

# **Durham Regional Police Service Disciplinary Hearing**

**IN THE MATTER OF THE POLICE SERVICES ACT, R.S.O. 1990, C.P.15, AS AMENDED**

**In The Matter Of**

**The Durham Regional Police Service**

**And**

**Sergeant Tom Irving #442 and Constable Toby Sebaaly # 3492**

## **Allegations:**

- Sergeant Tom Irving:**
1. Unlawful or Unnecessary Exercise of Authority
  2. Unlawful or Unnecessary Exercise of Authority
  3. Discreditable Conduct

- Constable Toby Sebaaly:**
1. Unlawful or Unnecessary Exercise of Authority
  2. Unlawful or Unnecessary Exercise of Authority
  3. Discreditable Conduct

## **Hearing Officer:**

Inspector Todd Rollauer #714, Durham Regional Police Service

## **Appearances:**

Counsel for the Prosecution: Mr. Alex Sinclair  
Durham Regional Police Service

Counsel for the Defence: Mr. Bill MacKenzie  
Durham Regional Police Association

Public Complainant: Mr. Robert White  
(Unrepresented by Counsel)

Prior to commencing Judgement with respect to the allegation of misconduct, I wish to thank Mr. Robert White the public complainant, Mr. Bill MacKenzie, Defense Counsel, and Mr. Alex Sinclair, the Service prosecutor, for their competent arguments and exhibits submitted. These elements in totality have assisted me in reaching my decisions.

Sergeant Tom Irving, Badge Number 442 has pleaded not guilty to one charge of Discreditable Conduct and two charges of Unlawful or Unnecessary Exercise of Authority laid under the Police Services Act. All of these charges have been sufficiently expressed within the Notice of Hearing.

Police Constable Toby Sebaaly, Badge Number 3492 has pleaded not guilty to one charge of Discreditable Conduct and two charges of Unlawful or Unnecessary Exercise of Authority laid under the Police Services Act. All of these charges have been sufficiently expressed within the Notice of Hearing.

Charge Number 1 – Unlawful or Unnecessary Exercise of Authority alleges that on April 14<sup>th</sup>, 2015 Sergeant Irving and Constable Sebaaly did commit an unlawful or unnecessary exercise of authority in that without good and sufficient cause made an unlawful or unnecessary arrest.

Charge Number 2 – Unlawful or Unnecessary Exercise of Authority alleges that on April 14<sup>th</sup>, 2015 Sergeant Irving and Constable Sebaaly did commit an unlawful or unnecessary exercise of authority in that they used unnecessary force against a prisoner or other person contacted in the execution of their duty.

Charge Number 3 – Discreditable Conduct alleges that on April 14<sup>th</sup>, 2015 as a result of their conduct did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police service.

## Evidence:

This Hearing began on March 3<sup>rd</sup>, 2016 with two days of evidence heard by the Tribunal. On March 30<sup>th</sup>, 2016, Mr. White and both Counsel submitted their submissions for consideration on the guilt or innocence of the subject officers, Sergeant Irving and Constable Sebaaly.

A total of twelve (12) exhibits were entered as evidence:

1. Order to Conduct a Hearing and Notice of Hearing – Sergeant Irving
2. Order to Conduct a Hearing and Notice of Hearing – Constable Sebaaly
3. Designation of Prosecutor
4. Book of Documents
5. Photograph of cards belong to Robert White
6. Transcript of OIPRD interview with Mr. White
7. Transcript of OIPRD interview with Constable Sebaaly
8. Audio Tape of Transmission between Constable Sebaaly and Communication
9. Transcript of OIPRD interview with Sergeant Irving
10. Curriculum Vitae for Detective Caplan
11. Book of Authorities submitted by Prosecution
12. Book of Authorities submitted by Defense

Additionally four (4) individuals testified before the Tribunal:

1. Mr. Robert White            Public Complainant
2. Constable Toby Sebaaly    Subject Officer
3. Sergeant Tom Irving        Subject Officer
4. Sergeant Jeff Caplan        Witness Officer

## Evidence of Mr. White

Mr. White testified that he has been working with Toronto Community Housing since 2001 and prior to this he was a security supervisor with Group 4 Security.

