21-ADJ-006
21-ADJ-007

ONTARIO CIVILIAN POLICE COMMISSION

B E T W E E N:

B.A. & M.M.

Respondents (Public Complainants)

- and -

TORONTO POLICE SERVICE

Respondent

- and -

ADAM LOURENCO & SCHARNIL PAIS

Appellants

RESPONDENTS' FACTUM

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OVERVIEW

1. This case is about four Black teens, B.A., B.H.A., 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. PCs Lourenco and Pais were found guilty under count one (unlawful arrest) and PC Lourenco was found guilty under count three (unreasonable force). The officers appeal against those findings of guilt.

2. The complainants (respondents) submit that the guilty verdicts on counts one and three should be upheld for the following reasons:

i. the Hearing Officer's ultimate decision on count one that there were no reasonable grounds (and no good and sufficient cause) to arrest Y.B. and M.M. for assault police was reasonable and correct; further, they submit that to the extent that the Hearing Officer's preliminary finding (that there *were* reasonable grounds that Y.B. and M.M. were about to commit an offence) was inconsistent with this ultimate finding, that preliminary finding was unreasonable and tainted by legal error and should be rejected;

ii. the Hearing Officer's decision on count three was careful and thorough and is subject to deference by the Commission; and

iii. the complainants offer multiple alternative bases on which the verdicts can rest as well.

PART I: CONCISE SUMMARY OF THE FACTS

3. The respondents rely on the facts as set out in the Appellants' Amended Factum[1] and respectfully ask that the Commission review that factum before this one. The complainants also respond to the facts relied on by PCs Lourenco and Pais throughout the legal arguments below.

PART II: STATEMENT OF THE ISSUES

ISSUE ONE: **THE GUILTY VERDICTS ON THE UNLAWFUL ARREST COUNTS SHOULD BE UPHELD**

A. The Hearing Officer's decision that there was no RPG for an assault police arrest was

[1] Appellants' Amended Factum 21-ADJ-010, dated February 6, 2023 ["AAF"].

reasonable and correct

4. The Hearing Officer's finding that there was no RPG to arrest Y.B. and M.M. for assaulting a police officer was reasonable and correct. After considering all of the relevant evidence and submissions, including the surveillance video, the Hearing Officer properly concluded that a "reasonable person standing in the officer's shoes would not conclude that there were objective grounds to believe the public complainants had committed an assault by act or gesture."[2] In so doing, he accepted the complainants' submissions at the hearing below that the teens' behaviour did not amount to RPG to arrest, and nothing assaultive had taken place.[3]

5. The Hearing Officer also effectively rejected as unreasonable PC Pais' and PC Lourenco's subjective perceptions of the complainants' conduct – subjective perceptions that both appellant officers nevertheless rely on in their factums. For example, they repeatedly describe the complainants as "rushing," "swarming," and "attacking" PC Lourenco in an "aggressive and swift manner"; and that Y.B. was "blading" his body in a "fighting stance."[4] Contrary to the officers' subjective perceptions, the Hearing Officer found the following facts, all of which are subject to deference.

i. There were no verbal threats: any yelling and swearing by the complainants at the moment that PC Lourenco was unlawfully assaulting B.A. – such as, "that's my brother, yo what the fuck, don't touch by bro, you can't do that" – did not amount to a threat.[5] Instead the Hearing Officer found that they had just "spontaneously expressed surprise and objected to what was occurring between PC Lourenco and B.A."[6]

ii. There were no threatening gestures: a review of the video showed that M.M. did not move towards PC Lourenco.[7] Further, Y.B.'s gestures were limited to moving towards PC Lourenco with an outstretched arm. The Hearing Officer found that when viewing the video without stopping, Y.B. "appeared to walk over in one fluid motion, without stopping to take a challenging or fighting stance."[8] These movements are distinguishable

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[2] Decision on the merits, paras 371-499.
[3] Public Complainants' Submissions: Transcript, Vol IV, pp 4488-4489, 4616-4618; Decision on the merits, paras 493-494.
[4] Factum of the Appellant, Adam Lourenco ["FAP-L"], paras 23, 26; Factum of the Appellant, Police Constable Pais ["FAP-P"], paras 14-15, 20-22, 27, 31, 35, 39-42, 49-52, 56-57, 65; PC Pais: Transcript, Vol IV, pp 3337-3343; Exhibit 11, pp 21-22; Exhibit 12, pp 21-22; Exhibit 14, pp 5-6; Decision on the merits, paras 391, 393, 396, 403, 406-407, 493.
[5] Unlike in *R v Gardner*, 1986 CanLII 5177 (NB KB), where someone in the crowd yelled "Let's get him. Let's get him boys" while advancing on the police officer: Authorities of the Appellant, Police Constable Pais ["AOA-P"], Tab 6, at para 2; Decision on the merits, paras 486-488.
[6] Decision on the merits, para 493.
[7] Exhibit 10, Clip 1, 6:16:10-6:16:28; Decision on the merits, para 490.
[8] Exhibit 9, Clip 1; Decision on the merits, para 493.

from the cases relied on by PC Pais, such as *R v Dawydiuk* and *R v Judge*.[9]

6. Both appellant officers also reference in their factums PC Pais' subjective perceptions of what happened after the gun came out. (PC Pais devotes about 23 paragraphs to this.) For example, PC Pais testified that he was using as much force as he could to get Y.B. and B.H.A. away from PC Lourenco, making it seem as if the gun had not caused them to move back and that they were still trying to get at PC Lourenco.[10]

7. In fact, the Hearing Officer effectively found PC Pais' perceptions to be unreasonable. He simply found that PC Pais had "pulled [them] away" and that once PC Lourenco pointed his firearm at them, "they acquiesced." Review of the video confirms this. At 6:16:10, Y.B. takes a step towards B.A. and PC Lourenco. At 6:16:12, PC Lourenco's pushes Y.B. and, at 6:16:13, he pulls his gun out. After that, it is clear, and consistent with the Hearing Officer's findings and Y.B.'s evidence, that Y.B. and B.H.A. are struggling to get *away* from PC Lourenco and that PC Pais appears to be restraining them – *i.e.*, preventing them from moving away as fast they were trying to. By 6:16:14 (one second after the gun was drawn), Y.B.'s hands can already be seen on his head. Finally, after PC Pais put B.H.A. on the ground, Y.B. and M.M. can be seen immediately complying as PC Pais directs them to the ground at 6:16:26 and 6:16:28.[11]

8. Stepping back, if the Commission accepts the appellant officers' argument that there was RPG to arrest Y.B. and M.M. for assault police it would be tantamount to accepting that anyone who expresses surprise or shock by police actions, asks questions of police, or non-violently objects to their behaviour is arrestable for assault police. Respectfully, the Commission should not support such a conclusion.

B. <u>The Hearing Officer's finding that there was RPG that the complainants were about to commit an offence was unreasonable and is tainted by legal error</u>

9. The appellant officers' central argument on this count is that the Hearing Officer erred by finding that while there was RPG that the complainants were about to commit an offence, there was no RPG that they had at least committed the offence of attempting to assault a police officer.[12] The complainants submit, however, that whether or not a distinction can be drawn

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[9] *R v Dawydiuk*, 2010 BCCA 162 (the accused drove his truck onto a sidewalk with pedestrians, lurched the truck forward towards them, revved his engine before striking a bystander): AOA-P, Tab 7, at para 3; In *R v Judge*, [1957] OJ No 423 (CA), the accused exited their vehicle and approached the victim. One of the accused made a motion to show he had a weapon and made a remark that he would burn the victim. While no actual physical violence was done to the victim, the accused's gestures were threatening and assaultive: AOA-P, Tab 8, at para 2.
[10] FAP-L, paras 24, 48(l); FAP-P, paras 23, 29-47, 64-67.
[11] Decision on the merits, paras 380, 382, 470, 498; Exhibit 9, Clip 1; Exhibit 10, Clip 1, 6:16:10-6:16:28.
[12] FAP-L, paras 39-57; FAP-P, paras 71-73, 77, 94.

between the Hearing Officer's two findings, the key issue is that the Hearing Officer's first finding – that there was RPG to arrest the complainants for being about to commit an offence – was both unreasonable and incorrect and should be overturned. On this basis, the Commission can and should dispense with the appellant officers' appeal, as it would leave standing the ultimate finding that there was no RPG (and no good and sufficient cause) for the arrests.

10. First, the Hearing Officer's decision was *unreasonable* because his finding that there was RPG that Y.B. and M.M. were about to commit an offence is inconsistent with his overall factual findings as summarized above (para 5). Nothing in those findings of fact could support a conclusion that Y.B. and M.M. were about to commit an offence. As such, that preliminary finding had no basis in the facts as found by the Hearing Officer himself.

11. Second, the Hearing Officer's decision was *incorrect* because he failed to consider the social context evidence about the relationship between racialized communities and the police in his analysis of whether Y.B. and M.M.'s actions could lead to RPG that they were about to commit an offence. The complainants had submitted below that this social context evidence needed to inform all aspects of fact-finding and the Supreme Court of Canada has recently confirmed this.[13] This problem with the decision must be reviewed on a correctness standard because the Hearing Officer's failure to consider this evidence is a question of law.[14]

12. It is trite law that if an officer is going to arrest an individual on the basis that he is about to commit an offence,[15] he must subjectively have RPG, and this subjective assessment must be justifiable from an objective point of view. That is, a reasonable person must be able to look at the circumstances and conclude that there were in fact reasonable grounds for an arrest.[16] Social context evidence is relevant to this determination of reasonableness. This is because if there is a preliminary finding that the officer's subjective grounds were informed by race or racial stereotypes – "to any degree" – then this will preclude a finding of reasonableness.[17]

13. Accordingly, in this case, the Hearing Officer at least had to wrestle with the question of whether subconscious bias played a role in the officers' subjective perceptions of the complainants' conduct and informed their subjective grounds to arrest Y.B. and M.M.[18] The

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[13] *R v Le*, 2019 SCC 34, at para 89; Public Complainants' Submissions: Transcript, Vol IV, pp 4463-4477, 4531.
[14] *DeHamilton v The Ontario Provincial Police*, 2022 ONCPC 7, at para 10.
[15] *Criminal Code*, RSC, 1985, c C-46, s. 495(1).
[16] *Charlton v St Thomas Police Services Board*, 2009 CanLII 25977 (ON SC), Authorities of the Appellant, Adam Lourenco ["AOA-L"], Tab 3, at para 37, citing *R v Storrey*, 1990 CanLII 125 (SCC), AOA-P, Tab 21.
[17] *R v Dudhi*, 2019 ONCA 665, at paras 54-66.
[18] *R v Brown*, 2003 CanLII 52142 (ON CA), at paras 7-8; *Peel Law Association v Pieters, 2013 ONCA 396*, at paras 118-124; *Elmardy v Toronto Police Services Board, 2017 ONSC 2074*, at paras 10, 20; *R v Chase*, 2022 ONCJ 253, at paras 69-93; *Le*, at paras 90-93; *R v Smith*, 2015 ONSC 3548, at paras 246-247; *R v K(A)*, 2014 ONCJ 374, at paras 11-38, 43-57, 70; *Maynard v Toronto Police Services Board*, 2012 HRTO 1220, at paras 180-185; *JKB v Peel (Police Services Board)*, 2020 HRTO 172

Hearing Officer's failure to do so was an error.

