

Ottawa 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 Ottawa Police Service
And
Sergeant Cory Robertson #1600
Constable Jonathan Thebault #2113

Charge: Unlawful or Unnecessary Exercise of Authority (Two Counts Each)
(One of Entry and one of use of Force upon Arrest)

Before:

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

Appearances:

Counsel for the Prosecution: Mr. Ryan Kennedy
Ms. Louise Morel
Ottawa Police Service

Counsel for the Defense: Ms. Pamela Machado
Ottawa Police Association

Public Complainant: Mr. Shawn Whelan (self-represented)

Background:

The Ottawa police officers that are charged with these offences were working the Overbrook community as a high visibility patrol zone to combat crimes in a high crime area. The officers observed the complainant Mr. Shawn Whelan as Whelan passed them proceeding in the opposite direction and the officers observed a missing front marker on the Whelan vehicle. The Ottawa officers were operating a plain unmarked police vehicle. They turned their vehicle around to follow the Whelan vehicle. While following the vehicle they observed Whelan proceed through a stop sign without coming to a full stop. They followed the vehicle to a private residence activated their rear emergency lights and Sergeant Robertson attempted to speak to the driver. The driver entered the residence via the front door. Sergeant Robertson was dressed in full Ottawa police uniform and was wearing his uniform belt with all use of force options on the belt. Sergeant Robertson yelled through the front door without any response and then attempted to shoulder the door open to gain entry. He advised Constable Thebault who has now left the unmarked cruiser to assist his partner at the front door to kick the door open. Constable Thebault complied with the order given to him by Sergeant Robertson and they entered the residence and located Mr. Whelan and arrested him. The officers testified there was a struggle as Whelan was resisting the arrest and they struck Whelan to obtain compliance with their request for Whelan to put his arms behind his back.

Subsequently after a brief conversation with Whelan he was issued a Provincial Offences ticket for Fail to Stop at the intersection of Queen Mary and Edith Avenue and issued a warning for Obstruction and Resist Arrest pursuant to the Criminal Code.

Pursuant to a complaint made to the Office of the Independent Police Review Director the officers were subsequently charged under the Police Services Act for their conduct on February 18, 2016.

The officers were each charged with the following offences:

Count One:

Unlawful or Unnecessary Exercise of Authority

You are alleged to committed Unlawful or Unnecessary Exercise of Authority in that on February 18, 2016 you without good and sufficient cause, made an unlawful or unnecessary arrest of Shawn Whelan at 2 Pommiers Private in the City of Ottawa, thereby constituting an offence against discipline as prescribed in Section 2(1) (g) (i) of the Code of Conduct, Ontario Regulation 268/10.

Count Two:

Unlawful or Unnecessary Exercise of Authority

You are alleged to committed Unlawful or Unnecessary Exercise of Authority in that on February 18, 2016 you used unnecessary force against Shawn in the execution of your duty at 2 Pommiers Private in the City of Ottawa, thereby constituting an offence against discipline as prescribed in Section 2(1) (g) (ii) of the Code of Conduct, Ontario Regulation 268/10.

Evidence:

This Hearing commenced on Tuesday August 14, 2018 in Ottawa, Ontario and concluded on Friday July 17, 2018. Four (4) days of testimony was heard by this Tribunal. Three (3) witnesses testified at this Hearing with nineteen (19) exhibits being tendered.

Shawn Whelan was the first witness to testify at this Tribunal. He testified that he is thirty years old and he resides in Ottawa. On the night in question he was at his father's residence in Ottawa preparing it for his father to move into at a later date. He referred to Exhibit #6 at Tab 1 to identify the residence location. It was a one bedroom, one level handicap accessible unit.

He testified he left his father's residence to attend at the nearby Loblaw's store to pick up some supplies for the residence. He testified that the store was approximately five (5) minutes away. He testified that he does not drink or consume drugs. He was operating his 2007 Toyota Yaris as the sole occupant and he testified that the vehicle is registered to him.

He testified he drove north on Edith Avenue and made a left hand turn onto Queen Mary. Whelan testified as he approached Quill Street he realized that he had forgotten his wallet back at his fathers' residence. He testified he did a u turn in the intersection of Quill and Queen Mary and proceeded back on Queen Mary towards Edith Avenue. He testified he observed a black car on Queen Mary heading toward Quill Street.

Whelan testified as he came to the intersection of Queen Mary and Edith Avenue he faced a stop sign. He testified he made a three (3) second stop at the stop sign on Queen Mary and then proceeded to make a right hand turn onto Edith Avenue. Prior to making the turn he testified he saw the black car make a u turn at Quill and Queen Mary as he had previously done. He testified there was no other vehicular traffic on Queen Mary or Edith Avenue.

He testified he parked at his fathers' residence in the laneway and was walking to the door when a man in dark clothing shone a flashlight in his face. He testified he said "Fuck you or fuck that" before he entered the residence.

He testified he could not identify the black car as a police cruiser.

In questioning by the Prosecutor, Whelan gave approximate distances from all the relevant intersections and distances to his fathers' residence. He testified that the black car while he was driving did not attempt to stop him.

He saw the black car when he was at his doorway angled sideways behind his vehicle approximately fifteen (15) feet away. He testified no emergency lights were activated just the flashlight on in his face.

He testified while he had one foot in the door he heard a voice say 'Yo man, come here for a second.' He testified he said "Fuck you" and he entered the home and locked the door. He testified he was scared as this was a high crime area of Ottawa and saw a person dressed in black carrying a flashlight.

Whelan testified this was the extent of conversation between the two parties in question. Whelan testified that the person did not identify himself as a police officer. Whelan testified that he was not asked for his name or to produce identification. He testified he took five steps into the living room and his heart was pounding. He testified approximately one (1) minute later the door was hit and the officers attended with the weapons out. He testified that a gun was put to his head and he was brought to his knees.

In Exhibit #6 at Tab 2 he identified the damage to his fathers' door. Whelan testified he took pictures the following day of the damage to the door and frame.

He testified the officers were wearing all black plain clothes. Whelan could not remember if he put the lights on in the residence after he entered.

Whelan identified Sergeant Robertson and Constable Thebault as the officers that were in his fathers' residence on February 18, 2016 as the officers were seated in the Tribunal.

He identified Sergeant Robertson as the officer that said "Yo, man" to him on the night in question.

He testified that at gunpoint in the residence he was advised to get to his hands and knees. He testified that he instantly did this. He testified that the officers were six (6) to seven (7) feet away at his point. He testified that he did not approach the officers', his hands were at his side and Sergeant Robertson had a gun pointed at him. He was unsure at this point whether Robertson still had his flash light out and activated. He testified that the officers were shouting "Police, Hands and Knees now".

Whelan testified that he was not resisting and that he placed his hands palm down and on the floor. He testified he was looking at the floor when he was struck by a metal object to the back of the head. He testified he was not sure if it was the gun or flashlight. He testified he was struck to the back of his ear on his left side. He testified that the force of the hit was moderate; however, it was hard enough after the punches and the kicks. He testified that after this he was punched in the face several times.

Whelan testified he kept asking the officers “why are you doing this, I have not done anything.”

He testified he was not sure how many times he was punched, but estimated ten (10) to fifteen (15) times. Whelan testified that the force was moderate, hard but not at maximum. He testified he received punches to the forehead, jaw and head. He testified it was mostly on the right side. He testified he was also kicked hard and he begged them to stop.

Exhibit #6 at Tab 4 he testified as to where he got stomped on his spine.

