21-ADJ-010

ONTARIO CIVILIAN POLICE COMMISSION

B E T W E E N:

B.A. & M.M.

Appellants (Public Complainants)

- and -

TORONTO POLICE SERVICE

Respondent

- and -

ADAM LOURENCO & SCHARNIL PAIS

Respondents

APPELLANTS' AMENDED FACTUM

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OVERVIEW

1. This case is about four Black teens, B.A., B.H.A.,[1] Y.B., and M.M. (the Neptune Four), whose lives were changed on November 21, 2011, after a violent interaction with two TAVIS police officers: PCs Lourenco and Pais. This case is a grim example of how Black people can do everything right and still end up assaulted, arrested, and charged in front of their own homes.

2. The incident began when PCs Lourenco and Pais pulled up beside the teenagers, who were on foot, and who were on their way out of the Neptune housing complex. The officers asked if they could speak with them. The officers' evidence was that they were enforcing the *Trespass to Property Act* ("*TPA*"), that they asked the youth for identification, and that they "possibly" mentioned there had been robberies in the neighbourhood. The teenagers did not recall hearing anything about the *TPA*. B.A. recalled that he was told that he fit the description of a robbery. B.A. and Y.B. agreed with the officers that they were asked for identification.

3. When B.A. tried to enforce his legal rights and leave, PC Lourenco grabbed him. He claimed that he was arresting B.A. for failing to identify under the *TPA*, a non-existent offence. He further claimed that B.A. spat at him when he tried to arrest him. B.A. denied this. On the basis of the alleged spit, PC Lourenco continued the arrest for assault police. The lawfulness of the assault police arrest was the subject of one of the charges against both officers.

4. The Hearing Officer found that the initial *TPA* arrest was unlawful and thus removed PC Lourenco from the lawful execution of his duties. The Hearing Officer found, however, that insufficient evidence was led to find that the ensuing arrest of B.A. for assault police was

[1] The initials of B.H.A. were redacted in the Hearing Officer's decision. He had withdrawn as a complainant.

unlawful. (The complainants submit that this conclusion was erroneous but, as a result of the Commission's Motion Decision, they are only entitled to raise these issues in their responding factum.)

5. Twenty seconds after the assault police arrest of B.A., PC Lourenco punched B.A. in the abdomen, again in his head area, and brought him to the ground. The Hearing Officer found PC Lourenco guilty of discreditable conduct because the force he used was unreasonable. Y.B. and B.H.A. then moved toward PC Lourenco and B.A. PC Lourenco pointed his firearm at them. Y.B., B.H.A., and M.M. were then arrested for assault police also.

6. The Hearing Officer convicted PCs Lourenco and Pais for unlawfully arresting the remaining complainants without good and sufficient cause. While he found that PC Pais was able to use a preventative arrest power to stop Y.B. and B.H.A. from continuing towards PC Lourenco, there were no reasonable grounds that they had committed an assault.

7. The Hearing Officer, however, acquitted PC Lourenco of the second count of discreditable conduct on the basis that his decision to use his firearm was reasonable. In so concluding, the Hearing Officer made the following errors that are addressed under ***Sole Issue***:

i. the Hearing Officer failed to apply the mandatory test from the *Equipment and Use of Force* regulation as to when an officer is allowed to point his firearm;

ii. he wrongly inserted a subjective 'intent' element into the test;

iii. he breached procedural fairness by using his "own knowledge and experience";

iv. he failed to consider *any* of the surrounding circumstances in assessing the reasonableness of PC Lourenco's conduct; and

v. he failed to consider the relevant social context evidence about interactions between police officers and young Black males.

8. The complainants ask that the Commission substitute findings of guilt for both officers

under count two.

PART I: CONCISE SUMMARY OF THE FACTS

A. The "Neptune Four"

9. As a result of this incident, twin brothers B.A. and B.H.A., and their friends Y.B. and M.M., became known as the "Neptune Four." They were 15 and 16 years old. They identified as Black. They lived in the Neptune Toronto Community Housing complex ("Neptune").[2]

10. B.A. estimated that he had previously been "profiled" by police more than 60 times. It began during grade five. In all of these incidents – including the one giving rise to this case – B.A. was not doing anything wrong. He believed he was stopped because he was Black.[3]

11. Police began stopping Y.B. when he was 12 or 13. He estimated that this had happened 30 or 40 times. It was just "what happens in my neighbourhood." M.M. estimated that he had been "carded" 50 to 60 times. M.M. wanted to become a police officer prior to this incident.[4]

B. The four young Black teenagers were on their way to an after-school program

12. On November 21, 2011, M.M. and Y.B. were hanging out at the home of B.A. and B.H.A. after school playing video games. The teens exited 145 Neptune Drive from the southwest corner of the building. They were wearing hoodies, jackets, runners, and dark coloured baseball caps. They were minding their own business.[5]

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[2] B.A.: Transcript, Vol. I, pp. 570, 690; Y.B.: Transcript, Vol. I, pp. 959, 1031; M.M.: Transcript, Vol. II, pp. 1561-1563, 1635-1636.
[3] B.A: Transcript, Vol. I, pp. 699-704.
[4] Y.B.: Transcript, Vol. I, pp. 1032-1034; M.M.: Transcript, Vol. II, pp. 1563-1564, 1589-1591.
[5] B.A.: Transcript, Vol. I, pp. 573-574, 617-618, 702-703; Y.B.: Transcript, Vol. I, pp. 967, 999-1000, 1031-1032, 1206-1207; M.M.: Transcript, Vol. II, pp. 1564-1566, 1636, 1856-1858; Ex 8, pp. 2-5; Ex 10, clip 2, 6:14:32-6:14:58; Ex 18.

