

Thunder Bay Police Service Discipline Hearing

In the Matter of Ontario Regulation 268/10

Made Under the Police Services Act, R.S.O. 1990,

And Amendments thereto:

And

In The Matter Of

The Thunder Bay Police Service

And

Detective William Wowchuk # 487

Detective Constable Brad Bernst # 340

Detective Constable Ronald Popowich # 228

Charge: Unlawful or Unnecessary Exercise of Authority (Three Counts)

Discreditable Conduct (Three Counts)

Before:

**Superintendent (Retired) M.P.B. Elbers
Ontario Provincial Police Adjudicator**

Appearances:

**Counsel for the Prosecution: Mr. Bernd Richardt
Thunder Bay Police Service**

**Counsel for the Defense: Mr. Seth Weinstein
Thunder Bay Police Association**

Public Complainant: Mr. Richard Burns (self-represented)

Background:

The Thunder Bay police officers that are charged with these offences are members of the street drug enforcement unit of the Thunder Bay Police Service. The officers were conducting surveillance on a residence in the city of Thunder Bay on September 07, 2011. A decision was made by the surveillance team to follow a vehicle away from the residence under police surveillance. As a result of that decision a male person, Richard Burns was arrested at the front door of the Money Mart located on Memorial Ave. Thunder Bay, Ontario.

Evidence:

This Hearing commenced on Tuesday July 10, 2012 in Thunder Bay, Ontario and concluded on Friday July 13, 2012. Four (4) days of testimony was heard by this Tribunal. Six (6) witnesses testified at this Hearing with eleven (11) exhibits being tendered.

Mr. Richard Burns testified that he is a fifty (50) year old resident of Thunder Bay, Ontario. He was the public complainant on these charges against the officers. He testified that he was not employed but had some financial interest in a local business. On September 07, 2011 he testified that he visited some family members and attended the Thunder Bay Casino for approximately an hour before attending the Ontario Native Women's Association (ONWA) to drop off some pay stubs. The door was locked at the ONWA location so he departed this location to travel to the Money Mart on Memorial Ave. He testified he attended the parking lot of the Money Mart and exited his vehicle. He was walking towards the Money Mart and was in the process of opening the door when he was grabbed from behind by someone who identified themselves as police officers. He testified that he was grabbed around the neck and he enquired what was going on. He testified that one of the officers responded that he was under arrest for Possession of a Controlled Substance. Burns testified he was angry and advised the Tribunal that he had a Human Rights Tribunal decision of Abuse against the Thunder Bay Police Service and he saw this arrest as a reprisal for that decision. Burns testified he was handcuffed. He testified he was not searched and was unsure if his vehicle was searched. Burns enquired of the officers "Where are the drugs."

Burns testified he wanted to be transported to the Thunder Bay Police Service station where he stated there were surveillance cameras. He testified he was at the Money Mart with the police for approximately thirty (30) minutes and that it was a very distressing situation.

Burns testified that he requested the police officers for medical assistance. Burns testified he was extremely upset and police called for an ambulance. An ambulance arrived and he testified that had he gone with the ambulance the police were going to tow his car.

Burns testified that the residence of 545 Oliver Street was the residence of Ray Robinson and that the residence contained two (2) apartments "A" and "B". Robinson is the uncle of Burns wife. Burns testified that Rachel McGuire lived in apartment B. Burns testified he knew both families. Burns testified that he was not at the residence at 545 Oliver on September 07, 2011.

Burns testified that he sought medical attention a couple of days after the arrest. Exhibit #6 was tendered at the Tribunal. It is a medical report dated September 12, 2011. Burns testified that on September 07, 2011 when he was arrested he was brought to the ground by the officers and he injured himself. Burns testified that when he was arrested officers searched his wallet and he identified himself to them as Richard Burns.

Burns testified that the residence at 545 Oliver in Thunder Bay has two entrances, the front and rear door. He testified that no one uses the front door. Access is gained via the rear door which he confirmed with Exhibit #5 Photograph #12. He identified the door gaining access to Apartment "A" on the right and to gain Apartment "B" to the left.

Burns testified that subsequent to his arrest he filed a complaint.

In cross examination by Mr. Weinstein, Burns testified that he believed the officers breached the Human Rights Complaint Settlement that he had with Thunder Bay Police Service.

