ONTARIO CIVILIAN POLICE COMMISSION

IN THE MATTER OF THE POLICE SERVICES

BETWEEN:

SERGEANT WILLIAM WOWCHUK AND DETECTIVE CONSTABLE BRAD BERNST

APPELLANTS

-and-

THUNDER BAY POLICE SERVICE

RESPONDENT

DECISION

Panel:	Roy B. Conacher, Q.C, Member Jacqueline Castel, Member
Hearing Date:	October 2, 2013
Hearing Location:	Toronto, Ontario

Ontario Civilian Police Commission
250 Dundas Street West, Suite 605
Toronto, ON M7A 2T3
Tel: 416-314-3004
Fax: 416-314-0198
Website: www.ocpc.ca

Appearances

Seth Weinstein, Counsel for the Appellants
Bernd Richardt, Counsel for the Respondent
Miriam Saksznajder, Counsel for the Office of the Independent Police Review Director
Thomas Bell, Counsel, Ontario Civilian Police Commission

Introduction

1. On June 10, 2012, Sergeant William Wowchuk and Detective Constable Brad Bernst (the "Appellants", the "Officers" or "Sgt. Wowchuk" and "D/Const. Bernst") pleaded not guilty to two counts of alleged misconduct:

    - 1 count of unlawful or unnecessary exercise of authority, by making an unlawful or unnecessary arrest without good and sufficient cause, contrary to s. 2(1)(g)(i) of the Code of Conduct; and

    - 1 count of discreditable conduct contrary to s. 2(1)(a)(x) of the Code of Conduct,

    The Code of Conduct is set out as a Schedule to Ontario Regulation 268/10 (the "Code of Conduct") and referred to in s. 80(1)(a) of the *Police Services Act*, R.S.O. 1990, c.P.15, as amended (the "Act").

2. The Hearing took place over four consecutive days, commencing on July 10, 2012, before Supt. (Retired) M.P.B. Elbers (the "Hearing Officer").

3. In his decision dated September 12, 2012, the Hearing Officer found the Appellants guilty of the first count, without good and sufficient cause, making an unlawful or unnecessary arrest, and not guilty of the second count of discreditable conduct.

4. The Appellants are appealing the finding of misconduct.

5. The Public Complainant, Mr. Richard Burns, did not participate in the appeal.

Decision

6. The appeal is dismissed for reasons which follow.

Preliminary Matters

7. Mr. Bell filed a brief containing Commission correspondence with the Public Complainant which the Panel entered as Exhibit 1 with the consent of the parties. Mr. Burns was not present at the appeal.

8. Mr. Bell submitted that the correspondence establishes five main things. First, in response to Mr. Burns advising that he has a disability and could not attend an appeal in Toronto, the Commission asked Mr. Burns to provide medical information identifying any limitations or restrictions in relation to Commission hearings, so that the Commission could develop an accommodation plan, if necessary.

9. Second, the correspondence establishes that the Commission provided Mr. Burns with information regarding the disciplinary appeal process and recommended he obtain legal assistance in preparing and advocating his case before the Commission.

10. Third, in response to Mr. Burns' email indicating he would like to introduce information not introduced at the hearing, the correspondence establishes that the Commission explained the process should Mr. Burns wish to bring a motion to adduce new or additional evidence on this appeal.

11. Fourth, the correspondence establishes that the Commission informed Mr. Burns that all disciplinary appeals take place in Toronto, and that Mr. Burns was informed of the date and location of the appeal as early as June 2013.

12. Finally, Mr. Bell advised that the Commission has not received any medical information from Mr. Burns, nor has Mr. Burns filed a factum in respect of the appeal. Additionally, he has not served and filed a motion requesting to change the venue or adduce new evidence.

13. Ms. Saksznajder informed the Panel that she provided all parties, including Mr. Burns, with the case of Allen v. Alberta (Law Enforcement Review Board) on October 2, 2013, and Mr. Burns told her he would require more time to consider the case.