13. The teens had chosen one of the two paths west from 145 Neptune Drive. That path ran alongside the complex parking lot and then angled northwest ***out*** of the complex. They were on their way to an after-school program called Pathways to Education. It was a pizza party night. They had ***not*** taken the other path that led to the east-facing side door of 155 Neptune Drive.[6]

14. The teens exited from 145 Neptune Drive at the same time as another group, composed of two children, a woman, and a man. PC Pais agreed it was possible he would have seen them.[7]

C. The officers were looking to move along drug dealers and gang members

15. At the same time, PCs Lourenco and Pais, part of TAVIS, had decided to engage in 'proactive policing' at Neptune, a majority Black community, because it was a "high crime neighbourhood." They were in uniform, carrying guns. The officers were concerned about drug dealers, gang members, and gun violence. PC Pais agreed that one way to intervene in these kinds of activities was to find out who was on the property, who was associating with whom, and to log this information through FIRs or 208s (known in the media as contact cards) because of the potential "evidentiary value." Indeed, part of TAVIS' mandate was to speak with people and get information from them.[8] It appeared that PC Lourenco was going to show PC Pais the ropes given his "vast experience" in 32 Division and the "numerous investigations" he had conducted at Neptune. PC Lourenco believed that some people in Neptune were "anti-police."[9]

16. The officers said their plan was to enforce the *TPA*. PC Pais explained that this allowed

[6] B.A., Transcript, Vol. I, pp. 573-574, 703; Y.B.: Transcript, Vol. I, p. 961; Ex 9, clip 1, 6:15:07-6:15:10; Ex 10, clip 2, 6:14:32-6:14:58; Ex 18.
[7] Ex 10, clip 2, 6:14:32-6:14:58; PC Pais: Transcript, Vol. IV, pp. 3607-3614.
[8] PC Pais: Transcript, Vol. IV, pp. 3619, 3810-3815; Ex 12, p. 19; B.A.: Transcript, Vol. I, pp. 712-713; Decision on the merits, paras. 80, 82.
[9] Ex 11A, pp. 4-5, 28; PC Pais: Transcript, Vol. IV, p. 3810.

them to move along drug dealers and gang members. The officers were not, however, responding to a specific trespassing issue and they did not know any names of possible trespassers.[10]

17. Earlier that day, the officers had been briefed on two robberies. The visual description of the suspect in one of the robberies was so vague (male, Black, 5'9") that it potentially included the complainants. It had taken place 2.4 kilometres away, four days prior. The Hearing Officer found that the police "were watching out for those suspects."[11]

D. The officers' decision to stop the teens

18. The four teens came to the attention of the officers as they drove into Neptune. PC Pais testified that it was expected of him to determine if the teens had a legitimate reason for being on the property. He testified that he could not see the race of the youth when he first entered the complex and was about 80 metres away.[12] There can be no doubt, however, that the officers could see that the teens were Black when PC Lourenco pulled up beside them.

E. The officers asked the teens to stop and then took up a "position of control"

19. PC Pais called out to the teens as the Dodge Caravan pulled up beside them. At first, only B.H.A stopped. PC Pais immediately got out of the car, approached B.H.A., and called out to the others who had continued to walk. He noted that he asked them to "stop" again. In spite of his attempts to get the youth to stop, PC Pais testified that they were free to carry on. He agreed that he had no basis to think that they were trespassing and had no lawful basis to detain them.[13]

[10] PC Pais: Transcript, Vol. IV, pp. 3331-3333, 3817-3818, 3821-3823; Decision on the merits, paras. 89, 186-187, 193.
[11] B.A.: Transcript, Vol. I, pp. 689-690; Y.B.: Transcript, Vol. I, pp. 1030-1031; M.M.: Transcript, Vol. II, pp. 1635-1636; PC Browne: Transcript, Vol. II, pp. 2721-2727; Decision on the merits, paras. 96, 186; Ex 8, pp. 2-5; Ex 36.
[12] Decision on the merits, paras. 90, 106, 107, 174-175; PC Pais: Transcript, Vol. IV, pp. 3331-3333, 3851-3853, 3867-3869.
[13] PC Pais: Transcript, Vol. IV, pp. 3615-3623, 3627-3629, 3331-3334; Ex 14, pp. 3-4; Decision on the merits, para. 102.

