

IN THE MATTER OF THE *POLICE ACT*, RSBC 1996, c.367 (as amended)

**AND IN THE MATTER OF THE PUBLIC HEARING
INTO THE COMPLAINT AGAINST CONSTABLES
REGINALD FORSTER AND RYAN D'ONOFRIO
OF THE VANCOUVER POLICE DEPARTMENT**

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ADJUDICATOR'S REASONS

Inquiry Counsel: Dana Urban, Q.C.

Counsel for Robert Parent :Phillip Rankin, Esq.

Counsel for Detlef Schroeder: Robert Campbell, Esq.

Respondents' Counsel: William Smart, Q.C. and Brock Martland, Esq.

Introduction

Robert Parent and Detlef Schroeder complain that Vancouver Police Constables Reginald Forster and Ryan D'Onofrio used unnecessary force against their persons in suppressing a riot at General Motors Place on November 7, 2002. Pursuant to s.60 of the *Police Act* the Police Complaint Commissioner ordered a public hearing. I conducted that hearing between May 10 and June 9, 2004 (12 days), and will now discuss the following:

1. The event
2. Crowd behaviour
3. Conduct of the police
4. The Robert Parent complaint
5. The Detlef Schroeder complaint
6. Statutory protections for police officers
7. Applicable principles
8. Submissions
9. Decision

1. The event

Approximately 7,500 tickets were sold for the November 7, 2002 performance by the rock group "Guns N' Roses". The scheduled starting time was 7:30 p.m., and although patrons are usually admitted to General Motors Place an hour before events begin, there was reason to believe that the group would not be honouring its Vancouver commitment and doors therefore remained locked until 7:40 p.m.,

when increasingly restive fans were simply told that the concert had been cancelled.

The cancellation announcement brought angry responses that quickly turned into destructive rampages at Gates 7 and 8 on the south side of General Motors Place and Gates 3 and 10 on the north side. Before order was finally restored the building sustained damage estimated at \$300,000.

An effective response to the unruly behaviour proved to be difficult, for two reasons.

First, General Motors Place is situated in a very confined space between the Dunsmuir Street viaduct on the north, Abbott Street on the east, the Georgia Street viaduct on the south, and Expo Boulevard on the west, with entrances located on three different levels. Because rioting began on opposite sides of the facility and on all three levels, knowing where to concentrate security manpower presented a formidable logistical challenge.

More important, when the disturbances began there were only nine police officers on site to assist unarmed Orca Bay security personnel.

2. Crowd behaviour

Orca Bay's ineffectual communications undoubtedly fuelled the crowd's anger. The public address system did not work at some gates, where Orca Bay employees had no option but to shout the cancellation announcement from doorways. As word spread down the lines of waiting fans the situation quickly deteriorated.

Led by the loudest louts at Gates 3, 7 and 8, the crowd began shouting and gesturing obscenely at the police, at Orca Bay security personnel, and at television crews. After the destruction of property began, within minutes every window and door at Gates 3, 7 and 8 had been broken. The vandals used steel crowd control barriers, concrete ashtray stands and metal newspaper vending boxes as battering rams, and loud cheers followed the smashing of each pane of plate glass.

The unarmed Orca Bay security force, supported by only one or two police officers at each entrance, wisely remained inside the building. Their visible presence just inside the broken doorways and windows, combined with the occasional bursts of police pepper spray, managed to keep the rioters at bay.

However, at the peak of the disturbance the noise of the crowd and the sound of breaking glass were frightening, and at one point fireworks were shot into the building through a smashed doorway. Essentially, the rioters had free reign until police reinforcements began arriving from other locations in the city.

While many people had wisely left the arena area when the rioting began, the nearby Sky Train entrance was closed, presumably to protect Sky Train facilities, and that potential escape route was therefore lost to a large crowd that eventually ended up, milling about and shouting, in two parking lots directly across Expo Boulevard.