He testified that the officers told him that Whelan was resisting. He testified the event lasted five (5) to seven (7) minutes. He testified his arms were taken behind his back and he was slammed facedown onto the floor.

The officers were not talking to one another he testified.

He testified he was handcuffed and searched. He testified they took his keys and change out of his pocket. Whelan was not sure which officer searched him. He testified they searched his vehicle also. The only items in the residence were a washer and dryer. He testified he heard an officer state “Where is it, where did he put it.”

Whelan testified other Ottawa police officers attended the residence. He was not sure how many other officers. He estimated three (3) to five (5) uniformed officers. He estimated this was three (3) to four (4) minutes after he was handcuffed. He testified he was still on the floor facedown when the other officers arrived. After some conversation with the officers the uniformed officers left and he was placed in the rear of the unmarked black cruiser. He testified he was in the back seat for approximately three (3) to five (5) minutes and he testified that the rear emergency lights were not activated.

He testified the officers went back into the house to finish the search.

He testified the officers returned to the cruiser and he asked them why he was arrested and have the crap beat out of me? He testified that they wanted to give him a warning but when told to “Fuck you” it changed. He testified he asked them why they not activated their emergency lights to stop him or identify themselves on his dad’s property. He was told to shut up or be charged with a criminal charge of Resist Arrest.

He testified he was issued a ticket for not a complete stop at Queen Mary and Edith Avenue. He stated he had stopped, always does. The discussion was with Sergeant Robertson.

He testified to Exhibit #6, Tab#3 which was a copy of the Provincial Offences ticket for Fail to Stop.

He testified that he was found Not Guilty in Provincial Offences Court.

He testified at the Hearing that he was injured as a result of the officers' attendance at his fathers' residence on February 18, 2016.

Exhibit #6 Tab #4 he identified the injuries he received. Pictures 1-4 were taken by Whelan on the same night and the fifth picture was taken a week later. Whelan identified the injuries and the position on his body. He also testified that he suffered two (2) cracked ribs.

He testified the officers asked him if he wanted to go to the hospital but he refused as he did not want to go with the police officers. He testified that the officers scared him and that he was one hundred per cent compliant with them.

Exhibit #6 Tab 5 was entered as the hospital report outlining his complaint and his injuries which was completed on February 19, 2016. He testified he could not walk or drive a car. He stated that two years later he still has pain from the events of February 18, 2016. He estimated that ten (10) percent still hurts still to this day.

He testified that after three months from the altercation he got x-rays of his ribs. He continues today with physical therapy.

He testified that he was released after his ticket was issued in the cruiser. He testified that Sergeant Robertson stated, "We really roughed you up, do you want medical attention?"

Whelan testified he replied "No, Thank you". He testified that he was scared of the officers.

Ms. Machado cross- examined Shawn Whelan. Whelan testified that he was setting up his fathers' unit on February 18, 2016. He testified that he does not use drugs and there would be no reason for drugs to be in the residence. He does not wear glasses or utilize contact lenses. Ms. Machado referred Whelan to Exhibit #7 his SIU interview document. He testified that he was involved in an incident with Ottawa Police from 2012 which is still ongoing in relation to a residence that was searched for drugs with the utilization of a tactical unit. This was his reason to state he was afraid of the police. This was also relayed to the SIU investigators. He testified in cross that the officers never stated they were police and the emergency lights were not activated. Whelan testified if he knew they were the police he would have stopped. He testified that he had Quebec plates on his vehicle. Whelan testified that the door is still broken.

Machado elicited from Whelan that he thought he observed a Black Charger on Queen Mary. Machado questioned if he observed a cage or a white light on in the car. Whelan testified he only saw the headlights of the vehicle.

Whelan testified he attended his fathers' residence he did not know it was the police and he entered and locked the door. He testified that after four (4) to five (5) bangs on the door it opened. Police told me I was resisting and to lie on the floor and then they started to kick and punch me. He testified after he was handcuffed they stopped punching him.

Whelan testified that while outside prior to entering the residence he saw a bright light and he could see shadows of a car and a person approximately seven (7) to eight (8) feet away. He saw only one person. He testified the officer was not wearing a hat and he could not identify the clothing the officer was wearing. He reviewed the pictures from his injuries from Exhibit #6 and advised the Tribunal his girlfriend took the pictures. The timeline remained the same as his testimony in chief.

He testified that he took the beating while on his hands and knees and this continued until the other Ottawa police officers arrived. He testified that he was not resisting.

Whelan testified that the officers never asked for his name or identified themselves as police officers. He testified that Sergeant Robertson did all the talking and Constable Thebault did not speak.

Sergeant Cory Robertson #1600 testified that he joined Ottawa Police Service in November of 2002 and has been a police officer since March of 1999. Prior to joining Ottawa he was a member with Peel Regional Police Service.

He explained Exhibit #11, the Use of Force Wheel, the dynamics and the fluidity that an officer must access on an ongoing basis. He stressed that a persons' behaviour changes due to a police officers' presence. Sergeant Robertson testified at the Hearing that he was promoted in March of 2016. He testified at the time of this incident he was an Acting Sergeant. He was working in a two man car with Constable Thebault. They were working the afternoon shift which consisted from 4.00PM to 2.30 AM. He was operating a Ford Taurus plain vehicle which had a 360 light package. The light package was an emergency light bar across the front and rear window and also there were light bars in the windows of the doors. They were policing in the Overbrook community in the City of Ottawa. They were conducting a high visibility patrol.

He was operating his vehicle westbound on Queen Mary when he observed the red Toyota operated by Mr. Whelan eastbound on Queen Mary with no front license plate.

He testified he did a u turn at Quill and Queen Mary to follow the Whelan vehicle. He testified he was approximately one hundred (100) meters behind the Whelan vehicle approaching the four way stop at Queen Mary and Edith Avenue.

Robertson testifies that Whelan slowed down for the stop sign made the right hand turn onto Edith Avenue without stopping and travelling approximately twenty five (25) kilometers as he made the turn. Robertson testified he continued to follow the Whelan vehicle to the residence on Pommier Private. He testified he angled his cruiser with the headlights to the driveway and the remainder of his vehicle on the road.

Sergeant Robertson testified it was approximately 12.30 AM with street lights on in the neighbourhood and artificial light was good. He testified he observed the Quebec markers on the Toyota and he advised Constable Thebaault to run a check on the plates with the onboard computer situated in the police vehicle. He testified he activated his rear emergency lights and exited the police vehicle.

He testified he observed a male party on the driveway walking towards the residence. Robertson testified that he said to the male party "Come and speak with me." He testified he identified himself as a police officer and the male party stated "Fuck You". The male entered the residence. Robertson testified he tried to open the front door of the residence and yelled "Police, open the door".

Robertson testified that he was aware that he had witnessed a valid HTA infraction, he was in full uniform, clearly identified himself as a police officer and it was clear that Whelan had obstructed him by failing to identify himself.

Constable Thebault attended the front door of the residence with Robertson and Robertson told him to kick the door in. Upon entering the residence sergeant Robertson testified he identified himself to Whelan and advised him he was under arrest. He testified he took hold of Whelan's right arm and once again told him he was under arrest.

Robertson testified he was unaware if there was anyone else in the residence. Robertson testified he attempted to put Whelan's arm around to his back but Whelan was resisting by holding his arm tight. He testified Whelan put his hand towards his pocket and not knowing if a weapon might be present he struck Whelan to the head area to distract him. He testified he gave Whelan two strikes to the thigh and Whelan was still resisting. Robertson testified they got Whelan to the ground and placed the handcuffs on his wrists.