He further testified that he was a police officer with the Jamaican Constabulary Force in Kingston Jamaica for approximately 18 years. A part of Mr. White's career included working within Major Crime; investigating incidents such as robberies, shootings and murders.

Mr. White testified that Exhibit 4, Tab 6 the OIRRD complaint was typed by his girlfriend however it was an accurate reflection of his written copy whereby he detailed the events.

On April 14<sup>th</sup>, 2015 Mr. White parked his vehicle on the west side of his bank (Scotiabank) located at 1947 Ravenscroft Rd in Ajax. He testified that he observed a marked police cruiser in front of the bank and that Constable Sebaaly was sitting in the car. Mr. White indicated that he entered the bank with the intention of checking the balance on his two VISA cards. Mr. White testified that he had an Interac debit card and two Scotiabank VISA's in his hand and not in his wallet and he was planning to use these cards.

Mr. White testified that there were two ATM's in the bank and both were occupied when he arrived. He waited for a Caucasian female to leave as he preferred the higher machine.

Mr. White stated that while at the ATM, he looked in mirror and there was a uniformed officer standing right behind him. Mr. White testified that he believed the officer was looking at his transactions and this caused him to become uncomfortable. Mr. White testified that the officer could have observed his PIN number and everything he was doing.

Mr. White referred to Exhibit 4, Tab 1, and the first photograph on page 1. He indicated that it appears the officer was monitoring him or he has just entered the bank. Mr. White testified that in the second photograph on page 1 was when he observed the officer in the mirror and was looking back to see where the officer was. Mr. White indicated he did not expect someone to be so close to him and apparently monitoring him and his transactions.

While referring to page two (Exhibit 4 Tab1), Mr. White stated:

*"Yeah. I think he was definitely looking at my transactions or watching, watching me."*

Mr. White testified that because the officer was too close for comfort, he only checked one balance and then took his other card out, left the bank and returned to his car.

Mr. White indicated that while sitting in his car he was going through his bills and indicated he was also waiting for his girlfriend and daughter.

Mr. White testified that he observed Constable Sebaaly return to his cruiser and remain there for a period of time. He then noticed the cruiser leave and pull directly behind his vehicle and moments later Constable Sebaaly exited the cruiser, approached his vehicle and tapped on the window.

Mr. White testified that Constable Sebaaly asked to see his driver's licence. Mr. White asked why and Constable Sebaaly indicated that he had observed Mr. White in the bank with several cards and that he did not do a transaction.

Mr. White testified he advised PC Sebaaly that he was there to check his bills. The officer then asked if he could see the cards and Mr. White responded:

*"No, Officer. No, these are my personal cards and I am not going to give them to you".*

Mr. White indicated that Constable Sebaaly advised him that he used to be in Major Crime and knew when someone is about to commit fraud. According to Mr. White, Constable Sebaaly further indicated that he needed to scan the cards in his car. Mr. White testified that he told the officer that he was not going to give him his cards and that the bank was still open and they could go in to check the cards.

Mr. White testified that he was very angry and felt that he was being harassed as Constable Sebaaly continued to ask for his cards.

Mr. White testified that Constable Sebaaly asked him if he would like a Sergeant to be called and he was agreeable to speaking with a Sergeant. Mr. White stated that he overheard Constable Sebaaly call for a Sergeant saying he had an uncooperative male.

Mr. White testified that he was sitting in his car and was not being hostile or confrontational.

Mr. White indicated that he did not try to put the cards away and only had three cards in his hand however had additional cards in his wallet.

Mr. White testified that simply because someone is wearing a uniform does not automatically make them honest and that he was not going to give his cards to anybody particularly when he was at his branch and he offered to go into the bank with the officer.