20. The other youth stopped three seconds later. PC Lourenco illegally parked the van in a place that blocked the flow of traffic. PC Lourenco left the van and approached the teens.[14]

21. Within 30 seconds of exiting the van, PC Pais directed B.H.A. to join the remainder of the group and had taken up what he referred to in his notes as a "position of control" behind them. PC Pais denied that his use of that term, and his decision to stand behind the youth, had tactical significance. He said that it simply meant that he was in a position where he felt safe.[15]

22. B.A., however, felt boxed in. Y.B. thought that PC Pais was watching them from behind in case someone tried to run. B.A. and M.M. testified that this encounter did not feel friendly, unlike their previous encounters with police. Y.B. and M.M. testified that they did not believe they could leave. B.A., however, had learned about his rights vis-à-vis the police in an afterschool program, and decided to find out whether or not he was free to go.[16]

F. The Hearing Officer found that PC Lourenco unreasonably escalated the situation

23. The Hearing Officer, except where noted, did not attempt to resolve the competing testimony about who said what for the remainder of the incident – including the allegations that B.A. swore at PC Lourenco, and vice versa. These issues were "peripheral." He did, however, reject the contention in PC Lourenco's notes that "alleged an immediate aggressiveness on the part of B.A." Instead, the Hearing Officer found that B.A.'s initial responses were not hostile, and that PC Lourenco had unreasonably escalated the incident at the moment he grabbed B.A.[17]

[14] Bacchus: Transcript, Vol. II, pp. 2261-2263; Ex 35; Ex 10, clip 1: 6:15:05-6:15:36.
[15] PC Pais: Transcript, Vol. IV, pp. 3334-3336, 3667-3669; Ex 10, clip 1: 6:15:05-6:15:36; Ex 14, p. 4.
[16] Decision on the merits, paras. 26, 28, 35, 40, 54, 57, 182, 210; B.A.: Transcript, Vol I, pp. 575, 705-706; Y.B.: Transcript, Vol. I, pp. 969-970, 1039-1040; M.M.: Transcript, Vol. II, pp. 1563-1564, 1584-1585.
[17] Decision on the merits, paras. 162, 501, 203, 209.

G. The teens were subjected to a focused investigation

24. B.A., Y.B., and both officers agreed that the officers asked the youth for identification. Y.B. and B.A. testified further that the officers told them the identification request was due to a robbery in the area. B.A. said he was told he fit the description. All three teens testified that they told the officers they could speak to B.A. and B.H.A.'s mom – either as an alibi or to confirm they lived in Neptune. PC Pais did not recall the youth mentioning B.A. and B.H.A.'s mother. He testified that he would have used that route to confirm their residence. The Hearing Officer, however, found as a fact that the youth had told them about B.A. and B.H.A.'s mother.[18]

25. PC Pais acknowledged that it was possible he had told the complainants that there had been robberies in the neighbourhood. But he testified that the officers had not said that the teens fit the descriptions. The thrust of PC Pais' evidence was that he and PC Lourenco were focused on determining whether the youth lived in the complex as part of their trespass investigation – and that they had explained this to them. He said that one option would have been to run their names in a police database as part of the investigation. He believed the youth had to comply with the request for ID. The teens did not hear anything about the *TPA* or the word 'trespass.'[19]

26. PC Pais confirmed that none of the teens were told they could leave. If they had asked to leave, "it could've been an option." Because things were happening "fairly quickly," he had not yet decided "if they could leave or if they could go" by the time PC Lourenco grabbed B.A.[20]

27. The officers, B.A., and M.M. agreed that B.A. tried to enforce his rights either by

[18] Decision on the merits, paras. 19-20, 29-30, 34, 40, 42, 50, 91-92, 103, 209; B.A.: Transcript, Vol. I, pp. 588, 704-705.
[19] Decision on the merits, paras. 25, 35, 91-92, 99-100; PC Pais: Transcript, Vol. IV, pp. 3332-3334, 3510-3512, 3553-3556, 3631-3657, 3792-3795; B.A.: Transcript, Vol. I, pp. 666-667, 702-705; Y.B.: Transcript, Vol. I, pp. 991-993, 1150-1163; M.M.: Transcript, Vol. II, pp. 1629-1631, 1695-1696.
[20] PC Pais: Transcript, Vol. IV, pp. 3681-3685; Decision on the merits, paras. 182, 210.

refusing to provide information or by asking whether he was free to go. The Hearing Officer found that PC Lourenco grabbed B.A. when he attempted to act on his rights and tried to leave. Twenty-four seconds passed from when PC Lourenco first stood in front of the youth until he physically took hold of B.A.[21]

H. PC Lourenco's justification for grabbing B.A. was a non-existent *TPA* offence

28. PC Lourenco's notes claimed that the reason why he grabbed B.A. was to place him under arrest for failing to identify himself under the *TPA* – an offence that does not exist. None of the youth, however, heard PC Lourenco caution B.A. or explain on what basis he was grabbing him. Further, neither officer indicated in their notes that B.A. had been cautioned that he was about to be arrested – though PC Pais testified that he did hear such a caution. PC Pais also did not include the reason for PC Lourenco's arrest of B.A. in his notes.[22]

I. PC Lourenco alleged that B.A. spit at him; he then punched him twice

29. B.A. thought that his attempt to leave angered PC Lourenco – as did Y.B. and M.M. B.A. testified that after PC Lourenco grabbed him, the officer began calling him names such as smart ass, bitch, and wannabe thug. PC Lourenco searched him forcefully, and then punched him twice. Once to his mid-section and once with a "haymaker" to his head that knocked him down. He denied spitting at PC Lourenco.[23]

30. PC Lourenco's evidence was that, at the moment that he took hold of B.A., B.A. said

[21] Decision on the merits, paras. 21, 25, 30-31, 94-95, 182, 209, 210; B.A.: Transcript, pp. 575-576, 694-695; M.M.: Transcript, pp. 1575-1576, 1639-1641, 1696; Ex 9, clip 1, 6:15:23-6:15:47; Ex 12, pp. 19-21.
[22] Decision on the merits, paras. 53, 105, 217; B.A.: Transcript, Vol, I, pp. 666-667; Y.B.: Transcript, Vol. I, pp. 991-993; PC Pais: Transcript, Vol. IV, pp. 3352-3353, 3710-3714; Ex 12, pp. 20-21; Ex 14, pp. 4-5.
[23] B.A.: Transcript, Vol. I, pp. 589-593, 604-605, 694-695, 818-827, 841-846, Y.B.: Transcript, Vol. I, pp. 972-973; M.M.: Transcript, Vol. II, pp. 1637-1640, 1696-1697; Decision of the merits, paras. 21, 337; Ex 19.

