Ontario Civilian Police Commission
Police Services Act

BETWEEN:

ADAM NOBODY

Appellant

-and-

POLICE CONSTABLE BABAK ANDALIB-GOORTANI (#9859)

Respondent

-and-

THE OFFICE OF THE INDEPENDENT REVIEW DIRECTOR and THE TORONTO POLICE SERVICE

Interveners

FACTUM OF THE COMPLAINANT, ADAM NOBODY
(Request for Leave to Appeal)

Date: January 6, 2016

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PART I: FACTS

(1) OVERVIEW

1. The proposed appeal arises from the sentencing hearing of a police officer who was convicted of criminal assault with a weapon in the course of his duties. After losing his criminal appeal, the Respondent, Constable Andalib-Goortani, pleaded guilty to discreditable conduct. He was sentenced to forfeit only five days' pay.

2. The proposed Appellant, Adam Nobody, was the public complainant in the disciplinary hearing of the Respondent. Mr. Nobody respectfully submits that the sentence imposed in the disciplinary proceedings undermines public confidence in the police disciplinary process and the Toronto Police Service.

3. The reasons given by the Hearing Officer, the Honourable Lee K. Ferrier, Q.C. treated the Respondent as the victim of the very proceedings in which he had pleaded guilty. The Hearing Officer gave no consideration whatsoever to the effect of the Respondent's crimes on Mr. Nobody or to public confidence in the officer and the police force. Furthermore, Mr. Nobody respectfully submits that the Hearing Officer made a number of legal errors and collaterally attacked the ruling of the criminal courts by finding that the Respondent had "already paid too large a price for his misdeed".[1]

4. The Respondent's criminal case has drawn a significant amount of public interest. Video of Mr. Nobody being beaten by at least four officers, including the Respondent, was published online and viewed thousands of times. The Special Investigations Unit ("**SIU**") conducted a lengthy criminal investigation. However, the Respondent's identity was only discovered after his photo was plastered on the front page of the Toronto Star, more than five months later. He was not wearing mandatory identification tags and did not come forward during the SIU investigation.

5. The lenient sentence imposed after the Respondent's disciplinary hearing has also drawn significant negative attention to the Toronto Police Service ("**TPS**"). Mr. Nobody respectfully submits that the decision inverts the disciplinary process. It ignores the public interest and effectively holds a public complainant and the media accountable for the harm caused to a police officer by his own criminal actions. If allowed to stand, it will only contribute to public fear and distrust of police. As such, the proposed appeal is of significant importance to the policing profession as a whole and the community at large. Mr. Nobody respectfully submits that leave to appeal should be granted.

(2) THE RESPONDENT'S ASSAULT AGAINST ADAM NOBODY

6. The facts of the Respondent's assault against Mr. Nobody are set out in the decision of Botham J from the criminal trial. Botham J noted that "[f]actually this is quite a simple case".[2]

7. Mr. Nobody was arrested on June 26, 2010 at Queen's Park in Toronto. He was part of a large crowd of protesters and other civilians who had converged in Queen's Park. At the southern

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[1] Decision of the Hearing Officer, dated November 10, 2015 at para 46 [Revised Decision of the Hearing Officer].
[2] *R v Andalib-Goortani*, 2013 ONCJ 822 at para 3 [Trial Decision].

end of the park, police formed a line and began to strike their shields and advance towards the crowd, moving them north towards the Legislature.[3]

8. No issue was taken at criminal trial with the grounds for Mr. Nobody's arrest.[4] The evidence at trial was that police had determined the assembly at Queen's Park to be unlawful and that all civilians were potentially subject to arrest. Mr. Nobody acknowledged at trial that he was verbally confrontational towards police and challenged why they were pushing people back. He testified that many people in the crowd were yelling at police, but his perspective was that the protesters were not as physically violent as described by police witnesses.[5]

9. The Respondent and a number of other police officers were deployed as an arrest team in Queen's Park. He testified in the criminal proceedings that he began chasing Mr. Nobody with his team after a team member shouted "there he is, get him". He confirmed that the video footage shows Mr. Nobody was taken to the ground and then surrounded by a number of police officers. At least three different officers were punching, kicking, and kneeing Mr. Nobody multiple times in the face and body during the arrest. The Respondent then struck Mr. Nobody at least four times with his asp in the thigh region.[6]

(3) SUBSEQUENT PROCEEDINGS

10. The SIU subsequently investigated the arrest of Mr. Nobody. SIU investigators determined that there was an "incident of probable excessive use of force by an unidentified police officer", but they were unable to identify the perpetrators.[7] No officers came forward to identify themselves or other officers.

