Citation: Brisco v. Windsor Police Service, 2024 ONCPC 24

Date: 2024-02-14
File: 23-ADJ-010

Between:

Police Constable Michael Brisco

Appellant

And

Windsor Police Service

Respondent

Decision

Panel: E. Morton, Vice Chair
L. Hodgson, Vice Chair
K. Grieves, Member

Participants: J. Manson, C. Fleury and D. Leung, counsel for the Appellant
D. Amyot, counsel for the Respondent

Held by Videoconference: November 21, 2023

INTRODUCTION

[1] On March 24, 2023, the Hearing Officer, Superintendent (Retired) Morris Elbers, found the Appellant, Police Constable Michael Brisco, guilty of one count of discreditable conduct contrary to s. 2(1)(a)(xi) of the *Code of Conduct* contained in Ontario Regulation 268/10, pursuant to the *Police Services Act,* R.S.O. 1990, c. P.15 (the Act). On May 18, 2023, the Hearing Officer issued his penalty decision with reasons ordering that the Appellant forfeit 80 hours pursuant to s. 85(1)(f) of the Act.

[2] The Appellant appeals both the finding of misconduct and the penalty imposed.

DISPOSITION

[3] For the reasons that follow, the appeal is dismissed.

BACKGROUND

[4] The Notice of Hearing alleged that the Appellant committed discreditable conduct as on February 8, 2022 he "made a monetary donation to support the illegal protests and occupations resulting from the Freedom Convoy movement in both Ottawa and Windsor."

[5] The Appellant did not dispute that he donated $50 through a crowd funding website to support the Freedom Convoy. He made the donation while at home, using his personal email address. At the time, the Appellant was, and had been since November 26, 2021, on an unpaid leave of absence from the Windsor Police Service (WPS) as a consequence of failing to comply with WPS' mandatory COVID-19 vaccination policy.

[6] The Respondent learned about the Appellant's donation after an unknown third party hacked the fundraising website and posted the names of donors on the internet. The Ontario Provincial Police (OPP) obtained the list and made it available to police services, including the WPS, upon request. The Chief of Police referred the matter to WPS Professional Service Branch (PSB) for investigation and at his compelled interview on May 24, 2022, the Appellant admitted he had made the donation. On July 8, 2023 the WPS served the Notice of Hearing.

[7] The Hearing Officer heard four days of evidence at the hearing, held in February of 2023. The Appellant brought a motion arguing the WPS did not have jurisdiction to charge him with misconduct as he was on unpaid leave when he made the donation and therefore not a "police officer". The Appellant further argued the Respondent

had not proven the misconduct as there was no clear and convincing evidence the movement the donation was intended to support was illegal and that his donation supported activity in both Ottawa and Windsor. He submitted that the donation could not be characterized as discreditable conduct as it was made when the Appellant was off-duty and to a movement that emphasized individual freedoms and whose value to public discourse was a matter of legitimate debate.

[8] The Hearing Officer dismissed the Appellant's jurisdictional motion, a decision not in issue on appeal. He found the Appellant had committed conduct "likely to bring discredit upon the reputation of the police force" when he made the donation. In his reasons, the Hearing Officer focused on evidence led by the WPS about the progression of the Freedom Convoy protests, and the heightened need for law enforcement resources, in the February 2022 timeframe leading up to the Appellant's donation. He found the WPS had led clear and convincing evidence that, in the days before the Appellant donated the $50, the protests in both Ottawa and Windsor had become unlawful and the Appellant was aware of this at the time he made the donation.

ISSUES ON APPEAL

[9] The Appellant raises the following issues on appeal:

1) The allegation of discreditable conduct was not established on the standard of "clear and convincing evidence";
2) The investigation into the Appellant's donation was an abuse of process;
3) The Hearing Officer erred by failing to balance the Appellants rights under the *Charter of Rights and Freedoms*[1] with the statutory objectives of the Act; and.
4) The penalty imposed is unreasonable and unduly harsh.

STANDARD OF REVIEW

[10] The standard of review to be applied by the Commission hearing an appeal from a 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 of law which are also to be reviewed on the standard of reasonableness unless there is an extricable question of law involved: *Jeremiah Johnson v. Durham Regional Police Service*, 2020 ONCPC 3; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 53. Findings of fact and credibility are generally owed considerable deference by

[1] Being Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982 c. 11 [*Charter*]

the Commission: *Toronto Police Service v. Blowes-Aybar*, 2004 CanLII 34451 (ON SCDC).

[11] In *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364, the Court of Appeal for Ontario elaborated on the application of this standard:

> 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]

[12] On the Appellant's appeal from penalty, the Commission will not interfere with the disposition unless it is unreasonable because it fell outside of the range of reasonable outcomes, contains a clear error in principle or fails to consider a relevant factor. The Commission is not to second-guess the decision of a Hearing Officer on penalty and must defer to the assessment and weight given by a Hearing Officer to the dispositional factors: *Husseini v. York Regional Police Service*, 2018 ONSC 283 (Div. Ct.). In *Karklins v. Toronto (City) Police Service*, 2010 ONSC 747 at paragraph 10, the Divisional Court confirmed the following description of the Commission's role on a penalty appeal:

> The role of the Commission on a penalty is well established. Our function is not to second guess the Hearing Officer or substitute our opinion. Rather, it is to assess whether or not the Hearing Officer fairly and impartially applied the relevant dispositional principles to the case before him or her. We can only vary a penalty decision where there is a clear error in principle or relevant material facts are not considered. That is not something done lightly.