14. The social context evidence is clear that because of systemic anti-Black racism, 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 – arrest, charges, and uses of force as a result. Specifically, Black people are subjected to disproportionate assault police charges. They are 3.8 times more likely to be charged with an assault police offence than their representation in the general population would predict.[19]

15. In evaluating whether Y.B. and M.M.'s actions were assaultive, the Hearing Officer was obligated to consider the vast gulf between his own findings of fact – Y.B. simply walks over with an outstretched hand – to the overblown subjective perceptions of the officers that they were being rushed, swarmed, and attacked. The reality is that but for Y.B. and M.M.'s identities (race, sex, age, style of dress, neighbourhood, etc.), it is unlikely that their actions (and inaction) would be perceived as a threat. Their behaviours would likely be seen as teens expressing surprise at PC Lourenco's escalating and unreasonable actions.[20]

16. A hypothetical illustrates the point. Imagine PC Lourenco had just struck an older white woman in a condo complex in Rosedale, an upper-class neighbourhood. This older white woman was part of a group of four individuals who all had similar identities. They had not been stopped for any articulable purpose. None of their names had been run and they had not been searched for weapons. Upon witnessing her friend being struck, one of the friends moves towards PC Lourenco and puts her arm out while yelling, "stop, what the fuck, that's my friend, you can't do that." What officer would look at that behaviour and conclude that the white female friend committed or was about to commit the offence of assault police? What decision-maker in reviewing this evidence could find that there was RPG to make an arrest? If a distinction is drawn between this hypothetical group of friends and the complainants so as to make the complainants arrestable, such a distinction would clearly be informed, at the very least, by subconscious (and unlawful) criminal profiling based on race.[21] In this way, the Hearing Officer ought to have considered how their race (and the youth's other intersecting identities) was relevant to the officers' perceptions of what constituted threatening gestures and acts.[22] His failure to do so was an error and the Commission ought to intervene on his finding that there was

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at paras 43, 46, 163-165; *R v S(RD)*, 1997 CanLII 324 (SCC), at paras 55-57 ["RDS"]; *Abbott v Toronto Police Services Board*, 2009 HRTO 1909, at paras 13, 39, 42, 45; *R v Khill*, 2021 SCC 37, at para 56.

[19] Ontario Human Rights Commission (2020), Racial Disparity in Arrests and Charges: An analysis of arrest and charge data from the Toronto Police Service, at p 16.

[20] Decision on the merits, para 493.

[21] *Brown*, at paras 7-8; *Elmardy*, at paras 18-20; *Smith*, at paras 246-247; *K(A)*, at paras 43-57; *Maynard*, at paras 180-185; *JKB*, at paras 163-165; *RDS*, at paras 55-57; *Abbott*, at paras 13, 39, 42, 45.

[22] *R v Sitladeen*, 2021 ONCA 303, at para 50; *Chase*, at paras 69-93.

RPG that the complainants were about to commit an offence.

17. In sum, the complainants ask the Commission to reject the appellant officers' appeal on the basis that there was ***neither*** RPG that Y.B. and M.M. were about to commit an offence ***nor*** was there RPG that they had committed the offence of assault police. Their actions were not assaultive, and there were no reasonable, non-discriminatory indicia to believe they were about to commit an offence.

C. Alternative bases for upholding unlawful arrest finding regarding Y.B. and M.M.

18. In the event that the Commission agrees with the appellant officers that the Hearing Officer's decision on this count cannot stand, the complainants submit, per *R v Keegstra*,[23] that the guilty verdict can nevertheless rest on any one of the following alternative bases.

1. The arrest of Y.B. and M.M. for assault police was unlawful because they were, in fact, empowered to use reasonable force against PC Lourenco

19. The complainants argued below that because, in their view, PC Lourenco was in the process of unlawfully arresting B.A., it meant that (i) Y.B. and B.H.A. were empowered by ss. 27 and 37 of the *Criminal Code* to use reasonable force to protect their friend, (ii) that simply stepping forward with a hand outstretched was certainly reasonable force, and (iii) that this meant that their conduct was not unlawful and, therefore, not arrestable.[24]

20. While the Hearing Officer did not ultimately find that the arrest of B.A. was unlawful, he did find that PC Lourenco's use of force – punching B.A. – was excessive. As such, on appeal, the complainants submit that because PC Lourenco's punching was not sanctioned by s. 25 of the *Criminal Code* – *i.e.*, his use of force exceeded what the *Code* allowed – it was as if a civilian was beating up B.A. in the moment that Y.B. and B.H.A. moved towards them.[25] Accordingly, ss. 27 and 37 still empowered Y.B. and B.H.A. to do what they did even though the initial arrest of B.A. was not found to be unlawful. And because the complainants' use of force *was* lawful (contrary to that of PC Lourenco), there was no lawful basis to arrest them for assault police.

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[23] *R v Keegstra*, 1995 CanLII 91 (SCC), at paras 21, 23.
[24] Public Complainants' Submissions: Transcript, Vol IV, pp 4488-4489, 4615-4616, 4626-4630; Decision on the merits, paras 459-461; The relevant version of the *Criminal Code* is the one that was in force at the time of the incident: *R v Bengy*, 2015 ONCA 397, at paras 48, 57-71; see e.g. *Gentles v Intelligarde International Incorporated*, 2010 ONCA 797, at paras 134-135, and *R v Webers*, 1994 CanLII 7552 (ON SC), at paras 43-55, for an application of ss. 27 and 37 of the *Criminal Code*.
[25] *Figueiras v Toronto (Police Services Board)*, 2015 ONCA 208, at paras 146-152.

21. This situation is, in fact, analogous to situations where an individual uses reasonable force to defend himself against an officer who is outside of the execution of his duties because he is, for example, executing an unlawful arrest or trespassing. In such situations, provided that the individual uses no more than reasonable force to defend himself from the officer, this defensive conduct cannot lead to a lawful assault police arrest.[26] Similarly, the reasonable force used by Y.B. and B.H.A. to defend B.A. could also not provide a basis for an assault police arrest.

2. The arrest of Y.B. and M.M. for assault police was unlawful because PC Lourenco was not in the lawful execution of his duties owing to *Charter* violations

22. An essential component of a *lawful* assault police arrest is that the officer must be in the lawful execution of his duties at the moment of the alleged assault on his person.[27] One way an officer will be outside of the lawful execution of his duties is if he is committing a *Charter* violation.[28] In light of these principles, one of the arguments the complainants advanced below was that their arrest was unlawful because PC Lourenco was outside of the lawful execution of his duties at the moment he was allegedly assaulted. And the reason he was outside of the lawful execution of his duties was because he was breaching ss. 9 and 15 of the *Charter*.[29] The complainants submit that the Hearing Officer, in rejecting this argument, erred.[30] On appeal, they re-advance this argument, as it provides an independent basis to find that the arrests of Y.B. and M.M. were unlawful. The standard of review is correctness. These are questions of constitutional law that are of "general interest to the legal system."[31]

a. *PC Lourenco was outside of the lawful execution of his duties because he arbitrarily detained the complainants contrary to s. 9 of the* Charter

[26] *Elliott v King and Durham Police Service*, 2006 ONCPC 13, at pp 3, 11, 14, 16-18; *R v Plummer*, 2006 CanLII 38165 (ON CA), at paras 48-49.
[27] *Criminal Code*, s. 270(1)(a); *Seguin and Wallace and Toronto Police Service*, 2016 ONCPC 2, at paras 27-29; *Elliott*, at pp 3, 11, 14, 16-18; *Correa v Ontario Civilian Police Commission*, 2020 ONSC 133, AOA-L, Tab 4, at paras 45-47.
[28] *R v Alato*, 2008 ONCJ 659, at paras 34-37.
[29] Public Complainants' Submissions: Transcript, Vol IV, pp 4463-4477, 4481-4482, 4506-4507, 4514-4529, 4531-4544, 4546-4564, 4571-4574. These submissions included arguments about racial profiling, selecting this group over other group exiting at the same time, vague suspect information re the robbery investigation, racially motivated overreaction, street justice, excessive force throughout the interaction, the trespass and robbery investigations as pretexts, etc. (*Charter* issues expressly linked to lawful execution of duties at pp 4475, 4481-4482, 4506-4507, 4514-4515, 4532, 4571, 4574); the TPS prosecutor also submitted that the complainants were detained contrary to s. 9 of the *Charter*: Transcript, Vol IV, pp 4346-4347ff.
[30] Decision on the merits, paras 174-176, 182.
[31] *DeHamilton*, at para 10; *Allen v Alberta (Law Enforcement Review Board)*, 2013 ABCA 187, AOA-P, Tab 24, at para 13.

i. Governing principles

23. A finding of arbitrary detention requires a two-stage inquiry: (i) whether the individual was detained, and, if so, (ii) whether the detention was arbitrary. **At the first stage**, ***psychological*** detention will be established where a reasonable person in the individual's position would conclude that they had no choice but to comply with a police direction and that they were not free to leave.[32] The following three non-exhaustive *Grant* factors "are to be assessed" in light of "all of the circumstances" to determine whether a detention has crystallized.