11. The SIU investigation was reopened after Chief of Police Bill Blair announced on CBC Radio that the video of Mr. Nobody's arrest had been tampered with" and "fabricated", that a "significant portion" had been removed, that it was clearly "doctored to create a certain impression", and that the "use of a weapon had been removed from that tape."[8] There were also

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[3] *Ibid* at paras 8-9.
[4] *Ibid* at para 4.
[5] *Ibid* at paras 12 and 23.
[6] *Ibid* at paras 27-34.
[7] Special Investigations Unit, "SIU Concludes Six Investigations into Injuries during the G20 Summit" (November 25, 2010).
[8] Special Investigations Unit, "SIU Reopens G20 Investigation", (November 30, 2010).

numerous media reports about the incident, including a story in the Toronto Star with the byline, "I see you, Mr. Policeman".[9] The video impugned by Chief Blair was determined to be authentic and Respondent was subsequently identified and charged with assault with a weapon.[10] The other subject officers involved in the arrest could not be positively identified by the SIU.[11]

12. At the criminal trial of the Respondent, the defence mounted a "vigorous attack" on the credibility of Mr. Nobody.[12] It was submitted that he was a much more active member of the protest than he acknowledged in his testimony.[13] However, Botham J did not accept the evidence of police witnesses on a number of points relating to Mr. Nobody's conduct.[14] She did accept the evidence of Mr. Nobody that he did not know he had been targeted for arrest.[15] The trial judge found that even if the officers perceived Mr. Nobody to be more verbally aggressive than he believed he was, the inconsistencies between their testimony and his were not sufficient to cause her to make negative findings about his credibility.[16]

13. Botham J held that the case did "not stand or fall" on Mr. Nobody's testimony because the arrest and the blows that the Respondent struck against him were captured on video.[17] Botham J instead made negative credibility findings about the Respondent:

> The defendant has testified that he did not see many of the punches and kicks administered by his fellow officers against Mr. Nobody at the time of his arrest. I do not accept nor am I left in a state of reasonable doubt that he could have observed the actions of Adam Nobody that he now relies on to justify his use of force while failing to observe his fellow officers' blows which are so clearly visible on the video footage. **I find that his explanation that he was responding to Adam Nobody's resistance is nothing more than an after the fact attempt to justify his blows rather than the reason for them.**[18] [Emphasis added.]

14. The trial judge concluded her ruling as follows:

> The objective evidence of the video footage at this trial is limited but cogent. It shows Adam Nobody on the ground surrounded by officers who are crouched over him. He is being punched, kneed and kicked. When the defendant prepares to deliver that second series of forceful baton thrusts, one officer has just applied a knee strike to Adam Nobody's face.
>
> I do not believe, nor am I left in a state of reasonable doubt that any of the blows struck by the defendant were proportionate or necessary and I am satisfied beyond a reasonable doubt that the

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[9] Rosie DiManno, "A second look at G20 police assault", (Toronto Star, December 7, 2010).
[10] Special Investigations Unit, "SIU Concludes Reopened G20 Investigation", (July 18, 2011).
[11] *Ibid.*
[12] Trial Decision, *supra* at para 18.
[13] *Ibid* at para 41.
[14] *Ibid* at paras 47-50.
[15] *Ibid* at para 52.
[16] *Ibid* at para 53.
[17] *Ibid* at para 55.
[18] *Ibid* at para 64.

> force used by the defendant was not necessary to control Adam Nobody or to assist in his arrest. He will be found guilty of the charge of assault with a weapon.[19]

15. The Respondent was given a custodial sentence for his role in arresting Mr. Nobody. The conviction was upheld on appeal, although the Respondent's sentence was varied to a suspended sentence and one year of probation.[20]

16. Mr. Nobody also filed a complaint with the Office of the Independent Police Review Director ("**OIPRD**"). Investigators substantiated Mr. Nobody's complaint, pursuant to s. 2(1)(g)(ii) of the *Code of Conduct*, that the Respondent used unnecessary force in his arrest and found that the complaint was serious in nature. After the Respondent lost the appeal of his criminal conviction, he pleaded guilty to discreditable conduct, pursuant to s. 2(1)(a)(ix) of the *Code of Conduct*, in that he was convicted of a criminal offence. The charge pursuant to s. 2(1)(g)(ii) of the *Code of Conduct* was withdrawn.

(4) PENALTY DECISION OF THE HEARING OFFICER

17. The Respondent's penalty hearing was held over two days, on October 6 and 28, 2015. Mr. Nobody sought the dismissal of the Respondent from the TPS, the prosecution sought a one-year demotion of the Respondent to the position of fourth-class constable, and the defence sought a penalty of forfeiture of five days' pay.

18. The Hearing Officer issued a decision dated November 5, 2015 [21] and a revised decision dated November 10, 2015.[22] He imposed a penalty of forfeiture of five days' pay.