Robertson testified they searched Whelan and then escorted him to the rear seat of the unmarked police vehicle.

Ms. Machado entered Sergeant Robertson's notebook as Exhibit #12 and he testified there was no influence in making his notes in relation to the incident of February 18, 2016.

Robertson testified when he saw Whelan walking towards the door and he asked Whelan to speak with him he was dressed in a full Ottawa police uniform. He was wearing an Ottawa police ball cap which is readily identifiable, Sergeant Hooks, body armour with white police lettering.

He was wearing the issue police pant with red stripe, full use of force items on police belt and carrying a flashlight which lit up the body of Whelan not shining in his face. He testified at the door he states "Ottawa police" and stated it more than once. He attempted to open door with his shoulder however he was not successful. Upon entry Whelan was approximately five (5) meters from the door.

He testified he did not know Whelan and had never seen him before. He testified that Whelan resisted by flexing his arm muscle when he had control of Whelan's right arm. He testified on the night in question Whelan was more muscular than what he appears now in today's Tribunal.

Robertson testified he did not know if anyone else was in the residence.

Robertson testified his gun was never out and if he had it out he would have had to fill out a Use of Force report. The blows to the thigh and head were distracting techniques in order for Whelan to comply with their request to stop resisting. Robertson also testified that he did not see Constable Thebault with his gun out either.

Robertson testified that after he delivered the two knee strikes Whelan complied and went to the ground. After a short struggle the handcuffs were put on Whelan. Robertson testified he did not see Thebault strike Whelan.

Robertson testified after placing him in the rear passenger side of his police cruiser he read the Caution to Whelan and his Rights to Counsel.

He testified Whelan asked why under arrest and Robertson told him he failed to stop at a stop sign. Robertson asked him why he told Robertson to fuck off. Whelan told Robertson he entered the house because he thought Robertson would leave because Whelan thought there was a warrant for his arrest in Gatineau, Quebec. Robertson testified there were no warrants outstanding for Whelan.

Robertson testified that Whelan appeared to be remorseful for his actions while in the back seat of the cruiser so he issued him the Provincial Offences ticket for the Highway Traffic Act violation and cautioned him on the criminal offences.

Robertson testified that while outside he observed a small bump on Whelan's forehead and above his eye. He asked if Whelan wanted an ambulance and Whelan responded with a "No".

Robertson also testified that he gave a voluntary interview to the SIU investigators who were also investigating this incident.

Ms. Morel conducted the cross examination of Sergeant Robertson.

Ms. Morel questioned Robertson in relation to a vehicle check of his unit prior to going out on patrol.

Robertson testified the vehicle was functional and all equipment was operating properly. His unit was a black Ford Taurus with no police markings on the vehicle. The unit had a 360 emergency light package and was equipped with a siren.

Robertson testified it had a laptop in the car which shone brightly when in use. Morel questioned Robertson as to why he did not activate his emergency lights after observing Whelan blow the stop sign. Robertson testified he had to stop at the intersection and he did not see this as an exigent situation. He advised he knew he could catch up to Whelan and he was approximately two hundred (200) meters behind him. He testified upon reaching the residence on Pommier Private he activated the rear emergency lights as people are often embarrassed when the front emergency lights are activated and neighbours begin to look out as to what the police are doing.

He testified he observed Whelan walking towards front door of residence. He had his flash light in hand turning it off and on intermittingly.

He testified to the situation with Whelan at the front door as he did in examination in chief.

Robertson testified upon entry into the residence he did not tell Whelan to go to the ground. He testified he told Whelan he was under arrest for Obstruction because he failed to identify himself to Robertson outside of the residence.

He testified he grabbed Whelan on the right wrist and elbow. Robertson attempted to put arm around his back, however Whelan was resisting and not complying with the directions given to him. Robertson testified he delivered a forearm strike to Whelan's head.

Morel took Robertson through Exhibit#6 Tab 4 and he identified the injuries to Whelan from the photographs.

Robertson testified he believed that Thebault was on the left side of Robertson when they were attempting to gain control and put Whelan onto the ground so that they could place the handcuffs on him. When they get Whelan cuffed they searched his pockets and waistline however he could not recall if anything was found.

Upon escorting Whelan outside other Ottawa officers arrive. Whelan was advised of arrest while in back seat of cruiser. He advised him Resist arrest, obstruction for failing to identify himself outside of residence. Robertson testified they did search the residence to ascertain if anyone else was in the residence.

When questioned in relation to his SIU interview Exhibit (14) at page 21 when he was asked if Robertson asked Whelan to identify himself Robertson replied "No".

Morel also exposed the difference in the testimony at the hearing and his SIU interview as to which officer entered the residence at Pommier Private first.

Mr. Whelan also cross examined Sergeant Robertson. Mr. Whelan first had Sergeant Robertson estimate some distances on Queen Mary and the speed he blew the stop sign. Robertson acknowledged he was carrying a flashlight and was turning it on and off. He acknowledged to saying the words Police to Whelan in front of his fathers' residence and that he was dressed in full police attire. Robertson advised that he did not have his firearm out during the time together. He testified he did not use any use of force options on his belt.

Whelan questioned the entry into the residence. Robertson testified that Thebault entered first however Robertson entered fast and passed Thebault. He advised Whelan that no Quebec charges were pending against him.

Robertson testified on numerous occasions when questioned by Whelan that he was positive his gun was never out.

Robertson testified that he believed it was a fresh pursuit but did not activate his emergency lights while travelling on the roadway.

He testified that he completed his notes after the incident.

Constable Jonathan Thebault #2113 was hired by the Ottawa Police Service in 2009. Thebault had previously worked for the Nuclear Response Force Team in Quebec from 2007-2009 and worked for Kativik Police Service in Quebec from 2005-2007.

Thebault testified that while a member of the Nuclear Force team he received an eighteen (18) week course in Tactical training which highlighted Use of Force training, Dynamic entry, Search for Weapons and the Use of Force model. He testified he had training with active shooters, high risk entry of buildings and vehicles, pistol and pepper spray training.

Thebault testified he attended the Ontario Police College in 2009. He testified that while in Quebec he taught defensive tactics and was a Use of Force instructor at a Quebec College.

He also taught baton, pepper spray, use of empty hand techniques and handcuffing prisoners as well as the theory behind these use of force techniques. He testified that he has annual requalification training with the Ottawa Police Service in Use of Force and the doctrine behind the use of force wheel.

Thebault testified when questioned by Ms. Machado the Use of Force wheel and the various techniques that apply to the resistance and the constant evaluation that the officer must access as he/she applies force.

He testified that he was working with Sergeant Robertson on the night in question as a two man patrol car in a problem area in the City of Ottawa.

He testified they were eastbound on Queen Mary observed the Toyota Yaris operated by Shawn Whelan. Sergeant Robertson conducted a u turn and proceeded westbound on Queen Mary. The Yaris had no front plate. He testified that the Toyota Yaris did a u turn at Quill and Queen Mary. Sergeant Robertson did the same u turn at Quill and Queen Mary. Thebault testified that they were following the vehicle from about seventy five (75) meters behind and they were unable to read the rear marker numbers.

Thebault testified the vehicle slowed down as it approached the intersection of Edith and Queen Mary however he was unsure if he observed any brake lights activated on the Toyota. He testified the vehicle made a right hand turn onto Edith from Queen Mary at approximately fifteen (15) to twenty (20) kilometers an hour.