24. **First factor: the circumstances giving rise to the encounter as the individual would reasonably perceive them.** If the police "immediately start[…] questioning" individuals "about who they [are] and what they [are] doing", and "demand[…] their identification" this can appear to single out the individuals for "focused investigation." By comparison, if the police are providing general assistance, maintaining order, or are making general inquiries about a particular occurrence this points away from a detention.[33]

25. **Second factor: the nature of the police conduct, including the language used.** If the police adopt "tactical positioning" – or convey urgency – this can reasonably be perceived as an "exercise of *power*." Further, if the police use any physical contact, and if they fail to tell the individuals "they [are] free to go and/or [that they are] not required to answer" questions this points to a detention. A psychological detention can occur within "seconds."[34]

26. **Third factor: the particular characteristics or circumstances of the individual.** Individuals in racialized low-income communities, who face "disproportionate policing" and who are at "particular risk from unjustified 'low visibility' police interventions in their lives" – including "carding" and "street checks" – may "feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive."[35]

27. Youth will "even more readily" conclude that they are detained. This is because an age difference will mean that "the power imbalance and knowledge gap between citizen and state is even more pronounced, evident and acute." Further, "[i]ndividuals who are frequently exposed to forced interactions with the police more readily submit to police demands in order to move on with their daily lives because of a sense of 'learned helplessness'."[36]

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[32] *Le*, at paras 25, 29; *R v Grant*, 2009 SCC 32, at paras 30-31.
[33] *Le*, at paras 31, 35, 40; *K(A)*, at paras 11-38, 43-57, 70.
[34] *Le*, at paras 31, 47, 50, 56-57, 64, 66.
[35] *Le*, at paras 31, 72, 75, 87, 94-95, 97.
[36] *Le*, at paras 109, 122.

28. Notably, this factor does not engage with whether the officers' actions were consciously or subconsciously motivated improperly by the alleged detainees' race. Rather, "the question is how a reasonable person of a similar racial background would perceive the interaction."[37]

29. **At the second stage of the s. 9 analysis**, a detention will be found to be arbitrary if there are no reasonable grounds to suspect that the individuals had engaged in any offence.[38]

ii. Analysis: PC Lourenco arbitrarily detained the complainants

30. The Hearing Officer concluded that the complainants were not detained until PC Lourenco took hold of B.A. His reasoning is short – but it appears he reached this conclusion because he found that the complainants had stopped "voluntarily" and because B.A. "felt he was free to leave."[39] The Hearing Officer's decision reflects three errors.

31. **First**, while the complainants accept that they stopped "voluntarily" – that is, they were not stopped by physical restraint – this was ***irrelevant*** to the question of whether the complainants were ***psychologically*** detained as a result of the direction from PC Pais. The Hearing Officer had to determine, objectively, whether a reasonable person would have felt that they had no choice but to comply with the police direction. He failed to do so.[40]

32. **Second**, the Hearing Officer compounded the first error by relying on B.A.'s ***subjective*** perception. The Hearing Officer found that because B.A. "felt he was free to leave," "it cannot be said that B.A. reasonably believed that he had no choice but to acquiesce and remain." The problem with this finding is two-fold: (i) the analysis as to whether a detention has crystallized is an ***objective*** one and "the perceptions of [alleged detainees are] intended to play a very limited role";[41] and (ii) the fact that PC Lourenco grabbed B.A. when he tried to leave demonstrated conclusively, from any perspective, that the complainants were ***not*** free to leave. Moreover, the

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[37] *Le*, at paras 74-81.
[38] *Le*, at para 38; *Grant*, at paras 55-57.
[39] Decision on the merits, paras 177-182.
[40] The youth only stopped once PC Pais called out to them contrary to the Hearing Officer's finding of fact that the group was standing in the walkway in front of 155 Neptune Drive. The youth were not standing around, loitering; rather, they were walking on the path leading *out* of the complex. PC Pais testified that he saw the group "leaving a building," one of them "slows to a stop," and observed the others "walking further." B.A. and Y.B. testified that they were leaving the complex. Video surveillance supports that: Decision on the merits, para 33; PC Pais: Transcript, Vol IV, pp 3332-3334; B.A.: Transcript, Vol I, pp 573-574, 703; Y.B.: Transcript, Vol I, p 961; Exhibit 9, Clip 1, 6:15:07-6:15:10; Exhibit 10, Clip 2, 6:14:32-6:14:58; Exhibit 18.
[41] Decision on the merits, para 182; *Le*, at paras 111-121.

other complainants testified that they did not think they could leave.[42]

33. **Third**, the Supreme Court of Canada has held that the three *Grant* factors "are to be assessed" in light of all of the circumstances to determine whether a detention has occurred. The Hearing Officer failed in this regard. He did not assess any of the *Grant* factors, including, significantly, the third one, which asks "how a reasonable person of a similar racial background would perceive the interaction with the police."[43]

34. The complainants submit that when the three *Grant* factors are properly assessed they all support a finding of detention from the moment that PC Pais called out to the complainants.

35. **First, the circumstances giving rise to the encounter, as the complainants would reasonably have perceived them:** the officers were not providing general assistance or maintaining order. They were also not making general inquiries about a particular occurrence that had taken place in the complex – in the sense of canvassing bystanders. Rather, the police evidence was that they had decided to conduct a *Trespass to Property Act* ("*TPA*") investigation on the complainants. They asked them to stop and immediately asked them for ID even though they were on their way ***out*** of the complex. PC Pais believed that the complainants had to comply with the request for ID and had not yet decided if they were to free to go. This alone would have conveyed to a reasonable person that they were under particularized suspicion.[44]

36. But PC Pais actually added that it was "possible" that he had mentioned that there had been robberies in the neighbourhood. Even without B.A.'s recollection that he was told he fit the description of the suspect, a reasonable person would understand that they were being investigated for a particular offence – which is the essence of an investigative detention.[45]

37. **Second, the nature of the police conduct:** the officers illegally parked their van in a place blocking traffic flow. This conveyed that they had an urgent and focused task. There was also physical proximity: PC Pais stood behind the youth in a "position of control." B.A. and M.M. said they had never experienced police conduct like this in the more than 100 times they had been stopped collectively. The officers further failed to inform the teens that they were free

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[42] Decision on the merits, paras 35, 40, 182; Y.B.: Transcript, Vol I, pp 969-970; M.M.: Transcript, Vol II, pp 1584-1585.
[43] *Le*, at para 75.
[44] Decision on the merits, paras 20, 34-35, 40, 42, 91-92, 99, 182; PC Pais: Transcript, Vol IV, pp 3334, 3408, 3493-3494, 3536, 3613-3614, 3632-3654, 3681-3685, 3797-3798, 3817-3820; Y.B.: Transcript, Vol I, pp 969-970; M.M.: Transcript, Vol. II, pp 1584-1585; B.A.: Transcript, Vol I, pp 625-628; Public Complainants' Submissions: Transcript, Vol IV, pp 4550-4554; Exhibit 11A, p 5; *Le*, at paras 37-40.
[45] Decision on the merits, paras 19, 29, 34, 100; PC Pais: Transcript, Vol IV, pp 3553-3556, 3792-3795; B.A.: Transcript, Vol I, pp 588, 704-705.

to go – and consistent with his apparent belief that the teens were ***not*** free to go – PC Lourenco grabbed B.A. when he attempted to leave.[46] Nothing could be stronger proof than that.

38. **Third, consideration of the particular characteristics and circumstances of the complainants:** a reasonable person with the complainants' characteristics and experiences – that of 15- and 16-year old Black teenagers walking through a social housing project – would know about the extra scrutiny they face from police, particularly in low visibility street-check scenarios, and would have learned that to acquiesce to police demands was better than risking being seen as evasive. Their perspective would also be impacted by age and learned helplessness. A reasonable person in the complainants' shoes would not have found a "realistic existence of free choice in dealing with the police."[47] They would not have believed they could ignore PC Pais' request. In sum, the complainants were detained.

39. **Moreover, this detention was arbitrary – and thus violative of s. 9 of the *Charter*:** the Hearing Officer found correctly that the officers had not observed any offence – trespass or otherwise – let alone any other "suspicious behavior" that could ground a lawful detention.[48] As such, PC Lourenco was outside of the lawful execution of his duties because of this *Charter*-violating conduct.

b. ***PC Lourenco was also outside the lawful execution of his duties by subjecting the complainants to racial discrimination contrary to ss. 9 and 15 of the* Charter**

i. Governing principles

40. **Background:** anti-Black racism is a particular form of racism that discriminates against people of African descent.[49] It relies on present-day stereotypes and associations between Blackness and criminality, violence, and immorality, and stems from the unique legacy 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

[46] Decision on the merits, paras 28, 35, 40, 54, 182, 194; PC Pais: Transcript, Vol IV, pp 3334-3336; B.A.: Transcript, Vol I, pp 699-704; MM: Transcript, Vol II, pp 1563-1564, 1585, 1636-1640; Bacchus: Transcript, Vol II, pp 2261-2263; Y.B.: Transcript, Vol I, pp 969-970; Exhibit 14, p 4; Exhibit 35.
[47] *R v Pinto*, 2003 CanLII 11404 (ON SC), at para 46; *R v Griffiths*, [2003] OJ No 1544 (CJ), at paras 13-14; David M Tanovich, "The Colourless World of *Mann*" (2004) 21 CR (6th) 47, p 5.
[48] Decision on the merits, paras 186, 209.
[49] *AA v P.R.Y.D.E. Learning Centres Inc.*, 2020 HRTO 1020, at para 66.

the disproportionate involvement of Black individuals in the criminal 'punishment' system.[50]

41. Police 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.[51]

42. **Sections 9 and 15:** a *Charter* detention that is based on racial profiling will, by definition, be an ***arbitrary*** detention and, as such, a breach of s. 9.[52] But racial profiling and discrimination, in breach of ***s. 15*** of the *Charter*, can also occur even when there is ***no*** finding of detention. This is because racial profiling occurs ***any time*** race or racial stereotypes are used, subconsciously or consciously, ***to any degree*** in ***suspect selection or subject treatmen***t.[53]

43. **Proof:** racial profiling is rarely proved by direct evidence; it must almost always be inferred. As such, the decision-maker must look at all of the circumstances to decide whether they "correspond to the phenomenon of racial profiling." The following types of "factual indicators" – framed here as questions – "can support the inference that the police conduct was racially motivated, despite the existence of an apparent justification for that conduct:"[54]

i. **street checks:** were the officers engaged in low-visibility "proactive policing" of a low-income racialized neighbourhood that they understand to be a "high crime" area?;[55]

ii. **race as a proxy for criminality:** were the individuals targeted young, Black, male, and

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[50] 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*, at paras 90-97; *R v Golden*, 2001 SCC 83, at para 83; *R v Morris*, 2021 ONCA 680, at paras 1, 42; *R v Theriault*, 2021 ONCA 517, at paras 143, 212; *R v Morris*, 2018 ONSC 5186, at paras 9, 21, 22 and Appendix A; *R v Jackson*, 2018 ONSC 2527, at para 82.

[51] *Le*, at paras 87, 90, 94-97; *Grant*, at 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) at pp 2-3, ["Disparate Impact"]; Ontario Human Rights Commission, *Use of Force by the Toronto Police Service Final Report* (2020) at pp 52-77 ["Use of force"]; Toronto Police Service, *Race and Identity Based Data Collection Strategy* (2022) at 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) at 66-67.

