any light" on whether the stop of the four youth on that evening was "indicative of racial profiling" and that he "could not infer from the evidence that the race of the public complainants influenced the actions of [the officers]."

[98] The Hearing Officer went on to hold it was speculative to say why the four youth attracted the attention of the officers that night and that it would be further speculation to say that any particular factor contributed to a conscious or unconscious racial bias on the part of the officers. He concluded that "racial bias was not alleged in the NOHs but I also did not find any indications of racially biased actions on the part of any of the parties."

[99] The public complainants submit the Hearing Officer erred by limiting his analysis to any unconscious anti-Black bias that may have led to the initial stop of the public complainants. They submit the Hearing Officer was required to take notice of anti-Black racism in the criminal justice system to analyze the officer's use of excessive force and ultimately arrest the public complainants as the brief interaction progressed. They argue the issue of unconscious racial bias needed to be analyzed not just in the selection of the youth for a stop, but further analysis was required as to whether unconscious racial bias played a role in how the complainants were treated after the stop: *R. v. Le,* supra, *R. v. Dudhi*, 2019 ONCA 665; *R. v. Sitladeen*, 2021 ONCA 303 at para. 50.

[100] On appeal, the complainants refer to a body of reports and studies, most of which post-date the hearing decision, that opine on treatment bias by police interacting with Black members of the public. The complainants rely on the Supreme Court of Canada decision of *R. v. Le* for the proposition that the "information necessary to inform the reasonable person" considering the factor of race in police and citizen interactions "is readily available from many sources and authorities which are not the subject of reasonable dispute" (para. 89). This social context evidence relevant to subject treatment, i.e., the decisions the officers made after and quite apart from their reasons for stopping the youth, it is submitted, ought to have played a role in the Hearing Officer's analysis of Lourenco's decision to point his firearm. Was it, they query, an outsized overreaction caused by subconscious racial bias that would not have resulted with a different demographic in identical circumstances? They submit these studies establish that Black males are perceived, through

subconsciously biased stereotyping, as guilty and dangerous, aggressive and possessed of uncommon strength. The complainants also refer to discussion in this literature of the phenomenon of "adultification" where Black youth are perceived as older or stronger than they are.

[101] On appeal, the officers renew their complainant that it was simply not open to the Hearing Officer to consider the role of conscious or unconscious racial bias in these disciplinary hearings as this was not particularized nor charged in the Notice of Hearing. The officers also submit the social fact evidence to which the complainants refer was either not raised or not in existence at the time of the hearing, meaning the officers had no way to challenge its accuracy or make submissions as to its weight.

[102] It is not controversial that, in the criminal law context, it is open to triers of fact to draw on their experience and take notice of social context or facts that are beyond reasonable dispute about anti-Black racism to inform their fact-finding: *R. v. R.J.S.*, [1997] 3 S.C.R. 4848; *Peart; Sitladeen; Dhodi; Le,* supra. The courts also recognize that "studies, academic writings and expert evidence" have been used by the courts to recognize a variety of factual indicators that can support, but will not dictate, the drawing of an inference that conscious or unconscious racial bias impacted the actions of police in either the selection or treatment of subjects: *Peart*, supra at para. 95; *R. v. Le*, supra at paras. 82-99.

[103] The Commission does not see a principle prohibiting the Hearing Officer, when determining whether the elements of count two had been made out, from drawing on relevant social context evidence to inform his analysis. There is no reason why these principles would not apply in a proceeding under the Act where criminal law concepts and tests are in issue. We do not think the failure to particularize subconscious racial bias in the Notices operates as a bar to the Hearing Officer taking notice of social context evidence to reach his conclusions on the misconduct charges. Particulars are provided to put an officer on notice of an outline of alleged facts that have yet to be proven and provide an officer with reasonable notice of the case to meet: *Rollins v. Pinkerton, Ontario Provincial Police and the Independent Police Review Director*, 2020 ONCPC 7 (CanLII) at para. 13; *Grychtchenko v. McCartney*, 2016 CanLII 81396 (ONCPC).

[104] The officers incorrectly conflate alleged particulars of misconduct, which are set out in the Notice and define the scope of the hearing, with what evidence may be called or relied upon to prove the elements or particulars of the misconduct counts alleged. The particulars do not dictate or circumscribe what evidence, either direct or circumstantial, will be called to prove facts relied on to meet the burden of establishing the elements of the misconduct offence. Taking notice of social context to interpret evidence of the encounter between the Black youths and the police officers is one of the routes to proving the count as particularized, not a separate finding of misconduct or the insertion of a new particular to the charging document

[105] The discreditable conduct analysis is primarily an objective one. Social context evidence about the racial dynamics of the interaction could have been taken notice of, weighed and relied upon, along with other evidence, in an assessment of the reasonableness of Lourenco's decision to draw and point his firearm at the public complainants.

[106] The Commission declines to go further and engage in analysis of the social context evidence the public complainants referred to on appeal as a reason to set aside the finding of not guilty on count two. First, the Commission has already decided, for the reasons given above, the Hearing Officer's approach to count two was fundamentally flawed. It is not necessary for the Commission conduct its own analysis about how relevant social facts may have affected the Hearing Officer's result.