19. The Hearing Officer noted in his decision that the Respondent was the last member of his arrest team to arrive after Mr. Nobody had been taken to the ground. The Hearing Officer observed that, when the Respondent arrived, the other members of his team had "what is fairly described as overwhelming physical superiority" over Mr. Nobody.[23] He found that the Respondent was "clearly… the last man in" and that his use of force was unnecessary.[24]

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[19] *Ibid* at paras 66 and 67.
[20] *R v Andalib-Goortani*, 2015 ONSC 1403; additional reasons at 2015 ONSC 1445.
[21] Decision of the Hearing Officer, dated November 5, 2015.
[22] Revised Decision of the Hearing Officer, *supra*.
[23] *Ibid* at para 8.
[24] *Ibid* at para 12.

20. During the hearing, the Hearing Officer refused to accept medical evidence with respect to Mr. Nobody's injuries because it could not be determined when in the course of Mr. Nobody's arrest the injuries had been received or who had caused them. Botham J heard evidence in the criminal trial regarding whether Mr. Nobody suffered injuries from the Respondents' blows, but no conclusive determination were made.[25] Nevertheless, the Hearing Officer held that the blows delivered by the Respondent "were of a fleeting and physically minor nature leaving no bruises and no injury to Mr. Nobody".[26]

21. This is the only reference to the effect of the Respondent's assault on Mr. Nobody in the Hearing Officer's decision. There is no consideration of the impact of the Respondent's conduct on Mr. Nobody's physical integrity, nor the impact that an assault by a peace officer would necessarily have on Mr. Nobody's psychological integrity.

22. In the course of the hearing, counsel for the Respondent submitted that the Respondent had been administratively disciplined for failing to wear mandatory identification at the time of Mr. Nobody's arrest. No evidence with respect to the nature of those disciplinary proceedings was before the Tribunal. The Hearing Officer ruled that because the Respondent was administratively disciplined, it would be inappropriate to consider it as an aggravating circumstance in this case.

23. In the course of the hearing, counsel for the Respondent submitted that the Respondent attended a charitable trip to El Salvador after the events of the G20. No evidence with respect to the timing or duration of that trip was before the Tribunal. No evidence as to when the SIU investigation occurred or when photos of the Respondent were published in the media was before the Tribunal. The Hearing Officer found that the Respondent's failure to come forward to identify himself "is explained, at least to a large degree, by the fact that when photos were published in the media, he was on his charitable trip to El Salvador". However, the Respondent did not testify or provide any evidence whatsoever that he was unaware of the SIU investigation or the Toronto Star's public campaign to identify him.

24. The Hearing Officer held that Botham's J's findings against the Respondent's credibility were not significant enough to be considered an aggravating factor, either. The Hearing Officer

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[25] Trial Decision, *supra* at paras 35-38.
[26] Revised Decision of the Hearing Officer, *supra* at para 13.

held that while the assault was "assuredly wrongful", it was "barely over the line of wrongfulness".[27]

25. The Hearing Officer concluded his decision as follows:

> The Officer's three years of a commendable record on the force have been followed by five years of turmoil – living with these proceedings hanging over his head for five years; the strain of a criminal proceeding followed by a criminal conviction, appeal and penalty; his marriage break-up; his limited employment activity in a desk job for a large part of that period; the effect on his health.
>
> The Officer has already paid too large a price for his misdeed.
>
> In my view, a penalty of forfeiture of 5 days' pay is the appropriate penalty and I so find.[28]

PART II: ISSUES AND ARGUMENT

(1) ISSUES

26. The question on this appeal is whether leave to appeal should be granted pursuant to ss. 87(1) and (4) of the *Police Services Act*, RSO 1990 c P.15 ("***PSA***"), which read as follows:

> **Appeal to Commission**
> 87. (1) A police officer or complainant, if any, may, within 30 days of receiving notice of the decision made after a hearing held under subsection 66 (3), 68 (5) or 76 (9) by the chief of police or under subsection 69 (8) or 77 (7) by the board, appeal the decision to the Commission by serving on the Commission a written notice stating the grounds on which the appeal is based.
>
> ...
>
> **Commission may hold hearing**
> (4) The Commission may hold a hearing, if it considers it appropriate, upon receiving a notice under subsection (1) from a complainant with respect to an appeal other than an appeal described in subsection (3).