"fuck you!!" and spat in his face. He thus continued the arrest for assault police. PC Lourenco's evidence was that he struck him one time (in the mid-section) to get him to comply.[24]

31. Given that the alleged spit was the basis for the impugned assault police arrest, this was the ***one place*** where the Hearing Officer relied on his credibility and reliability findings to govern a legal conclusion. He was concerned about both PC Lourenco's and B.A.'s evidence. He found that he could not decide on clear and convincing evidence that a spit did ***not*** happen.[25]

32. On the question of whether PC Lourenco's impugned force included a punch to the head – and was ultimately unreasonable – the Hearing Officer used the surveillance video to find that PC Lourenco had indeed punched B.A. twice: in the abdomen ***and*** to the "area of his head."[26]

J. PC Lourenco pointed his gun at Y.B., B.H.A., and M.M.

33. Once B.A. was on the ground under PC Lourenco, Y.B. and B.H.A. moved towards them. M.M. did not move. PC Lourenco popped up and pointed his gun at Y.B., B.H.A., and M.M. PC Lourenco's evidence was that he said, "police, please don't move" and "get back, get down on the ground." B.A. testified that he said, "do not move, I'll fucking shoot you guys." The teens testified that they were terrified. M.M. said, "I thought I was going to die." They all ended up on the ground. PC Pais arrested the remaining youth for assault police.[27]

[24] Ex 11A, pp. 14-17; Ex 12, pp. 20-21.
[25] Decision on the merits, paras. 345-346, 361. The Hearing Officer found Y.B. the most credible and reliable complainant and PC Pais generally credible. He found that B.A. was prone to exaggeration and that M.M. was unreliable and not credible. He also found that he could not rely on PC Lourenco's evidence: Decision on the merits, paras. 194-203, 209, 345-346, 351-362.
[26] Decision on the merits, para. 348.
[27] B.A.: Transcript, Vol. I, pp. 576, 598-600; M.M.: Transcript, Vol. II, p. 1580; PC Pais: Transcript, Vol. IV, pp. 3338-3340; Decision on the merits, para. 400; Ex 11A, pp. 25-27; Ex 12, pp. 21-22.

K. The aftermath, including PC Lourenco's gratuitous knee strike on B.A.

34. Once the complainants were all on the ground, PC Lourenco's evidence was that B.A., the male he was "originally fighting" with, threatened to kill him. PC Pais, who was right there, did not hear this. B.A. denied saying it. What is clear from the video is that PC Lourenco used his knee to drop his full weight on B.A.'s back who was lying prostrate on his stomach. B.A.'s legs flew up behind him in response to the force. Once back-up arrived, PC Lourenco took B.A. to a marked scout car. B.A. testified that PC Lourenco shoved him against the scout car and slammed the door on his legs. PC Pais agreed that PC Lourenco "deliberately used force" on B.A. to push him against the scout car because he was "still resisting [and] uncooperative." The Hearing Officer found the door closed on B.A.'s legs, but that it was not done on purpose.[28]

PART II: STATEMENT OF THE ISSUES

SOLE ISSUE: **THE HEARING OFFICER ERRED IN ACQUITTING PC LOURENCO OF DISCREDITABLE CONDUCT FOR POINTING HIS FIREARM**

A. The Hearing Officer found that PC Lourenco's use of his firearm did not amount to unreasonable force

35. PC Lourenco was charged with two counts of discreditable conduct. One for punching B.A. for which he was convicted. And one for pointing his firearm for which he was acquitted. The Hearing Officer's analysis that led to the acquittal correctly focused on whether PC Lourenco's decision to point his firearm was reasonable.[29]

[28] PC Pais: Transcript, Vol. IV, pp. 3779-3781, 3783-3788; B.A.: Transcript, Vol. I, p. 1352; Ex 9, clip 1, 6:17:21-6:17:37; Ex 11A, pp. 28-29, 32-33; Ex. 12, pp. 23-24; Decision on the merits, para. 357.
[29] Decision on the merits, paras. 470, 472; *Shaw and McGuigan v OPP*, 1979 OCCPS #79-09; *Brown v Haldimand-Norfolk Regional Police Force*, 1987 OCCPS #87-16.