14. The Panel decided to proceed in the absence of Mr. Burns. The Panel found that the Commission supplied Mr. Burns with the necessary information and gave him sufficient time to participate in the appeal. Despite being interested in the outcome of the appeal, it did not appear to the Panel as though Mr. Burns was prepared to become actively involved, since he did not file any of the required information or documents.

Facts

15. The facts in this case are not in dispute.

16. Sgt. Wowchuk has been a police officer for 23 years and has been the supervisor of the Thunder Bay Street Drug Enforcement Unit since January 2012. Det. Const. Bernst has been a police officer for approximately eight and a half years and has been a member of the Thunder Bay Street Drug Enforcement Unit since January 2010.

Prior to this incident, neither of the Appellants has been the subject of a police disciplinary hearing.

17. Information obtained in July and August 2011, from two confidential informants, revealed that "RR" was selling oxycontin from the back door of his residence. RR was a known drug dealer. The informants told the Officers that cars would drive through the laneway that led to the rear of RR's residence, where the occupants of the cars would buy oxycontin. They would then exit the laneway shortly after making the purchase.

18. As a result of this information, the Ontario Provincial Police ("OPP") Drug Enforcement Section and Thunder Bay Police Service ("TBPS") conducted surveillance on RR's residence on September 6, and 7, 2011.

19. OPP D/Const. Pucci, the lead investigator, confirmed RR's address on the NICHE reporting system. He could not confirm how many others resided at that address or whether there was more than one residence within the building.

20. D/Const. Pucci conducted surveillance on RR's residence for approximately 1 hour and 45 minutes on September 6, 2011. During this time, he observed five vehicles attend at the laneway leading to the rear of RR's residence and depart within a short time of arriving. He could not determine where the occupants of the vehicles had gone because the laneway led to several residences. He also could not determine whether RR was home when the vehicles attended. In addition, he did not observe any drug transactions taking place.

21. D/Const. Pucci followed two of the vehicles that exited the laneway and believed the actions of their occupants were consistent with persons having just purchased oxycontin. He believed he had sufficient grounds to

arrest the drivers for being in possession of a controlled substance, but he chose not to because he did not have any back up officers.

22. On September 7, 2011, D/Const. Pucci briefed the Appellants and D/Const. Popowich on the previous day's activities. It was agreed that members of the Thunder Bay Drug Unit would continue surveillance, while D/Const. Pucci worked on an "information to obtain" which he hoped would lead to a search warrant in respect of RR's residence.

23. The Appellants and D/Const. Popowich arrived in the vicinity of RR's residence at approximately 11 a.m. on September 7th. As they arrived, they observed a copper coloured vehicle exit the lane. The origin and departure of the vehicle could not be determined (i.e., they could not tell if the vehicle came from behind RR's residence). The Appellants and D/Const. Popowich could not get a direct sightline to the back door of the residence without risking detection. Over the next hour and a half, they observed three vehicles enter and exit the laneway at approximately 20 minute intervals. Each vehicle left shortly after entering. The Appellants could not see where the vehicles went, nor did they observe any transactions.

24. At approximately 12:30 p.m., a blue Neon entered the laneway, followed shortly by a van. The Appellants and D/Const. Popowich decided they would stop the first vehicle to exit the laneway and arrest the driver for possession of drugs.

25. The Public Complainant, Mr. Burns, was the driver of that first vehicle to exit the laneway (driving the blue Neon). The Appellants admitted that they did not see Mr. Burns exit the vehicle, attend the residence or engage in any drug transactions.

26. Mr. Burns was stopped, arrested, handcuffed, and searched incident to arrest a short distance from RR's residence. He did not have any drugs in his possession. As such, he was released unconditionally. The arrest lasted approximately 10 minutes.

27. Mr. Burns filed a complaint with the Office of the Independent Police Review Director ("OIPRD") and as a result a disciplinary hearing was directed.

Appellant's Submissions

28. Mr. Weinstein submitted that the Hearing Officer committed a reversible error by:

    i) convicting the Appellants of misconduct without providing reasons that were responsive to the issues raised at the hearing; and

    ii) concluding that the arrest of Mr. Burns was unlawful.