He testified that he was interviewed by two officers from the Office of the Independent Police Review Director in regards to his complaint. This interview took place on November 01, 2011 at the Valhalla Inn, Thunder Bay, Ontario. He testified that the police were alleging that the residence situated at 545 Oliver was a drug house. He testified Ray Robinson was known as a drug dealer. Robinson had a criminal record for drug trafficking. He testified that at the time of his arrest he had \$420.00 dollars but \$80.00 went missing from the arrest. After his arrest, Burns testified that he told the residents of 545 Oliver that the residence was under police surveillance. Burns testified on the day in question he was operating a Dodge Neon. Burns testified he was under arrest for possession of Oxycotin. After being forced to the ground he experienced chest pains and that is why the ambulance was called. He testified that the ambulance attendants gave him Aspirin. He testified that he was not in possession of drugs and also he had not attended 545 Oliver that day.

Burns testified that he had a bottle full of oxycodone in the glove compartment of his vehicle as he has a prescription for them due to his medical condition.

Burns testified that he was under arrest for approximately thirty (30) minutes and then he was released with no charges filed against him.

Mr. William Ford testified that he is an investigator with the Office of the Independent Review Director (OIPRD) and has been employed with them since September of 2010. He testified he investigates conduct complaints for the OIPRD as assigned and prior to working for OIPRD he was an Inspector with Halton Regional Police with thirty five (35) years policing experience.

Ford testified that he was assigned this complaint on September 19, 2011 and began his investigation. He testified he had discussions with Mr. Burns about the file and attended Thunder Bay and received statements from the Complainant, Burns and the three Subject Officers.

He testified that he took photographs of the area that was under surveillance by police at 545 Oliver and they were tendered as Exhibit #5, photographs one (1) to sixteen (16). Ford testified these were pictures taken in February of 2012 and depicts a winter scene of the location in question. Photographs seventeen (17) through twenty three (23) were taken in November of 2011 by Ford. Ford described the pictures to the Tribunal.

Ford testified that the statements taken of the complainant and the officers were all recorded and taken in proper context. Transcripts were completed of the audio statements.

Detective Constable Tyler Pucci # 11386 is a nine year member with the Ontario Provincial Police presently attached to the Drug Enforcement Section. He testified that he is assigned with the Thunder Bay Street team. He testified that the unit consists of a four member team. He testified that he began an investigation on the residence of Ray Robinson on August 09, 2011. He testified he was the lead investigator on the file. He testified how they obtained the information on the residence through informant information and they were conducting surveillance on the residence. He testified that Robinson had a criminal record for drug trafficking. Robinson was also known to members of the team. Pucci testified that Robinson was dealing in Oxycontin in 80 mg. quantities. One informant had purchased from Robinson fifty (50) times in the last six months.

Pucci testified that the residence is surrounded by trees and it was difficult for surveillance to obtain a direct visual on the residence. He testified if you parked in the alley way you would get compromised. He testified that the tactical team from Thunder Bay Police service indicated they were unable to keep a visual without the possibility of being compromised.

Pucci testified he conducted surveillance on his own on September 06, 2011. He testified that the modus operandi was that a vehicle would attend at stay for less than five minutes. Pucci testified he conducted surveillance for one hour and forty five minutes and observed three vehicles go down the laneway towards the Robinson residence. Pucci testified he followed two vehicles away from the area. He testified the first vehicle drove to the A&W parking lot.

The males exited the vehicle and walked to Mario's Bowl and entered the washroom. Pucci returned to the surveillance location. The second vehicle he followed to Hillcrest Park and park in the parking lot. The vehicle had two females seated in the front and one male seated in the rear of the vehicle. The male party was leaned forward in the seat which Pucci testified was consistent with someone sniffing or snorting a pill. He terminated surveillance at 1500 hours after commencing at 1300 hours.

Pucci testified that he attended the Street office on September 07, 2011 and briefed the members on his surveillance the day prior. He requested if the three remaining team members conduct surveillance on that day to ascertain the activity at the Robinson location.

Under cross examination Pucci was unable to advise as to how many people lived at the residence or definitively state as to whether there was two apartments at 545 Oliver. He testified that through the Niche reporting system it indicated that Robinson resided at that location. Pucci testified that there was not any independent investigation conducted to ascertain who lived at the residence. He testified it was not an easy location to keep surveillance. Pucci testified he did not see Robinson on September 06, 2011 while conducting surveillance. He testified if he had backup on the 6th he would have arrested the male in Hillcrest Park as he believed he had enough grounds.