36. The Hearing Officer found PC Lourenco's conduct reasonable on the following bases:

i. PC Lourenco could not know if there was "a potential threat, if the males were armed" or "if they intended to inflict bodily harm" and he was entitled to "ensure his own safety";

ii. pointing his firearm was a use of force "available to him" as a "defensive action" even "if it might have been beyond what was necessary";

iii. he had not "deliberately used unreasonable force" and had not "intentionally selected [a use of force option] that was inappropriate or unlawful"; and

iv. "his actions were in keeping with his training," a conclusion reached by the Hearing Officer based on his "own knowledge and experience."[30]

37. The complainants submit that the Hearing Officer's analysis discloses five errors that compel the Commission's intervention. This aspect of the decision must be reviewed on a correctness standard because four of the five errors raise an "extricable question of law" and the third one concerns the jurisdictional issue of procedural fairness.[31]

B. The Hearing Officer erred by failing to apply the requisite legal test

38. The Hearing Officer's reasonableness assessment needed to incorporate the requisite legal test, as set out in the *Equipment and Use of Force* regulation, for what an officer must establish in order to demonstrate that his pointing of a firearm was reasonable: an officer "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."[32] This test reflects the will of the provincial government. Its application is not optional.

39. The Hearing Officer, at its highest, appears to have found that PC Lourenco reasonably

[30] Decision on the merits, paras. 466, 470, 473-474, 476.
[31] *DeHamilton v The Ontario Provincial Police*, 2022 ONCPC 7, para. 10; *Forestall v Toronto Police Services Board*, 2007 CanLII 31785 (ON SCDC), para. 38.
[32] *Equipment and Use of Force*, RRO 1990, Reg 926, s. 9 [emphasis added].

believed that the complainants could have intended to inflict bodily harm[33]– not ***serious*** bodily harm and certainly not death. This finding does not satisfy the test. Indeed, given that the same test must be met for ***discharging*** a firearm, this decision currently stands for the ***incredible proposition*** that it would also have been reasonable for PC Lourenco to discharge his firearm.

40. That the bar is set so high for when a firearm can even be drawn results from the obvious truth that guns are very dangerous. Once PC Lourenco pointed his firearm while holding it in both hands, he only had one option if Y.B. had kept moving towards him: to shoot. Retreat, on the other hand, would have only meant that B.A. – an alleged trespasser and spitter – might have escaped. PC Lourenco also could have defended himself by drawing one of the intermediate weapons, such as a baton or pepper spray, that he was likely carrying. Retreating – and *perhaps* the use of intermediate weapons – would have been reasonable. Pointing a firearm was not.[34]

C. <u>The Hearing Officer erred by introducing an 'intent' element</u>

41. The Hearing Officer also erred by improperly introducing an ***intent*** element. The Hearing Officer found that he could not "say that [PC Lourenco] <u>deliberately</u> used unreasonable force" and, later, in the penultimate sentence of his analysis, he held that "I do not find [PC Lourenco] <u>intentionally</u> selected [a use of force option] that was inappropriate or unlawful."[35]

42. In fact, the prosecution did not have to prove that PC Lourenco, subjectively, had "deliberately" or "intentionally" used unreasonable force. The question was only whether the decision to use force was ***objectively*** reasonable.[36] Having to prove that the officer ***intentionally***

[33] Decision on the merits, para. 473.
[34] PC Pais: Transcript, Vol. IV, pp. 3760-3762, 3857-3859; Ex 9, clip 1, 6:16:10-6:16:24; Ex 44.
[35] Decision on the merits, paras. 474, 477.
[36] *R v DaCosta*, 2015 ONSC 1586, at paras. 92-105.

used unreasonable force erroneously added an element of the offence that did not exist.

D. The Hearing Officer improperly relied on his "own knowledge and experience"

43. The Hearing Officer breached procedural fairness by relying on his "own knowledge and experience" of Toronto Police Service firearms training to find that PC Lourenco's conduct was reasonable: "his actions were in keeping with his training."[37] The complainants were not able to cross-examine a witness on this evidence or to make submissions about it.

44. Hearing Officers are allowed to take judicial notice of certain facts and "to use their experience when assessing the evidence." They are ***not***, however, "permitted to use their experience to fill in gaps in the record or to make essential findings of fact." But that is precisely what happened here: the Hearing Officer filled a gap in the evidence about the appropriate use of force and made an essential finding of fact, at least in part, on that basis. Indeed, PC Lourenco, responding to the prosecutor's submissions, correctly submitted to the Hearing Officer: "I know you have experience in [use of force] and I know you have training [in it] but you cannot use your own experience and your own training to substitute for a lack of evidence."[38]

E. The Hearing Officer erred by failing to consider *any* of the surrounding circumstances

45. The Hearing Officer had to put himself in the "officer's shoes", which involves taking into account "all of the circumstances" from the point at which the events began. Thus, in *Shaw*, the analysis of the officers' decision to shoot consisted of a detailed account of the preceding

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[37] Decision on the merits, paras. 473-474.