ANALYSIS

1. The Evidence Supported the Finding of Misconduct to the Clear and Convincing Standard of Proof

[13] Though some of the facts surrounding the Freedom Convoy protest were a matter of general public knowledge, the Respondent carried the burden at the hearing of proving on clear and convincing evidence the "protests and occupations resulting from the Freedom Convoy movement in both Ottawa and Windsor" were "illegal." To this end, the Respondent called the lead PBS investigator in the case, Sgt. McFadden, as a witness and through her, introduced an extensive brief including media and police reports on the Freedom Convoy movement in January and February of 2022.

[14] In his reasons deciding the Respondent had met the burden of proving the protest activity arising from the Freedom Convoy movement was “illegal” the Hearing Officer considered this documentary evidence and focused his analysis on events that occurred shortly before the Appellant made his February 8, 2022 donation. The Hearing Officer found as fact:

> On February 2, the Prime Minister of Canada stated the protest activities in Ottawa were “becoming illegal”;
>
> The crowd source funding website “Go Fund Me” removed the fundraiser for the Freedom Convoy on February 4, 2022 as the movement had turned from a peaceful protest to an occupation marked by some violence;
>
> The Chief of the Ottawa Police Service (OPS) made statements to the press on February 4, 2022 that the Freedom Convoy was dangerous, volatile, Ottawa residents were becoming increasingly angry and frustrated and that “the lawlessness must end”;
>
> The OPS did not have enough resources to control the protest and all OPS personnel were on active duty and assisted by other police services;
> The Premier of Ontario called the protest “an occupation” on February 4, 2022;
>
> The Mayor of the City of Ottawa declared a state of emergency on February 4, 2022;
>
> A Superior Court Judge granted a civil injunction ordering protestors to stop blowing truck horns on February 7, 2022; and,
>
> Between February 5 and 7, 2022 protests arising from the Freedom Convoy blocked traffic bound for Canada on the Ambassador Bridge in the City of Windsor.

[15] Based on these facts, the Hearing Officer concluded it was clear at the time the Appellant made the donation the “protest was unlawful”. The Hearing Officer further considered the Appellant’s own evidence that he was an avid consumer of media at the time he made the donation. He found as fact the Appellant knew about these statements regarding the illegal nature of protest activity in both Windsor and Ottawa and specifically rejected the Appellant’s evidence he was unaware of the bridge blockade in his home town of Windsor as uncredible.

[16] The Appellant focuses on the submission that the Hearing Officer’s findings of fact supporting his conclusion that the allegations in the Notice had been proven to the standard of clear and convincing evidence were unreasonable.

[17] First, the Appellant submits there was no clear and convincing evidence the $50 donation supported “illegal” activity and this finding was therefore unreasonable. He submits the statements of public officials relied on by the Hearing Officer, describing the protest as “unlawful” or an “occupation” are conclusory and the officials had no legal authority to declare the protests illegal. He also criticizes the failure of the prosecution to call direct evidence of actual unlawful acts at the protest, instead relying on documentary evidence led through Sgt. McFadden. The Appellant further argues the Hearing Officer ignored evidence led by the Appellant to the effect that some public figures, in their own reports to the media, characterized reports of illegality as overblown and unfounded.

[18] The Commission finds there is no basis to interfere with the Hearing Officer’s factual finding, based on admissible evidence, that protests arising from the Freedom Convoy movement were “illegal” at the time the Appellant made his donation. The Appellant’s submissions directly engage the standard of review to be applied by the Commission where findings of fact are alleged to be unreasonable. The Commission is to focus on the chain of reasoning employed by the Hearing Officer to reach the conclusion the protest activity was illegal at the time the Appellant made his donation. The Commission looks to whether the decision is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law": (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII) at para. 85)

[19] The Hearing Officer, as he was entitled to do, considered documentary evidence of a number of different descriptions of activity and responses of local police services to come to his conclusion. He did not base his conclusion on a single piece of evidence, but considered a constellation of facts, all of which were proximate in time to when the Appellant made his donation, before concluding “[i]t is clear at the time of [the Appellant’s] donation that the protest was unlawful.” There is no basis for the Commission to re-weigh and reinterpret the evidence. The Hearing Officer’s factual conclusions, which are based on a comprehensive evidentiary record, are entitled to deference.

[20] It is also significant that the Appellant’s own evidence before the Hearing Officer was that he was aware public officials made statements that their position was the Freedom Convoy demonstration in Ottawa was illegal, which he disagreed with. The Appellant’s testimony was he knew the OPS Chief made public statements the police service required additional resources to respond to the protests. He also conceded the act of blocking roadways violated the *Highway Traffic Act*, R.S.O. 1990 c. H.8. The Appellant agreed in testimony that the blockade at the Ambassador Bridge in Windsor was unlawful and that he did not support it, but that he was unaware of the blockade at the time he made the donation. The Hearing Officer specifically rejected the Appellant’s evidence that he was unaware of the

blockade at the time he made the donation, emphasizing the Appellant's own evidence he was an avid consumer of media relating to the Freedom Convoy. The Commission owes deference to the Hearing Officer's factual and credibility findings.

[21] Second, the Appellant objects to the introduction of and weight given to the indirect evidence in the form of media and police statements and reports to prove the count of misconduct. While he agrees s. 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (SPPA), permits introduction of hearsay evidence, he states the Hearing Officer erred by admitting evidence that contained conclusory statements about the legality of the protests without corroboration by direct evidence about the nature of the protest activities.

[22] A key difficulty facing the Appellant is that his counsel at the hearing did not raise any objection to the prosecution tendering this evidence through the document brief. The Appellant, in his own evidence and during cross-examination of Sgt. McFadden, also tendered media and other reports to support his position the protests consisted of lawful activity or the reports of illegality were overblown. In submissions before the Commission the Appellant did not point to any specific inaccuracy regarding any of the reports that he alleges the Hearing Officer improperly relied upon.