Detective Constable Ronald Popowich # 228 is a thirty year member of the Thunder Bay Police Service presently attached the street level drug enforcement team. He testified that he has made numerous arrests in his career. He testified that on September 07, 2011 Pucci briefed the team member son his surveillance on the day prior on the Robinson residence. Pucci requested the team assist him as he was preparing an information to obtain a search warrant for the residence. He wished to obtain further information to ascertain if Robinson was active on the 7th. Pucci indicated to the team members if Robinson was active they could affect an arrest. Popowich testified that an arrest was not at any oost, they were aware that they required reasonable and probable grounds to make an arrest. He testified that simply having a hunch or a suspicion was not appropriate.

The three members conducted surveillance on the alleyway leading to Robinson's driveway as well as many other driveways that exited to this alleyway. They rotated positions during their brief stint. Popowich testifies to three vehicles going down laneway towards the target residence however he cannot positively place them at the Robinson entrance. Popowich advises that one can only observe vehicles going to and from area not exiting the vehicle and walking up the Robinson laneway. Popowich then leaves the eye position on Dalton and proceeds to the supermarket area on Oliver. Detective Constable Bernst takes the eye position on Dalton.

Bernst radios that a Dodge Neon has entered the alleyway travelling towards 545 Oliver. Detective Wowchuk takes a drive by the alleyway and radios he believes it is parked at the end of 545 Oliver.

A brief discussion was conducted with the team members on the police radio. The decision was made that the number of vehicular traffic was similar to September 6, 2011 and this indicated that Robinson was trafficking drugs and they decided to affect an arrest. The Dodge Neon stayed for approximately four minutes. It was being operated by a white male subject. No information was known about the vehicle or the driver by the team members at this point.

Richard Burns was not known to attend the residence nor did the team members know that Burns was operating this vehicle. Popowich testified he was parked on Ray Blvd. when the collective decision was made to affect an arrest. He testified that Bernst called the vehicle away north on Dalton and east on Oliver. He testified that Wowchuk was behind the Neon on Oliver followed by Bernst. Popowich could not proceed as he was caught with a red light. He testified the vehicle was followed to the Money Mart and upon his arrival Burns was already placed under arrest and in handcuffs. He testified that Burns was belligerent to the officers. He testified that Burns threw himself to the ground and he called an ambulance. He testified that Burns wanted to speak with Deputy Hay and was not showing any signs of distress. Popowich testified he did not search Burns. He testified that he removed the handcuffs from Burns. He testified that no drugs were found on Burns. He testified that the attitude of Burns suggested to him that he was clean.

He testified that Burns was released unconditionally and attended the ambulance to see the paramedics. Popowich testifies that is when he left the Money Mart location. He testified that the total encounter with Burns was twenty (20) minutes. He testified that a search warrant was conducted on the Robinson residence several weeks later with negative results.

In cross examination Mr. Richardt focused on the arrest of Burns. Popowich testified that in order to affect an arrest you must have reasonable and probable grounds and need to believe that an offence was committed. Popowich testified he believed 545 Oliver to be a single dwelling unit. He was confident that the source information was correct in regards to 545 Oliver. He testified that Burns was not a target and he was unaware that Burns attends that location. He testified that the blue van that went down the alley way was there to purchase drugs. He testified that the team had no evidence that Burns attended the Robinson residence or that anyone from the residence attended to the Burns vehicle. He testified that when Burns was arrested he had \$80.00 separate in his pocket.

Detective William Wowchuk # 487 is a twenty three (23) member of the Thunder Bay Police Service presently attached as the officer in charge of the street team drug enforcement unit. Wowchuk testified that on September 07, 2011 he formed part of the surveillance team which was observing the residence of 545 Oliver, the residence of Ray Robinson for drug trafficking. He testified that on July 26, 2011 an informant identified the residence of ray Robinson at 545A Oliver as a residence that Oxycotin was being sold. The informant utilized the rear door when attending the residence of Robinson. The cost was \$1.00 per milligram sold.

On August 09 and 31 two separate informants purchased pills from the Robinson residence. Wowchuk was aware that Pucci was working on a search warrant for the residence. Wowchuk was aware of the previous day's surveillance where Pucci observed five vehicles to proceed down the alleyway. Pucci wanted members to observe on this date to ascertain if Robinson was still active.