[52] *Le*, at para 78; *Peart v Peel Regional Police Services*, 2006 CanLII 37566 (ON CA), at paras 89-91; *Brown*, at para 10.

[53] *Le*, at para 76; *Sitladeen*, at para 50; *Dudhi*, at paras 59-66.

[54] *Peart*, at para 95; *Sitladeen*, at para 54; *Le*, at paras 89-97.

[55] *Le*, at paras 87, 94-95; *R v Tutu*, 2021 ONSC 5375, at paras 21, 23-27, 44, 48-50, 55-56, 69-70; *K(A)*, at paras 11-38, 43-57, 70; David M Tanovich, "Applying the Racial Profiling Correspondence Test" (2017), 64 Criminal Law Quarterly 359-383, at p 364 ["Tanovich Test"]; Steven M Penney and James Stribopoulos, "'Detention'" under the Charter after R. v. Grant and R. v. Suberu" 2010 CanLIIDocs 469, at p 458, fn 101 ["Detention"].

wearing streetwear, like hoodies?;[56]

iii. **carding:** did the officers attempt to extract information – *i.e.*, gather intelligence – about their residences, activities, and associations, through the TAVIS anti-violence strategy?;[57]

iv. **walking while Black *or* any Black person will do:** did the officers use pretexts – such as minor regulatory infractions or vague suspect descriptions – to give the interaction an aura of legality? and/or to cover up – and lie about – their true reason for the stop?; [58]

v. **racially-informed suspicion, escalation, and violent overreaction:** was the scrutiny applied during the investigation "more heightened" and "more suspicious" and did it result in a quick escalation of violence that appears disproportionate to the circumstances? (Black individuals are perceived – due to conscious or subconscious stereotyping – as "guilty and dangerous" as well as aggressive and having superhuman strength);[59]

vi. **adultification:** did the violent overreaction seem particularly disproportionate given that the individuals in question were children?[60]; and

vii. **knowing their place:** did the violent overreaction begin at a moment when the individual did not acquiesce willingly to whatever the police officers directed them to do?[61]

ii. Analysis: PC Lourenco's conduct amounted to racial discrimination

44. The Hearing Officer's reasoning on this issue was also short – and it was hard to follow. It appears that he decided that racial bias played no role 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.[62] This decision reflects three errors.

45. **First**, the Hearing Officer erred by focusing only on "suspect selection." "Subject

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[56] *Brown*, at paras 7-9; *Peart*, paras 89-90; *Elmardy*, at para 15; Ontario Human Rights Commission, *Under Suspicion: Research and consultation report on racial profiling in Ontario* (2017) at p 22; Ontario Human Rights Commission, *Interim report: A Collective impact* (2018) at pp 26-34 ["Collective impact"]; Re "intersection of identities" see e.g. *Baylis-Flannery v. DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28, at paras 145-146.
[57] *Le*, at paras 87, 94-95; *Elmardy*, at paras 11, 21; *Tanovich Test*, p 364; Tulloch, Michael H. *Report of the Independent Street Checks Review* (Toronto: Queen's Printer for Ontario, 2018), at pp 27-30, 35-46; *Detention*.
[58] *Peart*, at para 110; *Smith*, at paras 168-174, 246; *Tanovich Test*, pp 364-367; *Maynard*, at paras 175-176; *R v Ohenhen*, 2016 ONSC 5782, at para 105; *Brown*, at para 45; *R v Ahmed*, 2009 CanLII 66624 (ON SC), at paras 60-62; *Sitladeen*, at paras 43-54.
[59] *Brown*, at paras 7-8; *Peel Law Association*, at paras 118-124; *Elmardy*, at para 20; *Chase*, at paras 69-93; *Le*, at paras 90-93; *TPS Data*; *Disparate Impact*; *Use of force*; *Smith*, at para 247; *K(A)*, at paras 11-38, 43-57, 70; *Maynard*, at paras 180-185; *JKB*, at paras 43, 46, 163-165.
[60] *JKB*, at paras 43, 46, 157, 163-167.
[61] *RDS*, at paras 55-57; *Abbott*, at paras 13, 39, 42, 45; *Elmardy*, at para 10.
[62] Decision on the merits, paras 106, 174-176; PC Pais: Transcript, Vol IV, pp 3851-3853.

treatment," however, is a distinct issue.[63] It needed its own attention. It received none.

46. **Second**, the Hearing Officer's analysis regarding suspect selection was premised on a misapprehension of the evidence.[64] He failed to consider the relevant evidence that while the officers may not have been able to see the complainants' race when they entered Neptune, they certainly could see it by the time that PC Pais called out to them. He was about 3 metres away.

47. **Third**, he failed to fulfil his obligation to consider whether "all the circumstances" "correspond to the phenomenon of racial profiling" – for either suspect selection ***or*** subject treatment – "as understood in the social science literature, the reports of inquiries into race relations with police, and the case law."[65] At most, his decision reflects a superficial engagement with this issue. 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.

48. For example, take the Hearing Officer's finding that this stop was "random" – and therefore not connected to race. The social context evidence demonstrates that low-visibility proactive policing in poor, racialized "high crime" neighbourhoods is itself a potential indicator that race has played a role – to "***any degree***" – in suspect selection. That is, the officers were much more likely to come across young, Black teenage boys in a housing complex that had a significant Black population – as compared to, say, a condo complex in Rosedale. PC Lourenco also claimed that he was very familiar with Neptune and had chosen it specifically.[66]

49. When analyzed properly, the following circumstances demonstrate that both the selection and treatment of the complainants corresponded with the pattern of racial profiling and discrimination. As such, the analysis ought to have led to an inference that race (and the youth's other intersecting identities) were relevant to at least some "***degree***"[67] in this case.

50. **Street checks:** as already mentioned, PC Lourenco chose a Black-majority low-income "high crime" neighbourhood, which he knew well, for his and PC Pais' TAVIS proactive policing patrol. This corresponds with the pattern of racial profiling.[68]

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[63] *Le*, at para 76; *Sitladeen*, at para 50.
[64] *R v Morrissey*, 1995 CanLII 3498 (ON CA), at p 541.
[65] *Sitladeen*, at para 54.
[66] Exhibit 11A, pp 4-5; PC Pais: Transcript, Vol IV, pp 3810-3811.
[67] *Sitladeen*, at para 50.
[68] PC Pais: Transcript, Vol IV, pp 3810-3815; Exhibit. 11A, pp 4-5; Exhibit. 12, p 19; B.A.: Transcript, Vol I, pp 712-713; Decision on the merits, paras 80, 82.

51. **Race as a proxy for criminality:** the officers were on the look-out for drug dealers and gang members. They did not choose to investigate the two children, woman, and man who left 145 Neptune Drive at the same time as the teens. Rather, they chose four young Black male teenagers dressed in typical teenage attire, including B.H.A. wearing a hoodie. Further, B.A. testified that PC Lourenco called him a "wannabe thug" which is a racial epithet. Consistent with the definition of racial profiling, it appears that the teens attracted police attention not because of "personalized suspicion," but because of conscious or subconscious "negative stereotyping that attribute[d] propensity for unlawful conduct" to their intersecting identities. B.A. believed that they were stopped because of being Black.[69]

52. **Carding:** PC Pais understood his role was to collect information about which potentially criminal individuals were on the property and who was associating with whom. Consistent with his understanding, B.A., Y.B., and the officers all agreed that the officers asked to see the teens' identification after they stopped them. PC Pais agreed that if he had received their identifications, he might have run their names through a police database.[70]

53. **Walking while Black:** The officers' evidence that this was a trespass investigation – and that PC Lourenco had arrested B.A. for a trespass offence – made no sense. Instead, it had all the hall-marks of a pre-text to cover up what was an attempt to gather "intelligence." For example:

i. the officers were not responding to a specific trespassing call from Neptune; nor did they know any names of possible trespassers;[71]

ii. the Hearing Officer found there was no basis to suspect the youth for trespassing;[72]

iii. the complainants had just ***exited*** a building as opposed to having tried to enter one;[73]

iv. they were walking along the sidewalk that led ***out*** of the complex;[74]

v. the officers did not wait the few seconds it would have taken to confirm that the

[69] PC Pais: Transcript, Vol IV, pp 3612-3613, 3810-3815; Y.B.: Transcript, Vol I, pp 997-1000, 1206-1207; B.A.: Transcript, Vol I, pp 589-593, 617-618, 625, 704-706; M.M.: Transcript, Vol II, pp 1856-1858; Exhibit 8, pp 2-5; Exhibit 10, Clip 2, 6:14:32-6:14:58; Exhibit 12, p 19; Exhibit 18; see e.g. *McKay v Toronto Police Services Board*, 2011 HRTO 499, at paras 160-163.

[70] PC Pais: Transcript, Vol IV, pp 3510-3512, 3796-3798, 3813-3814; Exhibit 12, p 19; Decision on the merits, paras 20, 34, 40, 42, 91-92, 99. The complainants were prohibited from asking whether this might have turned into a 'carding' incident: Transcript, Vol IV, pp 3815-3817, 3823-3827, see Rulings: Transcript, Vol I, pp 193-227, 1061-1074; Transcript, Vol II, pp 2770-2780.

[71] PC Pais: Transcript, Vol IV, pp 3817-3818.

[72] B.A.: Transcript, Vol I, pp 702-703; Y.B.: Transcript, Vol I, pp 967, 1031-1032; M.M.: Transcript, Vol II, pp 1565-1566, 1636; Decision on the merits, paras 186, 189, 209.

[73] PC Pais: Transcript, Vol IV, pp 3408, 3493-3494, 3818-3819; Public Complainants' Submissions: Transcript, Vol IV, p 4550; Exhibit 10, Clip 2, 6:14:32-6:14:58; Exhibit 18.

[74] Exhibit 9, Clip 1, 6:15:07-6:15:10; Exhibit 10, Clip 2, 6:14:32-6:14:58; Exhibit 18; B.A., Transcript, Vol I, p 703.

complainants were not going to turn off in the direction of 155 Neptune Drive;[75]

vi. the Hearing Officer found that the officers had not taken up the complainants' offer that they speak with B.A. and B.H.A.'s mother to confirm their residence;[76]

vii. the Hearing Officer found that PC Lourenco was not actually "content to let B.A. leave" and "sought to exert control" over the teens in spite of the fact that all the officers could potentially have done to alleviate any trespass concern was to direct them to leave;[77]

viii. the Hearing Officer found that PC Lourenco's actions lacked "reasonableness" and there was "scant opportunity" for the teens to "comply with an investigation";[78]

ix. PC Lourenco ostensibly arrested B.A. for a non-existent offence;[79]

x. none of the complainants heard either officer say anything about trespass, including when PC Lourenco grabbed B.A., which suggests that PC Lourenco simply grabbed B.A. out of anger and created a (poor) after-the-fact justification for his conduct;[80] and

xi. similarly, PC Pais did not record in his notebook the supposed basis upon which PC Lourenco initially grabbed B.A.[81]

54. **Any Black person will do:** PC Pais conceded that it was possible he had mentioned that there had been robberies in the area. Indeed, he had just come from a briefing where the visual description of one of the suspects was a Black male who was 5'9".[82] B.A. recalled being told that he fit the description.[83] While PC Pais did not agree that he or PC Lourenco said this to B.A., what possible basis did the officers have for making ***any*** mention of a robbery that had occurred 4 days before, 2.4 kilometres away,[84] other than to provide an aura of legal authority?