[23] The Hearing Officer was entitled, pursuant to s. 15(1) of the SPPA to rely on the hearsay evidence in the form of news and police reports introduced through Sgt. McFadden. As the trier of fact, the weight he gave the evidence was within his discretion and deserving of deference: *Cudney v. St. Thomas Police Service*, 2021 ONCPC 15 (CanLII) at para. 22. The Appellant has not raised a specific reason that the police and media reports relied upon by the Hearing Officer were undeserving of the weight he placed on them.

[24] The Commission disagrees with the Appellant's further submission, which is that Hearing Officer's decision is unreasonable because he failed to consider evidence tendered by the Appellant in support of his position they were peaceful demonstrations involving some bad actors, but largely unmarred by illegal activity. The Commission notes the Hearing Officer did refer to this evidence in his decision; it was not overlooked. The Hearing Officer's reasons state "[the Appellant] reviewed a number of articles with his Counsel which corroborated his belief the movement was peaceful. He referred to further articles [in the defence document brief] and various movements in our society." The Appellant's real quarrel here is, again, with the lack of weight the Hearing Officer put on these statements when he reached his conclusion. The Hearing Officer was not obliged to refer to, let alone analyze and weigh, every piece of evidence in grappling with the key issue at the hearing: *Siriska v. Ontario Provincial Police*, 2022 ONCPC 8 (CanLII) at para. 32.

[25] Finally, the Appellant submits the finding of misconduct was unreasonable as there was no clear and convincing evidence the $50 donation could have been used to further protests in “Windsor” as particularized in the Notice of Hearing. The Appellant submits the Hearing Officer “improperly relied on the supposition that once a donation is made, it is outside the control of the person who made it.” The Appellant argues the Appellant believed his donation would only flow to support the protests occurring in Ottawa and there is no evidence to support the Hearing Officer’s finding that the donated funds could have been directed elsewhere.

[26] The Commission finds it was not necessary for the Respondent to prove the funds the Appellant donated could have flowed to protests in Windsor to prove the count as worded in the Notice of Hearing. The Notice of Hearing did not allege the Appellant committed misconduct by donating to support “fundraisers” for protests in both Ottawa and Windsor. Rather, it alleged the misconduct was donating funds “to support the protests arising from the Freedom Convoy movement in both Ottawa and Windsor.” There was no dispute at the hearing that the bridge blockade in Windsor was part of a protest arising from the Freedom Convoy movement. It was proven on clear and convincing evidence that there was a Freedom Convoy movement in both Ottawa and Windsor. The Notice of Hearing describes the Freedom Convoy, the movement the Appellant’s donation was intended to support, as taking place in both Ottawa and Windsor, and the Hearing Officer was satisfied on the evidence before him that it did.

[27] The Commission finds it was open to the Hearing Officer to find that the evidence supported the finding of misconduct to the clear and convincing standard. We are not satisfied that the Appellant has established that the Hearing Officer committed a legal error in doing so, and we are satisfied that the Hearing Officer’s conclusions were reasonable and open to him to make on the evidence before him.

[28] Having found the allegations on the Notice were proven on the requisite standard, the Hearing Officer’s conclusion the conduct amounted to discreditable conduct contrary to s. 2(1)(a)(xi) of the *Code of Conduct* was reasonable. In his reasons, the Hearing Officer correctly instructed himself that, in approaching whether the Appellant’s conduct was likely to bring discredit upon the reputation of the WPS, he was to apply a test that is primarily an objective one to be measured against the reasonable expectations of the community. He considered that “likely” to bring discredit relates to the extent of the potential damage to the reputation and image of the service should the conduct become public knowledge. In concluding the Respondent had met its burden of proving discreditable conduct contrary to s. 2(1)(a)(xi), the Hearing Officer considered factors that went beyond the fact the protests were “illegal” and emphasized the fact that the Appellant made his donation after the protests had become unlawful.

2. The Appellant Cannot Raise the Abuse of Process Argument for the First Time on Appeal

[29] The Appellant submits the investigation and prosecution of the Appellant amounted to an abuse of process as it relied on information the Appellant made the donation that was illegally obtained by a third party. The Appellant argues the Respondent's decision to act on the information obtained this way is "a grave error that calls the integrity of the entire police disciplinary system into question." Relying on *Power v. London Police Service*, 2013 ONCPC 14, the Appellant argues the Commission should find the manner in which the WPS conducted its investigation compromised the fairness of the proceedings and brings Act-based investigations and proceedings into disrepute.

[30] The Appellant raises the abuse of process argument for the first time on appeal. At the hearing, the Appellant's counsel cross-examined Sgt. McFadden on how the WPS obtained the information from the OPP and confirmed that all involved understood the list of donors was obtained illegally by a third party. This was not contested at the hearing. However, the Appellant did not file an abuse of application at any stage of the proceeding and did not otherwise raise or even mention abuse of process or seek a stay of proceedings at any point.

[31] The Commission declines to consider this argument on the basis that it was not raised before the Hearing Officer below. The principles against raising a new argument on appeal were recently discussed by the Supreme Court of Canada in *R. v. J.F.*, 2022 SCC 17 (CanLII). A majority of the court stated the following at paragraphs 40 and 41:

> Generally speaking, appeal courts are reluctant to entertain new arguments, because they are deprived on the trial court's perspective. This is also the case for constitutional issues. Only in exceptional circumstances will a party be permitted to raise a new argument on appeal.
>
> Where an argument is raised for the first time on appeal, the appeal court must determine whether the situation is an exceptional one in which the exercise of its discretion is warranted, having regard to all of the circumstances. For this purpose, the court must consider, among other things, "the state of the record, fairness to all parties, the importance of having the issue resolved by this [c]ourt, its suitability for decision and the broader interests of the administration of justice" What is meant by the "state of the record" is that there must be sufficient evidence in the record for the court to decide this issue. In every case, an appeal court's "discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties." [Internal citations omitted]

[32] This Commission has recently affirmed the principle that new arguments should not be heard on appeal unless certain well-established prerequisites are made out: *Gangadeen v. Peel Regional Police Service*, 2023 CanLII 5919 at para. 39, citing *R. v. Reid*, 2016 ONCA 524 (CanLII) at paras. 37-44. The burden is on the party seeking to raise an issue for the first time on appeal to establish the evidentiary record is sufficient to permit the appeal decision maker to fully, effectively and fairly determine the issue raised on appeal. As well the, the failure to raise the issue at trial must not be due to tactical reasons and the party must satisfy the tribunal a miscarriage of justice will result from the refusal to raise the new issue on appeal: *Reid*, *supra* at para. 43.