Failure to Provide Reasons

29. Mr. Weinstein submitted that the adequacy of the adjudicator's reasons for judgment, and his conclusion the arrest was unlawful, are questions of law. Accordingly, the standard of review is correctness: see Dunsmuir v. New Brunswick (2008) 291 D.L.R. (4th) 577 (S.C.C.), Housen v. Nikolaisen (2002), 211 D.L.R. (4th) 577 (S.C.C.) at para. 8 and Regina v. Sheppard, [2009] S. S.C.R. 527 at paras. 18 to 20.

30. He argued that the Hearing Officer must demonstrate that he appreciated the critical issues at the hearing and failure to do so is a reversible error: see Regina v. R.E.M. (2008), 235 C.C.C. (3d) 290 at para 55 (S.C.C.):

> The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial.

31. Mr. Weinstein submitted that the Hearing Officer's decision focused entirely on the lawfulness of the arrest. The decision was silent on the issue of whether there was "good and sufficient" cause for the arrest. For a finding of misconduct under section 2(1)(g)(i) of the Code of Conduct, the prosecution must establish, through clear and convincing evidence, that the unlawful or unnecessary arrest was made without "good and sufficient cause".

32. He argued that his interpretation of section 2(1)(g)(i) of the Code of Conduct corresponds with the plain reading of the section and general principles of statutory interpretation: see Re: Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. at para. 2 and Bell Express Vu Limited Partnership v. Rex, [2002] 2 S.C.R. 559 at paras. 26 and 27.

33. Mr. Weinstein stated that at the hearing he argued that the phrase "without good and sufficient cause" imports into the offence an assessment of an officer's intentions and *bona fides*. Punishment should not follow mistakes made where, at the time, the action was subjectively reasonable. He distinguished between mistakes made in good faith and egregious misconduct or gross negligence. The latter warrants discipline, but the former does not, he submitted.

34. He emphasized that police officers must be provided some leeway to make mistakes without fear of recourse, and holding officers to a standard of perfection is both unrealistic and unworkable: see Hill v. Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R. 129 and Magiskan v. Thunder Bay Police (City) Police Services Board, [2011] O.J. No. 5920 (Ont. S.C.).

35. Mr. Weinstein pointed out that in this case, it was never alleged that the Officers were not acting in good faith, and the Hearing Officer ultimately concluded that they were acting honourably when they arrested Mr. Burns.

36. He also argued that given the Hearing Officer's finding that the Officers were acting honourably, he had a duty to explain why their conduct amounted to misconduct. In failing to do so, the Hearing Officer made a reversible error.

37. Mr. Weinstein argued that it is improper to speculate that because the Hearing Officer found no objective basis for the arrest, then consequently, there was also no "good and sufficient cause". The Hearing Officer needed to explain what constituted "good and sufficient cause".

38. He further argued that the fact that there is no case law on the interpretation of "good and sufficient cause" does not excuse the Hearing Officer from addressing the interpretation in his decision.

Lawfulness of the Arrest

39. Turning to the second ground of appeal, Mr. Weinstein referred the Panel to his written submissions and indicated he would be relying on those. He did not make oral submissions addressing the lawfulness of the arrest.

40. In his factum, he submitted that where a police officer arrests an individual without a warrant pursuant to section 495(1)(a) of the *Criminal Code*, the officer must, on reasonable and probable grounds, believe that the person has committed or is about to commit an indictable offence. The grounds must be reasonable on an objective and subjective basis: see Regina v. Storey (1990) 53 C.C.C. (3d) 316 at pp. 323-234 (S.C.C.):

> In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

41. Mr. Weinstein submitted that it is an error of law to assess each fact or observation in isolation. The assessment of reasonableness must be considered on the basis of the totality of the circumstances relied on by the officer, including the dynamics of the situation within which the police officer acted, including his or her experience. He submitted, further, that "reasonableness" is an objective assessment through the lens of a reasonable person having the officer's experience, training, knowledge and skill.

42. Mr. Weinstein argued that the Appellants had the subjective grounds to arrest Mr. Burns and that the grounds articulated by the Officers for their subjective

belief, that the driver of the Neon had recently engaged in a drug transaction, were objectively reasonable.