The situation for the police and Orca Bay personnel became even more dangerous when rioters discovered rocks and concrete chunks in the parking lot and began hurling them across Expo Boulevard. At the same time bottles and other objects were being thrown from the Dunsmuir Street viaduct and the slim security force had to seek shelter. The possibility of the rioters regrouping and returning also became a concern.

4. Conduct of the police

Although television crews captured some of the rioters' behavior on the west side of the building, the most graphic footage of the dangers facing police and Orca Bay security personnel was taken at Gates 3 and 10 on the east side.

When police reinforcements arrived they made their way to Gate 3, where they joined the beleaguered defenders and immediately began venturing out on the patio, dispersing the crowd towards the stairs and down to the street level plaza.

The police used both their limited supply of pepper spray and their metal batons to get people moving, and although most people moved to avoid being sprayed or hit, some seemed bent on staying and responded to directions only after being either struck or threatened. Television accounts confirm that baton blows were directed only at noncompliant rioters' legs.

After the crowd was forced down the stairs adjacent to Gate 3, the rioters' attention shifted to the doors and windows at Gate 10. Before those were totally smashed the growing police and Orca Bay security force managed to clear people out of the lower plaza and across Expo Boulevard. It was then that Robert Parent reached street level and proceeded towards Gate 10.

I will discuss Mr. Parent's meeting with the police in a moment, but at this point I must observe that for the most part the police used measured but effective means to clear the crowd away from General Motors Place. While occasional stragglers continued to come down from Gate 3, most of the crowd ended up on the opposite side of Expo Boulevard. However, the danger from the rocks and concrete chunks being thrown from across Expo Boulevard then had to be addressed.

Even though there were fewer than 20 police officers then at the scene the commanding officer decided to clear the area under the Dunsmuir Street viaduct. Backed by Orca Bay security personnel the police charged across Expo

Boulevard and dispersed people on to the adjacent parking lot and away from the Dunsmuir Street viaduct. Unfortunately, the Schroeders were by then in the parking, and in a moment I will also discuss their involvement with the police. 333

Clearing the rock throwers out of the parking lot was an extremely hazardous maneuver. One officer narrowly escaped injury when a rock hit the bill of his hat as he was running across Expo Boulevard, and Constable D'Onofrio testified that he was struck in the chest by a chunk of concrete. However, the parking lot was soon cleared, and police officers and Orca Bay security personnel then returned to the east side of Expo Boulevard to await the arrival of more reinforcements.

Although they were dealing with a situation that was, at times, tumultuous, the police and Orca Bay security guards had restored relative calm less than forty minutes after the rioting began.

4. The Robert Parent complaint

Robert Parent, who is 42 years old, lived in downtown Vancouver on November 7, 2002. He walked to General Motors Place with a friend, arriving at Gate 8 well before concert time. However, when cancellation of the performance was announced Mr. Parent did not retrace his earlier route along Georgia Street but chose instead to follow the upper walkway to Gate 2 on the north side of the building.

Mr. Parent and his friend became separated at Gate 2, and after going down to the patio level at Gate 3, Mr. Parent turned and descended the adjacent stairway to the lower plaza adjacent to Expo Boulevard.

Inexplicably, Mr. Parent failed to see the extensive damage at Gate 3, which had been cleared of people only minutes before he reached the patio level. Nor did he hear crowd noises that should have alerted him to the presence of hundreds of people gathered in the nearby parking lots and in the vicinity of the Sky Train entrance.

Mr. Parent testified that when he reached ground level and headed towards Gate 10 a police officer directed him "across the street". He thought that he was being pointed in the direction he was already headed, and claims that the police officer did not touch him.

However, as he neared a group of security guards, Mr. Parent felt blows to his legs and back before he was pushed forward. He testified that he was shocked and confused, and television footage shows him holding up his hands inquiringly before he turned to his left and was suddenly knocked to the ground by Constable Forster. After being helped to his feet he was directed to leave the plaza area.