[33] The Commission is not satisfied that the Appellant has established that he ought to be permitted to raise this issue on appeal. We are not satisfied that there is a sufficient evidentiary record before the Commission to adjudicate this question. Sgt. McFadden's evidence touched on the donor list provided by the OPP and the investigative steps taken to identify the Appellant as one of the donors. None of this evidence was elicited in the context of an abuse of process argument. We are satisfied that the Respondent would be significantly prejudiced in the circumstances. As noted in *Reid* at paragraph 22, "the burden is on the party who seeks to raise the new issue on appeal…It is incumbent on that party to demonstrate that all the facts necessary to address the proposed issue are as fully before the appellate court as they would have been had the issue been argued at trial."

[34] The Appellant's failure to satisfy the first prerequisite is dispositive of this issue. The Commission further notes that the Appellant provided no explanation as to why this issue was not raised at the hearing. There is no allegation of negligence or incompetence on the part of the Appellant's counsel at the hearing, nor is there any evidence that the abuse of process argument was not raised due to inadvertence. The Commission concludes this is not an appropriate case to permit the Appellant to argue the abuse of process issue for the first time on appeal.

3.The Hearing Officer Erred by Failing to Conduct an Analysis of the Impact of the Misconduct Charge on the Appellant's s.2(b) Charter Rights

a) Positions of the Parties

[35] The Appellant submits the Hearing Officer erred by failing to analyze whether the disciplinary process unduly limited the Appellant's s. 2(b) *Charter* right to freedom of thought, belief, opinion and expression. The Appellant relies on the line of cases dealing with protection of *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions: *Doré v. Barreau du Quebec*, 2012

SCC 12; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32. The Appellant argues the Hearing Officer failed to apply the test, referred to as the "*Doré* analysis" that was established in these cases. The Appellant submits that these cases required the Hearing Officer to balance the legislative objectives of the misconduct proceeding against the appellant's *Charter* right to free expression.

[36] The Appellant argues on appeal that he raised the issue of his own *Charter* s. 2(b) rights several times throughout the proceedings. He submits that the decision is unreasonable because the Hearing Officer did not engage in the balancing test required by the *Doré* analysis, which the appellant submits he was required to do whether or not the Applicant formally raised the application of *Doré*. The Appellant urges the Commission to cure the Hearing Officer's error by conducting the *Doré* analysis now and submits the appeal record is sufficient for the Commission to conduct the balancing test.

[37] The Respondent's position is that the Appellant is disentitled to raise the *Doré* analysis for the first time on appeal. The Respondent states the Appellant did not squarely raise his own s. 2(b) *Charter* right at the hearing, and certainly did not submit the Hearing Officer was required to conduct a *Doré* analysis. The Respondent relies on the principles that generally enjoin a party from raising an issue for the first time on appeal, set out in the section above, and emphasizes that there is an incomplete record for the Commission to conduct a *Doré* analysis at this stage. In the alternative, the Respondent submits that, should this Commission find it appropriate to cure the Hearing Officer's error of failing to balance the Appellant's *Charter* right against the statutory objectives of the Act, the existing record supports a conclusion any limitation on Appellant's *Charter* right is outweighed by the public interest in enforcing the objectives of the Act.

b) Further Background

[38] At his disciplinary hearing, the Appellant did not at any point submit that the Hearing Officer should conduct the *Doré* analysis. The Appellant did not serve a Notice of Constitutional Question in accordance with s.109(1)(1) of the *Courts of Justice Act*, R.S.O. c. C 43. Nor did he squarely raise the argument that his $50 donation limited his s. 2(b) right to freedom of expression protected by the *Charter.* Rather, the concepts of *Charter* rights and values were, for the most part, raised in different contexts than the Appellant's own s.2(b) right. First, when arguing the WPS did not have jurisdiction as he was on unpaid leave at the time of the donation the Appellant asserted that his choice to remain unvaccinated implicated his s. 7 *Charter* right to security of the person. Second, throughout the Appellant's evidence and in closing submissions, there is reference to the Appellant's perception the active Freedom Convoy participants, which did not include the appellant, protested

to protect the mobility rights and freedom of expression and security of the person rights of individuals in Canada, under ss. 2(b), 6, and 7 of the *Charter*.

[39] There was limited evidence and submissions at the hearing about the extent to which the $50 online donation constituted expressive activity, or how the disciplinary proceeding had infringed the Appellant's s.2(b) *Charter* right. The Appellant gave evidence over two days, and in one exchange during examination-in-chief he replied it was "correct" that he believed that he was in a position to make "an expression of freedom under section 2" of the *Charter* as an individual who was, in his mind, unemployed. The Appellant also testified that others had sent him messages of gratitude for "standing up" for the *Charter*. The prosecutor did not conduct any cross-examination with respect to the Appellant's *Charter* rights. During Sgt. McFadden's evidence, she agreed that during her communications with the Appellant during her investigation, she understood his position was that he was exercising his s.2 *Charter* right to free expression when he made the donation. Having reviewed the record, this is the extent of the evidence about the link between the Appellant's own s.2(b) *Charter* right and his decision to make the $50 donation.