43. He argued that the Hearing Officer failed to carefully consider all the circumstances when assessing the reasonableness of the arrest, including the cumulative effect of the information received from the reliable confidential informants, RR's background and the prior surveillance. Rather, he argued, the Hearing Officer reviewed each fact in isolation and focused primarily on what the Officers failed to do.

44. Mr. Weinstein submitted, further, that it was not necessary for the Appellants to actually observe or witness the transaction before they effected the arrest. They were entitled to draw reasonable inferences and make deductions, drawing on their experience. He argued that having regard to the dynamics in which they were operating, their collective experience and the information they had available to them, a reasonable person in the position of the Appellants could conclude that there were reasonable grounds for arrest: see Regina v. Caravaggio, [2010] O.J. No. 1681 (Ont. C.A.) at para. 5:

> While the officer could not say that he observed a drug transaction between the appellant and the other man, their interaction certainly was suspicious and at least consistent with a drug transaction. When combined with the information obtained from the informant, the officer's observations of the appellant, his vehicle and its location, there were sufficient basis for the trial judge to find that the officer had reasonable and probable grounds to arrest the appellant.

Respondent's Submissions

45. Mr. Richardt submitted that the standards for reasons set out in R v. Sheppard (2002), 162 C.C.C. (3d) 298 (SCC) apply in the criminal law context:

> "There are of course, significant differences between the criminal courts and the administrative tribunals. Each adjudicative setting drives its own requirements. If the context is different, the rules may not necessarily be the same. These reasons are directed to the criminal justice context. (emphasis added)

46. He argued that the reasons given by an administrative tribunal should be read in the appropriate context, as stated in Clifford v. Ontario Municipal Employees Retirement System (2009) ONCA 670 at p. 210:

> …. as Baker indicated, recognition of the day-to-day realities of administrative agencies is important in the task of assessing sufficiency of reasons in the administrative law context. One of those realities is that many decisions by such agencies are made by nonlawyers. That includes this one. If the language used falls short of legal perfection in speaking to a straightforward issue that the tribunal can be assumed to be familiar with, it will not render the reasons insufficient provided there is still an intelligible basis for the decision.

47. He submitted that the reasons for a disciplinary tribunal are entitled to deference: see Kalin v. Ontario College of Teachers, [2005] O.J. No. 2097 (Div. Crt):

> Even where there is a statutory right of appeal and no privative clause, the disciplinary bodies of self-governing professions are entitled to considerable deference. … This is particularly the

> case on issues within the tribunals core area of expertise, such as whether particular acts amounted to professional misconduct and the appropriate penalty for misconduct. On such issues, this Court has held that the appropriate standard of review for a discipline tribunal of the College is that of reasonableness.

48. Mr. Richardt argued that, when measured against the standard of a lay person speaking in non-legal language, the reasons of the Hearing Officer were sufficient. The Hearing Officer articulated in a clear and logical fashion why he came to the conclusion that the Appellants were guilty of misconduct.

49. Mr. Richardt argued that the issues on which a police officer must reflect, when determining whether there are reasonable and probable grounds, are:

    i) What is the evidence that an offence has been committed; and

    ii) What is the evidence to link the person to be arrested to the offence.

    The officer must believe that the person to be arrested has committed an indictable offence, and that belief must be objectively reasonable: see Canada v. Mugesera [2005] Carswell Nat 1740.

50. Mr. Richardt submitted that reasonable grounds did not exist to arrest the driver of the first vehicle which left the lane, which turned out to be Mr. Burns. He argued that any decision to arrest a random member of a group is arbitrary and there was a substantial risk of “innocent coincidence”. Therefore, the Appellants did not have reasonable and probable grounds: see R v. Brown, [2012] ONCA 225 (Ont. C.A.).

51. Mr. Richardt submitted that where an arrest is found to be unlawful, the mere fact that the Officers were acting honourably cannot at law constitute good and sufficient cause. The Appellants did not suggest any other facts or circumstances constituting good or sufficient cause. This is too low a standard to measure a police officer's conduct.