He testified that they also made the right hand turn onto Edith and were approximately fifty (50) meters behind the Whelan vehicle.

Thebault testified that Robertson stopped the police vehicle behind the Toyota Yaris which was parked in the driveway at the residence on Pommiers Private. Cruiser was parked ten (10) to fifteen (15) feet away on an angle to the driveway. Robertson advised Thebault to place the unit in a traffic stop and he walked towards the front door of the residence on Pommier Private.

Thebault testified he was unsure if he pressed the button to complete the traffic stop when he observed what appeared to be Whelan ignoring Robertson. He testified Whelan opened the front door of residence and Robertson was speaking to him .Thebault is not sure what Robertson said but he did think he heard Whelan utter the words "Fuck you." He testified Whelan walked into house quickly.

Thebault testified he could hear Robertson calling someone and saying "open the door, Police". He testified he saw Robertson attempt to shoulder the door unsuccessfully on two occasions and Thebault attended to assist. Robertson advised him to open the door. Thebault kicked the door open and entered. Thebault testified that he had no doubt that Whelan knew it was the police.

Thebault testified both officers in full Ottawa police issued uniforms. Both officers had the issue ball cap, wearing body armour, police badge on breast area, uniform pants with red stripe and wearing all use of force options on police belt.

Thebault was not sure if the police emergency lights were activated.

Upon entry Thebault observed Whelan in an open area next to the kitchen. He estimated the distance between them to be ten (10) to fifteen (15) feet away. Thebault testified there were some lights on in residence. He was empty handed and had put his flashlight away before entry was gained to the residence.

Thebault told Whelan to get to the ground and Robertson advised him he was under arrest. Thebault testified that Whelan was wearing a backpack when he entered the house and he was not wearing it now.

The issue as Thebault considered it was that they have a vehicle with Quebec markers and the occupant has entered a residence in Ontario. Did the person have keys to enter this residence? He advised that Whelan was advised on five occasions to get to the ground before he was able to grab his left wrist.

Thebault testified at the time of arrest Whelan would have been fifteen (15) pounds heavier than he is today and was more muscular. Thebault testified that Whelan was able to get his arm away however Thebault was able to grab the left arm again. Thebault testified he wanted to get Whelan to the ground before Whelan had a chance to take a swing at him. He testified he repeatedly said under arrest and get to the ground. He testified Whelan went down at some point on his knees and was bending forward. He testified that Whelan was always getting verbal commands from the officers and at one point Thebault punched Whelan to the face when he could not get his arm. He testified the punch was with his left hand and it was a distraction technique to get his arm.

Thebault testified once Whelan was handcuffed he stopped resisting. Thebault searched him while he was down and upon exiting with him other Ottawa police officers arrived.

Thebault testified he stayed in residence and Robertson escorted Whelan to the police cruiser. Thebault testified he cleared the residence and while in the master bedroom smelled an odour of marihuana in the air. He observed ashes and a roach on the window sill. He testified he searched the car and found the backpack in the residence. It contained clothes but no ID.

He then attended the police cruiser where Robertson and Whelan were in conversation with one another. He heard Robertson ask Whelan why he ran away. Whelan responded with he believed there was an outstanding warrant from Quebec for his arrest. He thought he would be going in for this warrant. He advised the officers that he believed that the officers could not enter the residence for a stop sign violation. He testified Whelan was apologetic and he was remorseful. Conversation in cruiser lasted for ten (10) minutes Thebault believed.

Thebault testified that Whelan was made aware that in a fresh pursuit coupled with failing to identify allowed the access to the residence. Whelan replied with thought it was over after I got into the house.

They checked Whelan on the system and there were no outstanding warrants or convictions.

Whelan was issued the POA ticket for Fail to Stop.

Thebault observed the lump over his eye and the scratch. Whelan was offered medical attention and he refused the offer for assistance.

Thebault advised his notes were made shortly after the incident and he also gave a voluntary interview to the SIU investigators.

Mr. Kennedy cross examined Constable Thebault. He commented that Constable Thebault showed no interaction with Mr. Whelan in his notebook for the night in question. He testified he did not do a vehicle check for the unit prior to going on patrol. He testified that the onboard laptop in the police cruiser shines a light which reached the roof of the unit and is active unless the computer is not utilized for thirty (30) minutes. The cage in the unit would not be visible. He validated to Mr. Kennedy time parameters to do checks and searches on the laptop.

He outlined for the Tribunal the Ottawa Police uniform, colouring, badge size and colour of lettering on the uniform the officers wore that night.

He reiterated the car movements of Whelan and Robertson on Queen Mary. Upon attending Pommier Private, Whelan's vehicle was facing west and the police cruiser was facing southwest at end of driveway. Thebault is unsure whether the rear emergency lights were activated.

Robertson exited police vehicle flashlight in hand while Thebault was placing vehicle in a traffic stop on the computer. Thebault could not hear what Robertson was saying to Whelan. He testified the conversation between Whelan and Robertson was less than ten (10) seconds.

Whalen entered residence and Robertson yelled at him to open the door while hitting it with his hand. He testified Robertson stated "Police, open the door". Thebault did not say anything. When questioned by Kennedy if Robertson asked for identification Thebault replied "No".

Thebault testified Whalen was arrested for Fail to Identify himself. Constable Thebault's firearm stayed in holster the entire time of the incident.

Constable Thebault testified he struck Mr. Whelan on one occasion for sure and cannot remember if Robertson struck Whalen. He testified from the evidence of Robertson he is aware; however, he has no independent recollection.

He testified that Whalen was charged for the HTA infraction and issued a POA ticket. He was warned for the other offences.

Thebault observed the injuries to Whalen. He observed the left eye, broken skin and the scratch on side of head which Whalen refused medical attention when offered by the police officers.

Mr. Whalen also cross examined Constable Thebault. Constable Thebault testified he could not hear the conversation from the cruiser in relation to Whalen and Robertson. He testified it was Sergeant Robertson and himself that applied the handcuffs to Whalen's wrist on the night in question. When Whalen questioned Thebault about the kicking to his back and ribs Thebault testified that did not occur. Thebault testified he searched Whalen's backpack.

He agreed with Whalen that two officers arrived as backup. Thebault testified he was right handed holding onto Whalen's bicep and that is why he used his left hand to punch him.

Submissions:

Submissions were heard on day four of the Hearing on the merits of the case by Mr. Ryan Kennedy, representing the Ottawa Police Service, Ms. Pamela Machado, representing Sergeant Robertson and Constable Thebault and Mr. Shawn Whelan representing himself as the Public Complainant. The Hearing generated three days of evidence and the fourth day was utilized for submissions by Counsel. Exhibit # 18, a case book of authorities containing nineteen (19) cases was tendered at the Tribunal by the Defense Counsel, Ms. Pamela Machado. Exhibit #19, a single case was tendered by Mr. Ryan Kennedy for the Prosecution.

Ms. Machado was first to present her submissions. She introduced her case law and summarized her submissions regarding the evidence of the witnesses in this fashion:

“Shawn Whelan's evidence was spotty at best; he was unsure if a gun was out, and then he was certain; he wasn't sure if there was a flashlight or not; he stated he could not see that Constable Thebault and Sergeant Robertson were police officers once inside the house despite them being in full uniform with their names on their shirts. He stated they had no badges or names; no nothing.