55. **Racially-informed suspicion, escalation, and violent overreaction:** The following examples of heightened suspicion, speed of escalation, and disproportionate violence conform to the pattern of Black males being perceived (consciously or subconsciously) as aggressive, dangerous, and superhumanly strong:

[75] Public Complainants' Submissions: Transcript, Vol IV, pp 4550-4551, 4554-4555; PC Pais: Transcript, Vol IV, pp 3534-3536, 3818-3820; Exhibit 18.
[76] Decision on the merits, para 209.
[77] Decision on the merits, paras 208-209.
[78] Decision on the merits, para 20.
[79] Decision on the merits, para 210.
[80] Decision on the merits, paras 25, 35, 53; B.A.: Transcript, Vol I, pp 666-667; Y.B.: Transcript, Vol I, pp 991-993.
[81] Decision on the merits, para 105; Exhibit 14, p 5.
[82] Decision on the merits, paras 96, 100; PC Pais: Transcript, Vol IV, pp 3553-3556, 3792-3795.
[83] Decision on the merits, paras 19, 29; B.A.: Transcript, Vol I, pp 588, 704-705.
[84] PC Browne: Transcript, Vol II, pp 2721-2727; Exhibit 36.

i. PC Pais almost immediately adopted a "position of control;"[85]

ii. PC Lourenco grabbed B.A. when he tried to leave;[86]

iii. PC Lourenco used unreasonable force when he punched B.A.'s body and head area;[87]

iv. PC Lourenco pointed his firearm at Y.B. after Y.B. moved towards him with an "outstretched arm" that did not indicate a "challenging or fighting stance;"[88]

v. 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;[89]

vi. 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;[90] and

vii. PC Pais agreed that PC Lourenco pushed B.A. up against the scout car.[91]

56. **Adultification:** that the complainants – skinny, young teenagers – experienced the above-noted level of scrutiny and force was consistent with the phenomenon of adultification whereby Black children are perceived to be older, bigger, and stronger than they are.

57. **Knowing their place:** At the exact moment that B.A. tried to assert his rights, disregard PC Lourenco's direction, and walk away, the Hearing Officer found that PC Lourenco "escalated the situation unnecessarily" in a way that lacked "reasonableness." The complainants believed that PC Lourenco grabbed B.A. out of anger. B.A. testified that PC Lourenco called him a "smart ass" and "bitch."[92] PC Lourenco's response, whether subconsciously or consciously, conformed to the pattern in which an officer feels compelled to teach a racialized person "their place."

58. In light of the foregoing, the complainants submit that there is a clear inference that race played at least some role in both suspect selection and subject treatment – certainly to the low "***any degree***" standard. Indeed, these facts provide a grim, zoomed-in example of why Black

[85] PC Pais: Transcript, Vol IV, pp 3334-3336.
[86] Decision on the merits, paras 21, 25, 31, 182, 210; Exhibit 12, pp 19-21.
[87] Decision on the merits, para 348.
[88] Decision on the merits, para 493.
[89] Exhibit 9, Clip 1: 6:17:21-6:17:37; Exhibit 11A, pp 32-33; PC Pais: Transcript, Vol IV, pp 3779-3781.
[90] Exhibit 11A, pp 28-29; Exhibit 12, p 23.
[91] Decision on the merits, para 357; PC Pais: Transcript, Vol IV, pp 3783-3790.
[92] Decision on the merits, para 209; B.A.: Transcript, Vol I, pp 589-593, 694-695; Y.B.: Transcript, Vol I, pp 972-973; M.M.: Transcript, Vol II, pp 1637-1640, 1696-1697.

people in Toronto are subject to so much more use of force – and death – at the hands of police.

59. In sum, PC Lourenco ought to have been found outside of the lawful execution of his duties for breaching s. 9 and/or s. 15 of the *Charter*. As such, the arrest of Y.B. and M.M. for assaulting a police officer *in the lawful execution of his duties* was not lawful.

3. The guilty verdict can be upheld because the arrest of B.A. was unlawful

60. Per the Commission's motion ruling in this matter, at paragraph 63, the guilty verdict on count one can be upheld if the complainants establish on appeal that the arrest of B.A. was unlawful and that the Hearing Officer erred in finding otherwise. The complainants submit that the Hearing Officer did err in respect of two aspects of his finding about B.A.: (i) in respect of PC Lourenco being outside of the execution of his duties; and (ii) in respect of the alleged spit.

a. B.A.'s arrest was unlawful because PC Lourenco was not in the lawful execution of his duties

61. As noted above, at paragraphs 22-59, an essential component for a *lawful* assault police arrest is that the officer must be in the lawful execution of his duties at the moment of the alleged assault on his person. Just as the arrest of Y.B. and M.M. was unlawful because PC Lourenco was outside of the execution of his duties owing to *Charter* violations, the same applied to B.A.

62. The complainants also submitted that PC Lourenco was outside of the lawful execution of his duties on a distinct basis at the moment that B.A. allegedly spit at him, thus undermining the lawfulness of the assault police arrest in an additional way. That is, the complainants submitted that PC Lourenco was in the process of unlawfully arresting B.A. for trespass at the moment of the alleged spit. This was ostensibly accepted by the Hearing Officer. He found that PC Lourenco was not engaged in the lawful execution of his duties at the moment of the alleged spit because he was arresting B.A. for a trespass offence that did not exist.[93] He erred, however, by not going on to give proper legal effect to this finding, which would have been to find that the subsequent arrest of B.A. for assaulting a peace officer *in the execution of his duties* was also unlawful. The complainants request that the Commission intervene on this basis.[94]

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[93] Decision on the merits, paras 184, 210, 329.

[94] It is possible that the Hearing Officer, without saying so explicitly, found that the alleged spit immediately returned PC Lourenco to the lawful execution of his duties based on *R v Barrow*, 2011 ONCJ 239: Decision on the merits, paras 184, 210, 329. In *Barrow*, an officer, engaging in an unlawful arrest, was found to have been returned to the lawful execution of her duties because Ms. Barrow had tried to seize the officer's gun. Because Ms. Barrow "put the lives and safety of everyone" "in jeopardy" "there was a *material change in circumstances*" and the "officer

b. Issues pertaining to the alleged spit

63. Because the Hearing Officer failed to give proper legal effect to his finding that PC Lourenco was not in the lawful execution of his duties at the moment of the alleged spit, he ended up conducting two lines of analysis about the alleged spit – one ***hypothetical*** and one ***factual***. Either of these lines of analysis could also have resulted in a finding that the assault police arrest was unlawful. But the Hearing Officer erred by finding in favour of PC Lourenco on both points.

i. The Hearing Officer erred in determining, *hypothetically*, that a spit would have amounted to *un*reasonable force

64. Because PC Lourenco was not in the lawful execution of his duties due to the unlawful *TPA* arrest, the Hearing Officer properly found that "B.A. was allowed to resist the arrest of himself [by means of the alleged spit] provided that the force he used was no more than necessary." Before turning, ***factually***, to the question of whether or not B.A. had *actually* spit, the Hearing Officer considered, ***hypothetically***, if a spit could count as reasonable resistance.[95]

65. The Hearing Officer determined that ***if*** a "spit occurred" at the point that PC Lourenco grabbed hold of B.A., ***"it would have been integral to resisting the arrest of himself"***. This should have been sufficient for him to find that, hypothetically, a spit would have amounted to reasonable defensive force. This would have meant, in turn, that the assault police arrest was missing an essential element – an ***unlawful*** assault against PC Lourenco – thereby undermining the basis for the assault police arrest. The Hearing Officer, however, found that spitting would ***not*** have amounted to reasonable force based on an obscure Yukon decision called *R v EBK*.[96]

66. In *EBK*, the trial judge held that for a spit to be defensive, it had to satisfy three requirements. One requirement was that "no other reasonable force" could be used to resist the unlawful arrest. Applying *EBK*, the Hearing Officer found that spitting would not have been reasonable force because B.A. "had ***other alternatives*** in resisting the arrest of himself." Because B.A. had not availed himself of these "other alternatives," the spit was offensive.[97]

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had a legal duty to take appropriate action": *Barrow*, at paras 21-35 (emphasis added). *Barrow* however was not applicable to these circumstances, and any reliance on it amounted to an error in law. Even PC Lourenco properly conceded that that the circumstances in *Barrow* were "obviously very different": PC Lourenco's Submissions: Transcript, Vol IV, p 4082. More applicable to these facts was the case of *R v Decoteau*, in which the court held that an officer remains outside the lawful execution of his duties if there is "one continuing transaction": *R v Decoteau*, 2009 ABPC 354, at paras 15, 21-22, 42.

[95] Decision on the merits, paras 329, 339-340.

[96] Decision on the merits, paras 339-340; *R v EBK*, 2002 YKYC 6.

[97] *EBK*, at para 39; Decision on the merits, para 340.

67. The Hearing Officer's decision reflects three errors. These errors must be reviewed on a correctness standard because they involve questions of criminal law.[98]

68. **First,** while the question of whether B.A. had "other alternatives" for resisting was something that could perhaps have been considered as part of an overall reasonableness analysis, it was ***not*** a discrete requirement that B.A. had to establish. In 2011, the law was that an individual in B.A.'s situation could resist an unlawful arrest so long as he did not intend "to cause death or grievous bodily harm" and so long as the force was "no more than necessary." The *Code* "did ***not*** require consideration of alternative means of response." Moreover, the complainants could not locate any other case that adopted the *EBK* – or a similar – approach when considering spitting as defensive conduct.[99] Not even such dangerous defensive acts as shooting or stabbing must satisfy the kind of rigorous three-part test set down in *EBK*.

69. **Second,** the Hearing Officer never explained what other alternatives were, in fact, available to B.A. Presumably, he was adopting PC Lourenco's submission that B.A. should have pulled away and run.[100] Failing to identify these other alternatives was a further error.