(2) TEST FOR LEAVE TO APPEAL

27. This Commission recently set out the test for whether leave to appeal a penalty decision should be granted in *Grychtchenko and McCartney and Toronto Police Service*. Leave to appeal should be granted if any one of the following conditions is met:

i. The decision is clearly wrong on its face and the Appeal involves matters of such importance that leave ought to be granted;

ii. There is a conflicting decision of the Commission on the matter involved in the proposed Appeal and it is desirable that leave be granted; or

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[27] *Ibid* at para 44.
[28] *Ibid* at paras 45-47.

iii. The matters raised in the proposed Appeal are of significant importance to the policing profession as a whole and the community at large.[29]

28. Mr. Nobody respectfully submits that all three conditions are met in this case.

(3) THE DECISION IS CLEARLY WRONG ON ITS FACE

29. Mr. Nobody respectfully submits that the Hearing Officer made a number of errors of law, such that the Decision is clearly wrong on its face:

i. The Hearing Officer failed to consider the effect of the Respondent's misconduct on Mr. Nobody or on public confidence in the officer and the police force;

ii. The Hearing Officer erred in his assessment of mitigating factors and collaterally attacked findings made in the criminal proceedings; and

iii. The Hearing Officer erred in his assessment of aggravating factors.

i. The Hearing Officer failed to consider the effect of the Respondent's misconduct on Mr. Nobody or on public confidence in the officer and the police force

30. There is not a single reference in the Hearing Officer's decision to the perspective of Mr. Nobody or other members of the public. This is contrary to the fundamental purposes of civilian oversight.

31. Disciplinary proceedings are employment matters, but in the context of policing they are mandated by a public statute that defines misconduct and the disciplinary process. The Supreme Court of Canada has observed that this process serves the public interest:

> The public complaints process incorporates a number of features to enhance public participation and accountability. For instance, pursuant to Part II of the PSA, the Commission, as an agency comprised of civilian members, provides independent oversight of police services in Ontario to ensure fairness and accountability to the public. Part V sets out a comprehensive public complaints process by which members of the public can file official complaints against policies or services. Judicial oversight of disciplinary hearings under the PSA is available by statutory right of appeal to the Commission and then to the Divisional Court: see ss. 70(1) and 71(1).[30]

32. Unlike in other areas of labour relations, police officers and their employers have no freedom to control their own disciplinary process through collective bargaining.[31] They are required to engage in a process where the complainant is given full standing in disciplinary

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[29] *Grychtchenko and McCartney and Toronto Police Service*, 2015 ONCPC 20 (CanLII) at para 31 [*Grychtchenko*].
[30] *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 (CanLII) at para 34 [*Penner*].
[31] *Durham Regional Police Service v Durham Regional Police Association*, 2013 CanLII 70441 (ON LA) at para 39.

hearings if public complaints are substantiated. According to the Supreme Court, "[b]y making the complainant a party, the *PSA* promotes transparency and public accountability".[32]

33. Disciplinary proceedings in the police context have been characterized as quasi-criminal in nature. As a result, when it comes to the imposition of penalty, this Commission and the courts have applied principles akin to the principles of sentencing.[33] Section 718 of the *Criminal Code* emphasizes the importance of the interests of the victim and society at large in that process:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to **respect for the law and the maintenance of a just, peaceful and safe society** by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and **the harm done to the victim or to the community** that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) **to separate offenders from society**, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and **acknowledgement of harm done to victims or to the community**. [Emphasis added.][34]

34. This Commission has previously identified "the damage to the reputation of the police force that would occur if the officer remained on the force" as one of the key elements to be considered in a penalty hearing, along with the nature and seriousness of the misconduct and the offender's prospects for rehabilitation.[35]

35. Mr. Nobody respectfully submits that the principles of sentencing and the purposes of civilian oversight and a public complaints system cannot be served where an adjudicator fails to consider the perspectives of the complainant or the public.

ii <u>The Hearing Officer erred in his assessment of mitigating factors and collaterally attacked findings made in the criminal proceedings</u>

36. Mr. Nobody respectfully submits that the Hearing Officer's finding that the Respondent "has already paid too large a price for his misdeed" was a conclusion that resulted from a failure

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[32] *Penner, supra* at para 54.
[33] *Blakely v Parker*, 2007 CanLII 33123 (Ont Div Ct) at para 14.
[34] RSC 1985, c C-46, s 718.
[35] *Groot v Peel Regional Police* (2002), 3 OPR 1558 (OCCPS) at 1557 [*Groot*]; *Venables v York Regional Police*, No 08-08 (OCCPS) at 8 [*Venables*].

to correctly apply the appropriate legal principles and amounts to a collateral attack on the decisions of the criminal courts.

No basis for finding that Mr. Nobody had suffered "no bruises and no injury"

37. The Hearing Officer's finding that Mr. Nobody had suffered no injuries as a result of the Respondent's assault was the only consideration he gave to the effects of the Respondent's actions on Mr. Nobody or anybody else. Mr. Nobody respectfully submits that this finding is incoherent and simply does not follow from the record that was before the Tribunal.