Constable Dennis Greig testified that he twice told Mr. Parent to move in the direction of the Sky Train station. When Mr. Parent kept walking toward Gate 10, the officer claims that he unsuccessfully attempted to bar his way, hitting him on his thigh with his baton. Constable Greig's testimony is supported by that of Orca Bay security guard, Daniel Parks, who observed the officer to twice pointing Mr. Parent towards Sky Train.

On the other hand, John Mellich, another Orca Bay security guard, testified that while he saw Constable Greig speak to Mr. Parent twice, Mr. Parent was directed towards Gate 10. He said that Mr. Parent seemed upset by this predicament and reluctantly continued in the direction of Expo Boulevard before he was knocked down.

If Mr. Parent was confused about the directions he was receiving he nevertheless quickened his pace, and the television footage clearly shows that while the Orca Bay security workers and another police officer were trying to intercept Mr. Parent, Constable Forster rushed up and knocked him to the ground.

Constable Forster testified that he knocked Mr. Parent to the ground because he wanted to maintain the police line, perceiving Robert Parent's quick approach as a threat. He said that he tried to hit Mr. Parent in his upper chest with the heels of his hands, but that his gloved right hand landed higher than intended, striking Mr. Parent in his mouth.

Although several witnesses to the incident testified that Mr. Parent was "cross-checked", Constable Forster denied grasping his metal baton in both hands and demonstrated how he held that weapon in his right hand while continuing to hold his empty pepper spray canister in the other. Frame by frame enhancement of television footage supports the officer's testimony.

Mr. Parent's sudden meeting with Constable Forster resulted in the loss of two front teeth, and he later required bone grafts and replacement of four more teeth at a cost of \$25,000. I was told that civil proceedings are pending.

5. The Detlef Schroeder complaint

Detlef Schroeder, who is 54 years old, lives in New Westminster. His daughter Johanna bought the tickets to the "Guns N' Roses" performance, and the Schroeders and a friend arrived at the Sky Train Stadium Station well in advance of the scheduled start.

When they heard that the performance was cancelled, the Schroeders decided to walk down town for a drink before returning home. Unfortunately, when they reached the east end of the Dunsmuir Street viaduct they changed their minds

and tried to take a short cut to the Sky Train station. After going down a steep dirt path at the end of the viaduct they walked on to the parking lot below, where they met people running in all directions.

Although Mr. Schroeder has no memory of what then happened, Johanna Schroeder testified that a police officer ordered them out of the area. However, Johanna Schroeder fell as she attempted to comply, and as she was getting to her feet she saw her father on the pavement, being struck by police officers wielding batons.

Matthew Ericson, a member of the Orca Bay security staff, followed the police as they charged across Expo Boulevard. He observed Mr. Schroeder in a “shoving match” with a woman police officer, and intervened by sweeping Mr. Schroeder’s feet out from under him. After concluding that Mr. Schroeder was not being combative he began to help him to his feet. However, before Mr. Schroeder was up, Constable D’Onofrio suddenly appeared and struck Mr. Schroeder four times, with maximum force.

Constable D’Onofrio testified that he struck Mr. Schroeder because he thought that it was necessary to assist Matthew Ericson in keeping Mr. Schroeder on the ground. The first three blows were to Mr. Schroeder’s upper arms, but a fourth blow landed on Mr. Schroeder’s back, fracturing one of his ribs.

Between Constable D’Onofrio’s third and fourth blows, Constable Forster rushed up and struck Mr. Schroeder on the back of his right thigh, also with maximum force. Constable Forster testified that he has no memory of striking Mr. Schroeder.

Constable D’Onofrio’s testimony was unusual. On the basis of his subsequent review of television coverage he now believes that he intended to gain Mr. Schroeder’s compliance so that Mr. Schroeder would leave the parking lot – even though he conceded that the blows to Mr. Schroeder’s arms were meant to temporarily disable him.