[38] *Statutory Powers Procedure Act*, RSO 1990, c S 22, s. 16; *Stevenson v York Regional Police Service*, 2013 ONCPC 12, para. 162 [emphasis added]; *Siriska v Ontario Provincial Police*, 2022 ONCPC 8, paras. 33-37; see e.g. *Nobody v Adams, Donaldson, Fardell, Simpson, Toronto Police Service and the Office of the Independent Police Review Director*, 2018 ONCPC 8, paras. 29-33; PC Lourenco's reply submissions: Transcript, Vol. V, pp. 5079-5080.

events: the victim led police on a high-speed chase, almost ran over two people, rammed a police car, and then raised his arm as if he had a gun. It was then that the officers fired.[39]

46. By contrast, the Hearing Officer in this case failed to consider ***any*** of the circumstances that led up to PC Lourenco's decision to draw his firearm. Instead, he began his analysis from the moment that PC Lourenco had punched B.A. and had him on the ground.[40]

47. Based on uncontested evidence, the Hearing Officer's own findings of fact, and accepting (for the sake of argument) PC Lourenco's subjective perspective where no explicit finding of fact was made, the circumstances prior to the key moment included PC Lourenco: (i) attending at a location for which there had been no report of any recent crime; (ii) seeing four young Black teenagers who were doing nothing wrong; (iii) engaging with B.A., who tried to enforce his legal rights in a non-hostile way; (iv) arresting B.A. for a trespass offence that did not exist; (v) possibly being spit at by B.A.; and (vi) using unreasonable force to punch B.A. twice.[41]

48. Unlike in *Shaw*, there was no indication of dangerous, highly provocative, and clearly criminal conduct on the part of the complainants in the moments leading up to PC Lourenco's use of force. If there had been, the defence would have been correct to point to such behaviour in its attempt to justify PC Lourenco's conduct as reasonable. But the lack of any such behaviour was also relevant. The Hearing Officer's failure to consider these circumstances was an error.

49. In fact, the Hearing Officer did not even consider his own assessment of Y.B.'s movements that took place after PC Lourenco was already holding B.A. on the ground. The

[39] Decision on the merits, paras. 469, 476; *Berntt v Vancouver (City)*, 1999 BCCA 345, para. 25; *DaCosta*, para. 97; *Shaw*, pp. 6-7; *Adams et al*, paras. 35-37; *Haldimand-Norfolk*, pp. 6-7.
[40] Decision on the merits, para. 466.
[41] Decision on the merits, paras. 21, 23, 69, 116, 186, 189, 193, 203, 209-210, 348.

Hearing Officer found, based on the video, that "Y.B.'s gestures were limited to moving towards Constable Lourenco with an outstretched arm" and that Y.B. did not "take a challenging or fighting stance."[42] Had he found, alternatively, that Y.B. had lunged at PC Lourenco with, say, a knife in his hand, that surely would have impacted his assessment of the reasonableness of PC Lourenco's conduct. Conversely, his assessment of the mild nature of Y.B.'s conduct also needed to be factored into his analysis. The Hearing Officer, however, failed to do so.

F. The Hearing Officer erred by failing to consider the social context evidence

50. The Hearing Officer failed to consider the relevant social context evidence about anti-Black racism in determining whether PC Lourenco's use of force was reasonable. Our highest court, however, has observed that social context evidence about the "relationship between the police and racialized communities" may inform fact-finding.[43] The complainants submit that, in the context of his analysis of the firearm issue, the Hearing Officer was obligated to grapple with the relevant social context evidence and determine whether subconscious bias played a role in the use of force in question and whether its presence may have undermined the reasonableness of PC Lourenco's conduct. His failure to do so was an error.

1. The social context evidence

51. Anti-Black racism is a particular form of racism that discriminates against people of African descent.[44] This form of racism relies on present-day stereotypes and associations between Blackness and criminality, violence, and immorality, and stems from the unique legacy

[42] Decision on the merits, para. 493.
[43] *R v Le*, 2019 SCC 34, para. 89.
[44] *AA v P.R.Y.D.E. Learning Centres Inc.*, 2020 HRTO 1020, para. 66.

of colonialism, enslavement, and segregation in Canada. Though slavery was abolished in 1834, these stereotypes have persisted, and anti-Black racism continues to exist within the fabric of all social institutions. One of the continuing impacts of this history on Black communities involves the disproportionate involvement of Black individuals in the criminal 'punishment' system.[45]

52. The police, in particular, have played a devastating role in the ongoing marginalization and mass criminalization of Black communities. Reports since the 1970s have repeatedly found that Black people are more likely to experience proactive and aggressive policing, and are more likely to be stopped, questioned, arrested, charged, over-charged, assaulted, and killed by police.[46]

53. One of the factors that contributes to this grim phenomenon is that Black individuals are perceived – due to conscious or subconscious stereotyping – as "guilty and dangerous," as well as aggressive and having superhuman strength. This can lead to quick escalation and violent overreaction in police-civilian encounters.[47] Further, the phenomenon of adultification – where Black children are perceived to be older than they are – means that the violent overreaction can

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[45] We have chosen to describe the criminal system as the 'criminal punishment system' to capture the reality that this system, like many institutions, does not treat everyone justly; instead, racial disparities for Black and Indigenous people exist at all stages within the system (from arrest to incarceration); *Le*, paras. 90-97; *R v Golden*, 2001 SCC 83, para. 83; *R v Morris*, 2021 ONCA 680, paras. 1, 42; *R v Theriault*, 2021 ONCA 517, paras. 143, 212; *R v Morris*, 2018 ONSC 5186, paras. 9, 21, 22 and Appendix A; *R v Jackson*, 2018 ONSC 2527, para. 82.