Mr. Whelan had been arrested before; he has had interaction with the police; he is aware based on that and logic alone, that he is required to provide his hands behind his back when arrested. Furthermore, Constable Thebault made it very clear that he did ask him to put his hands behind his back and get on the ground multiple times. Repeatedly was the word he used.

Constable Thebault was fair in his evidence; he admitted when he did not recall something; he admitted he made a mistake in his listing of streets during his SIU interview, but noted it accurately in his notebook.

Sergeant Robertson had RAPG to believe he had committed the offence of HTA fail to stop and believed he had grounds to enter based on both a failure to identify himself, inferred from Mr. Whelan's response of Fuck You to Sergeant Robertson's request for Mr. Whelan to speak with him, as well as obstruct at that time. He further stated he believed multiple exigent circumstances were in existence to permit entry into the home without a warrant. He was convinced the Mr. Whelan was aware he was dealing with the police when asked to speak with them. He did not waiver in his evidence and justified his actions completely.

Both officers were respectful toward Mr. Whelan during their testimony, even when faced with questions that were repeatedly asked, and in the face of allegations that question their professional integrity.

They proved to be experienced in the Use of Force and Tactical Communication. They took the Tribunal through their intentions, observations and communications as it pertained to the Use of Force Model. Constable Thebault spoke to his level of experience in relation to Use of Force. It was extensive to say the least. Both officers took us through the steps in affecting the arrest, and in their entire interaction with Mr. Whelan. Constable Thebault also provided legal background as it pertains to arrest and search powers when asked in cross-examination by Mr. Whelan.

Mr. Whelan illustrated his dissatisfaction with the incident that occurred on several occasions. He was argumentative during this proceeding, and both officers confirmed he was actively resistant on the evening in question. That does not equate to misconduct on behalf of these officers. He evidenced there were several inconsistencies in his statements, before the Tribunal as it pertained to whether each officer had their weapon unholstered; whether they used their weapon or their flashlight to strike him; whether they struck him in his ribs. There is absolutely nothing outside of his personal testimony that proves that to be the case. This is a member of the public who admittedly is familiar with police, and believed he was a target of the Ottawa Police, despite any evidence of same. He spoke of being targeted in the past, and felt he was on this evening. Neither officer knew Mr. Whelan; neither had any prior interaction with him and neither even knew who he was until after he was arrested.

You have heard that the Complainant made attempts to evade police; he failed to stop at a stop sign, and when asked to identify himself, failed to do so and ran inside the dwelling at 2 Pommier Private to further evade police. You have heard that later, he apologized for fleeing and told police he thought they were after him for an outstanding warrant in QB. The Complainant stated that he believed he was targeted and harassed by the OPS.

You have heard that these officers identified themselves, activated their rear emergency lights to notify Mr. Whelan that he was dealing with the police.

You have heard that Mr. Whelan believed he was being followed for an outstanding warrant; hence, his motive to evade is clear.

You have heard that these officers had the lawful authority to enter the residence and once inside, and dealing with a resistive suspect, used their authority under the CC and the PSA to apply force in order to affect the arrest, in as much as was reasonably necessary. They did not elect to utilize their intermediate weapons, such as pepper spray or their batons, despite the fact that the circumstances justified them doing so pursuant to their authorities.

There was no evidence of a beating; you heard that Mr. Whelan refused treatment and when examined approx. 19 hours following, there were no visible signs of bruising, swelling or marks to his abdomen and torso which would be conducive to his allegations of a beating. The injuries were not congruent with the degree of beating Mr. Whelan alleges occurred.

In cases of hot pursuit, the law is clear; society's interest in effective law enforcement takes precedence over the privacy interests of a person and in that regard, the police are authorized to enter a dwelling to make an arrest without a warrant. That is exactly what they did and anything that flowed from this has been proven to be lawful."

Ms. Machado has supported a portion of her argument to excerpts from the Criminal Code and the Highway Traffic Act which are relevant to her argument and position. For the sake of fairness and due diligence I am going to add those relevant sections to this decision.

The allegations of misconduct include unlawful/unnecessary arrest.

Mr. Whelan had committed an infraction pursuant to section 136 of the HTA; namely fail to stop at a stop sign.

The HTA mandates that Mr. Whelan was obligated to identify himself to police.

Section 33 (3), *Highway Traffic Act* - Identification on failure to surrender license

33 (3) Every person who is unable or refuses to surrender his or her license in accordance with subsection (1) or (2) shall, when requested by a police officer or officer appointed for carrying out the provisions of this Act, give reasonable identification of himself or herself and, for the purposes of this subsection, the correct name and address of the person shall be deemed to be reasonable identification.

Section 217(2) of the HTA gives police officers the authority to arrest someone without a warrant if the person fails to identify themselves when directed to do so pursuant to section 33(3) of the HTA. In addition, section 129(a) of the CC prohibits the wilful obstruction of a peace officer in the execution of his/her duty. The Complainant was clearly aware that Sergeant Robertson was a police officer and evaded his efforts to speak with him and allow him an opportunity to ascertain his identity. There need not be an explicit request. The rear lights of the cruiser were activated; Sergeant Robertson presented himself to Mr. Whelan in full uniform, and asked to speak with him, implying his intention to ascertain his identity.

This was in and of itself a refusal to identify, and certainly an effort to obstruct the officer's furtherance of his lawful duty. The SIU Director, an experienced Crown, agreed with this conclusion.

Section 495 of the CC allows officers to arrest without warrant those found committing a criminal offence, such as obstructing a peace officer, whose identity it was necessary to establish. Therefore, and in line with the finding of the SIU, if Sergeant Robertson and Constable Thebault had grounds to arrest the complainant without a warrant pursuant to the CC, then assuredly they have those same authorities pursuant to the Code of Conduct and the Police Services Act.

Ms. Machado has supplied nineteen cases to assist the Tribunal in making a decision on this matter.

They are as follows: R.vs Patenaude, Proulx, Rodriguez, Macooh, Soal, Godoy, Haglof, Feeney and Hayer. Russell vs. York Police, McCormick and Metropolitan Police Service, Nobody vs Adams, Burgess and the ST. Thomas Police, Taylor vs PC Kok, Potter vs OPP, Magiskan vs

Police Services Board, Turpin and Durham Regional Police, Berketa and Niagara Regional Police and Mulville and Azarnyek and York regional Police.

These cases are argued in Machado's submission. I will make reference to the salient points and applicable law in my decision.

Mr. Kennedy makes the following submission to the Tribunal:

"This allegation of unlawful arrest against the respondent officers can be reduced to a few key points of evidence and one simple question:

- Did the respondent officers ask Shawn Whelan to identify himself or provide them with identification before breaking down the door to the residence and placing him under arrest?

As we will outline in our submissions, without a request being made by the officers for Shawn Whelan to identify himself or provide them with identification, there were no grounds to forcefully enter 2 Pommiers Private in order to arrest him without a warrant.

The police cannot enter a private residence in hot pursuit in order to make an arrest for any kind of offence, but rather there must be an offence which would allow the police to make an arrest without a warrant. Section 217(2) of the *Highway Traffic Act* permits an arrest without of a warrant for a contravention of failure to identify under section 33(3), but the requirements of a failure to identify offence must be established in order to do so. Those requirements were not met in this case, and therefore we submit that the arrest of Mr. Whelan was unlawful."