52. Mr. Richardt pointed out that the Hearing Officer stated that the Officers made a rushed decision based on mere suspicion. He properly concluded that the objective evidence available to the Officers in this case was a "wish and a prayer".

53. He argued that the Hearing Officer cannot be faulted for failing to give an explanation rejecting a legal argument for which there was no factual basis.

Independent Police Review Director's Submissions

54. Ms. Saksznajder submitted that the level of scrutiny to which reasons of an administrative tribunal are held is not the same as that of judges hearing criminal cases. Reasons do not have to be perfect in the administrative context. They have been found to be adequate provided they allow for meaningful appellate review: see McCormick v. Greater Sudbury Police Services, 2010 ONSC 270 (Div. Crt) at para. 110, Clifford v. Ontario Municipal Employees Retirement System, supra, at 210 and Kalin v. Ontario College of Teachers, supra.

55. Ms. Saksznajder argued that, in this case, the Hearing Officer considered the major points at issue and analyzed the evidence in great detail.

56. She submitted that the reasons explicitly set out the factual findings and reasoning of the Hearing Officer.

57. She indicated that the OIPRD cannot accept Mr. Weinstein's argument that good faith, absent gross negligence or egregious misconduct, satisfies the requirements of good and sufficient cause.

58. She argued that the phrase "sufficient cause" on its plain meaning, imports an objective element into the analysis. If the words simply meant "good faith", the drafters of the Code of Conduct would have used those words. The Hearing Officer found that the objective component was entirely lacking.

59. She argued that the Hearing Officer not only considered the lawfulness of the arrest but also fully explained why the unlawful arrest amounted to misconduct.

60. Specifically, the Hearing Officer found that the Appellants rushed their decision when there was no urgency, no risk of detection, and no risk of obstruction or destruction of evidence. They did not have enough evidence to obtain a warrant on September 6th, and nothing had changed between September 6th and 7th. The Hearing Officer said they had a "hope and a prayer" and this is nothing close to reasonable and probable grounds.

61. The consequences, the Hearing Officer found, were serious, as it meant that an innocent man was improperly arrested and handcuffed, even if for only a short time.

Reply Submissions

62. Mr. Weinstein stated that the panel held in the Watters case that the failure to provide reasons is an error of law. The case also makes clear that if reasons are determined to be absent or insufficient, it is not permissible to substitute a reasonable opinion or impression of what the Hearing Officer intended to say: see Stephen Watters v.

Ontario Provincial Police and Lisa Smith (February 1, 2011, O.C.P.C.)

63. Mr. Weinstein argued that there was a change in circumstances between September 6 and 7th. On September 6th, the location of the vehicles behind the laneway could not be determined. On September 7th, it was possible to place the Neon at RR's residence.

64. Mr. Weinstein stated that his position is not that good faith is the only factor to be considered when determining whether good and sufficient cause exists. Other factors were alluded to, he stated.

65. He argued that the impact of the Appellants' conduct on Mr. Burns is more relevant to penalty than to the analysis of good and sufficient cause.

66. The Hearing Officer recognized there was a basis for stopping Mr. Burns when he spoke about investigative detention in his decision.

Issues

67. The issues before us are:

    i. Were the Hearing Officer's reasons for judgment deficient with respect to addressing "good and sufficient cause"?

    ii. Did the Hearing Officer err in concluding that the arrest of the public complainant was unlawful?

Reasons and Analysis

Adequacy of Reasons

68. The Appellant's first challenge is to the adequacy of reasons given by the Hearing Officer, specifically with

reference to assessing whether the Appellants had good and sufficient cause, pursuant to s.2(1)(g)(i) of the Code of Conduct.

69. This ground for appeal will be determined on the standard of reasonableness: Newfoundland and Labrador Nurses' Union and Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (CanLII).

70. In the administrative law context, reasons are not held to the same standard as in the criminal law context: see Clifford v. Ontario Municipal Employees Retirement System, supra, at pp. 9-10.

> In the context of administrative law, reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges or interests are affected know why the decision was made and to permit effective judicial review. As M. (R.E.), [2008] 3 S.C.R. 3 (S.C.C.) held at para. 17, this is accomplished if the reasons read in context, show why the tribunal decided as it did. The basis of the decision must be explained and this explanation must be logically linked to the decision made. **This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision.** To paraphrase for the administrative law context what the court says In M. (R.E.) at para 24, **the "path" taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way.**
> (Emphasis added.)