70. **Third,** the Hearing Officer erred by failing, generally, to consider key relevant circumstances in his assessment of whether a spit would have amounted to reasonable force, and, specifically, by failing to assess these circumstances in light of his apparent finding that B.A. should have first tried to pull away and run. The missing circumstances were: (i) that B.A. was a young Black teenager in a social housing complex; (ii) that PC Lourenco was a white, fully grown male police officer with a loaded firearm; and (iii) the social context of this interaction.

71. Indeed, the case law mandates that any assessment of the reasonableness of defensive conduct must include analysis of all relevant circumstances – such as the size, strength, and gender of the parties involved – as well as consideration of the social context in which the alleged defensive conduct takes places. Beyond the confines of the self-defence jurisprudence, our highest courts have observed that social context evidence about the "relationship between the police and racialized communities" may inform fact-finding, and that it is "common sense" that "being a Black man in our society" can lead to distrust of law enforcement. Regarding pulling away and running, courts have held that: "accused people should not flee from police"; that running away "might validly" raise "suspicions"; and that racialized people may be disinclined

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[98] *DeHamilton*, at para 10; *Allen*, AOA-P, Tab 24, at para 13.
[99] *Plummer*, para 49; *Bengy*, at para 48 (emphasis added); see e.g.: *R v Lemoine*, [1992] NSJ No 595; *R v JDC*, 2009 ABPC 346; *R v Navoy*, 2008 ABPC 51; *R v JM*, 2006 BCPC 451; *R v Willie*, 2007 ONCJ 344; *Decoteau*; *R v Shewchuk*, 2014 ABPC 141; *R v Arturo Surhoff*, 2016 ONSC 2244; *R v Ruan*, 2016 BCSC 1450; *R v Ruan*, 2017 BCCA 284; *R v Morris*, 2001 ABQB 109; *R v Sepulveda*, 2005 BCPC 236.
[100] PC Lourenco's Submissions: Transcript, Vol IV, p 4086; Vol V, p 5063.

to engage in "evasive" conduct for fear that it will increase suspicion. Finally, the reality is that Black individuals are more likely to be struck, shot, and killed by police.[101]

72. The Hearing Officer's failure to consider any of B.A. or PC Lourenco's specific attributes, such as their age, size, weight, strength, or possession of weapons – let alone the broader social context – means that this decision now stands for the proposition that the only way B.A. could have lawfully resisted was first to try and pull his arm away from PC Lourenco and run. Such a result is patently absurd. It is not hyperbole to submit that any such action on the part of B.A. would have placed him in mortal danger. It also, simply, would not have made sense: B.A. had ***already*** tried to ***walk*** away and had been immediately grabbed in a manner that the Hearing Officer found to "escalate[…] the situation unnecessarily" and to demonstrate that PC Lourenco was "not content to let B.A. leave."

73. In sum, once the Hearing Officer found, hypothetically, that spitting "would have been integral to [B.A.] resisting the arrest,"[102] he should have found that the force was reasonable, that there was no evidence of an ***unlawful*** assault against PC Lourenco, and that the assault police arrest itself was, therefore, unlawful. The complainants ask the Commission to make this finding.

ii. The Hearing Officer also erred in finding, *factually*, that the prosecution had to prove on clear and convincing evidence that a spit did *not* happen even after rejecting PC Lourenco's evidence that a spit *did* happen

74. Having found, ***hypothetically***, that a spit would have amounted to ***un***reasonable force, the Hearing Officer accepted PC Lourenco's submission that a spit would have provided a lawful "reason for an arrest." He thus, finally, turned to the ***factual*** question of whether B.A. had spit at PC Lourenco. Mirroring the approach used in criminal law, the Hearing Officer decided that the question he had to ask himself was whether he was satisfied on clear and convincing evidence that B.A. did ***not*** spit at PC Lourenco.[103]

75. Without conceding that the criminal law formulation was applicable to this forum, the complainants submit that once the Hearing Officer rejected PC Lourenco's evidence that he was spit on, the prosecution had met its burden of proving on clear and convincing evidence both that B.A. did ***not*** spit at PC Lourenco – and that the assault police arrest was therefore unlawful (as

[101] See e.g.: *R v Jacko*, [1998] 1 CNLR 164, OCJ (Gen Div), at p 10; *R v Malott*, 1998 CanLII 845 (SCC), concurring decision, at paras 35-45; *R v McConnell*, 1995 ABCA 291, at paras 78-87, dissent aff'd in 1996 CanLII 189 (SCC); *Le*, at paras 72, 89; *Theriault*, at paras 133-148; *Morris ONSC*, at para 66; *R v Young*, 2007 ONCJ 4, at para 14; *Grant*, at para 169; *Use of force*; *Disparate Impact*.
[102] Decision on the merits, paras 209, 339-340.
[103] Decision on the merits, paras 341-342, 344.

there was insufficient evidence of an assault). The Hearing Officer reached the opposite, erroneous conclusion because of a series of errors in his analysis.

76. As a starting point, it is clear that the Hearing Officer rejected PC Lourenco's evidence about the spit. The Hearing Officer had "concerns" about PC Lourenco's credibility and, as such, he could not use PC Lourenco's "notes and statement" to find "that he was spit upon."[104]

77. The Hearing Officer also demonstrated that he found no merit in PC Lourenco's account through his use of the criminal law *W(D)* framework to assess PC Lourenco's evidence. He stated that it was the "third point" of *W(D)* that had a "bearing here."[105] Per the very case cited by the Hearing Officer, a decision-maker only arrives at this third branch of *W(D)* once a defendant's "exculpatory statement" – *i.e.*, PC Lourenco's claim that he had been spit on – has been entirely rejected. Specifically, it has been ***disbelieved*** at the first branch of *W(D)*, and has also been found not to have left the decision-maker with "any reasonable doubt as to his guilt" at the second branch of *W(D)*.[106]

78. Having turned to the ***third*** branch of *W(D)*, the Hearing Officer should have only focused on whether the evidence he did accept demonstrated an unlawful assault police arrest on clear and convincing evidence[107] – *i.e.*, whether there was clear and convincing evidence that PC Lourenco had not been in the lawful execution of his duties and/or that no assault had been committed against him. This analysis should have been straightforward. He had already concluded that PC Lourenco was not in the lawful execution of his duties and, having rejected PC Lourenco's evidence about a spit, there was no longer any cogent evidence of an assault.[108]

79. Instead, the Hearing Officer misinterpreted the third branch of *W(D)*. The Hearing Officer found that the prosecution still had the burden of proving that a spit had ***not*** happened

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[104] Decision on the merits, paras 209, 345.
[105] Decision on the merits, para 344; *R v W(D)*, [1991] 1 SCR 742, p 758.
[106] Decision on the merits, para 343.
[107] See e.g.: *R v L(CJ)*, 2004 MBCA 126, at para 34; *R v MD*, 2021 BCCA 339, at para 76.
[108] Exculpatory evidence from sources other than the accused can be considered under the third branch of *W(D)*. In this case, PC Pais had offered weak circumstantial evidence that he had seen B.A.'s head move and heard the sound of spitting. The Hearing Officer did not place any weight on this evidence. In fact, the Hearing Officer was rightly critical of PC Pais for stating "without being able to support it" that he never had "any doubt" that B.A. spit at PC Lourenco, which he found inconsistent with his earlier testimony that he had not "actually seen the spit". The fact that PC Pais was generally found to be a credible witness does not matter. It is contrary to a substantial body of jurisprudence to use a witness' certainty and general credibility as a proxy for that witness' reliability. Credibility is a measure of whether the witness is doing their best to tell the truth whereas reliability is a measure of the witness' *actual* accuracy: *R v HC*, 2009 ONCA 56, at para 41; *R v MB*, 2017 ONCA 653, at para 61; *R v Taylor*, 2010 ONCJ 396, at para 65; Decision on the merits, paras 344-346; B.A.: Transcript, Vol I, pp 604-605, 671; Exhibit 11A, pp 14-17; Exhibit 12, pp 20-21; Exhibit 13A, pp 17-18; Exhibit 14, p 5; PC Pais: Transcript, Vol IV, pp 3336, 3425-3430, 3530-3531, 3540, 3875, 3877.

even after he had already rejected PC Lourenco's evidence on this point. As a result of this misinterpretation, the Hearing Officer effectively turned "no spit" into a free-standing element of the offence that the prosecution had to prove even in the absence of evidence that a spit had taken place. In this vein, the Hearing Officer found that he could not rely on B.A.'s denial of the spit as clear and convincing evidence that PC Lourenco was not spit on because of concerns he had about B.A.'s testimony.[109] But once PC Lourenco's evidence about the spit had been rejected, it did not matter that B.A.'s denial was also rejected. Certainly, rejection of B.A.'s denial could not become positive evidence that a spit had taken place.[110] In sum, the spit issues, whether considered hypothetically or factually, should have resulted in a finding that arresting B.A. for assault police was unlawful.

D. There was also no good and sufficient cause to make the arrests

80. Beginning with the arrests of Y.B. and M.M., the Hearing Officer found that those arrests were without good and sufficient cause, in essence, because there was no basis to arrest them once they were on the ground. This conclusion is consistent with how the good and sufficient element has been understood in the case law.[111]

81. Moreover, contrary to PC Pais' argument,[112] based on the totality of evidence in this case, the Hearing Officer did not have to conduct an analysis of this element of the offence beyond what was in his decision.[113] He clearly found that there was simply nothing that the officers could point to justify the arrest. Further, perfectionism is not necessary in the administrative law context, particularly with lay decision-makers; deference is owed.[114]

82. The appellant officers also point to other parts of the Hearing Officer's decision, which they say demonstrate that he actually found that there was good and sufficient cause in spite of his ultimate conclusion. That is, they submit that because the Hearing Officer found that PC Pais had good and sufficient cause to stop the complainants from moving towards B.A. and PC Lourenco, and that because there was RPG in that moment that they were about to commit an

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[109] Decision on the merits, paras 346, 361.
[110] *R v Tessier*, 1997 CanLII 3475 (BC CA), at para 49; *R v O'Connor*, 2002 CanLII 3540 (ON CA), at para 19; *Walton v Alberta (Securities Commission)*, 2014 ABCA 273, at para 36.
[111] *Wong and Toronto Police Service*, 2015 ONCPC 15, at paras 26-27, 29; *Wowchuk & Bernst v Thunder Bay Police Service*, 2013 ONCPC 11, at paras 25-26, 77-80.
[112] FAP-P, paras 99-100.
[113] *Correa*, AOA-L, Tab 4, at paras 39-54; *Fenton, Supt. Mark v Toronto Police Service*, 2017 ONCPC 15, at paras 105-106, citing *Wowchuk*, at paras 78-86.
[114] *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670, at para 43.

offence, this translates into good and sufficient cause for the ultimate assault police arrest.[115]

83. In response, the complainants extend the argument made above, at paragraphs 9-17, to include this "good and sufficient" finding as well. In short, the Hearing Officer's legal findings about the moment that Y.B. and B.H.A. moved towards PC Lourenco and B.A. are based on errors in law. In fact, Y.B. and B.H.A.'s decision to move towards PC Lourenco and B.A. was reasonable under the extreme circumstances of PC Lourenco punching out B.A. And while PC Pais had an obligation to intervene, he should have focused on de-escalating all aspects of the situation: both to protect B.A. from PC Lourenco and to ensure that the understandable protest by the other complainants did not escalate further. There was, however, neither RPG nor any good and sufficient cause, at any point, to arrest Y.B., B.H.A., and M.M.