38. At the criminal trial, the specific causes of Mr. Nobody's various injuries was found to be inconclusive, although there was evidence that he was seriously injured in the course of his arrest. The Hearing Officer chose not to admit Mr. Nobody's medical records as evidence because it would be impossible to prove the exact cause of Mr. Nobody's injuries. After ruling that the matter was not provable, it is inconsistent and illogical to subsequently find that Mr. Nobody was not injured by the Respondent.

39. Even if injuries were not caused by the Respondent directly, the stated purpose of his strikes was to facilitate the actions of the other officers who were striking Mr. Nobody. He participated in beating an unarmed suspect who was subject to "overwhelming physical superiority".[36] Mr. Nobody respectfully submits that the Respondent should not have been given credit for causing no physical injuries under these circumstances.

Existence of disciplinary proceedings is not a mitigating factor

40. Mr. Nobody respectfully submits that the Hearing Officer erred in his penalty decision in considering as a mitigating factor that the Respondent had been "living with these proceedings hanging over his head for five years". It would confound logic if the mere existence of the proceedings needed to determine a police officer's guilt is a factor that could reduce the penalty he faces for his misconduct. Disciplinary proceedings are not themselves part of their own penalty.

41. The Respondent did not come forward to identify himself during multiple SIU investigations and a major media campaign, a period that spanned over five months. He did not plead guilty in criminal court. He did not plead guilty to misconduct until after his criminal conviction and appeal. If the time this took was harmful to the Respondent, he was the author of

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[36] Revised Decision of the Hearing Officer, *supra* at para 8.

his own misfortune. The delay caused by his own choices can certainly not be considered a mitigating factor in sentencing.

Existence of criminal proceedings is not a mitigating factor

42. Similarly, Mr. Nobody respectfully submits that the Hearing Officer erred in considering as a mitigating factor that the Respondent had faced "the strain of a criminal proceeding followed by a criminal conviction, appeal and penalty". The existence of parallel criminal proceedings is again the result of choices made by the Respondent. While he had the right to contest and appeal his criminal charges, the Respondent should not be granted relief in unrelated proceedings for any toll that may have taken on him.

43. The Supreme Court of Canada has held that criminal and disciplinary proceedings serve entirely different functions:

> I would hold that the appellant in this case is not being tried and punished for the same offence. The "offences" are quite different. One is an internal disciplinary matter. The accused has been found guilty of a major service offence and has, therefore, accounted to his profession. The other offence is the criminal offence of assault. The accused must now account to society at large for his conduct. He cannot complain, as a member of a special group of individuals subject to private internal discipline, that he ought not to account to society for his wrongdoing. His conduct has a double aspect as a member of the R.C.M.P. and as a member of the public at large. To borrow from the words of the Chief Justice quoted above, I am of the view that the two offences were "two different `matters', totally separate one from the other and not alternative one to the other". While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions. I would respectfully adopt the following passage from the reasons of Cameron J.A. in the court below:
>
> > **A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public.... And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers.** For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the state; to a judgment for damages, at the instance of the patient, and to an order of discipline on the motion of the governing council of his profession. Similarly **a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damage he caused; and to the police force for discipline.** [Emphasis added.] [37]

The Hearing Officer's decision constitutes a collateral attack on the criminal proceedings

44. Mr. Nobody respectfully submits that the Hearing Officer's decision that the Respondent "has already paid too large a price for his misdeed" followed his erroneous consideration of the

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[37] *R v Wigglesworth*, [1987] 2 SCR 541, 1987 CanLII 41 (SCC) at para 28.

criminal and disciplinary proceedings as mitigating factors. The criminal proceedings should rather have been considered the basis for separate and distinct disciplinary proceedings centered around the employment consequences of the Respondent's acknowledged misconduct. With respect, Mr. Nobody submits that a finding that the criminal dispositions were instead a mitigating factor because the penalty was "too large" amounts to a collateral attack on the rulings of the criminal courts.

iii. The Hearing Officer erred in his assessment of aggravating factors

45. Mr. Nobody respectfully submits that the Hearing Officer made a number of legal errors in concluding that there were no aggravating factors in this case. In addition to negative effect that the assault and the publicity surrounding it has on the public perception of the TPS, Mr. Nobody submits that the Respondent's failure to wear mandatory identification tags, his failure to subsequently come forward to identify himself prior to the criminal charges, his untruthful testimony, and his lack of remorse should all have been considered aggravating factors. Each of these factors is addressed below.

