CITATION: Nobody v. Ontario Civilian Police Commission, 2016 ONSC 7261
DIVISIONAL COURT FILE NO.: 106/16
DATE: 20161121

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

DAMBROT, NORDHEIMER and KING JJ.

BETWEEN:	
ADAM NOBODY Applicant	*Julian N. Falconer* and *Marc Gibson* for the Applicant
– and –	
ONTARIO CIVILIAN POLICE COMMISSION Respondent	*Benson Cowan* and *Melanie Goren*, for the Respondent Ontario Civilian Police Commission
	Lynette D'Souza, for the Respondent Independent Police Review Director
	Lawrence Gridin and *Deepa Negandhi* for the Respondents, Constables Michael Adams, David Donaldson, Geoff Fardell and Oliver Simpson
	HEARD at Toronto: November 21, 2016

DAMBROT J. (Orally)

[1] The applicant ("Nobody") was the complainant and a statutory party to a discipline hearing into the alleged misconduct of four police officers (the "constables") held pursuant to s. 68(5) of the *Police Services Act* (the "PSA"). The Hearing Officer dismissed the charges, and Nobody filed an appeal to the Ontario Civilian Police Commission (the "Commission"). The Commission dismissed his appeal without a hearing on the merits on the basis that he had filed

his appeal out of time and that the Commission did not have the jurisdiction to hear the appeal or to extend the time for filing the appeal. Nobody applies for judicial review of the Commission's decision.

BACKGROUND

[2] On June 26, 2010, Nobody was arrested at a G20 protest at Queen's Park in Toronto. The constables were all involved in his arrest. On December 21, 2010, Nobody made a formal complaint to the Office of the Independent Police Review Director ("OIPRD") against a number of police officers, including the constables.

[3] After the OIPRD completed its investigation of Nobody's complaint, the Director concluded that there were reasonable grounds to believe that the constables had committed acts that constituted misconduct within the meaning of s. 80 of the PSA and that the misconduct was serious in nature. The Director referred the matter to the chief of the Toronto Police Service (the "Chief") in accordance with s. 68(3) of the PSA. By virtue of s. 68(5), the Chief was obliged to hold a hearing into the matter unless he was of the view that the misconduct was not a serious nature.

[4] The Chief appointed a Hearing Officer to conduct a hearing into the misconduct charges arising from the Director's referral. The Hearing Officer conducted the hearing over several days. After reserving for a period of time, the Hearing Officer released his decision finding all of the constables not guilty of misconduct. This ruling was emailed to Nobody, and was deemed to have been received by him on June 2, 2015. He was entitled to appeal the decision of the Hearing Officer to the Commission within 30 days of receiving notice of the decision by serving written notice on the Commission stating the grounds on which the appeal was based. The last day for service was July 2, 2015. On July 2, 2015, at approximately 4:30 p.m., counsel for Nobody faxed a notice of appeal to the Commission. The Commission acknowledges that it received the notice by fax on that date and at that time.

[5] Although Nobody faxed his notice of appeal to the Commission within 30 days of actually receiving the decision, and the Commission received the notice within that same 30 day period, the constables took the position that service was out of time on the basis of s. 96(2) of the PSA. Section 96(2) deems a faxed notice to be received the day after it is sent, a day that was not within the 30 day time limit. The constables brought a motion in writing before the Commission for an order dismissing Nobody's appeal on this basis.

[6] On February 4, 2016, the Associate Chair of the Commission granted the constables' motion, ruling that service of Nobody's notice of appeal was untimely, and that the Commission had no power to extend the time for service. In reaching that conclusion, the Commission observed that its decision "may produce a result that appears to be unfair or even illogical in the circumstances of this matter".

[7] Nobody brings this application for judicial review to challenge that decision.

THE ISSUES

[8] The decision of the Commission turned entirely on the interpretation of three provisions of the PSA.: s. 87(1), s. 96(1) and s. 96(2). These provisions read:

> 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.
>
> 96. (1) Where a notice, referral, request or other document is required to be given to or served on a person or body under this Part, it may be given or served personally, by mail, by fax or other electronic transmission, or by some other method that allows proof of receipt.
>
> (2) A notice, referral, request or other document is deemed to be received by the person or body as follows, unless the person or body establishes that the person or body did not, acting in good faith, through absence, accident, illness or other cause beyond the person's or body's control, receive the notice as deemed:
>
> 1. In the case of mail, on the fifth day after the document is mailed.
>
> 2. In the case of fax or other electronic transmission, on the day after the document is sent or, if that day is a Saturday or a holiday, on the next day that is not a Saturday or a holiday.

[9] The issues on this application are:

1. Did the Commission err in its interpretation of sections 87 and 96 of the PSA?

2. What is the applicable standard of review?

[10] I will begin my analysis with the standard of review.