Mr. White testified that he asked if he was under arrest and Constable Sebaaly stated:

*“No”*

Mr. White asked for his driver’s licence back so he could go and Constable Sebaaly stated:

*“No, I want to see those cards. I want to scan those cards.”*

Mr. White indicated he was not advised he was under investigative detention, did not receive a caution and no rights to counsel.

Mr. White testified that he agreed to speak with a Sergeant because he would be someone with experience, knowledge and provide Constable Sebaaly with guidance.

Mr. White stated he observed Sergeant Irving arrive and have a discussion with Constable Sebaaly. Mr. White testified that Sergeant Irving spoke with him and stated he understood that Mr. White was an ex-police officer.

Mr. White confirmed that he was a police officer and told him exactly what had recently happened. Mr. White testified that Sergeant Irving stated:

*“Well, being an ex-police, you know, you could have just shown him the card and let him just scan them and you go about your business.”*

Mr. White stated that he told Sergeant Irving that he expected him, as a Sergeant, to come out here and guide him in the right direction and that he was not going to hand over his credit cards to him.

Mr. White testified that Constable Sebaaly stated:

*“You know what, Robert, enough is enough”*

Mr. White reported that Constable Sebaaly opened the car door, held him by the neck of his shirt and pulled him out of the car. Mr. White testified that he was turned around and pushed against his car at which point he was handcuffed behind his back by Constable Sebaaly.

When Mr. White was asked how much force was used he stated:

*"I wouldn't say it's, it's a lot of force, but force was used."*

Mr. White testified that he was searched and his wallet which contained additional cards was taken as well as the three cards he was holding prior to his arrest.

Mr. White was shown Exhibit #5 (Photograph of cards belonging to Robert White) and testified that all of these cards belonged to him, however he was not holding all of them only the two Visa cards and the Scotiabank Debit card.

Mr. White testified that after being handcuffed he was placed in the backseat of a cruiser. He continued and stated that he was in severe pain from a shoulder injury and was awkwardly sitting in the cruiser.

Mr. White testified that the injury was not a result being handcuffed and placed in the cruiser but this did aggravate a previous injury. Under cross examination Mr. White indicated that it was two weeks after his arrest that he went to see his doctor and he simply managed through the pain during this time as he has done for years.

Mr. White referred to Exhibit 4, Tab 2, whereby his doctor, Dr. Sam Louli, a general practitioner provided a letter pertaining to his shoulder injury.

Mr. White attended Dr. Louli's office on April 30<sup>th</sup>, 2015 for what was described as severe left shoulder pain. The letter indicated that for the past 4 years Mr. White had been suffering from chronic tendonitis and degenerative changes of the shoulder joints. During this examination Mr. White had significant decreased range of motion of the left shoulder joint and was experiencing severe pain with any manipulation. He was diagnosed with a severe left shoulder sprain and an aggravation of his chronic tendonitis. Mr. White was referred for physiotherapy.

Mr. White testified that it is his belief he was arrested because he was a black man and singled out for this reason.

During cross examination Mr. White testified that it was only his opinion that race was a factor and that Constable Sebaaly never mentioned anything that was racist or gave an indication that race played a part in his interactions with him.

Mr. White testified that he still comes to this conclusion and as a result has filed a Human Rights Complaint and is seeking damages.

Mr. White testified that he felt Constable Sebaaly had a bit of an attitude but otherwise was professional. He also indicated that Sergeant Irving was professional as well.

Mr. White indicated that he did not make notes immediately after this incident and it was six (6) days later when he documented the events of his complaint and filed them with the Office of the Independent Police Review Director (OIPRD)

Mr. White under cross examination reaffirmed that his wallet was in his back pocket and he was holding three cards in his hand. He testified that he saw Constable Sebaaly in the mirror and felt he was looking over his shoulder making him feel uncomfortable.

Mr. White testified that he checked one card and left the bank. However after attention was drawn to his interview with OIPRD he indicated that he used two cards, one Visa and one debit card.