6. Statutory protection for police officers

The *Criminal Code*, R.S.C. 1985, Chap. C-46, contains the following protections for police officers in riot situations:

25. (1) Everyone who is required or authorized by law to do anything in the administration of enforcement of the law ... as a peace officer ... is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

32. (1) Every peace officer is justified in using or in ordering the use of as much force as the peace officer believes, in good faith and on reasonable grounds,

(a) is necessary to suppress a riot; and

(b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.

7. Applicable principles

I am grateful to Inquiry Counsel and Respondents' Counsel for their case law reviews, from which I have gleaned the following principles which I believe to be pertinent to this inquiry:

1. The essential question to be answered is whether in all of the circumstances the police officers abused their authority by intentionally or recklessly using unnecessary force on the persons of the complainants: Sections 10(b) and 17 of the *Code of Professional Conduct*.
2. The inquiry is a disciplinary matter that is regulatory, protective or corrective and primarily intended to maintain discipline, professional integrity and professional standards: *R. v. Wigglesworth* [1987] 2 S.C.R. 541
3. In deciding whether the complaints are proved on the civil standard of proof pursuant to s.61(6) of the *Police Act*, supra, "clear and convincing evidence" is required: *Ewachniuk v. Law Society of British Columbia*, 2003 BCCA 223.
4. Determination of the protection afforded to police officers in *Criminal Code* Sections 25(1) and 32(1) requires application of the test articulated in *Berntt v. Vancouver (City)*, 1999 BCCA 345 and applied in *Abbotsford (City) Police Department v British Columbia (Police Complaint Commissioner)*, 2001 BCCA 573. That test involves consideration of the following questions:
 - Did the police officer believe that the force he was about to use (and did use) was necessary to suppress the riot?
 - Did the police officer believe that the force he was about to use (and did use) was not excessive having regard to the danger to be apprehended from the continuance of the riot?
 - If the answer to the first question is "yes", did the police officer have reasonable grounds for that belief?
 - If the answer to the second question is "yes", did the police officer have reasonable grounds for that belief?

8. Submissions

Counsel for Mr. Parent and Mr. Schroeder emphasized the fact that neither man was a riot participant, and that nothing Mr. Parent or Mr. Schroeder did that evening justified the use of force against them.

On Robert Parent's behalf, Mr. Rankin submitted that "as riots go this was pretty small stuff". That aside, he further submitted that regardless of what conclusion I reach about the precise manner in which Mr. Parent was struck, there simply was no need to interrupt Mr. Parent's lone, empty handed and weaponless walk towards the small security force that stood between Mr. Parent and the police line that Constable Forster insists that he was trying to protect.

Mr. Rankin was particularly critical of the testimony of Constable Forster, alluding to his frequent use of euphemisms and listing the many "material inconsistencies" he perceives in the officer's account of his encounter with Mr. Parent. He was similarly critical of the testimony of Constable Greig, suggesting that the officer's testimony was not subjected to sufficient scrutiny because it was led by Inquiry Counsel who could not, of course, cross-examine his own witness.

Mr. Campbell submitted that the subjective reconstructed explanations of the police officers cannot be considered trustworthy. With respect to Mr. Schroeder, he emphasized that the weight of the evidence does not support Constable D'Onofrio's version of events and that Constable Forster simply cannot remember striking Mr. Schroeder. Moreover, beating Mr. Schroeder did nothing to assist in suppressing riotous activity, and was attributable to frustration, only. Mr. Urban, Inquiry Counsel, conceded that the police were justified in their feelings of fear, but he was skeptical about the emotional recounting of those feelings, emphasizing that police officers are trained to overcome such fears and emotions at such times and are hired to stand "in harm's way". He did, however, concede that police officers met that standard on November 7, 2002 – all but Constables Forster and D'Onofrio.

Alluding to the protection afforded to police officers by Criminal Code Sections 25(1) and 32(1) Mr. Urban emphasized that they must not use any more force than is necessary, that the force they use must be reasonable and that they have additional protection in that their conduct is to be assessed only on the basis of the test articulated in *Berntt*, supra.