Failure to wear mandatory identification is an aggravating factor

46. Mr. Nobody respectfully submits that the Hearing Officer erred in holding that it would be inappropriate to consider failure to wear mandatory identification tags while committing an act of misconduct as an aggravating feature to that misconduct. With respect, it should have been considered an aggravating factor that the Respondent was not wearing mandatory identification tags, including his badge number and epaulets. The Ontario District Court has observed that the public "has a vital interest in the performance of police officers who are given great powers in order to protect the public".[38]

47. Similarly, the Alberta Court of Queen's Bench has stated:

> The police are officers of the state who possess special powers, including the power to restrain the liberty of the subject, and to conduct searches and seizures in certain situations. The police have the ability to set in motion the criminal justice process against citizens. For all of these reasons the public scrutiny of police activities is important. Especially important are allegations of corruption in policing.[39]

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[38] *Re Ottawa Police Force and Lalande*, 1986 CanLII 2511 (Ont DC).
[39] *Robertson v Edmonton (City) Police Service (#8)*, 2004 ABQB 242 (CanLII) at para 36.

48. Those comments were made with respect to public access to police disciplinary proceedings, but Mr. Nobody respectfully submits that they are equally applicable to public scrutiny of police actions in order to be able to bring disciplinary proceedings in the first place. Justice cannot be seen to be done where police can with impunity fail to identify themselves as required by their job to the people they serve. This can only be considered an aggravating factor where a police officer commits misconduct under those circumstances.

49. Mr. Nobody respectfully submits that it was inappropriate for the Hearing Officer to consider that the Respondent had been "administratively disciplined" for failure to wear his mandatory identification. Any such discipline occurred prior to the finding that the Respondent had committed other acts of misconduct at the same time. Those prior proceedings would necessarily not have considered the cumulative aggravating effect of the combined offences.

50. Moreover, in any event there was insufficient evidence before the Tribunal as to the nature of the prior disciplinary proceedings or what considerations had gone into its disposition that would permit the Hearing Officer to dismiss this conduct as not aggravating.

Continued avoidance of accountability is an aggravating factor

51. Mr. Nobody respectfully submits that the Hearing Officer also erred in concluding from an insufficient record that the Respondent's failure to identify himself in response to the SIU and media investigations was due to "his charitable trip to El Salvador". There was no evidence before the Tribunal as to the duration and timing of that trip or the duration and timing of the investigations. There was certainly no evidence that he was on such a trip at all times when his photos were published in the media and/or his misconduct was being investigated by the SIU. There was no evidence that the Toronto Star's efforts to identify him did not come to his attention through internet access or notification by a third party.

52. This Commission has identified an offender's "recognition of the seriousness of the transgression" as pertinent consideration on penalty.[40] As a public officer with public duties, the Respondent's failure to hold himself accountable to the public with respect to serious allegations of misconduct demonstrates a lack of remorse and a lack of suitability for his office. It also reflects

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[40] E.g. *Groot, supra* at 1558; *Venables, supra* at 9.

poorly on his prospects for rehabilitation. Mr. Nobody respectfully submits that this should have been considered an aggravating factor and not disregarded as it was by the Hearing Officer.

Untruthful testimony is an aggravating factor

53. Botham J found that the Respondent's testimony in his criminal trial was an "after the fact attempt to justify his blows rather than the reason for them".[41] Mr. Nobody respectfully submits that there was no basis for the Hearing Officer to conclude that this finding was not of the "egregious" nature found in cases such as *Ferry* and *Groot*.[42]

54. The Respondent was found to have fabricated exculpatory testimony on a central issue at trial that was rejected by a court, resulting in a criminal conviction. The same findings were made in *Groot,* which led this Commission to conclude that the subject officer's usefulness to his employer had been undermined because it is part of his job to testify in criminal court again in the future. The Hearing Officer did not explain why the fabrication of evidence in this case would not affect the usefulness of the Respondent in the same manner, or in any way distinguish the circumstances of the present case other than through a bare assertion.

55. Mr. Nobody respectfully submits that the Respondent's lack of credibility in court affects his character, the reputation of the TPS, and his future usefulness as a police officer. This should have been considered an aggravating factor by the Hearing Officer.

Lack of remorse is an aggravating factor

56. As set out above, the Respondent failed to identify himself as required at the time of his misconduct and continued to avoid identification in the months that followed. He has never apologized for his conduct. Mr. Nobody respectfully submits that the Respondent's lack of remorse should have been considered as an aggravating factor. It was given no consideration by the Hearing Officer.