Wowchuk testified they began surveillance as a three member team at 1100 hours. He testified that he was aware that in making an arrest, it required reasonable and probable grounds which are not mere suspicion. A hunch was not good enough. Wowchuk did an initial recognizance on foot to see if they could get a better observation point with negative results. He observed a green Camaro in the driveway which he knew belonged to Robinson. Wowchuk observed a small blue vehicle down the alleyway. He observed the Neon and then a grey pickup park directly behind the Neon in the area of the Robinson residence. He did not see anyone exit the vehicles. A discussion was held with team members and he concurred with the decision to follow next vehicle out.

He testified he followed neon east on Oliver to High and then merge to Memorial. They followed vehicle to the parking lot of the Money Mart. He exited his vehicle with Bernst and had his badge out. He testified that Burns turned around and he was informed that he was under arrest on reasonable and probable grounds that he was in possession of a controlled substance. He testified that Burns was handcuffed. Burns told them about the Human Rights Hearing Settlement and agreement. Wowchuk testified that he told Burns that he departed from a suspected drug house and he informed Bernst read him his rights to Counsel. He testified that Burns fell onto the parking barrier. He testified that Burns asked for an ambulance. He checked the wallet of Burns and he testified that Burns wished to go to the station and speak with Deputy Hay. Wowchuk observed a separate \$80.00 in his pants pocket. A further searched was completed with negative result. They removed his handcuffs and released him. A search warrant was conducted at the Robinson residence at a later date with negative results.

Under cross examination Wowchuk testified that they never contemplated a stop of a person or vehicle for investigative detention. Wowchuk was of the belief that they had sufficient grounds to make an arrest upon the surveillance that was conducted on September 06 and 07, 2011. Wowchuk was advised by Counsel that Robinson was not at his residence when the surveillance was conducted on the 7th of September. He replied "Sometimes we are wrong". Wowchuk testified that Robinson was the primary target and due to the vehicles attending the alleyway, they formed a belief that they had reasonable and probable grounds to make an arrest.

Detective Constable Brad Bernst # 340 is an eight year member of the Thunder Bay Police Service presently attached to the street team drug enforcement unit. On September 06, 011 he attended work in plain clothes and the team members had discussions about Ray Robinson who lived at 545A Oliver Road. He was aware that through source information received that Robinson was dealing in "Oxys." The rear door was used to gain access to the residence when purchasing drugs. He testified that he had met with a confidential informant and that person had pointed out 545 Oliver road as a drug house. Detective Constable Pucci he testified had similar information. He testified that Pucci had conducted surveillance on September 06, 2011 and had observed five vehicles attend the location at 545 Oliver Road. Bernst was also aware that Robinson had been charged and convicted in the past for drug offences.

On September 07, 2011, Constable Pucci requested the assistance of the team to conduct surveillance on the residence to ascertain if there was still activity at that location, as he was preparing a CDSA warrant to search the premises.

Bernst testified he attempted to get an "eye" on the residence from the Rec Center however that location was not suitable. He testified that he followed a blue van which left the vicinity of 545 Oliver to an apartment complex in the city. Bernst re-attended 545 Oliver and he assumed the position as the "eye." He observed a vehicle proceed down the alleyway. Detective Wowchuk did a drive by past the alleyway and confirmed vehicle parked in the vicinity. He could not say 100% that it was parked at 545 Oliver to the rear of that residence.

Bernst testified it was agreed upon by the members to "grab" the first vehicle out as they believed that Robinson was open for business. Bernst testifies that a Dodge Neon is the first vehicle away followed by a Ford Explorer. Bernst testified he obtained the license plate information from vehicle and followed it to the Money Mart. He testified that he was going to arrest the driver.

Bernst testified that when Mr. Burns was opening the front door of the Money Mart, Bernst gained control of Burns left arm by the bicep. He testified that Burns was distraught and asked why he was under arrest. Bernst testified he told Burns he was under arrest for possession of a controlled substance. Bernst testified he then attempted to read the Rights to Counsel to Burns', however he testified, that Burns was speaking over him as he was reading Burns his rights. Bernst testified that Burns was handcuffed and searched incident to arrest. He testified at this point they were located in front of Burns Neon and he removed from Burns right pocket a wallet and \$80.00 cash from the left pocket. He placed the items on the roof of the Neon. He testified it was windy day. The money was returned to Burns and the search did not produce any drugs. He testified the duration of the search was approximately three (3) minutes and then his handcuffs were removed. Burns was released unconditionally. An ambulance was dispatched to the Money Mart location. Constable Bernst testified that Richard Burns was in custody for approximately ten (10) minutes and he was advised at the time the arrest was for possession of "oxys."