Mr. Urban observed that there is a common thread to be observed here: no other police officer but Constable Forster found it necessary to strike anyone on the head; no other officer but Constable D'Onofrio found it necessary to strike anyone repeatedly while they were on the ground; no other officer but Constable D'Onofrio found it necessary to hit anyone in the ribs; and no other officers but Constables Forster and D'Onofrio found it necessary to deal with stragglers with sufficient force that bodily harm resulted.

Mr. Urban doubted the testimony of Constable Forster concerning the potential danger posed by Robert Parent. He also doubted the officer's testimony concerning the manner in which he claims to have held his baton when he intercepted Mr. Parent, emphasizing that the testimony of Orca Bay security personnel does not support Constable Forster's version of events.

Similarly, Mr. Urban emphasized that Mr. Schroeder posed no threat when Constable D'Onofrio, joined by Constable Forster, began striking him while he was on the ground. Given Constable D'Onofrio's size (6 feet, 2 inches and 240 pounds) Mr. Urban criticized the repeated baton strikes, particularly since Matthew Ericson, also a large man, had the situation under control as he tried to help Mr. Schroeder to his feet. The "reconstructed" version of the encounter is also incapable of internal justification, he submitted.

Mr. Smart began his submission by emphasizing that I cannot appropriately consider the likely intentions of either Mr. Parent or Mr. Schroeder before they became involved with Constables Parent and D'Onofrio: *Berntt*, supra, at Par. 27. That submission undoubtedly reflects my observation, made during the hearing, to the effect that Mr. Parent and Mr. Schroeder were simply in the wrong place at the wrong time.

Relying on both s. 25(1) and s. 32(1) of the Criminal Code, Mr. Smart further submitted that riots take on "an existence of their own" and that in considering a police officer's duty to suppress a riot I must first determine, subjectively, whether any force had to be used at all. I must then determine, objectively, whether the force used was reasonable.

In considering the duties of the police it must be recognized that weighing the pros and cons of acting is not usually possible: *Abbotsford*, supra, at Par. 21.

Emphasizing the need to react instantly to perceived danger, Mr. Smart submitted that Constables Forster and D'Onofrio had demonstrated courage and composure before the incidents involving Mr. Parent and Mr. Schroeder and, after assessing the situations they then faced, made split-second decisions to act. Those decisions were made on the basis of what they saw, not what others may have seen. They did what they were expected to do.

With particular reference to the incident involving Mr. Parent, Mr. Smart also submitted that this inquiry has dramatically demonstrated how unreliable eyewitness testimony can be. Countering suggestions that the injury to Mr. Parent resulted from a "cross-check", he emphasized that the enhanced video images of the Forster-Parent confrontation reveal the reliability of Constable Forster's testimony that he inadvertently struck Mr. Parent higher than he intended, with his gloved right hand.

Emphasizing that everyone in the vicinity was watching Mr. Parent come from behind the police line, Mr. Smart submitted that Constable Forster perceived Mr. Parent as a threat, and properly decided to stop him. It was not unreasonable to “hit him high” in order to accomplish that, and his conduct has to be assessed on the basis of that decision.

Similarly, Constable D’Onofrio saw Matthew Ericson involved in what he perceived to be a confrontation with Mr. Schroeder, and did what he thought was necessary to assist the Orca Bay security guard. In light of the fact that other skirmishes were taking place throughout the parking lot, Mr. Smart submitted that assuming control of the situation was a reasonable action.

9. Decision

The events of November 7, 2002 were both frightening and dangerous for the badly outnumbered police officers and security guards who were unexpectedly called upon to respond to the disappointed and unruly “Guns N’ Roses” fans, and I reject the suggestion that “as riots go this was pretty small stuff”.

Indeed, among the eleven police officers and security personnel who testified about their respective roles in quelling the riot there were several who found it emotionally draining even to recount memories of the event. Fears for their own safety and the safety of Orca Bay employees trapped in the arena during the height of the riot were very real when the threat of a breach of the building was at its peak.