Under cross examination Mr. White testified he that was looking at Constable Sebaaly in the mirror and was looking around to see where he was. Mr White indicated he was uncomfortable and did not complete his transactions because the officer was to close so he simply left the bank.

Mr. White testified that he did not consider going into the bank to continue his banking or going to the drive-thru ATM he simply returned to his car.

Mr. White confirmed that after providing Constable Sebaaly with his driver's license he declined on providing him with his credit cards to go scan them in his cruiser. Mr. White testified that he felt like the officer was going to do something illegal and offered to go inside the bank with him.

Mr. White testified that he was angry at Constable Sebaaly but was speaking to him in the same manner he was addressing the Tribunal. Mr. White testified that he did not raise his voice nor did he become uncooperative. He simply did not feel compelled to provide Constable Sebaaly with his bank cards.

Mr. White confirmed under cross examination that Sgt. Irving arrived and spoke with him. During this conversation he continued to have the three cards in his hand.

Mr. White testified that Sergeant Irving advised him that he could just have given the cards and let them be scanned and that he would be on his way. Mr. White advised Sergeant Irving that he was not going to hand over his cards.

Mr. White testified that he thinks Constable Sebaaly used one hand to grab him around his shirt and assumed it was with his right hand.

It was suggested by Mr. MacKenzie that Officer Sebaaly grabbed Mr. White's left arm and that he voluntarily stepped out of the car. Mr. White denied this suggestion.

Mr. White testified that while being handcuffed and escorted to the cruiser and ultimately placed in the back seat, he never told Constable Sebaaly about his shoulder. It was not until Constable Sebaaly returned after checking the cards that he advised him that he was in pain.

Mr. White testified that he recalled seeing the bank manager speaking to the officers and although not 100 percent certain, he believed he was still inside the cruiser.

Mr. White testified that he was not doing anything improper at the ATM. He continued and indicated that in his experience as a police officer in Jamaica he came across dishonest police officers many times. It is these past experiences that Mr. White used to formulate his opinion on what Constable Sebaaly's intention was.

Mr. White testified that his independent recollection was better on May 7<sup>th</sup> 2015 when he provided his statement to the OIPRD and was better on April 21<sup>st</sup>, 2015 when he wrote his complaint than it is today.

Mr. White testified that Constable Sebaaly at no time advised him that he was under arrest or provided him with his rights to counsel.

#### Evidence of Constable Toby Sebaaly

Constable Sebaaly testified that at the time of this incident he had been a member of the Durham Regional Police for 7 years. He further indicated that has been assigned to the Major Fraud – Organized Crime Unit for two and half (2 ½) years and had returned to uniform patrol about two (2) months prior to this incident.

During his time within this Unit, Constable Sebaaly testified that he had taken a number of courses and educational forums related to fraud.

Constable Sebaaly testified that he was one of 4 members assigned to this Unit and their focus was concentrated on fraudulent credit cards, debit cards and counterfeit currency. One of the assigned members was a supervisor which was Detective Jeff Caplan. Constable Sebaaly testified that Detective Caplan provided the team some of the training which included the scanner as he was deemed an expert witness in credit cards and magnetic strip cards.

Constable Sebaaly testified that the scanner could examine any card with a magnetic strip to confirm the data and if the encoded data does not match the embossed number then the card is assumed to be fraudulently obtained. He further stated that when he returned to uniform patrol he brought the scanner with him.

Constable Sebaaly testified that it takes approximately 5 seconds after swiping a card to receive the encoded data. He further stated that the information that returns is dependent on the bank. In some instances it is simply the embossed number and in other cases it is the embossed number and the name embossed on the card.

Constable Sebaaly testified that this is the extent of the information that is provided and other information such as a PIN and account balances are not provided. He continued and stated that during his tenure in Major Fraud, he utilized this piece of equipment numerous times. In some instances cards were scanned and found to be fraudulent and individuals were arrested and in other cases the cards were found to be valid and not compromised.