84. In the event that the Commission agrees with the appellant officers that the Hearing Officer's decision is erroneous because there is no basis to distinguish between his first finding that there was RPG and good and sufficient cause and his ultimate finding that there was not, the complainants submit that the guilty verdicts can nevertheless rest on any one of the three alternative bases mentioned above in paragraphs 18-79. Each of these alternative bases reflect serious misconduct that is not close to the line such that there is no way they could lead to a finding of good and sufficient cause even in the absence of RPG.[116]

85. Finally, if the Commission resolves this aspect of the officers' appeal by considering whether the arrest of B.A. was unlawful, and thereby arrives at the good and sufficient cause issue for B.A. specifically, the complainants submit that the false trespass arrest, and the rest of the officers' conduct towards B.A., once again, was not close to the line; it was egregious.[117]

ISSUE TWO: THE GUILTY VERDICT ON UNREASONABLE FORCE SHOULD BE UPHELD

A. The Hearing Officer's decision: punching B.A. was unreasonable

86. The Hearing Officer's decision that PC Lourenco's use of force (*i.e.*, the punching) was unreasonable (and discreditable) was thorough and ought to be deferred to by the Commission. His analysis reflected the very cases put to him by PC Lourenco below. In short, the Hearing Officer had to determine whether, in all of the circumstances, PC Lourenco punching B.A.

[115] Decision on the merits, paras 493-494; FAP-P, paras 99-108; FAP-L, paras 4, 34, 55-57.
[116] Public Complainants' Submissions: Transcript, Vol IV, pp 4589-4592, 4621-4622.
[117] *Brown v Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA), at pp 29-30, 34-36; Public Complainants' Submissions: Transcript, Vol IV, pp 4499-4503.

amounted to a reasonable use of force.[118] To answer this question, the Hearing Officer turned to the most cogent piece of evidence before him: the video of the incident. He found that the video appeared to show "two strikes, one to B.A.'s body, and one higher to the area of his head" following which "B.A. fell to the ground." He further found that the "video did not demonstrate that the resistance used by B.A. was such that strikes" – *i.e.*, the strike to the head *and* the strike to the abdomen – "were appropriate." In his view, B.A. had not offered "greater resistance" than "not providing his hands and pulling back" in the 25 seconds that followed PC Lourenco pushing him away from the group. As such, B.A. "did not warrant being struck."[119]

87. The Hearing Officer properly situated his analysis of PC Lourenco's use of force within the broader context of the incident. He called PC Lourenco's approach "cavalier" and found that he failed to demonstrate "good faith." Further, PC Lourenco's notes, statement, and actions from the beginning of the incident reflected a "lack of reasonableness" – including his hasty and misguided trespass investigation, his desire to "exert control over the public complainants," and the way in which "he escalated the situation unnecessarily."[120]

88. The Hearing Officer also distinguished this case from *Nobody v Adams, et al*,[121] where the Commission upheld the decision below that "distractionary strikes" by the officers were justified. The Hearing Officer observed that the arrestee in *Nobody* was "not only resisting the arrest of himself, but was also assaultive." Specifically, it was "alleged he tried to bite an officer." By contrast, the Hearing Officer here found that such strikes were not reasonable.[122]

B. PC Lourenco's argument about his punch to B.A.'s head is a red herring

89. PC Lourenco's first complaint about the Hearing Officer's decision has three components: (i) that "B.A.'s claim that he was punched in the head was far from clear or convincing"; (ii) that the Hearing Officer failed to show that he had carefully weighed the evidence of the punch to the head; and (iii) that his conclusion that B.A. had, in fact, been punched in the head led him to an "erroneous result."[123]

90. This argument is a red herring. Even if the finding of fact regarding the punch to the head was unreasonable (which is ***expressly*** not conceded), this still would not undermine the Hearing Officer's ultimate decision on this count. This is because the question before the Hearing Officer

[118] Decision on the merits, paras 301-302, 347-348.
[119] Decision on the merits, paras 348, 350.
[120] Decision on the merits, paras 209, 345, 348.
[121] *Nobody v Adams, Donaldson, Fardell, Simpson, Toronto Police Service and the Office of the Independent Police Review Director*, 2018 ONCPC 8, paras 29-33.
[122] Decision on the merits, para 347.
[123] FAP-L, para 62.

was not whether there was clear and convincing evidence that B.A. was punched in the head; rather the question was, per the notice of hearing, whether there was clear and convincing evidence that PC Lourenco's use of force – that of "punching" B.A. – was unreasonable and that it amounted to discreditable conduct.[124] The Hearing Officer's clear ruling was that ***no*** strikes were permitted under the circumstances. If there was something in his decision to suggest that he would have deemed a punch to the abdomen to be reasonable – and that it was specifically the punch to the head that was excessive – then it might be worth entertaining the substance of PC Lourenco's argument. There is, however, no basis to argue that the Hearing Officer distinguished between the strike to the head and the admitted strike to the abdomen.[125]

91. By way of brief comment, it was nevertheless perfectly reasonable for the Hearing Officer, after careful review of all the evidence,[126] to reach a factual conclusion about the punch to the head based solely on the video.[127] Indeed, the complainants had submitted that at 6:16:08 of Clip 1 (Exhibit 9) the punch to the head can easily be seen (following the punch to the abdomen). Nor is there any indication that B.A. crunched over after the punch to the abdomen, as PC Lourenco contends. Rather, as the punch to the head is landing, B.A.'s head and body move backwards, and he ends up on the ground. In essence, PC Lourenco is re-mounting an interpretation of the video that was already rejected below.[128] Both this rejection and the Hearing Officer's ultimate factual finding are subject to deference by this tribunal.

92. As a final note, the Hearing Officer did not, contrary to PC Lourenco's contention, rely on the blood on B.A.'s face to reach his conclusion about the punch to the head,[129] and he was

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[124] *Susan Mancini and Constable Martin Courage of the Niagara Regional Police Service*, 2004 CanLII 76810 (ON CPC), at para 98.
[125] Decision on the merits, paras 348, 350.
[126] Decision on the merits, paras 222-292.
[127] Decision on the merits, para 348. (It is not clear why PC Lourenco spent so much time in his factum providing a review of the problems with B.A.'s evidence, given that the Hearing Officer did not rely on B.A.'s testimony to find that PC Lourenco punched B.A. in the head.)
[128] PC Lourenco's Submissions: Transcript, Vol IV, pp 4033-4034; Public Complainants' Submissions: Transcript, Vol IV, pp 4597-4601; FAP-L, paras 71-72.
[129]The Hearing Officer only mentioned the blood on B.A.'s face in a subsequent portion of the decision. At that point, he had resumed his analysis of the arrest of B.A. and was assessing B.A.'s evidence to determine whether he could rely on B.A's denial of the spit. In that context, the Hearing Officer mentioned, in passing, that he accepted that B.A. "had been struck in the facial area causing a cut to his mouth." Having already found earlier that B.A. had been struck in the head, he was simply observing that the blood was consistent with such a strike – not the other way around. Moreover, PC Browne had agreed that there might have been a little cut that he had not seen when he was searching B.A. – though he would have expected B.A. to tell him about it (Decision on the merits, para 354; FAP-L, paras 70, 73-77; PC Browne: Transcript, Vol II, p 2644).

certainly not obligated to accept either Y.B.[130] or PC Pais' evidence[131] about not seeing it.

C. PC Lourenco's argument about the spit is lacking in foundation

93. PC Lourenco makes a further argument, which is that, in essence, the Hearing Officer's decision on this count was unreasonable because his conclusion that a spit "*may* have happened" ought to have been a "key" part of his analysis. This is because it would have raised B.A.'s level of resistance to "assaultive."[132]

94. This argument is lacking in foundation. The Hearing Officer never found that a spit may have happened. Rather, as argued above, at paragraphs 74-79, fn 108, he found PC Lourenco's evidence that he had been spit on lacking in credibility and PC Pais' circumstantial evidence on this point lacking in reliability. Further, the Hearing Officer had the credible evidence of Y.B. who said that he never lost sight of B.A. and that he never saw B.A. spit at PC Lourenco.[133] The Hearing Officer also reasoned that it was "not realistic that B.A., who previously had many positive or neutral interactions with police officers, who was on his way to an OJEN mentoring program, and who had participated in a mock trial at court under the instruction of a judge, would spit on Constable Lourenco." Based on the foregoing, there was no need for the Hearing Officer to consider the spit in the core part of his analysis on this count.[134]

95. PC Lourenco also raises a more specific concern. He submits that the "question of whether B.A. spat on Lourenco was just as relevant to Lourenco's justification for arresting as it was to his justification for using force."[135] As such, he submits that the Hearing Officer erred by not focusing on the spit in his analysis of the punching as much as he had focused on it in his

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[130] The Hearing Officer, who conducted a thorough review of Y.B.'s evidence, was entitled to find Y.B. to be a generally credible witness, and then not ultimately rely on Y.B.'s evidence that he did not see a punch to the head to trump what can plainly be seen on the video. Moreover, credibility – whether a witness is telling the truth as they recall it – is fundamentally different than that witness' reliability – the actual accuracy of a witness' evidence. Indeed, Y.B., in spite of being found credible, made at least three mistakes in his evidence that may have impacted his reliability: Decision on the merits, paras 246-259; FAP-L, para 67; see e.g.: *HC*, at para 41; *MB*, at para 61; *Taylor*, at para 65.

[131] The Hearing Officer did not have to directly reference PC Pais' evidence about not seeing a punch to the head in his analysis. First, he had already summarized PC Pais' evidence on this point, demonstrating that he considered it. Second, it was perfectly reasonable for him to, once again, accept the clear evidence of the video over the answers provided by PC Pais. Further, the answers from PC Pais on this point were worthy of little weight given that in this portion of his evidence he was a non-adversarial party answering leading questions from PC Lourenco: Decision on the merits, para 292; FAP-L, paras 68-69; PC Pais: Transcript, Vol IV, pp 3901-3905; see e.g. *Maves v Grand Trunk Pacific R Co*, 1913 CanLII 337 (AB CA), p 407.