Mr. Kennedy argues the point with the case he submitted as Exhibit 319 in this proceeding. He stated:

R. v. Plummer, 2006 Carswell Ont 7056 (C.A.)

1. In that case, the police officer purported to arrest the suspect because he had failed to identify himself as required by the HTA. However, the Act carefully circumscribes that arrest power. The Court of Appeal stated that **where a person refuses to produce their license**, the officer is entitled to arrest without a warrant under section 217 of the Act **only where the person has also refused to give reasonable identification "when requested by a police officer"** (para. 2)
2. The Court of Appeal outlined the requirements for a valid arrest under the authority of section 33(3) at paragraph 43 of its decision:

[43] In my view, the proper interpretation of s. 33(3) requires that **the officer must make a specific request for identification other than a driver's licence. Until that request for alternative identification has been made and the person has refused to comply, there is no contravention of the subsection. It follows that there can be no power to arrest without a warrant until the officer has made the request for alternative identification.** The appeal judge erred in law in his interpretation of s. 33(3).

3. The Court of Appeal further emphasized at paragraph 47 of its decision that even when the officer believes that a demand for identification will be met with a refusal, the demand must still be made:

[47] On the version of events as testified to by the officer there can be little doubt that, had the request for alternative identification been made, the appellant would have refused to comply. But, that is not the point. The arrest power is a limited one and it can only be triggered if the officer had reasonable and probable grounds to believe that the appellant had contravened s. 33(3). Reasonable and probable grounds imply objective and subjective components: *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, [1990] S.C.J. No. 12, 53 C.C.C. (3d) 316, at p. 250 S.C.R., p. 324 C.C.C. The officer not only had to believe that the appellant had committed an offence under s. 33(3), but that belief had to be reasonable. On the facts known to the officer, the appellant did not contravene s. 33 and therefore the officer did not have grounds to make the arrest. **Without the request, an essential element of the contravention was not made out.**

4. Therefore, in order for an officer to have grounds to arrest for failure to identify under section 33(3) of the HTA, there must be a specific request made for identification other than a driver's license, and until that request for alternative identification has been made, and the person has refused to comply, there is no power to arrest for a violation of section 33(3), as there was no offence committed.
5. The grounds upon which the respondent officers entered the residence to arrest Mr. Whelan was failure to identify under the HTA. Constable Thebault testified on cross-examination that once the door of the home had been broken down, he was arresting Mr. Whelan for failure to identify. Sgt. Robertson testified he was justified in going into the home to arrest Whelan as he was seeking lawful identification of Mr. Whelan under the HTA and needed to continue his investigation.
6. Since the basis for forcefully entering the residence and arresting Mr. Whelan without a warrant was for failure to identify, before doing so the officers must have made a specific request for identification and there must have been a refusal to comply. Otherwise, as directed by the Court of Appeal, the arrest is unlawful.

Mr. Kennedy made other points in his submission that I will comment on later in my decision. He submitted to the Tribunal that since the entry was illegal than any other arrest procedure that were conducted inside the residence was also a use of unnecessary force and authority.

Mr. Whelan also addressed the Tribunal with a four page submission.

Mr. Whelan talked about the SIU investigation and how it assisted the OIPRD investigation. He advised the Tribunal that Sergeant Robertson testified that he did not ask him to **IDENTIFY** himself that this is conclusive proof that an unlawful arrest was conducted and therefore following that any unnecessary force conducted was illegal.

He pointed out inconsistencies in the officer's evidence, his interpretation of the perception of law and outlined the Legal Rights of a citizen. He referred to Section 8, 10 and 12 of the Charter. Mr. Whelan also summarized the Polgrain Estate v. Toronto East General Hospital. This case had to do with a sexual assault of a patient from a nurse of the hospital. I do not have the entire case however after searching this case I find it has no similarities to this case or instructive in any way. The basis of the argument is an abuse of process which was not raised or decided upon during this hearing. I do appreciate Mr. Whelan making a submission and taking an avid role in this Hearing.

Findings:

Sergeant Cory Robertson #1600 and Constable Jonathan Thebault #2113 are before the Tribunal charged with two counts each of Unlawful or Unnecessary Exercise of Authority.

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 6-152, 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.

I find from the testimony of the principal parties involved in this allegation that the Overbrook community area on the night in question was subject to a high visibility patrol. Sergeant Robertson and Constable Thebault were in an unmarked plain Ottawa police cruiser patrolling this area as part of the strategy to help reduce the crime rate in this area.

Mr. Whelan also testified to the knowledge of the crime rate in this area as his father was moving to this part of town.

The testimony was also not disputed that Mr. Whelan and Sergeant Robertson along with his partner, Constable Thebault were operating their vehicles on Queen Mary on the night in question.

Their testimony was also consistent that they first observed one another in their own vehicles while travelling on Queen Mary Street in the City of Ottawa.

Sergeant Robertson testified he observed Whelan on Queen Mary and the attention was drawn to the Whelan vehicle as it did not have a front marker attached to the Whelan vehicle.

Whalen testifies that he passed the police cruiser on Queen Mary however he did not recognize the unit as a police cruiser. He was aware that after he pulled a u turn at Quill Street and Queen Mary as he had forgotten his cell phone and wallet while enroute to Loblaw's to purchase tacks to hang his father's curtain up in his new residence on Pommier Private that the vehicle he had passed on Queen Mary also pulled a u turn at the same location at Quill and Queen Mary. The testimony becomes a little blurred when he reaches the intersection of Queen Mary and Edith Avenue. It is agreed both units made the turn and subsequently ended at the same drive at 2 Pommier Private in the city of Ottawa.

I am aware and Counsel has pointed out in their respective submissions that there were discrepancies in the officer's notebooks and their SIU interview. I also find this was flushed out during cross examination and re-exam by Counsel.

The issue to be determined is whether Mr. Whelan brought his vehicle to a complete stop at Queen Mary and Edith Avenue on the night in question. Mr. Whalen testified he stopped at the intersection and conducted his three second stop before making the right hand turn and proceeding down Edith Avenue to his fathers' residence. Sergeant Robertson has testified he was riding along Queen Mary with his partner, Constable Thebault following the Whalen vehicle and slowly reducing the distance between the vehicles. He testifies that Whalen upon attending the intersection of Queen Mary and Edith Avenue slowed his vehicle down but did not come to a complete stop. He testified Whalen made the right hand turn and estimated the speed to be twenty five (25) kilometers an hour while making the turn without coming to a full stop. Constable Thebault corroborates this testimony however estimated the turn to be completed by Whalen without stopping at fifteen (15) kilometers an hour.

I do not see any reason for the Ottawa police officers to be deceitful in their testimony. They were operating in an area of high crime and attention to detail would be my presumption to be extremely acute. Mr. Whelan testified he had forgotten his phone and wallet which would have made his trip to Loblaw's to purchase the tacks his father had requested him to purchase to hang the curtains unsuccessful if he had no money. He initiated the u turn at Quill and Queen Mary to rectify the problem. I believe it was quite possible that after approaching the intersection of Queen Mary and Edith Avenue with the angst of having to return and add further time to this venture that he did not stop completely at this intersection. The officer's testimony has been accepted by this Tribunal in relation to this Highway Traffic Act incident of Fail to Stop.

I might add that Mr. Whalen in his testimony and in his submissions advised the Tribunal that the charge was dismissed by the Justice of the Peace in Provincial Offences Court. The reason given by the Justice of the Peace was due to the officers' action at the residence on Pommiers Private. This Tribunal is certainly not bound by that decision and the reasoning given by the tier of fact in that proceeding.