Under cross examination Bernst maintained that the surveillance team believed due to the informant information and the vehicular traffic on September 6 and 7 that they had enough grounds to make an arrest. Bernst was unaware that Robinson was not at the residence on the 7th during their surveillance. Informant information was learned that he lived there with his two children who also deal from the residence.

Findings:

Detective William Wowchuk # 487, Detective Constable Ronald Popowich # 228 and Detective Constable Brad Bernst # 340 is before the Tribunal charged with one count each of Unlawful or Unnecessary Exercise of Authority and one count each of Disorderly Conduct .

Submissions were heard on day four of the Hearing on the merits of the case by Mr. Richardt, representing the Thunder Bay Police Service and Mr. Weinstein, representing Detective Wowchuk, Detective Constable Popowich and Detective Constable Bernst. The Hearing generated three days of evidence and the fourth day was utilized for submissions by Counsel. Exhibit # 11, a case book of authorities containing six (6) cases was tendered at the Tribunal by the Prosecutor, Mr. Richardt. Exhibit #10, a case book of authorities containing nine (9) cases was tendered by Defense Counsel, Mr. Weinstein.

I have considered the cases supplied to me by Counsel. I have read the cases supplied to the Tribunal and while not always on point, have found them to be instructive in my deliberation.

At page 6-138, Legal Aspects of Policing, the discipline offence of abuse of authority is referred to as “unlawful or unnecessary exercise of authority” in some jurisdictions. It consists principally of two issues: unlawful or unnecessary arrest, and unnecessary force.

The Code of Conduct provisions governing unlawful or unnecessary exercise of authority governs situations where a police officer without good and sufficient cause makes an unlawful or unnecessary arrest or uses any unnecessary force against a prisoner or other person contacted in the execution of duty.

In Ontario, Legal Aspects of Policing (pages 6-14) provides that a police officer commits an offence against discipline by acting “in a disorderly manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force”.

The most recent application of the test for discreditable conduct in Ontario confirms that the test is “primarily an objective one” and that the conduct must be measured against the “reasonable expectations of the community”.

The Ontario Civilian Commission on Police Services has articulated the following approach regarding the meaning of “likely” to bring discredit upon the reputation of the police force:

The measure used to determine whether conduct has been discreditable is the extent of the potential damage to the reputation and image of the service should the action become public knowledge.

I find from the testimony of the principal parties involved in this allegation that surveillance was conducted by members of the Thunder Bay street drug enforcement unit on September 07, 2011. The surveillance team was comprised of Wowchuk, Popowich and Bernst who were each operating their own police vehicle.

The location to be under surveillance was the residence of Ray Robinson, a known and convicted drug trafficker, situated at 545 Oliver Road in Thunder Bay, Ontario. We are aware that three officers Wowchuk, Bernst and Detective Constable Pucci met with two separate informants who attended and purchased oxycotin from the rear door of Robinson's residence in July and most recently August 31, 2011. One of the informants indicated he had been there on a least fifty (50) occasions to purchase drugs. Pucci was the lead investigator on this file and he was gathering information to get a search warrant on the residence.

Pucci had conducted surveillance by himself on September 06, 2011 where he observed five vehicles proceed down the alleyway towards the rear of the residence at 545 Oliver. Pucci could not state conclusively where the occupants of the vehicle exited and to what residence they attended. He assumed it was the Robinson residence. The five vehicles attended over a period of one hour and forty five minutes at which time he followed two vehicles away from that alley way. The surveillance commenced at 1300 hours. Pucci testified that one car parked at the A&W and the two parties walked to the washroom of the bar they attended. He assumed that they were snorting or sniffing. He did not enter the washroom. The second vehicle he followed was occupied by three parties. Two females sat in the front seat and one lone male occupant in the rear seat. They travelled to the parking lot of Hillcrest Park. When Pucci attended he testified that the male party was crouched over in the seat snorting or sniffing. Again it is an assumption of Pucci, as he did not peer inside the vehicle. This information was relayed to the members of the street team by Pucci on September 07, 2011.