[40] At no point throughout the hearing or in closing argument did the Appellant's counsel refer to the *Doré* analysis or any cases applying it. Nor did he make submissions touching on the principles from *Doré*, such as the Hearing Officer's need to balance the Appellant's *Charter* rights and values against the Act's objectives. Much of the argument about the Appellant's *Charter* rights in submissions to the Hearing Officer revolved around his right to choose to remain unvaccinated. That said, in closing submissions the Appellant's counsel made references to the Appellant's *Charter* right being engaged such including:

- s. 11(c)(i) of Ontario Regulation 268/10 of the Act permitting a police officer to make contributions of money to a political party or other organization involved in political activity, and argued this is what the Appellant did in making the donation;
- s. 1(2) of the Declaration of Principles of the Act citing the importance of safeguarding the fundamental rights guaranteed by the *Charter* and the *Human Rights Code;*
- when discussing the fact this was an off-duty, or as he described it "private" act, "It's more harmful to step in as a Police Service and interfere with private acts such as this and attempt at a donation to a political organization."
- in discussing whether the donation met the test for "discreditable conduct" contrary to s. 2(1)(a)(xi) of the *Code of Conduct* he submitted "[t]he reach that's being asked in my respectful submissions of the Police Act, in to Constable Brisco if you find him as such his life [*sic*], while off duty making

> a private donation, expressing freely his speech, guaranteed under the *Charter* in a secure website. It's too far."

[41] The Respondent made no argument about limitations on the Appellant's *Charter* rights, the objectives of the Act or the need to balance any such limitations against these objectives at the hearing. Nor did Respondent's counsel conduct any examination or cross-examination on *Charter* issues of any witness.

[42] In his reasons dismissing the Appellant's jurisdictional motion, the Hearing Officer referred to the Appellant's *Charter* arguments concerning his choice to remain unvaccinated. This is not in issue on appeal. The Hearing Officer did not analyze any *Charter* issues in the context of his analysis of the substantive charge. He briefly referred to the Appellant's *Charter* rights, stating "[the Appellant] believes he has done nothing wrong and would support the Convoy again. He believes his *Charter* Rights were breached." After concluding the Appellant's donation had been made after the protest movement had become unlawful, the Hearing Officer wrote:

> Police Act disciplinary Hearings are proceedings which make police officers accountable to their respective police agencies. It is employer and employee law. Police officers must follow policies of their respective agencies otherwise a misconduct charge can be filed against the member. The worst situation is that a member can be dismissed from the organization. That in itself is severe however, there are no *Charter* issues and loss of freedom in Police Act matters. These issues are applicable and do occur in criminal or quasi-criminal proceedings. No Police Act charge is equivalent to a criminal process, nor is the Hearing likened to a criminal trial. [Emphasis added]

c) Analysis

[43] The first issue to decide is whether the Appellant is prevented from raising the Hearing Officer's failure to apply *Doré* on the ground that they did not raise it before the Hearing Officer.

[44] In *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 3, the Supreme Court of Canada reaffirmed the principle from *Doré* that administrative decision makers have an obligation to consider *Charter* values relevant to their exercise of discretion if that discretion has the effect of limiting *Charter* rights.

[45] The Commission has some concern that the Appellant's counsel failed to raise *Doré* before the Hearing Officer, and only did so on appeal before the Commission. The Respondent did not make any submissions to the Hearing Officer about the statutory objectives of the Act and how those should be balanced against any

limitation on the Appellant's right. In addition to losing the opportunity to make legal arguments below, the Respondent did not establish an evidentiary record that the statutory objectives of the Act reasonably limited the Appellant's s.2(b) right. Nor did they cross-examine the Appellant on any issues raised by an application of the *Doré* test, such as his own understanding of the limitations of his *Charter* rights while acting in an on or off duty capacity as an employee of the WPS. The Appellant has not provided any explanation as to why counsel at the hearing did not raise the *Doré* analysis at the hearing.

[46] However, we are satisfied that the Supreme Court's decision in *Commission scolaire* is dispositive on this point. The Court held the following, at paragraphs 64-66:

> [I]t has consistently been held that the Doré framework applies not only where an administrative decision directly infringes Charter rights but also in cases where it simply engages a value underlying one or more Charter rights, without limiting these rights.
>
> This is the case because administrative decision makers have an obligation to consider the values relevant to the exercise of their discretion, in addition to respecting Charter rights. There can be no doubt about this, because "[t]he Constitution — both written and unwritten — dictates the limits of all state action". As L'Heureux-Dubé J. clearly stated in Baker v. Canada (Minister of Citizenship and Immigration), a discretionary decision, to be reasonable, must be made in accordance with the "fundamental values of Canadian society" as reflected in the Charter. Relying on this statement, Abella J. held in *Doré* that discretionary decisions must "*always*" take Charter values into consideration (emphasis in original).
>
> An administrative decision maker must consider the *relevant* values embodied in the Charter, which act as constraints on the exercise of the powers delegated to the decision maker. I refer in this regard to the considerations identified by this Court in *Vavilov*: ". . . a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision . . .". In practice, it will often be evident that a value must be considered, whether because of the nature of the governing statutory scheme, because the parties raised the value before the administrative decision maker, or because of the link between the value and the matter under consideration (citations omitted).

[47] In our view it is clear that where administrative action engages a Charter right or value the decision-maker must consider and apply *Doré*. While the Appellant may not have expressly raised *Doré*, we are satisfied the circumstances of this case were such that the Hearing Officer ought to have been alive to the need to balance *Charter* values. The disciplinary process in this case was related to the Appellant's

expressive activity. Moreover, the Appellant made various references to his right to free expression during his examination and also in his closing submissions. As a result, we are satisfied that the Hearing Officer erred by not considering and applying *Doré*.