71. As such, a tribunal's reasons do not have to be perfect. They do not need to include all of the arguments, statutory provisions, jurisprudence and findings on each element leading to the result. Where, as in the case before us, reasons are provided, any challenge to the adequacy of those reasons is to be decided on the reasonableness standard. The Supreme Court of Canada held in the Newfoundland and Labrador Nurses' case, supra, at para. 16:

> …. if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

72. In this case, Mr. Weinstein argued that even if the Hearing Officer found the arrest unlawful (i.e., the Appellants did not have reasonable and probable grounds to make the arrest), pursuant to s.2(1)(g)(i) of the Code of Conduct, there is only misconduct if he determined that the Appellants also lacked "good and sufficient cause", which he defined as good faith absent gross negligence or egregious misconduct. Mr. Weinstein submitted that the Hearing Officer only addressed the issue of the lawfulness of the arrest and failed to provide reasons addressing the second prong of the inquiry under s 2(1)(g).

73. The Respondents agreed with Mr. Weinstein that the words "good and sufficient cause" are not superfluous and were intended to have meaning by the drafters of the Code of Conduct. However, the Respondents rejected Mr. Weinstein's interpretation of "good and sufficient cause" which they saw as imposing too low a standard to measure a police officer's conduct. They also submitted that the Hearing Officer's reasons were more than adequate.

74. The Hearing Officer's reasons are not perfect in terms of how they are structured. It would have been preferable to have included headings for the two separate inquiries under s. 2(1)(g)(i) of the Code of Conduct: (1) Was the arrest unlawful or unnecessary? and (2) if so, was there good and sufficient cause? However, perfection is not required in the administrative law context. When the entire record is considered, and the reasons are read as a whole, we find that the basis of the decision is intelligible.

75. Unquestionably, the decision focuses on the first issue: was the arrest unlawful or unnecessary? In the context of this case, there is no flaw in such a focus. We note from our review of the record that the evidence and counsel's submissions at the hearing also focused on whether the arrest was unlawful or unnecessary.

76. The Hearing Officer references Mr. Weinstein's argument, that good intentions (absent gross negligence/egregious misconduct) are enough for good and sufficient cause, when he says at page 13 of the decision:

> 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.

Nevertheless, the Hearing Officer went on to find that good intentions are not enough to save the Appellants from a finding of misconduct, for the following reasons:

> 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.

77. The Hearing Officer also references Mr. Weinstein's argument that the seriousness of the misconduct must be considered (when determining if there is good and sufficient cause) in the following passage:

> 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."

78. In the context of the Hearing Officer's specific findings and conclusions on whether there were "reasonable and probable grounds" for the arrest, and in the absence of any other evidence which might have somehow given the Appellants good and sufficient cause to make the unlawful and unnecessary arrest, a separate and more detailed analysis of "good and sufficient cause" was not required.

79. Specifically, the Hearing Officer concluded that the Appellants made a rushed decision when they were nowhere close to having "reasonable and probable grounds"; that the decision to arrest the occupant of the first vehicle to exit the laneway was arbitrary in the circumstances (i.e., given that they didn't witness any transactions let alone drug transactions, they couldn't see if the occupant of the vehicle attended RR's residence,

they didn't know whether RR was even home, and they didn't perform a CPIC and CNI to determine whether the occupant of the vehicle had a drug record); and that the arrest was a "wish and a prayer" in the context of the Officers observations or lack thereof. In other words, the Hearing Officer made very clear that this was not a border line case in terms of there being no objective basis for the arrest.

80. There was also no evidence whatsoever on the record that there was any reason to warrant the "rushed decision" and unlawful arrest, such as the risk of detection or of evidence being obstructed or destroyed. The Hearing Officer stated, "I did not receive any testimony that the surveillance would have to be terminated at any particular time."