At this point there was agreement to conduct further surveillance by the team members to assist Pucci. Team members take up surveillance of the residence at 1100 hours. As they arrived for the surveillance, a copper coloured vehicle was seen leaving the alleyway, origin of that vehicle was unknown. At 1128 hours, approximately half an hour later, a blue van was in and out of the laneway and followed to 75 Academy. It was also unknown as to where the vehicle and occupants attended when they were at the alleyway. At 1151 hours a red vehicle went into the alleyway and again I do not believe we have a positive destination of the vehicle or the occupant(s) destination as there was no evidence as to where it went. At 1208 hours a brown vehicle went into the alleyway. Again, I don't believe there was evidence as to where it went. At this point in time we have some traffic but not particularly suspicious traffic. At 1232 hours a blue Dodge Neon is seen entering into the laneway and Wowchuk confirms that it's parked on the lane across from the 545 Oliver Road driveway and he's unable to see an occupant in the vehicle.

At 1233 hours, a green Ford comes into the alleyway and Detective Wowchuk confirms that it's parked tight behind the Neon. There's a decision made within the next minute or two by Detective Wowchuk, discussed with the other team members, who all agree with him that they will arrest the driver of the first vehicle that comes out. The discussion did not last long. In seconds the decision was made.

The Dodge Neon departs the alleyway operated as we know now, by Richard Burns and is followed to the Money Mart on Memorial by Wowchuk and Bernst. We know that Popowich was held up by a traffic light and does not attend the Money Mart until after the arrest is made. Bernst and Wowchuk exit their vehicles, badges in hand at the Money Mart after Burns locates a parking spot. Burns is opening the front door of the Money Mart when he is arrested by Bernst who advises him he is under arrest for possession of a controlled substance. His Rights to Counsel is read to him and he is handcuffed and searched. No drugs were found on Burns. Burns did request an ambulance for medical assistance and the officers called in the request to Communications. The entire incident at Money Mart lasted approximately ten minutes before Burns was released unconditionally.

Mr. Burns in his testimony at this Tribunal was deceitful. He testified that he was not in attendance at the residence of 545 Oliver on September 07, 2011. Surveillance followed him away from the alleyway to the Money Mart. We heard some rambling in his testimony as to where he was and maybe some of it was correct, but the portion of not attending 545 Oliver I do not believe. In fact in his testimony he identified the occupants of the residence and identified the two apartments as A and B which I do not believe the officers were aware that it was not a single dwelling residence. There was no need to be deceitful in this situation. It might be, if you are going to stick with the story that the arrest was retribution for the Human Rights Settlement which I believe is a totally ludicrous statement to make. The officers were conducting surveillance and Burns became the subject of the arrest. He was the first vehicle out after the decision was made. It is unfortunate the complaint to OIPRD was worded as it was. Burns in his testimony and his behaviour at the Tribunal, did not assist in anyway with establishing his credibility.

The Burns arrest at the Money Mart is the focal issue to deal with on this occurrence. Counsel have both discussed and also contained in their Brief of Authorities the Storrey case. It offers guidance to the trier of fact. You must understand that the belief for an arrest has to be subjectively held. That is, you need to be convinced that the officer honestly held the belief that they say they held on the day that they made the arrest. Secondly, that belief has to be objectively reasonable and that means, is whether a reasonable person placed in the feet of the officer, would come to the same belief.

A reasonable person standing in the shoes of the police officer must have believed that reasonable and probable grounds existed to make the arrest.

Mr. Weinstein commented on his other cases noted in his Book of Authorities. Hill, Hanson, Collis were all cases that police officers saw with their own eyes transaction or believed transactions as a result of their experience. In all the cases presented they were watching at the time. The difficulty I have with this case and what makes it different from the cases presented is the presumption or assumptions that were made by the officers. There was no actual eyeball of anything on this particular surveillance. The officers were not aware that the house was not a single dwelling.

The officers on the 7th observed one of the suspects' vehicle parked in the alleyway. The officers' were not totally sure on the 6th or the 7th of September that Robinson was present in his residence. The officers on surveillance could not put one vehicle at 545 Oliver Road other than in the vicinity of the laneway. The officers were unable to place one occupant from any of the vehicles into the laneway or to the house situated at 545 Oliver Road. The officers were unable to place any occupant coming from the house to any vehicle that attended the laneway.