[48] The Hearing Officer's consideration of the actual misconduct charge discloses an awareness of the impact of his adjudicated administrated decision on the Appellant's *Charter* right. In considering the donation itself, the Hearing Officer wrote the Appellant "believes his Charter rights were breached" and goes on to hold "there are no Charter issues and loss of freedom in Police Act matters." Even though the Appellant made no submissions on *Doré* before the Hearing Officer, the Hearing Officer recognized the Appellant's s.2(b) *Charter* right had been raised, and then held he was not required to consider it in proceedings under the Act. The holding that the *Charter* does not apply in proceedings under the Act was an error.

[49] The Appellant does not ask the Commission to send this matter back for a re-hearing. Instead, he invites the Commission to cure the Hearing Officer's failure to consider and apply *Doré* by engaging in its own analysis based on the record below. The Appellant submits the Commission has all of the evidence before it required to do so. Though the Respondent's initial position is the record is insufficient for this balancing to take place, it submitted in the alternative that the Commission ought to conclude that the objectives of the Act outweigh any limitation on the Appellant's *Charter* rights in this case.

d) Doré Analysis

[50] In *Commission scolaire,* the Supreme Court reaffirmed that *Doré* first requires a decision-maker to determine whether administrative action limits *Charter* protections. If it does, then the decision-maker must balance the *Charter* values with the statutory objectives that the administrative action seeks to achieve.

[51] We are satisfied that the disciplinary process in this case limited the Appellant's freedom of expression. The Appellant gave evidence that his donation was meant to convey his support for the Freedom Convoy, a movement that had political protest as its objective. The Commission accepts this *prima facie* falls within protection of s. 2(b) of the *Charter,* as "an activity conveys or attempts to convey a meaning" *Irwin Toy Ltd. V. Quebec (Attorney General)*, 1989 CanLII 87 (SCC) at p. 969. In *Lauzon v. Ontario (Justices of the Peace Review Council),* 2023 ONCA 425, the Court of Appeal for Ontario held that the *Doré* analysis applies "when a professional misconduct finding engages expressive freedom" (paragraph 147).

[52] *Doré* then requires the decision-maker to balance *Charter* values with the Act's objectives. This must be a "proportionate balancing", in which the decision-maker

considers whether the limit on the right is proportionate to the public benefit the limit seeks to achieve: *Commission Scolaire*, *supra* at para. 73. In *Lauzon*, the Court of Appeal held the following at paragraph 148 regarding the "robust" analysis in which a decision-maker must engage when applying *Doré*:

> In my view, the analysis must advert to the proportionality analysis developed by the Supreme Court in *Oakes* for cases in which a government actor is seeking to limit a Charter right. The proportionality analysis from *Oakes* asks whether the limit on the right is proportionate in effect to the public benefit conferred by the limit. Two aspects must be carefully assessed: the negative effects on the individual whose rights are engaged, and the positive effects on the public good. Using the court's own words, this analysis is to take "full account of the 'severity of the deleterious effects of a measure on individuals or groups'", that is, whether the "benefits of the impugned law are worth the cost of the rights limitation", or, more precisely, whether "the deleterious effects are out of proportion to the public good achieved by the infringing measure". This is to be a "broader assessment". (internal citations omitted)

[53] As the *Doré* analysis was not expressly raised at the hearing the Respondent made no submissions to the Hearing Officer on the Act's statutory objectives. On appeal, the Respondent submits that the objective of the Act's disciplinary procedures is to maintain public confidence in policing, by providing a tool to police chiefs to ensure members act in accordance with the fundamental purposes of the Act, which include the provision of adequate and effective police services in the province.

[54] The Respondent points to *Canadian Broadcasting Corporation v. Ferrier,* ONCA 1025, in which the Court of Appeal acknowledged one of the Act's objectives is "to enhance public confidence in policing by ensuring a more transparent and independent process for dealing with complaints against thepolice" (paragraph 72). In *Figueiras v. (York) Police Services Board*, 2013 ONSC 7419, the Divisional Court noted that the following in relation to the Act's complaints system:

> One of the fundamental purposes of the complaints system [is to] to ensure transparency and enhance public confidence in the process. Police officers have extraordinary powers to control the public. The public has an interest in ensuring that those powers are exercised in accordance with the law. It is an interest that extends beyond a personal "sense of grievance." Public confidence in those who are responsible for the administration of justice, including police officers, is essential to the health of a free and democratic society.

[55] The Act attempts to achieve this objective through various means. As noted by the Appellant, municipal police officers are presumptively prohibited by section 46 of the Act from engaging in political activity. However, O. Reg 268/10 prescribes various exemptions. Section 11(c) permits officers to donate money to political parties and organizations. Moreover, if a municipal officer is off-duty and not in uniform, they are permitted to express political views that are not directly related to the police officer's responsibilities as a police officer (s. 12(1)(1)), or to engage in any other political activity so long as they do not, among other things, engage in political activity that "places or is likely to place the police officer in a conflict of interest" (ss. 12(1)7, 12(2)).

[56] The Act also prohibits various forms of misconduct in the *Code of Conduct*. This includes the charge that is the subject of this proceeding, which is acting in "a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force of which the officer is a member" (s.2(1)(a)(xi)). Significantly for this matter, the Act places a protection for officers who are accused of committing misconduct while off-duty. Section 80(2) of the Act provides that an officer shall not be guilty of misconduct "if there is no connection between the conduct and either the occupational requirements for a police officer or the reputation of the police force". These provisions, which address a police officer's occupational requirements and the service's reputation, are aimed at furthering the Act's objectives of maintaining public confidence in policing.

[57] The next stage of the analysis is to consider whether the Respondent has demonstrated that the Act's limit on the Appellant's *Charter* protections, namely the finding that his donation constituted misconduct and the penalty imposed, is proportionate to the effect on the Appellant's *Charter* rights.