Constable Sebaaly testified that on April 14<sup>th</sup>, 2015 he commenced his shift at 1600 hrs. He stated that he attended the Scotiabank ATM to simply do some personal banking.

Constable Sebaaly stated that he first observed Mr. White in line at the bank. He further testified that there were a few people in the bank and both he and Mr. White were in line waiting for the two ATM's to become available. During this time Constable Sebaaly noticed that Mr. White was holding multiple loose cards in his hand but was unable to determine how many.

Constable Sebaaly testified that Mr. White approached an available ATM which was to the right of the second ATM. He stated that Mr. White was acting suspicious by looking over his shoulder and he caught Mr. White looking at him in the ATM mirror. Constable Sebaaly testified that Mr. White turned his head towards him a few times as well.

Constable Sebaaly testified that he was approximately eight (8) feet away from Mr. White and noticed him make a transaction, but did not hear the cash drawer open.

Constable Sebaaly stated that the second ATM became available which was to the left of Mr. White. As he began to make his transaction, Constable Sebaaly testified that Mr. White was commencing a second transaction.

Constable Sebaaly testified that the closest he got to Mr. White was when he was beside him at the ATM and at no time was he attempting to gain access to his private information.

Constable Sebaaly testified that Mr. White's actions caused him to be suspicious of possible criminal activities. He continued and stated that from previous experiences people have been known to test cards in order to confirm that a PIN is still correct and that there is balance on the card so they can use it later. He testified that individuals check cards to make sure the card is still active and has not been reported stolen.

Constable Sebaaly testified that after he completed his transaction he was placing money into his wallet when Mr. White completed his second transaction, took his card out, left the bank and went to a vehicle.

Constable Sebaaly indicated that he pulled his cruiser behind Mr. White's vehicle and approached the vehicle.

Constable Sebaaly stated that Mr. White provided him with his driver's license and at this time he was informed that a criminal investigation was being conducted.

Constable Sebaaly testified that he informed Mr. White of his Rights to Counsel to which he understood. Constable Sebaaly indicated that Mr. White did not want a lawyer but he was informed of the 1-800 number for free duty counsel.

Constable Sebaaly testified that Mr. White informed him that he was an ex-police officer and continued to state that he did not have to give the cards to him and that he wanted to go inside the bank.

Constable Sebaaly testified that Mr. White was becoming irate and indicated he was tired of being harassed by the police. Constable Sebaaly stated that he informed him of his rights to counsel again and Mr. White stated he had a lawyer but did not want to call him.

Constable Sebaaly stated that Mr. White told him a supervisor should be present and at the request of Mr. White, a sergeant was contacted to attend the scene.

Constable Sebaaly testified that going into the bank would have not assisted him. He stated he did not observe the type of cards that were in his hand while inside the bank and Mr. White could have produced different cards to him while at the car.

Constable Sebaaly stated that when Sergeant Irving arrived he explained to him what took place and his grounds to believe that criminal activity had occurred.

Constable Sebaaly testified that Sergeant Irving spoke with Mr. White and he still did not want to produce his cards. As a result Mr. White was arrested by Constable Sebaaly.

Constable Sebaaly testified that he reached inside the vehicle and grabbed Mr. White by his left arm, advising him he was under arrest. Constable Sebaaly testified that he did not grab Mr. White by his shirt collar or neck area as this would have meant he entered the vehicle and exposed his use of force options. Constable Sebaaly testified that Mr. White was cooperating and there was no need for force.

Constable Sebaaly testified that he handcuffed Mr. White behind his back and escorted him to his police car and placed him in the backseat. Mr. White did not make any complaints and when inside the cruiser he was again read his Rights to Council and declined to call a lawyer.

Constable Sebaaly testified that he retrieved a wallet from the left rear pocket of Mr. White and Exhibit #5 was a photograph of the cards he obtain from Mr. White and scanned.