(4) THERE IS CONFLICTING JURISPRUDENCE ON THE MATTERS AT ISSUE

57. In addition to the legal errors outlined above, Mr. Nobody respectfully submits that the Hearing Officer erred in distinguishing the penalties administered in the cases submitted by the

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[41] Trial Decision, *supra* at para 64.
[42] Revised Decision of the Hearing Officer, *supra* at para 44.

prosecution at the penalty hearing. Three cases in particular are addressed below: *Groot v Peel Regional Police, Venables v York Regional Police*, and *Neely v Weller*.[43]

58. In *Groot*, the subject officer was convicted of assault in criminal court. The trial judge's findings in that case included that the officer had committed an "unjustified assault upon a defenceless and shackled complainant" and that his testimony at trial had been untruthful.[44] As mitigating factors, the criminal court noted that the officer was a first offender with no "suggestion of a pattern of abusive conduct towards prisoners generally", was a young and relatively inexperienced constable, and had "demonstrated himself to be a person of present good character".[45] Nevertheless, this Commission upheld the penalty of dismissal in that case.

59. In *Venables*, the subject officer was also a junior officer convicted of simple assault on a defenceless prisoner. In that case this Commission also upheld the penalty of dismissal. The only significant aggravating factor that was not present in this case was the existence of discriminatory overtones to the assault. However, unlike the Respondent, the officer in that case apologized, completed an anger management course, and sincerely expressed his remorse.[46]

60. In *Neely*, the subject officer kneed, kicked, and punched a prisoner in custody, gave false testimony, and lacked remorse. Despite his "exemplary record of service to the force" and "strong possibility of rehabilitation", the officer was dismissed. The penalty was upheld by the Divisional Court.[47]

61. Mr. Nobody respectfully submits that the Hearing Officer erred in distinguishing these cases on the basis of the "significant" injuries suffered by the complainants.[48] The injuries in the cases of *Groot* and *Venables* amounted primarily to facial lacerations. In this case, there was no evidence before the Tribunal to suggest that Mr. Nobody had suffered no injuries as a result of the serious beating that the Respondent participated in; rather, it could simply not be determined the extent to which the Respondent had injured Mr. Nobody directly. As submitted above, it was not reasonable to find that his unlawful application of force with a weapon in the context of a beating by several officers did not have serious effects. Mr. Nobody also respectfully reiterates that the

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[43] *Neely v Weller*, [1987] OJ No 1966 (Div Ct), aff'g (1985) 1 PLR 230 (Police Complaints Board) (QL) [*Neely*].
[44] *Groot, supra* at 1555.
[45] *Ibid.*
[46] *Venables, supra* at 9-12.
[47] *Neely, supra* at 5-6.
[48] Revised Decision of the Hearing Officer, *supra* at 7-8.

Hearing Officer erred by utterly failing to consider the non-physical effects of the assault on Mr. Nobody.[49]

62. At the time of the Respondent's assault, Mr. Nobody was effectively a helpless prisoner on the facts found by Botham J. The cases cited above are highly analogous to the facts underlying the Respondent's misconduct. In some ways the Respondent's conduct was actually more aggravating, including his use of a police-issued weapon. Given the Hearing Officer's significant errors in principle, as set out above, which also amount to conflict with established jurisprudence, Mr. Nobody respectfully submits that it is desirable that leave to appeal be granted in this matter.

(5) THE MATTERS RAISED IN THE PROPOSED APPEAL ARE OF SIGNIFICANT IMPORANCE TO THE POLICING PROFESSION AS A WHOLE AND THE COMMUNITY AT LARGE

63. Mr. Nobody respectfully submits that the errors alleged in section (3) of this Part involve matters of such importance that leave ought to be granted based on those issues alone. Mr. Nobody also respectfully submits that the conflicting jurisprudence set out in section (4) of this Part independently makes it desirable that leave to appeal be granted. In any event, Mr. Nobody respectfully submits that the matters raised in the proposed appeal as a whole have significant implications for public trust in policing and thus are of significant importance to the police profession as a whole and the community at large.

64. Numerous investigations and inquiries have now been conducted into the events of the G20 in Toronto. This Commission recently emphasized the public interest in "the circumstances of the alleged actions of a number of police officers in their treatment of individuals during the now infamous G20 Summit".[50]

65. The decision of the Hearing Officer in this matter has generated particular public attention.[51] This is unsurprising given that video of the assault is readily available online and a media campaign was central to uncovering the Respondent's identity in the first place. Much of the coverage following the decision has been negative towards the TPS and the police disciplinary process in general.

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[49] See e.g. *Neely, supra* at 5-6, where the Tribunal noted the complainant's ongoing depression.
[50] *Grychtchenko, supra* at para 35.
[51] See e.g. media articles assembled at tabs 19-30 of the Complainant's Book of Authorities.

66. Under these circumstances, there is heightened interest for both police and the public in a disciplinary process that reflects detailed consideration as to how the Respondent's misconduct has affected the complainant and public confidence in police generally. Mr. Nobody respectfully submits that such consideration should be provided in all cases, but was entirely absent from the Hearing Officer's decision. Instead, the decision as a whole treats the Respondent as a victim of the very proceedings that were caused by his own actions and required to determine his guilt. With even the most sympathetic offender, there would be no offence if there were not also other perspectives to consider. It is a matter of significant importance that this oversight be corrected.