We are now at the point of the evening whereupon Mr. Whalen has his vehicle parked in the laneway of 2 Pommier Private and has exited his vehicle.

Sergeant Robertson and Constable Thebault have followed the Whalen vehicle to his father's residence without activating any police emergency equipment from their police unit.

Robertson testifies he parks on an angle towards the front of the house which the headlights of the police cruiser illuminate and also prevents the Whalen vehicle from reversing out of the driveway as the police cruiser is blocking same. The officers and Mr. Whalen corroborate each other with this testimony.

The difference being on this point is whether the rear emergency lights were activated by Robertson. Sergeant Robertson testified he activated the rear emergency lights while he exited the vehicle. He stated he did so due to the fact the rear portion of his vehicle was on the roadway and also it identifies the police car. Constable Thebault cannot recall if the lights were activated and Mr. Whalen testified that they were not activated.

For the purposes of this decision I am taking the position that the rear emergency lights were not activated.

I know that Robertson testified as to why the front emergency lights were not activated and he responded that far too often persons complained to the police because the activation of the lights may humiliate parties from their neighbours. In my mind this is a feeble answer and that is not what the expectations of the police are when they are conducting investigations and they ought to be concerned about their safety as well as the safety of others they are investigating or protection of a scene.

Evidence is adduced from both Robertson and Whelan that they were approximately six (6) to eight (8) feet apart in front of the residence. Whalen testified he could see one person. The flashlight was in his face and he could only observe the person in front of him wearing dark clothing.

Sergeant Robertson testified when he saw Whelan walking towards the door and he asked Whelan to speak with him he was dressed in a full Ottawa police uniform. He was wearing an Ottawa police ball cap which is readily identifiable, Sergeant Hooks, body armour with white police lettering. He was wearing the issue police pant with red stripe, full use of force items on police belt and carrying a flashlight which lit up the body of Whelan not shining in his face.

He testified he observed a male party on the driveway walking towards the residence. Robertson testified that he said to the male party "Come and speak with me." He testified he identified himself as a police officer and the male party stated "Fuck You". The male entered the residence. Robertson testified he tried to open the front door of the residence and yelled "Police, open the door".

Robertson testified that he was aware that he had witnessed a valid HTA infraction, he was in full uniform, clearly identified himself as a police officer and it was clear that Whelan had obstructed him by failing to identify himself.

At this point we must make the decision was the entry into the residence unlawful. If the answer is “Yes” then the count against the officers will be in the affirmative. If the answer is “No”, then we have to consider the actions of the officers inside the residence and make the determination if the arrest was excessive and the use of force to conduct that arrest was it excessive.

The Whelan arrest at the residence of his father is a focal issue to deal with on this night in question.

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. Kennedy relies on the Plummer case.

In that case, the police officer purported to arrest the suspect because he had failed to identify himself as required by the HTA. However, the Act carefully circumscribes that arrest power. The Court of Appeal stated that **where a person refuses to produce their license**, the officer is entitled to arrest without a warrant under section 217 of the Act **only where the person has also refused to give reasonable identification “when requested by a police officer” (para. 2)**

Mr. Whelan testifies he was not asked for identification by Sergeant Robertson. Sergeant Robertson testified that he breached the door because Mr. Whelan refused to identify himself and therefore was obstructing his “investigation”. However, at that point, the investigation was completed – Sergeant Robertson had witnessed the alleged offence of a failure to stop, and the only thing left was to inform the offender of the offence, ask for a driver’s license or other form of identification in order to identify the offender, and issue a ticket. Mr. Whelan could not be obstructing an investigation if he was never advised that he committed an offence or asked to identify himself Mr. Kennedy argued in his submission to the Tribunal.

Sergeant Robertson testified he observed a male party on the driveway walking towards the residence. Robertson testified that he said to the male party “Come and speak with me.’ He testified he identified himself as a police officer and the male party stated “Fuck You”. The male entered the residence. Robertson testified he tried to open the front door of the residence and yelled “Police, open the door”.

Robertson testified that he was aware that he had witnessed a valid HTA infraction, he was in full uniform, clearly identified himself as a police officer and it was clear that Whelan had obstructed him by failing to identify himself.

I have reviewed the cases submitted to me by Counsel and have also reviewed the Housser decision which is a 2016 decision to assist me in my decision making process.

Housser vs. Niagara Regional Police (2017) UNSC 1010 Para graph 6 which states:

“According to the Appellant, because Sergeant Kraushar was driving in an unmarked police car, was not in uniform and had no operating red lights, Sergeant Kraushar was not “readily identifiable” as a police officer. This was particularly the case in light of what the Appellant described as a press release which he claimed warned motorists about persons who were in unmarked cars impersonating as police officers. The trial judge considered and rejected this submission. In his view, any sensible person would have identified Sergeant Kraushar as a police officer. In coming to this conclusion, he found that Sergeant Kraushar turned on his siren and lights that other motorists did pull over, that Sergeant Kraushar showed his badge while he was driving next to the Appellant’s vehicle and that Sergeant Kraushar did not drive erratically. These findings are entitled to deference and are sufficient to support the conclusion that Sergeant Kraushar was readily identifiable as a police officer, even without operating red lights.”

This paragraph is noted for the position that Mr. Whelan did not recognize Sergeant Robertson as a police officer. Testimony has been received in regards to the dress of Sergeant Robertson. It was a full Ottawa Police uniform complete with wearing a belt containing all use of force options. The lighting conditions were excellent not only with the night sky, street lights, and headlights of cruiser, flashlight and being only six to eight feet apart. Admittedly it is unknown positively from evidence received whether the rear emergency lights were activated. Constable Thebault was in the police cruiser searching the computer for data on the license marker and registered owner. This would have illuminated Constable Thebault and the interior of the police cruiser.

I also would like to discuss the Maccooh and Haglof cases as presented by Ms. Machado. These cases can also be seen in Legal Aspects of Policing written by Paul Ceysens at pages 3-70 and 3-71. These cases relate to the Fresh Pursuit doctrine as presented by Ms. Machado. It states the following:

The judgement of the Supreme Court of Canada in R vs Maccooh addressed the authority of a police officer to enter a dwelling house when the police officer is in “hot pursuit” which it accepted in the following:

Generally, the essence of fresh pursuit is that it must be continuous pursuit conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction.

The Supreme Court of Canada ruled that a police officer in hot pursuit may enter private property for both indictable offences and offences other than indictable offences. In the latter case, the offence need not be committed in the presence of the police.

Police who arrive shortly after the offence is committed and see the offender fleeing should be able to follow him into private premises, for a provincial offence as well as an indictable offence.

This power of entry should also be enjoyed by police continuing a pursuit already begun. The requirement that there really be hot pursuit is in my opinion sufficient...

The Supreme Court did emphasize the limits of power to enter residential premises:

This does not mean, however, that the police can enter residential premises in hot pursuit in order to make an arrest for any kind of offence. Clearly, the police have this power when a warrant has been issued against the offender; but if there is no warrant, there must always be an offence or circumstances which will allow the police to make an arrest without warrant. This requirement ensures that the right to enter applies only to offences or in circumstances which the legislature has considered sufficiently serious to justify a power of arrest without warrant.

Ceyssens continues in his book when he states that the majority judgement in Feeney affirmed the view that fresh pursuit can authorize warrantless entry of a dwelling house, despite the general rule, articulated in Feeney, that warrantless arrests in dwelling houses are prohibited.