Constable Sebaaly testified that all of the cards were determined to be legitimate. He testified that Mr. White was released after 5-10 minutes in custody and described him as being emotional and upset making a comment that he was going to contact his lawyer.

Under cross examination Constable Sebaaly testified that he would not arrest someone for simply refusing to provide their cards to him and relies on other observations.

Constable Sebaaly on numerous occasions asserted that he based his decision on a variety of observations, training and previous experiences.

Constable Sebaaly testified that when he entered the bank, Mr. White was in line and there was another patron in between them. He stated Mr. White approached the ATM and commenced his transactions.

Constable Sebaaly testified that he was not aware of what the individual did at the ATM who was ahead of him. Constable Sebaaly testified that he approached the ATM once it became vacant.

Constable Sebaaly testified that both he and Mr. White completed their final transactions around the same time.

Under cross examination Constable Sebaaly testified that in his experience individuals have used leased vehicles or ones owned by other people as well as their own personal vehicles pertaining to credit card frauds. He stated that because Mr. White was the registered owner of the vehicle and he did not attempt to leave it did not alleviate his suspicions.

Constable Sebaaly testified that he advised Mr. White he was being detained shortly after he provided his driver's license. Constable Sebaaly stated that Mr. White was being irate and uncooperative and asked if he could leave. It was at this point he told Mr. White he was being detained for investigative purposes.

Constable Sebaaly testified that Mr. White offered to go into the bank with him, however in Constable Sebaaly's mind this was not an option. Constable Sebaaly testified that although there was staff inside the bank he was not certain which cards Mr. White used inside at the ATM and while in his car he could have put those cards away or retrieved other cards, his own Scotiabank cards.

Constable Sebaaly agreed with Mr. Sinclair on the premise that if you give someone their Rights to Counsel and you do not have reasonable grounds, that arrest is improper.

Constable Sebaaly testified that the individual between himself and Mr. White was a black male who was in his late forties (40') and was wearing a suit and tie. Constable Sebaaly stated he was concentrating on Mr. White and did not make similar observations with respect to the transactions this second male was conducting.

Constable Sebaaly testified that Mr. White placed three cards on the console of the vehicle and that he retrieved these cards, however he is unable to recall if these were all Scotiabank cards.

Constable Sebaaly testified that there has been instances when he has not arrested individuals who did not provided him their cards upon request.

Under cross examination Constable Sebaaly reaffirmed that when Sergeant Irving attended he explained the circumstances to him and believed he has the grounds to make an arrest. Constable Sebaaly stated that Sergeant Irving spoke to Mr. White but could not specifically hear their conversation.

Constable Sebaaly testified that he and Sergeant Irving had a conversation and subsequently Mr. White was arrested. Constable Sebaaly stated that he always handcuffs individuals that he arrests.

Constable Sebaaly testified that Mr. White was uncooperative and evasive prior to his arrest, however after he was in custody he described him as being cooperative but emotional.

Constable Sebaaly testified that he did not ask permission from Mr. White to touch him or to handcuff him.

Constable Sebaaly stated that after Mr. White was arrested he was searched and his wallet was retrieved. After Mr. White was placed in the cruiser, his wallet was searched and then his vehicle was searched for cards with magnetic strips. His wallet contained additional cards but no cards were located in his vehicle.

While being questioned by Mr. White, Constable Sebaaly maintained that he grabbed his left arm, advised him that he was under arrest and asked him to step out of the vehicle.

Constable Sebaaly testified that he took photographs of Mr. White's cards with his personal cell phone and emailed them to himself and that this photo is no longer on his phone.

#### Evidence of Sergeant Tom Irving

Sergeant Irving testified that he has been a member of the Durham Regional Police Service for 28 years and has been a sergeant for approximately 13 years.

Sergeant Irving testified that he started his shift at 4:30 pm on April 14<sup>th</sup> 2015 and had received a radio call from Constable Sebaaly asking him for assistance.

Sergeant Irving stated that the general role of a Sergeant is to guide, direct and provide assistance to those under his command regarding any questions or concerns and to make sure they are doing the appropriate actions.