[132] FAP-L, paras 78, 80-81 (emphasis in original).

[133] Y.B. did candidly acknowledge under cross-examination, testifying six years after the incident, that he could not be one hundred percent sure that a spit did not happen – but he remained steadfast that he had not seen a spit: Y.B.: Transcript, Vol I, pp 975, 976, 1043, 1198; Decision on the merits, paras 337, 344.

[134] Decision on the merits, paras 344, 347-350.

[135] FAP-L, para 81.

analysis of B.A.'s arrest. In response, as was just argued, the Hearing Officer did not need to focus on the spit because he did not accept that even a possible spit had been established on the evidence. Moreover, the analogy drawn between the two counts is misplaced. The spit was the *sole* justification offered by PC Lourenco for the assault police arrest. By contrast, on the unreasonable force count, the alleged spit, which the video demonstrated would have taken place about 25 seconds before PC Lourenco punched B.A., was but one factor in the overall circumstances that the Hearing Officer had to consider (if he had found that the spit happened).

96. In the alternative, if the Commission agrees with PC Lourenco that the Hearing Officer effectively found that a spit "may have happened," it nevertheless did not amount to an error for the Hearing Officer to fail to directly consider a "possible spit" on this count.[136] The Hearing Officer was clearly alive to the spit issue having summarized the relevant evidence and submissions and having analyzed this point extensively in his decision. This included recounting PC Pais' evidence about the spit as "assaultive" behaviour and PC Lourenco's submission that the spit was part of the justification for his use of force.[137] What was clearly compelling to the Hearing Officer, however, was that in the "25 seconds after Constable Lourenco started to push B.A. away from the group" "there was no greater resistance" other "than not providing his hands and pulling back." B.A. was, therefore, doing absolutely nothing assaultive. On that basis, he reached a perfectly reasonable and defensible conclusion that the strikes were not warranted.[138]

D. <u>The evidence of unreasonable force was the video itself</u>

97. Finally, PC Lourenco submits that there was no evidence to contradict his own evidence, the evidence of PC Pais, and the TPS use of force policy that PC Lourenco's conduct was reasonable.[139] PC Lourenco is incorrect. The Hearing Officer had been provided with substantial evidence about the context in which the use of force had taken place and also had the luxury of a video. It was perfectly open to him – indeed, he was obligated – to consider all of the circumstances, including what the video depicted, in deciding if punching B.A. was reasonable.

98. Certainly this was not a case where, as contended by PC Lourenco, the prosecution required expert evidence to counteract what the subject officer himself – and his escort – deemed to be reasonable force in their evidence. The case of *Cavanagh*[140] relied on by PC Lourenco to support this proposition makes the point. In *Cavanagh*, the court held that lay jurors would require expert evidence "to determine whether releasing a weapon onto its 'Y'-sling would

[136] Decision on the merits, paras 347-350.
[137] Decision on the merits, paras 226, 250, 275, 282, 291-292, 297, 337, 344, 351-360.
[138] Decision on the merits, paras 347-350.
[139] FAP-L, paras 84-86.
[140] *R v Cavanagh*, 2013 ONSC 5757: AOA-L, Tab 7.

constitute negligence" in the course of a high-risk ETF raid on a residence.[141] Here, however, the Hearing Officer had to make a simple decision about whether strikes were warranted.

99. Moreover, the fact that the Hearing Officer did not reference the three sources of evidence highlighted by PC Lourenco in the core of his decision,[142] does not mean that he did not consider them. To the contrary, as noted above, at paragraphs 86-92, he summarized both PC Pais' evidence about PC Lourenco's use of force *and* PC Lourenco's submissions that punching was in keeping with the TPS Use of Force procedure.[143] The Hearing Officer's decision, then, is clearly distinguishable from the case provided by PC Lourenco: *Purbrick v Ontario Provincial Police*.[144] In that case, the Hearing Officer erred because there was a "complete lack of reference" to the character evidence that had been filed.[145] That is *not* what happened here.

100. Perhaps if the defence had tendered compelling and unbiased expert evidence in support of its position, it would have been unreasonable for the Hearing Officer to fail to analyze it. But there was no obligation for him to go further than he did with the so-called "uncontradicted evidence" of PCs Lourenco, Pais, and the TPS Use of Force policy given what it was.

101. Regarding PC Lourenco, one would hope that a subject officer would always view their force as reasonable such that PC Lourenco's evidence was not worth much. Nor was his evidence subject to cross-examination thus entitling it to even less weight. Regarding PC Pais, the lay opinion evidence of a co-accused escort officer that resulted from leading questions from a non-adversarial party was hardly worth more.[146] And regarding the TPS Use of Force policy, the document that explains the use of force wheel itself states that it "is not intended to serve as a justification for officer use of force nor does it prescribe specific response option(s) appropriate to a situation." Further, the document adds that it "does not replace or augment the law," it does "not justify an officer's actions," and that the reasonableness of any particular action can be "judged only after one considers the complex interplay" of relevant factors (emphasis in original).[147] The Hearing Officer did just so.

E. Alternative basis for upholding the guilty verdict on count three

102. In the event that the Commission finds that the Hearing Officer committed reversible error in respect of count three, the complainants submit that there is an alternative basis upon

[141] *Cavanagh*, at paras 58, 66: AOA-L, Tab 7; FAP-L, para 85
[142] Decision on the merits, paras 347-350.
[143] Decision on the merits, paras 292, 297, 302.
[144] *Purbrick v Ontario Provincial Police*, 2011 ONCPC 7: AOA-L, Tab 6.
[145] *Purbrick*, at para 45: AOA-L, Tab 6; FAP-L, para 86.
[146] PC Pais: Transcript, Vol IV, pp 3875-3882, 3894-3897, 3901-3905; see e.g. *Maves*, at p 407.
[147] Exhibit 15, Appendix B, pp 1-2, 6.

which the guilty verdict can rest. That is, if the arrest of B.A. was unlawful, then PC Lourenco was not allowed to use *any* force, and, as such, the punching would clearly be unreasonable. The complainants advanced this submission below but it was moot because the Hearing Officer found that the officers had not committed misconduct when arresting B.A. The Hearing Officer therefore did not consider this submission.[148] If the Commission, however, accepts that B.A.'s arrest was unlawful for any of the reasons set out in paragraphs 60-79 above, it follows, then, that PC Lourenco's force to effect this unlawful arrest must have been unreasonable.

F. The relevance of social context evidence on this count

103. As a final note, if the Commission finds that there is merit to PC Lourenco's appeal on this count, before it can grant a favourable remedy to PC Lourenco, it must first consider the social context evidence about how young Black men, owing to racial stereotypes, are considered to be more aggressive, strong, and dangerous, as argued in the complainants' appellant factum.[149] In essence, the Commission must consider whether PC Lourenco's decision to punch B.A. was informed by racial bias. This is because a use of force cannot be objectively reasonable if it is driven by bias – be it conscious or unconscious – that is subjectively held by the officer.[150]

PART III: STATEMENT OF ORDER SOUGHT

104. The complainants request that the Commission dismiss the officers' appeals.

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

Per **JEFF CAROLIN**
Barrister & Solicitor
Co-counsel for the respondents

NANA YANFUL
Black Legal Action Centre
Co-counsel for the respondents

[148] Decision on the merits, para 320; Public Complainants' Submissions: Transcript, Vol IV, pp 4486-4487, 4593-4597; *Figueiras*, at paras 146-150; *Wilson v Ontario Provincial Police Service*, 2008 CanLII 52621 (ON SCDC); *Wilson v Ontario Provincial Police*, 2006 ONCPC 11.
[149] AAF, paras 50-59.
[150] The complainants argued below that the excessive force formed part of the overall s. 15 *Charter* breach, that this was consistent with the phenomenon of a police officer overreacting to Black youth, and that the social context evidence needed to inform the Hearing Officer's fact-finding: see e.g. Public Complainants' Submissions: Transcript, Vol IV, pp 4463-4477, 4531, 4571, 4601; *Chase*, at paras 69-93; *Le*, at para 89; *Dudhi*, at paras 54-66; *Khill*, at para 56.

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. *Allen v Alberta (Law Enforcement Review Board)*, 2013 ABCA 187
4. *Baylis-Flannery v. DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28
5. *Brown v Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ON CA)
6. *Charlton v St Thomas Police Services Board*, 2009 CanLII 25977 (ON SC)
7. *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670
8. *Correa v Ontario Civilian Police Commission*, 2020 ONSC 133
9. *DeHamilton v The Ontario Provincial Police*, 2022 ONCPC 7
10. *Elliott v King and Durham Police Service*, 2006 ONCPC 13
11. *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074
12. *Fenton, Supt. Mark v Toronto Police Service*, 2017 ONCPC 15
13. *Figueiras v Toronto (Police Services Board)*, 2015 ONCA 208
14. *Gentles v Intelligarde International Incorporated*, 2010 ONCA 797
15. *JKB v Peel (Police Services Board)*, 2020 HRTO 172
16. *Maves v Grand Trunk Pacific R Co*, 1913 CanLII 337 (AB CA)

17. *Maynard v Toronto Police Services Board*, 2012 HRTO 1220

18. *McKay v Toronto Police Services Board*, 2011 HRTO 499

19. *Nobody v Adams, Donaldson, Fardell, Simpson, Toronto Police Service and the Office of the Independent Police Review Director*, 2018 ONCPC 8

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Relevant Statutes

Criminal Code, RSC, 1985, c C-46

Assaulting a peace officer

270 (1) Every one commits an offence who

> **(a)** assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;
>
> **(b)** assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or
>
> **(c)** assaults a person
>
> > **(i)** who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or
> >
> > **(ii)** with intent to rescue anything taken under lawful process, distress or seizure.

Arrest without warrant by peace officer

495 (1) A peace officer may arrest without warrant

> **(a)** a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> **(b)** a person whom he finds committing a criminal offence; or
>
> **(c)** a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

Criminal Code, RSC, 1985, c C-46 (in force as of November 21, 2011)

Use of force to prevent commission of offence

27 Every one is justified in using as much force as is reasonably necessary

> **(a)** to prevent the commission of an offence
>
> > **(i)** for which, if it were committed, the person who committed it might be arrested without warrant, and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).

Preventing assault

37 (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

Extent of justification

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

ONTARIO CIVILIAN POLICE COMMISSION

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

- and -

TORONTO POLICE SERVICE
Respondents

- and -

ADAM LOURENCO & SCHARNIL PAIS
Appellants

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