[46] *Le*, paras. 87, 90, 94-97; *R v Grant*, 2009 SCC 32, paras. 154-155; Ontario Human Rights Commission, *A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (2020) pp. 2-3, ["Disparate Impact"]; Ontario Human Rights Commission, *Use of Force by the Toronto Police Service Final Report* (2020) pp. 52-77 ["Use of force"]; Toronto Police Service, *Race and Identity Based Data Collection Strategy* (2022) pp. 45, 47-62 ["TPS Data"]; Scot Wortley, Akwasi Owusu-Bempah and Huibin Lin, *Race and Criminal Injustice: An Examination of Public Perceptions of, and Experiences with, the Criminal Justice System among Residents of the Greater Toronto Area* (Toronto: X University Faculty of Law, 2021), pp. 66-67.

[47] *R v Brown*, 2003 CanLII 52142 (ON CA), paras. 7-8; *Peel Law Association v Pieters*, 2013 ONCA 396, paras. 118-124; *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074, para. 20; *R v Chase*, 2022 ONCJ 253, paras. 69-93; *Le*, paras. 90-93; *TPS Data*; *Disparate Impact*; *Use of force*; *R v Smith*, 2015 ONSC 3548, para. 247; *R v K(A)*, 2014 ONCJ 374, paras. 11-38, 43-57, 70; *Maynard v Toronto Police Services Board*, 2012 HRTO 1220, paras. 180-185; *JKB v Peel (Police Services Board)*, 2020 HRTO 172, paras. 43, 46, 163-165.

be visited upon Black youth in situations that seem particularly disproportionate.[48] Finally, one of the triggers for this kind of violent overreaction can be when a racialized individual does not 'know their place,' *i.e.* the individual does not acquiesce willingly to whatever the police officer directed them to do.[49]

2. The Hearing Officer failed to consider race in his analysis of PC Lourenco's conduct

54. The Hearing Officer's only reference to race in his decision was short – and hard to follow. He referenced the idea of social context evidence but did not refer to any of it. He simply found that systemic racism "exists" and it is "unacceptable." He did not even mention the particularly insidious form of systemic racism at issue here: anti-Black racism. At most, his decision reflects a superficial engagement with this issue.[50]

55. It appears the Hearing Officer decided that racial bias played no role in the interaction whatsoever because the officers "random[ly]" selected the first people they saw in Neptune, and that, from the distance of 80 metres away, they could not see the race of the complainants.[51] As such, the Hearing Officer focused erroneously only on whether racial bias played a role in "suspect selection." "Subject treatment," however, is a distinct issue.[52] It needed its own attention in order to determine the reasonableness of PC Lourenco's conduct. It received none.[53]

56. Rather than rely on this superficial analysis, the Hearing Officer needed to at least

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[48] *JKB*, paras. 43, 46, 157, 163-167.
[49] *R v S(RD)*, 1997 CanLII 324 (SCC), paras. 55-57; *Abbott v Toronto Police Services Board*, 2009 HRTO 1909, paras. 13, 39, 42, 45; *Elmardy*, para. 10.
[50] Decision on the merits, paras. 174-176.
[51] Decision on the merits, paras. 106, 174-176; PC Pais: Transcript, Vol. IV, pp. 3851-3853.
[52] *Le*, para. 76; *R v Sitladeen*, 2021 ONCA 303, para. 50.
[53] And, of course, the police could certainly see that the complainants were Black once they stopped and began to engage with them.

consider the fact that one of the outcomes of systemic anti-Black racism is that, as noted above, young Black men in poor neighbourhoods are perceived as dangerous, aggressive, and strong as a result of subconscious and conscious bias and are subjected to increased – and disproportionate – uses of force as a result. A decision-maker must at least attempt to wrestle with this issue because acting on "irrational fears" against an identifiable group – such as young Black men – cannot ground a finding that defensive conduct (in this case, the act of pointing the gun) was reasonable.[54]

57. Further, viewing this moment in its proper context that night, reveals three ways in which PC Lourenco's act of drawing the gun was embedded within a pattern of unreasonable conduct that demonstrates unnecessarily escalated and overreactive conduct consistent with systemic anti-Black racism:

i. PC Lourenco grabbed B.A. when he tried to leave;[55]

ii. PC Lourenco used unreasonable force when he punched B.A.'s body and head area;[56]

iii. PC Lourenco decided to point his firearm at Y.B. after Y.B. moved towards him with an "outstretched arm" that did not indicate a "challenging or fighting stance;"[57]

iv. once all the complainants were on the ground, PC Lourenco claimed that B.A. yelled a death threat at him, which PC Pais, who was right there, did not hear. This was PC Lourenco's apparent justification for executing a full knee-drop onto B.A.'s back, which caused B.A.'s legs to fly up in the air backwards;[58]

v. PC Lourenco noted that B.A. was the person he was "originally fighting" with, which reflects a highly exaggerated recollection of what had just happened;[59] and

vi. PC Pais agreed that PC Lourenco pushed B.A. up against the scout car.[60]

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[54] *R v Khill*, 2021 SCC 37, para. 56.
[55] Decision on the merits, paras. 21, 25, 31, 182, 210; Ex 12, pp. 19-21.
[56] Decision on the merits, para. 348.
[57] Decision on the merits, para. 493.
[58] Ex 9, clip 1: 6:17:21-6:17:37; Ex 11A, pp. 32-33; PC Pais: Transcript, Vol, IV, pp. 3779-3781.
[59] Ex 11A, pp. 28-29; Ex 12, p. 23.
[60] Decision on the merits, para. 357; PC Pais: Transcript, Vol. IV, pp. 3783-3790.