[58] The Appellant submits that his donation was "political expression" that "lies at the core of political freedom that section 2(b) is intended to protect." He submits his s.2(b) right to free expression must be given "primacy" in an analysis of whether the donation amounted to discreditable conduct. The Respondent submits that any limit on the Appellant's constitutionally protected expression to achieve the objectives of the Act is minimal as the limitation (i.e. the discipline process and penalty for discreditable conduct) arose only because the Appellant donated to a movement that, at the time, involved unlawful activity and exhaustion of police resources in the province.

> We accept that donating to political parties or causes is a form of expression protected by section 2(b) of the *Charter*. However, we do not agree that, in the circumstances of this case, the activity in question can be considered in such simple terms. The focus must be on the actual misconduct, which was donating to illegal protests. The Hearing Officer found, and the Commission has

confirmed, that there was clear and convincing evidence the Appellant made the donation at a time where he knew that elements of the Freedom Convoy movement were engaged in illegal activity, and that police resources had been exhausted in Ottawa.

[59] In assessing the reasonableness of the Respondent's limitation of the *Charter* right through discipline hearings it is appropriate to set the donation in the context of the factual findings of the Hearing Officer. The discipline process here was aimed at expressive activity that undermined the objectives and provision of adequate and effective police services and the maintenance of confidence in policing. The Hearing Officer found clear and convincing evidence the protests arising from the Freedom Convoy were, at the time Appellant donated, unlawful. The Hearing Officer also made findings that at the time the Appellant chose to make the donation, these protests exhausted OPS resources to control them; the OPS did not have enough resources to control the protest and all OPS personnel were on active duty and assisted by other police services.

[60] Moreover, having found that discreditable conduct had been proved, the Hearing Officer accepted that the Appellant's conduct brought disrepute on the police service. The Hearing Officer's reasons on how he reached that conclusion do not include an analysis of whether his finding considered Charter values and the Appellant's right to free expression. The Commission concludes that the finding the Appellant's conduct was likely, in the eyes of a reasonable member of the community, to bring discredit to the reputation of the respondent police service strikes a proportionate balance between the objectives of the Act and the Charter right and values at play. Again, the conduct under consideration whether the donation made at a time the protests were illegal and exhausted police resources, is key to this analysis. While the Appellant has free political expression by donating to political causes, this is limited when the political movement was illegal and also undermined the objective of the Act in providing adequate and effective police services. The Commission finds the limit against supporting political activity that undermined the objectives of the Act, and was illegal, has a limited negative effect on the Appellant's right to freely express dissent by supporting political movements. The limit applied because, at the specific time the Appellant made the donation, the protests were illegal and sapped police resources.

[61] The Commission also considers the collateral effects of the limitation of free expression in this case, which can involve a "chilling effect" on the rights of others (*Lauzon*, *supra*, at para. 151). As set out above, the Act and its Regulation already limit political expression by prohibiting municipal officers from engaging in political activity subject to exemptions. The Act also limits the conduct of officers more generally by providing that officers are liable for off-duty conduct where there is a connection between the conduct and either the occupational requirements for a

police officer or the reputation of the police force. The Commission does not accept that the finding of misconduct here, which is limited to a circumstance where the Appellant made a donation to support a protest found on clear and convincing evidence to be illegal, and that exhausted police resources in the province, will have a negative systemic effect on *Charter* values and the right to expression than those already in place in the Act.

[62] The Commission agrees with the Respondent that the statutory objectives in this case are the protection of public confidence in policing services through discipline, as well as promotion of the objective of providing adequate and effective police services. The Commission finds the limit on free expression here is outweighed by the public good achieved by promoting these objectives through the discipline process. As discussed below, the Commission also finds the penalty given reinforces this proportionality.

[63] The Commission therefore finds the Respondent has met its burden of demonstrating the limit on the Appellant's *Charter* right is proportionate in the circumstances of this case. While the Hearing Officer erred in his analysis, the existing record supports a conclusion any limitation on Appellant's *Charter* right is outweighed by the public interest in enforcing the objectives of the Act.

4.The Penalty Imposed is Reasonable

[64] The Appellant had a 15-year career at the WPS with no prior disciplinary history and strong workplace and community character references. At the penalty hearing the Respondent sought a forfeiture of 140 hours of time while the Appellant submitted a 40-hour forfeiture was reasonable. The Hearing Officer arrived at the penalty of 80 hours of forfeited time following a detailed analysis of the appropriate dispositional principles to be applied in this case.

[65] The Hearing Officer also considered the unreported decision of *Ottawa Police Service v. Constable Kristina Neilson* (unreported), October 6, 2022 ("*Neilson*"), where the subject officer pleaded guilty to making an online donation of $55 on January 23 and February 5, 2022 to "the illegal occupation known as the Freedom Convoy." In *Neilson*, following a guilty plea, the Hearing Officer accepted a joint submission and imposed a penalty of 40 hours along with participation in a restorative justice process. The Hearing Officer distinguished *Neilson* as it involved mitigating factors not present in this case.

[66] The Appellant raises three arguments on the penalty appeal.

[67] First, he submits the Hearing Officer erred by relying on a connection between his donation and the actions of protestors in Windsor when no connection could be established on the available evidence. In his penalty reasons, the Hearing Officer refers to the impact of the protests on the Freedom Convoy in the City of Windsor itself, particularly on the Ambassador Bridge, when considering the factor of damage to caused to the reputation of the police service as a dispositional factor. He observed there had been extensive media coverage of the Appellant's misconduct proceeding, and that the donation made to the Freedom Convoy directly opposed the efforts of the WPS and other police services to "resolve with the protestors."