67. The Hearing Officer's treatment of the Respondent's failure to wear mandatory identification while committing other acts of misconduct and failure to identify himself after the fact also have particularly significant implications for "transparency and public accountability" functions that the public complaints process is supposed to serve. Mr. Nobody respectfully submits that these are aggravating factors that significantly affect public trust in police and are likely to recur in future cases if not addressed by the Commission.

PART III: ORDER SOUGHT

68. The Appellant respectfully requests:

i. An oral hearing with respect to this request for leave to appeal;

ii. In the alternative, that leave to appeal the penalty decision of the Hearing Officer be granted; and

iii. Such further and other relief as counsel may advise and the Commission may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 6, 2016

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PART IV: AUTHORITIES

(1) Jurisprudence

1. *R v Andalib-Goortani*, 2013 ONCJ 822
2. *R v Andalib-Goortani*, 2015 ONSC 1403; additional reasons at 2015 ONSC 1445
3. *Grychtchenko and McCartney and Toronto Police Service*, 2015 ONCPC 20 (CanLII)
4. *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 (CanLII)
5. *Durham Regional Police Service v Durham Regional Police Association*, 2013 CanLII 70441 (ON LA)
6. *Blakely v Parker*, 2007 CanLII 33123 (Ont Div Ct)
7. *Groot v Peel Regional Police* (2002), 3 OPR 1558 (OCCPS)
8. *Venables v York Regional Police*, No 08-08 (OCCPS)
9. *R v Wigglesworth*, [1987] 2 SCR 541, 1987 CanLII 41 (SCC)
10. *Re Ottawa Police Force and Lalande*, 1986 CanLII 2511 (Ont DC)
11. *Robertson v Edmonton (City) Police Service (#8),* 2004 ABQB 242 (CanLII)
12. *Neely v Weller*, [1987] OJ No 1966 (Div Ct), aff'g (1985) 1 PLR 230 (Police Complaints Board) (QL)

(3) Statutory Provisions

Criminal Code, RSC 1985, c C-46, s 718

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Police Services Act, RSO 1990, c P. 15, s 87

Appeal to Commission

87. (1) A police officer or complainant, if any, may, within 30 days of receiving notice of the decision made after a hearing held under subsection 66 (3), 68 (5) or 76 (9) by the chief of police or under subsection 69 (8) or 77 (7) by the board, appeal the decision to the Commission by serving on the Commission a written notice stating the grounds on which the appeal is based. 2007, c. 5, s. 10.

Commission to hold hearing

(2) The Commission shall hold a hearing upon receiving a notice under subsection (1) from a police officer. 2007, c. 5, s. 10.

Same

(3) The Commission shall hold a hearing upon receiving a notice under subsection (1) from a complainant if the appeal is from the finding that misconduct or unsatisfactory work performance was not proved on clear and convincing evidence. 2007, c. 5, s. 10.

Commission may hold hearing

(4) The Commission may hold a hearing, if it considers it appropriate, upon receiving a notice under subsection (1) from a complainant with respect to an appeal other than an appeal described in subsection (3). 2007, c. 5, s. 10.

Appeal on the record

(5) A hearing held under this section shall be an appeal on the record, but the Commission may receive new or additional evidence as it considers just. 2007, c. 5, s. 10.

Solicitor General may be heard

(6) The Solicitor General is entitled to be heard, by counsel or otherwise, on the argument of the appeal. 2007, c. 5, s. 10.

Independent Police Review Director may be heard

(7) The Independent Police Review Director is entitled to be heard, by counsel or otherwise, on the argument of the appeal of a decision made in respect of a complaint made by a member of the public. 2007, c. 5, s. 10.

Powers of Commission

(8) After holding a hearing on an appeal, the Commission may,

(a) confirm, vary or revoke the decision being appealed;

(b) substitute its own decision for that of the chief of police or the board, as the case may be;

(c) in the case of an appeal from a decision of a chief of police, order a new hearing before the chief of police under subsection 66 (3), 68 (5) or 76 (9), as the case may be; or

(d) in the case of an appeal from a decision of a board, order a new hearing before the board under subsection 69 (8) or 77 (7), as the case may be. 2007, c. 5, s. 10.

ADAM NOBODY
COMPLAINANT

-and-

POLICE CONSTABLE BABAK ANDALIB-GOORTANI (#9859)
RESPONDENT

ONTARIO CIVILIAN POLICE COMMISSION

Proceedings commenced in **TORONTO**

BRIEF OF AUTHORITIES OF THE COMPLAINANT, ADAM NOBODY
(Request for Leave to Appeal)

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