58. Further, the way in which the complainants – skinny, young teenagers – were treated – with such intense scrutiny and force – was consistent with the phenomenon of adultification mentioned above.

59. Finally, it was at the exact moment that B.A. tried to assert his rights, disregard PC Lourenco's direction, and walk away, that PC Lourenco responded in such a disproportionate manner. His actions conform to the phenomenon, referenced above, of when an officer feels compelled to teach a racialized person "their place." Indeed, the Hearing Officer even found that PC Lourenco "escalated the situation unnecessarily" in a way that lacked "reasonableness." [61] It was only moments later that he pointed his gun. The unreasonableness of his conduct – at least in part driven by subconscious anti-Black racism – clearly continued.

60. In sum, but for these five errors, the complainants submit that the irresistible conclusion was that PC Lourenco used unreasonable force. They ask the Commission to make this finding.

G. "Discreditable conduct" and remedy sought on appeal

61. On the issue of whether this unreasonable force also amounted to "discreditable conduct," the complainants submit that had the Hearing Officer turned his mind to this issue he would have concluded in the same way that he had in respect of PC Lourenco punching B.A. He found, *inter alia*, that the punching was discreditable because it had the "potential to damage the reputation and image" of Toronto police.[62] As such, the complainants request that the Commission find that PC Lourenco's use of force was unreasonable ***and*** discreditable, that it

[61] Decision on the merits, para. 209.
[62] Decision on the merits, para. 350.

substitute a finding of guilt; in the alternative, they request a new hearing on this count.

PART III: STATEMENT OF ORDER SOUGHT

62. The complainants request that the Commission substitute a finding of guilt on the firearm count, and invite submissions as to how the penalty should be adjusted accordingly. In the alternative, the complainants request a new hearing on count two.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 6th day of February, 2023.

PER: **JEFF CAROLIN**
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PART IV: AUTHORITIES BEING RELIED UPON

Jurisprudence

1. *AA v P.R.Y.D.E. Learning Centres Inc.*, 2020 HRTO 1020
2. *Abbott v Toronto Police Services Board*, 2009 HRTO 1909
3. *Berntt v Vancouver (City)*, 1999 BCCA 345
4. *Brown v Haldimand-Norfolk Regional Police Force*, 1987 OCCPS #87-16
5. *DeHamilton v The Ontario Provincial Police*, 2022 ONCPC 7
6. *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074
7. *Forestall v Toronto Police Services Board*, 2007 CanLII 31785 (ON SCDC)
8. *JKB v Peel (Police Services Board)*, 2020 HRTO 172
9. *Maynard v Toronto Police Services Board*, 2012 HRTO 1220
10. *Nobody v Adams, Donaldson, Fardell, Simpson, Toronto Police Service and the Office of the Independent Police Review Director*, 2018 ONCPC 8
11. *Peel Law Association v Pieters*, 2013 ONCA 396
12. *R v Brown*, 2003 CanLII 52142 (ON CA)
13. *R v Chase*, 2022 ONCJ 253
14. *R v DaCosta*, 2015 ONSC 1586
15. *R v Golden*, 2001 SCC 83
16. *R v Grant*, 2009 SCC 32

17. *R v Jackson*, 2018 ONSC 2527

18. *R v K(A)*, 2014 ONCJ 374

19. *R v Khill*, 2021 SCC 37

20. *R v Le*, 2019 SCC 34

21. *R v Morris*, 2018 ONSC 5186

22. *R v Morris*, 2021 ONCA 680

23. *R v Sitladeen*, 2021 ONCA 303

24. *R v Smith*, 2015 ONSC 3548

25. *R v S(RD)*, 1997 CanLII 324 (SCC)

26. *R v Theriault*, 2021 ONCA 517

27. *Shaw and McGuigan v OPP*, 1979 OCCPS #79-09

28. *Siriska v Ontario Provincial Police*, 2022 ONCPC 8

29. *Stevenson v York Regional Police Service*, 2013 ONCPC 12

Secondary Sources

1. Ontario Human Rights Commission, *A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Toronto: Government of Ontario, 2020)

2. Ontario Human Rights Commission, *Use of Force by the Toronto Police Service Final Report* (Toronto: Government of Ontario, 2020)

3. Scot Wortley, Akwasi Owusu-Bempah and Huibin Lin, "Race and Criminal Injustice: An Examination of Public Perceptions of, and Experiences with, the Criminal Justice System among Residents of the Greater Toronto Area" (Toronto: X University Faculty of Law, 2021)

4. Toronto Police Service, *Race & Identity Based Data Collection Strategy: Understanding Use of Force & Strip Searches in 2020 Detailed Report* (2022)

Relevant Statutes

Equipment and Use of Force, RRO 1990, Reg 926

> **9.** 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. O. Reg. 283/08, s. 3.

Statutory Powers Procedure Act, RSO 1990, c S 22

Notice of facts and opinions

> **16** A tribunal may, in making its decision in any proceeding,
>
> **(a)** take notice of facts that may be judicially noticed; and
> **(b)** take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge.

ONTARIO CIVILIAN POLICE COMMISSION

B.A. & M.M.
Appellants (Public Complainants)

- and -

TORONTO POLICE SERVICE
Respondents

- and -

ADAM LOURENCO & SCHARNIL PAIS
Respondents

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