I believe that it is also important to note that two police officers who had also been on duty during the 1994 Stanley Cup riot described the “Guns N’ Roses” disturbance as more dangerous.

With respect to the actions of Constable Forster, when he and his partner arrived at General Motors Place the situation outside was volatile, and they prudently entered the building through a door on the east side that was opened for them from inside. None of the additional reinforcements had yet arrived. Constable Forster was among the first of the slim supplementary force to venture out on to the patio at Gate 3, and he helped to push the crowd down to the street level plaza and across Expo Boulevard. Given both the ugliness he had just observed and his concern for maintaining security behind him, Constable Forster was justified in his belief that it was necessary to stop Mr. Parent’s quickening approach.

Notwithstanding the several descriptions of an alleged “cross-check”, the evidence of that manner of baton use is not clear and convincing. Constable Forster demonstrated how he grasped the baton with part of the handle protruding out from the heel of his hand, and it seems just as likely to me that it

was the butt end of the baton that struck Mr. Parent in the mouth as Constable Forster rushed towards him, both hands raised.

Unfortunately, the contact was higher than the officer had intended. However, since he believed that stopping Mr. Parent was a necessary step in suppressing the riot, and I am satisfied that he had reasonable grounds for that belief, I cannot conclude that Constable Forster used unnecessary force against Robert Parent.

With respect to the force used against Detlef Schroeder, I come to a different conclusion.

Earlier, I characterized Constable D'Onofrio's evidence as unusual. However, it might be more appropriate to suggest that the evidence of both officers is unusual, since Constable D'Onofrio now offers two explanations for striking Mr. Schroeder but Constable Forster can offer none.

Constable D'Onofrio's first explanation for striking Mr. Schroeder was to assist Matthew Ericson in keeping him on the ground. However, after reviewing television footage of the incident the officer came to believe that his intention was to gain Mr. Schroeder's compliance so that Mr. Schroeder would leave the parking lot.

Notwithstanding that Constable D'Onofrio seemed adamant in his cross-examination that he would not have done anything differently, and that he acted according to his training and what he then believed, I find that his belief that he needed to strike Detlef Schroeder simply was not reasonable.

In this regard, police officers engaged in suppressing riots are inevitably faced with unexpected dangers to which they must respond with little if any time to think of the alternatives, but their "force options theory", learned in training, does not go out the window at such times. It is necessary to know who is being hit, and why.

When, in the course of clearing the parking lot across Expo Boulevard, Constable D'Onofrio came upon Matthew Ericson helping Mr. Schroeder to his feet, it was not reasonable for Constable D'Onofrio to repeatedly strike Mr. Schroeder without at least determining whether Mr. Ericson, who weighed 225 pounds at the time, was somehow in danger as he dealt with Mr. Schroeder.

With respect to the involvement of Constable Forster, it is inconceivable to me that he would strike Mr. Schroeder simply because his brother officer was already striking him. Although Constable Forster has no memory of striking Mr. Schroeder, it is obvious that Constable D'Onofrio did not need his help.

For the above reasons I conclude as follows:

1. The allegations of disciplinary default of abuse of authority by using unnecessary force against the person of Robert Parent have not been proved against Constable Reginald Forster.
2. The allegations of disciplinary default of abuse of authority by using unnecessary force against the person of Detlef Schroeder have been proved against Constable Reginald Forster and Constable Ryan D'Onofrio.

I have jurisdiction pursuant to s. 61(6) of the *Police Act* to recommend any disciplinary or corrective measures that may be imposed by a discipline authority. However, I decline to do so, for two reasons.

First, Constables Forster and D'Onofrio have unblemished records of service. That is, of course, a significant mitigating factor.

Second, until their encounter with Detlef Schroeder, Constables Forster and D'Onofrio had conducted themselves appropriately, and their momentary lapse, occurring in extremely stressful circumstances, does not warrant discipline.

The Honourable Ross Colver, Adjudicator
June 22, 2004

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