81. Mr. Weinstein argued that it is inappropriate to speculate that because the Hearing Officer determined there was no objective basis for the arrest, then by extension "good and sufficient cause" was absent. This is not a case of speculation. There was no evidence on the record to support a finding of "good and sufficient cause", and the Hearing Officer's reasons do include a thorough review and analysis of the evidence.

82. Also there is no case law to support Mr. Weinstein's interpretation of "good and sufficient" cause, and the interpretation is not supported by a plain language reading of the phrase. Mr. Weinstein said in reply submissions that he did not intend for "good intentions" to be the only "trump card" and that he alluded to other factors. With respect, based on our review of the evidence and his submissions at the hearing, we see no reference to any other factors.

83. In the circumstances of this case, given the Hearing Officer's findings that the Appellants were nowhere close

to having reasonable and probable grounds, and given the absence of any other factual basis on the record to support a finding of "good and sufficient cause", it was not necessary for the Hearing Officer's reasons to contain a definition or analysis of "good and sufficient cause".

84. We agree with the Respondent's and the OIPRD's submissions that the Appellants' interpretation of "good and sufficient cause" results in far too low a standard. Also, in our view, in the circumstances of this case, that the Appellants were acting "honourably" or "in good faith" at the time they arrested Mr. Burns may be relevant to the issue of penalty. As noted above, penalty is not an issue on this appeal.

85. In summary, we find that the basis for the Hearing Officer's decision, read in the context of the proceeding and after a careful review of the record, is clear and intelligible. The reasons, measured against the standard of a lay person, show that the Hearing Officer grappled with and addressed the substance of the matter before him.

86. In addition, we find that the reasons are sufficient to enable the Appellants and this Panel to know why the decision was made. The reasons are also sufficient to enable this Panel to determine that the conclusion is within the range of acceptable outcomes. As such, the *Dunsmuir* criteria are met.

Was the Arrest Unlawful?

87. The standard of review with respect to the Hearing Officer's interpretation of the law is correctness: see Law Society of Upper Canada v. Neinstein (2010), 99 O.R. (3d) 1 (Ont. C.A.).

88. The Hearing Officer's conclusion that the arrest was unlawful is a question of law. As such, the standard of review is correctness.

89. The parties agreed that where an officer makes an arrest without a warrant under section 496 (1) (a) of the Criminal Code, the officer must believe, on reasonable and probable grounds, that the person has committed or is about to commit an indictable offence, and the grounds must be reasonable on an objective and subjective basis. The parties also agreed that the Appellants had the necessary subjective basis.

90. The parties disagreed on the issue of whether the Appellants had the objective grounds to arrest Mr. Burns.

91. We do not accept Mr. Weinstein's argument that the Hearing Officer failed to consider all of the circumstances when considering the reasonableness of the arrest. The following passages from the decision makes clear he considered all of the factors, and properly concluded that the Appellants made a rushed, arbitrary decision, where too much information was missing:

> ….**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 RR was present in his residence. **The officers on surveillance could**

not put one vehicle at [RR's address] 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 the house situated at [RR's address]. 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 [RR's address]. Again that would be an assumption. Many residences have driveways that back onto the alleyway where their homes face onto [RR's street]. 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.

… The officers in this incident made a rushed decision. They had only been there one and a 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.** (Emphasis added.)

92. The case is distinguishable from R. v. Caravaggio where the Ontario Court of Appeal found that the police officer had reasonable and probable grounds to make the arrest even though the officer could not say for sure that he observed the drug transaction. In that case, the officer did observe a transaction which was suspicious and consistent with a drug transaction. In the present case, the officers did not observe any sort of transaction, let alone one resembling a drug transaction, and they did not even know whether RR was home at the time Mr. Burns was in the laneway.

93. Accordingly, we find that the Hearing Officer's conclusion, that the Appellants lacked the objective grounds to arrest Mr. Burns, thereby making the arrest unlawful, meets the standard of correctness.

94. The appeal is therefore dismissed and the Hearing Officer's decision is confirmed.

DATED AT TORONTO, THIS 30th DAY OF OCTOBER, 2013

Roy B. Conacher Q.C.
Member

Jacqueline Castel
Member