[107] Another difficulty relates to procedural fairness to the officers. As Lourenco put it in his written submissions, there was "no evidence in support of the key propositions that the complainants seek to rely on now: a perception that Black men are perceived as guilty, dangerous and of superhuman strength, and that Black youth are 'adultified' meaning they are perceived as older than they actually are." Lourenco submits these specific phenomena go beyond what is beyond reasonable dispute and the sources the complainants rely upon now on appeal cannot fit within the purview of judicial notice. He submits there was no opportunity to challenge the assertions or the scholarship on which they are based. The Supreme Court decision of *R. v. Le* supports a proposition that adjudicators acting in an appellate function can take notice of social facts and rely on studies and reports that post-date the hearing to inform a review of legal errors in the initial decision. However, the Commission agrees it would be procedurally unfair at this stage to consider and apply the complainants' social science evidence for the first time on appeal to draw inferences regarding the alleged role that subconscious stereotypes played in Lourenco's decision to draw his firearm.

The Commission Substitutes a Finding of Discreditable Conduct

[108] Given the various errors we have found, the Hearing Officer's decision on count two is unreasonable and must be set aside. The Commission is empowered by s. 87(8) of the *PSA* to substitute its own finding with respect to the allegation of discreditable conduct particularized in this count. To make out the elements of count two, the prosecution was required to prove on clear and convincing evidence the use of force was not reasonable and that it amounted to discreditable conduct.

[109] The Commission finds, that though it does not entirely dispose of the issue, Regulation 926 must play a role in assessing the reasonableness of Lourenco's use of force. He was required to have reasonable grounds to believe that the public complainants' advance presented a risk of serious bodily harm or loss of life. The

Commission has reviewed the evidence, including the statements and testimony of the public complainants and Pais, and Lourenco's statement, along with the video. There is no evidence to suggest the standard set by Regulation 926 was met. The officers provided evidence through testimony or their statements about their perceptions of being outnumbered, that the youth were yelling, and that the youth were about to attack them. Lourenco in his statement does not reference a belief or concern the youth were armed and said he became fearful because of the context of the actions of B.A., who he said had spit at him and resisted arrest, and the words and swift movement of the other youth. Even taking the accounts of the officers' perceptions at their highest, they cannot reasonably be said to describe a belief the use of force option was necessary to prevent loss of life or serious bodily harm.

[110] Another factor in assessing reasonableness of the force used is the overall context, or "all the circumstances", of the encounter. The youth were stopped on a residential street in the early evening hours for what was, according to the officer's evidence, a random stop for TPA enforcement. Though there was evidence there had been a report of robberies two kilometers away, there was no report of recent crime in the actual housing complex the officers attended. As the Commission has set out in detail above, there was not a reasonable basis to arrest the youth for assault, based on the nature of their movement toward the site of B.A.'s arrest. The Commission does not agree the fact B.A., according to Lourenco, spat at him and was uncooperative with the arrest, provides context that creates a perception of danger such that pointing a handgun at the approaching and vocal youth was reasonable. The Commission also looks to the video itself to conclude there is clear and convincing evidence the use of force was unreasonable

[111] No one factor is determinative, but the Commission, when considering the context of the encounter, the clear requirement of s. 9 of Regulation 926, and the youths' movements toward Lourenco as depicted on the video, finds there is clear and convincing evidence the decision to draw and point the firearm at Y.B. and M.M. is unreasonable force.

[112] The Commission next looks to whether there is clear and convincing evidence the test for discreditable conduct contrary to s. 2(a)(xi) has been met; whether a reasonable member of the community, dispassionate and fully apprised of the circumstances of the case, as well as applicable rules and regulations, would determine the conduct would likely damage the reputation of the police service. The Commission considers that this reasonable person, in deciding whether the conduct would likely damage the reputation of the police service, would be aware of the terms of s. 9 of Regulation 926 in the use of force analysis. The reasonable person would also be aware of the circumstances, which involved a random stop of youth in their residential neighbourhood where surrounding circumstances did not suggest they were armed or had a history of criminal activity or violence. Though the evidence that came through the statements of Lourenco and Pais and the testimony of Pais describe a perception of a violent attack that warranted the "split second"

decision to draw the firearm, the reasonable member of the public, fully apprised would also have access to the video, which depicts the Y.B. and M.M. walking toward B.A. after he had been punched by Lourenco. This was embedded in the context of an encounter that, again, was escalated from a random stop of youth who were doing nothing wrong through Lourenco's actions.

[113] The events between the youth and officers became public knowledge and were subject to media attention. Lourenco's unreasonable use of force against the two youth had the potential to damage the reputation of the TPS in the eyes of a fully apprised reasonable person. The Commission finds there is clear and convincing evidence count two has been proven.

[114] The Commission therefore substitutes a finding of guilt on count two, pursuant to 87(8) of the Act. In reasons dated April 30, 2021, the Hearing Officer ordered as a global penalty that Lourenco forfeit 12 days or 96 hours as a penalty for findings of misconduct on counts one and two. The incident giving rise to these misconduct proceedings occurred over a decade ago and has been subject to prolix legal proceedings. The Commission has decided, given the substitution of the verdict of guilt for count two, it is appropriate to solicit submissions as to whether it is in the public interest to vary the penalty at this stage and if so the appropriate penalty.

ORDER

[115] The Commission substitutes a finding of misconduct pursuant to s. 87(8) of the Act with respect to Pais and Lourenco unlawfully arresting Y.B. and M.M. (count one). It confirms the finding of misconduct with respect to Lourenco's use of excessive force for punching B.A. (count three). The Commission revokes the Hearing Officer's finding that Lourenco was not guilty of misconduct by pointing a firearm at Y.B. and M.M. (count two) and substitutes a finding of guilt on this count, pursuant to s. 87(8). The Commission's Registrar will correspond with parties with respect to a filing date for penalty submissions.

Released: June 28, 2023.

Laura Hodgson, Vice Chair

Emily Morton, Vice Chair

Colin Osterberg, Member