Informant information was received that vehicles were lined up. On a total of 3.5 hours of total surveillance over two days only on one occasion there were two vehicles in a row. That statement would only be true if we knew that they were parked at the rear of 545 Oliver Road. Again that would be an assumption. Many residences have driveways that back onto the alleyway where their homes face onto Oliver road. All driveways are at the rear of these residences due to the heavy traffic flow on Oliver Road. The vehicles could have attended anyone of these residences. I also find that not one vehicle that was surveilled leaving the alleyway had a CPIC check to ascertain the owner or a subsequent CPIC and CNI check to determine if any of the occupants or owners of the vehicles had drug records. This I believe would have been helpful in the decision making process that the officers conducted on the 7th of September.

I truly believe that the street team was doing a tough job in an area that could not be easily surveilled. That makes the job more difficult and I believe you must be more cautious. The officers in this incident made a rushed decision. They had only been there one and one half hours. I did not receive any testimony that the surveillance would have to be terminated at any particular time. Five vehicles at best attended the alley way with absolutely no knowledge as to where the occupants attended; only mere suspicion. All the team members agreed to arrest the next driver of the vehicle. A discussion that took only seconds to arrive at that particular conclusion. No drug transactions were observed by these officers.

Richard Burns was arrested. I believe that the arrest was unnecessary considering the facts that the members had at the time of the arrest. It is my belief that a reasonable person standing in the shoes of these officers on September 07, 2011 would arrive at the same conclusion that I have.

When an arrest is unnecessary and an individual's right to freedom has been removed, however briefly, that matter is serious. The arrest of Richard Burns was unnecessary. His personal freedom was removed. He was assaulted and handcuffed. His injuries were minor, but unnecessary. He could not leave voluntarily until he was released unconditionally by Detective Wowchuk and Detective Constable Bernst. This is a significant action against him by the Thunder Bay Police Service.

Detective Constable Popowich was not present for the arrest or the search of Burns.

Mr. Weinstein has argued that the Thunder Bay officers' intentions were honourable and that each officer has made hundreds of arrests. I believe this to be the case as well.

I also believe and find that the officers rushed their decision and in no way had anything close to reasonable and probable grounds to arrest Burns with the observations that were made on the 7th of September. Investigative detention may have been the alternative solution.

The arrest for Possession of a Controlled Substance was I believe a "wish and a prayer" by the officers considering what they observed and what they clearly did not have.

The accepted quality of the evidence that is required to be met in the prosecution of matters such as these is *clear and convincing evidence*, which has been described as:

"weighty, cogent and reliable evidence upon which a trier of fact, acting with care and caution, can come to a reasonable conclusion that the officer is guilty of misconduct."

It is my finding that the prosecution has met this standard in the Tribunal of these allegations.

Decision One:

Based on all the evidence brought before me in this Hearing, it is the decision of this Tribunal that Detective Wowchuk # 487 and Detective Constable Bernst # 340 are GUILTY of Unlawful or Unnecessary Exercise of Authority as stated in the allegation contained in the Notice of Hearing.

Based on all the evidence brought before in this Hearing, it is the decision of this Tribunal that Detective Constable Ronald Popowich # 228 is NOT GUILTY of Unlawful or Unnecessary Exercise of Authority as stated in the allegation contained in the Notice of Hearing.

Decision Count Two:


In relation to Count Two, Discreditable Conduct, the particulars of the charge are the same as contained in Count One, Unlawful or Unnecessary Exercise of Authority.

In keeping with the "fairness approach" to charges under the Police Services Act I find that a Police Service cannot and must not lay additional counts against a member(s) for the purpose of utilizing an "umbrella" to reach a desired guilty decision.

All the particulars of the count mentioned in the charge above are exact as the Unlawful or Unnecessary Exercise of Authority and based on the same scenario. A finding of Guilt was found on Count One which would include the particulars of Count Two.

Therefore, a finding of Guilt has been rendered and no further decision is required.

The Discreditable Conduct charges will be dismissed against Detective Wowchuk #487, Detective Constable Ronald Popowich # 228 and Detective Constable Bernst #340.


M.P.B. Elbers, Superintendent
(Retired)

September 12, 2012
Date