[68] There is no merit to this submission. The Commission has found that the Appellant's conduct fell within the scope of the Notice of Hearing, which alleged making a donation to support a movement that gave rise to protests in both Windsor and Ottawa. It was open to the Hearing Officer to consider the impact on the reputation of the WPS, the Appellant's own employer, when discussing the dispositional factor of reputational damage to the police service. In any event, the Hearing Officer's reasons also consider the negative impact of the Appellant's conduct on policing services across the province, which includes the WPS. We do not consider the Hearing Officer's reference to the impact on the Windsor community as a sufficient basis for the Commission to reweigh the aggravating factor of damage to reputation of police service.

[69] Second, the Appellant argues the Hearing Officer erred by failing to apply the principle of parity and imposing a higher penalty that is outside of the range of penalty established in case law. The Appellant submits the *Neilsen* decision established a range of penalty of between 24 and 70 hours forfeiture for a similar offence, and the Hearing Officer erred by departing from this range. He further submits the disposition of 80 hours runs afoul of the principle of parity or consistency of discipline as the subject officer in *Neilsen* received 40 hours of forfeiture for similar misconduct.

[70] The Commission does not accept the argument that imposition of a penalty higher than that in the *Neilsen* case runs afoul of the principle of parity. The *Neilsen* case had mitigating factors not present here: there was an early guilty plea, the Hearing Officer was tasked with deciding whether to accept a joint submission, and the subject officer's disposition contained, as part of the joint submission, a restorative justice component which the Hearing Officer found significant. The Hearing Officer explicitly refers to these distinguishing features when considering the principle of consistency of penalty. He was entitled to consider *Neilsen* and to distinguish it based on the absence of these mitigating factors.

[71] Third, the Appellant submits the Hearing Officer erred by referring to his decision to not receive the COVID-19 vaccine as an aggravating factor on penalty. In the section of his disposition dealing with “aggravating factors”, and in considering the negative impact of the Appellant’s actions on the “public interest” in confidence in policing services, the Hearing Officer refers to the decision to not receive the vaccine. He wrote:

> Constable Brisco is a police officer and as such the public expects him to obey the Policies and procedures of the Windsor Police Service. General Orders of the Service are expected to be adhered to forthwith as policy dictates. A general order was enacted for the Service for the betterment of the Police Service employees and the general public who attend the station. Those that chose not to be vaccinated were given direction. It was obvious by Constable Brisco’s actions he did not believe in this direction. This type of behaviour displayed by Constable Brisco was deemed not tolerable by the Service.

[72] The Hearing Officer goes on to list four further aggravating factors, including the seriousness of the misconduct, need for deterrence and damage to the reputation of the service. In these sections of his decision the Hearing Officer relates the aggravating factors to the actual misconduct at issue, the donation on February 8, 2022.

[73] On an initial reading of the Hearing Officer’s reasons, the comment about the Appellant’s vaccination refers to an irrelevant factor as aggravating. The vaccination issue was not the subject of the discreditable conduct charge, and the prosecutor did not submit the Appellant’s failure to comply with the WPS vaccination policy should be aggravating on penalty. We agree that it would be an error for the Hearing Officer to consider this as an aggravating factor. However, the reference to the Appellant’s vaccination status must be read in the context of the Appellant’s submissions on penalty, where he made his perceived mistreatment at the hands of his employer by placing him on unpaid leave a central issue.

[74] At the outset of his submissions on penalty counsel for the Appellant pointed to the hardship the Appellant experienced as a result of being placed on a leave of absence for, as the Appellant viewed it, exercising his constitutionally protected right not to be vaccinated. He submitted “that’s a factor that I respectfully submit needs to be considered.” It is clear when reading the Hearing Officer’s reasons as a whole the concern lay in the Appellant’s position that he was not accountable to the service for his actions while on unpaid leave. In the context of these submissions, the Hearing Officer referred to the Appellant’s fixation on his treatment by his employer due to the vaccination policy in weighing the dispositional

principles. In the Commission's view, the Hearing Officer did not rely on the vaccination issue as prior misconduct or aggravating in and of itself. Rather, it reflects his consideration of the Appellant's minimization of his accountability for his actions and responds to the submissions that he made regarding the penalty.

[75] The Commission further finds that even if the reference to the Appellant's vaccination status was an irrelevant consideration, the erroneous reference would not affect the result. The Hearing Officer's reasons correctly analyze a number of relevant dispositional factors, with public interest only being one of them. Though the Hearing Officer referred to the Appellant's non-compliance with the vaccination policy at the outset of his reasons, his more extensive analysis of other aggravating factors throughout his decision, including the harm to the reputation of the police service, do not refer to this issue again. We are not satisfied that the Appellant has identified an error in principle, and we are satisfied that the penalty was in the range of reasonable outcomes. There is no basis for the Commission to interfere.

[76] Finally, although the Appellant did not raise this during their penalty submissions, as noted by the Court of Appeal in paragraph 147 of *Lauzon*, a tribunal must consider and apply *Doré* not only when making a disposition, but also when deciding on the appropriate penalty. We are not satisfied that the penalty chosen by the Hearing Officer offends the proportionality required by *Doré*. While the penalty can be characterized as significant, and is more serious than the reprimand that was given in *Doré*, it is far less serious than demotion or termination. In our view, the Hearing Officer gave detailed reasons for the penalty he chose, including the harm caused to the reputation of the WPS. This factor is particularly linked to the important objective of maintaining confidence in policing, discussed above. We do not view the penalty as a disproportionate limit on the Appellant's Charter right and would not disturb on this basis.

ORDER

[77] The appeal is dismissed. Pursuant to s. 87(8)(a) of the Act, the Commission confirms the misconduct and penalty decisions of the Hearing Officer.

Released: February 14, 2024

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Emily Morton

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Laura Hodgson

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Kate Grieves