THE STANDARD OF REVIEW

[11] In *Ottawa Police Services v. Diafwila*, 2016 ONCA 627 the Court affirmed that the standard of review that applied to the decision of the Commission is reasonableness on questions of fact, mixed fact and law, and on those questions of law related to the interpretation of the Commission's home statute. This case obviously concerns the interpretation of the Commission's home statute. But that is not necessarily determinative of the standard of review.

[12] In *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, after affirming, at paragraph 22, that where an issue on judicial review involves the interpretation by an administrative body of its own statute the standard of review is presumed to be reasonableness, Karakatsanis J., for the majority of the Court identified four exceptions. She stated, at para. 24:

> The four categories of issues identified in *Dunsmuir* which call for correctness are constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or *vires*", and issues "regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required (*Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22).

[13] The commonplace provisions concerning the service of documents under review here have nothing to do with the specialized subject matter of the PSA scheme. Their interpretation quite clearly falls into the category of issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise." As a result, the standard of review is correctness.

DID THE COMMISSION ERR IN ITS INTERPRETATION OF SECTIONS 87 AND 96 OF THE PSA?

[14] The decision of the Commission is undoubtedly unfortunate. To deprive a citizen of his or her statutory right of appeal where he has actually served his notice of appeal within the statutory time limit on the basis of a deeming provision is, if not unfair, certainly undesirable. That is particularly so in a legislated police complaints system intended to be transparent and accessible, in order to promote public confidence in police and policing. However, in my view, in addition to being unfortunate the decision is wrong in law.

[15] The Commission in effect interpreted the word "deem" as creating an irrebuttable presumption that electronic service is effected the day after a document is sent. While the use of the word "deem" can give rise to an irrebuttable presumption, that is not always the case. Context matters. The purpose of the deeming provision is a crucial consideration.

[16] There is authority for the approach I take to the interpretation of this deeming provision. In *Gray v. Kerslake*, [1958] S.C.R. 3, Cartwright J., as he then was, stated:

> The question of the meaning to be given to the word "deemed" when used in a statute has been considered in many decisions, a number of which are collected and discussed in the judgments delivered in the Appellate Division in *Hickey v. Stalker* [53 O.L.R. 414, [1924] 1 D.L.R. 440], a case dealing with an Ontario statute different from the one with which we are concerned. As is pointed out by Meredith C.J.C.P., at p. 416, the word may mean "deemed conclusively" or "deemed until the contrary is proved".
>
> At pp. 418-419 Middleton J., as he then was, after referring to the treatment of the word in the dictionaries, continued:

> Far more important are two decisions of the Supreme Court of Nova Scotia. In *Regina v. Freeman* (1890), 22 N.S.R. 506, Townshend, J., speaking for the full Court, says (p. 513): "The word 'deemed' has acquired no technical or peculiar signification when used in legislation, but, like other words, must be interpreted with reference to the whole Act of which it forms a part ..."

[17] Although *Gray v. Kerslake* preceded the adoption of the modern principle of statutory interpretation by the Supreme Court in *Re Rizzo and Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27 by several decades, its approach is entirely consistent with it: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament." Here, the object of the deeming provision is of central importance.

[18] I turn then to the purpose of deeming provisions such as the one in s. 96(2). It seems to me that they have an obvious purpose. They resolve problems that can arise in ascertaining the time of service when it is effected electronically. Generally speaking, they protect the rights of persons who serve documents electronically from disputes about when the served document actually arrives at its destination, when it is seen, and whether or not it has gone missing as a result of an electronic mishap. Deeming provisions like this are intended to be of benefit to a party serving a document. They provide certainty to the serving party. They are not intended to be traps for the unwary.

[19] In this case, Nobody had a statutory right of appeal that is circumscribed only by a 30 day time limit. He filed his notice of appeal within the time limit, and we know, in this case, that it was physically received by Commission staff within that time period. The deeming provision cannot be employed as a weapon to deprive him of his right to appeal.

[20] Properly interpreted, s. 96(2) is not an absolute deeming provision. It creates a presumption that service takes place the day after a document is sent by fax or other electronic transmission, but that presumption is a rebuttable one. Where its effect is to take service outside the time limit for serving a notice of appeal, it can be rebutted, as in this case, by proof that actual service occurred within the time limit.

[21] As a result, in my view the Commission erred in law in its interpretation of sections 87 and 96 of the PSA and in dismissing Nobody's appeal.

DISPOSITION

[22] The application is allowed, the Commission's ruling is quashed, and the Commission is ordered to proceed to hear the Applicant's appeal. I would dispose of this application in the same manner even if the standard of review was reasonableness. In my view, the Commission's interpretation of sections 87 and 96 is unreasonable.

COSTS

[23] I have endorsed the Application Record of the Applicant as follows: "This application is allowed for oral reasons delivered in Court. Costs to the Applicant solely from the Respondent constables fixed at $15,000 all inclusive."

DAMBROT J.

I agree

NORDHEIMER J.

I agree

KING J.

Date of Reasons for Judgment: November 21, 2016

Date of Release: NOV 2 3 2016

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ORAL REASONS FOR JUDGMENT

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