In *R v Haglof*, a driver left the scene of an accident. Police officers attended at his home approximately fifteen minutes later and had reasonable grounds to believe that he was inside. However, police did not witness the accident and did not observe the driver enter his home. They entered the house and arrested the driver shortly after arriving at the house. The events were ‘sufficiently proximate to be considered as forming part of a single transaction’, and police acted within the fresh pursuit exception authorizing a warrantless arrest in a dwelling house.

When we access the actions of the officers and the public complainant on the night in question, February 18, 2016 we have learned the following.

Mr. Whalen failed to come to a complete stop at Queen Mary and Edith Avenue. The officers from their plain car observed this infraction as they were following him on Queen Mary due to the initial reason that they observed a missing marker on the front of Mr. Whalen’s car, initialized a u turn to investigate. They followed Whalen to the residence of 2 Pommier Private where he parked his vehicle in the laneway. We have learned that this was a high crime rate area of Ottawa and that is why the extra patrols were in place on this evening under the direction of Sergeant Robertson. Robertson blocks the laneway with his cruiser and observes it is a Quebec marker and observes a male party walking to the residence. Robertson exits the vehicle and instructs his partner Thebault to run the marker and registered owner on the data base from the on board computer in the police vehicle. Robertson attempts to identify the male party and is told to ‘Fuck you’. We know from testimony given at this Tribunal that Whalen believed there was an outstanding Quebec warrant for his arrest and that is why he entered the residence as he believed this would end the presence of the police officers and he was safe in the residence.

This admission then negates the position that he did not know who was shining the flashlight and he was unaware that Sergeant Robertson was a police officer.

Sergeant Robertson on the other end is patrolling in a high crime area has an out of town marker parked at an Ontario residence with a male party refusing to identify himself when asked to speak

to the officer. Sergeant Robertson believes he has been obstructed from his investigation. He was aware that in order to charge the driver for the infraction he must identify that person.

I must ask myself the question would a reasonable person in the shoes of the police officer believe when taking all these issues together believe that he has the power to arrest this person. I find that a reasonable person would have this belief. It is always easy to second guess a person's action when you have an abundance of time to analyse the situation. Police officers never or almost never have that luxury. I find that Sergeant Robertson's actions were reasonable and justified based on the evidence that has been received at this Hearing.

The second issue that has to be addressed is the actions taken by Sergeant Robertson and Constable Thebault after they gained entrance to the residence.

Whelan testified that at gunpoint in the residence he was advised to get to his hands and knees. He testified that he instantly did this. He testified that the officers were six (6) to seven (7) feet away at this point. He testified that he did not approach the officers', his hands were at his side and Sergeant Robertson had a gun pointed at him. He was unsure at this point whether Robertson still had his flash light out and activated. He testified that the officers were shouting "Police, Hands and Knees now".

Whelan testified that he was not resisting and that he placed his hands palm down and on the floor. He testified he was looking at the floor when he was struck by a metal object to the back of the head. He testified he was not sure if it was the gun or flashlight. He testified he was struck to the back of his ear on his left side. He testified that the force of the hit was moderate; however, it was hard enough after the punches and the kicks he received. He testified that after this he was punched in the face several times.

Whelan testified he kept asking the officers "why are you doing this, I have not done anything."

He testified he was not sure how many times he was punched, but estimated ten (10) to fifteen (15) times. Whelan testified that the force was moderate, hard but not at maximum. He testified he received punches to the forehead, jaw and head. He testified it was mostly on the right side. He testified he was also kicked hard and he begged them to stop.

Sergeant Robertson testified he did not know Whelan and had never seen him before. He testified that Whelan resisted by flexing his arm muscle when he had control of Whelan's right arm. He testified on the night in question Whelan was more muscular than what he appears now in today's Tribunal.

Robertson testified he did not know if anyone else was in the residence.

Robertson testified his gun was never out and if he had it out he would have had to fill out a Use of Force report. The blows to the thigh and head were distracting techniques in order for Whelan to comply with their request to stop resisting. Robertson also testified that he did not see Constable Thebault with his gun out either.

Robertson testified that after he delivered the two knee strikes Whelan complied and went to the ground. After a short struggle the handcuffs were put on Whelan. Robertson testified he did not see Thebault strike Whelan.

Constable Thebault testified at the time of arrest Whelan would have been fifteen (15) pounds heavier than he is today and was more muscular. Thebault testified that Whelan was able to get his arm away however Thebault was able to grab the left arm again. Thebault testified he wanted to get Whelan to the ground before Whelan had a chance to take a swing at him. He testified he repeatedly said under arrest and get to the ground. He testified Whelan went down at some point on his knees and was bending forward. He testified that Whelan was always getting verbal commands from the officers and at one point Thebault punched Whelan to the face when he could not get his arm. He testified the punch was with his left hand and it was a distraction technique to get his arm.

The testimony from the principle parties is strikingly different. Mr. Whelan contends the officers had their weapons out; he complied with the order of down on your hands and knees, was punched several times and was compliant throughout the officer's attendance in the residence. Mr. Whalen also testified that the beating continued until the other Ottawa police officers arrived.

Sergeant Robertson and Constable Thebault testified that upon entry to the residence Thebault was yelling get down and Robertson was yelling that Whelan was under arrest. Whelan was grabbed by the officers each taking an arm. No weapons were out upon entry. Robertson and Thebault both testified that Whelan was more muscular and weighed approximately fifteen (15) pounds heavier than today. Whalen was resisting and was not on the ground as he had testified. Robertson admitted to striking Whalen in the head with his forearm and delivering two thigh strikes with his knees as distraction techniques to seek compliance from his verbal commands to get down. Thebault admitted to punching Whalen in the face with his left hands also as a distraction technique as Whalen was not complying with the verbal commands to get down.

Testimony was also received that the officers were walking Whalen out of the residence enroute to the cruiser when the other Ottawa officers arrived.

When I review the testimony from the officers in relation to the Use of Force options wheel (Exhibit #11) they were very knowledgeable and extremely conversant with the tactics and techniques to be utilized in various situations. Their yearly requalification also supported their testimony.

Exhibit #6 at Tab 4 and 5 was also reviewed in this decision making process. The injuries photographed and the documentation provided by the hospital in relation to the injuries that Mr. Whalen incurred are more in line with the testimony provided by the officers. I find that if Mr. Whalen had been beaten as he described for the length of time he testified to the injuries would have been more severe and certainly more extreme than what was observed on the photographs and reported by the hospital staff in Tab 5 of Exhibit #6.

I find that Mr. Whalen embellished his testimony and it is not supported by the Exhibits provided.

The officer's evidence is supported by the exhibits tendered.

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 not met this standard in the Tribunal for these allegations.

Decision One:

Based on all the evidence brought before me in this Hearing, it is the decision of this Tribunal that Sergeant Cory Robertson #1600 and Constable Jonathan Thebault#2113 are NOT GUILTY of Unlawful or Unnecessary Exercise of Authority Contrary to Section 2 (1) (g) (i) of the Code of Conduct Ontario Regulation 268/10 as stated in the allegation contained in the Notice of Hearing.

Decision Count Two:

Based on all the evidence brought before me in this Hearing, it is the decision of this Tribunal that Sergeant Cory Robertson #1600 and Constable Jonathan Thebault#2113 are NOT GUILTY of Unlawful or Unnecessary Exercise of Authority Contrary to Section 2 (1) (g) (ii) of the Code of Conduct Ontario Regulation 268/10 as stated in the allegation contained in the Notice of Hearing.



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

September 18, 2018
Date