Sergeant Irving testified that when Constable Sebaaly made his request for a Sergeant over the air, he could hear a male party and he sounded like he was yelling.

Sergeant Irving testified that Exhibit 8 was the radio transmission he heard on that date and he could hear Constable Sebaaly requesting a sergeant and could hear a male party's voice that was elevated.

Sergeant Irving testified that when he arrived on scene he spoke with Constable Sebaaly. He stated that Constable Sebaaly informed him that he had observed a gentleman in possession of a number cards and was acting nervous while at the ATM by looking in the mirror and turning around and looking at the officer. Sergeant Irving continued and stated that he was informed that after the male completed his transactions he left the bank and Constable Sebaaly approached the male.

Sergeant Irving testified that he asked Constable Sebaaly how many cards the male had and was advised it was estimated at ten (10). Sergeant Irving stated that Constable Sebaaly informed him that he had a scanner that would be able to ascertain whether the cards were fraudulent or not but that Mr. White was not allowing him to scan the cards.

Sergeant Irving testified that when Constable Sebaaly was in the Major Fraud Unit he assisted a member of the platoon with a credit card investigation and as a result was aware of his experience in fraud investigations that related to credit cards.

Sergeant Irving testified that he went up to the vehicle and Mr. White was still sitting in the driver's seat and asked him what he was doing at the ATM. Sergeant Irving stated that Mr. White informed him that he was checking his bank balances.

Sergeant Irving testified that he noticed a number of cards in his right hand and would have estimated that there was between eight (8) and twelve (12) cards. Sergeant Irving continued and stated that he asked Mr. White if all of the cards were from Scotiabank and Mr. White indicated they were not and some were from other institutions.

Sergeant Irving testified that Mr. White was upset that Constable Sebaaly was accusing him of committing a criminal offence and like Constable Sebaaly; he was also in Major Crime as a police officer in Jamaica.

Sergeant Irving testified that he asked Mr. White to take himself back to when he was a police officer and would he consider someone at an ATM who put in numerous cards without any transactions to be suspicious? Sergeant Irving stated that Mr. White paused for a period of time and replied that it was the way the officer asked.

Sergeant Irving testified that based on the information that was provided to him by Constable Sebaaly and his observations with respect to the perceived number of cards in Mr. White's hand he felt there were sufficient grounds to make an arrest.

Sergeant Irving testified that he advised Mr. White he could not be forced to turn over his cards but he could voluntarily turn them over and if not that Constable Sebaaly would arrest him.

Sergeant Irving testified that he had a clear view of Constable Sebaaly arrest of Mr. White. He stated that Constable Sebaaly told him he was under arrest, took a hold of his upper left arm and Mr. White got out of the vehicle and was subsequently searched, handcuffed and placed in the rear seat of a cruiser.

Sergeant Irving testified that Constable Sebaaly did not grab Mr. White by the front of his shirt in the area of the neck and he would have had concerns if he did. He stated he did not have an issue in the manner in which Constable Sebaaly affected the arrest and although Mr. White was being loud he was not being physically uncooperative.

Sergeant Irving testified that Mr. White was handcuffed to the rear and he did not complain about any pre existing medical condition. Sergeant Irving remained with Mr. White at the cruiser while Constable Sebaaly searched his vehicle. He stated that he asked Mr. White why he was crying and after not initially responding, Mr. White indicated he was upset with the whole situation; however he did not mention that he was in any pain.

Sergeant Irving testified that he and Constable Sebaaly went to his cruiser to scan the cards. He stated that the cards did not appear to be fraudulent after being checked.

Sergeant Irving testified that Constable Sebaaly used his personal phone to take pictures of the cards. He stated that this is beginning to be a common practice and removes the need to wait for a SOCO officer (Scene of Crime Officer).

Sergeant Irving testified that Mr. White never indicated that he was being improperly treated because of his skin colour and only mentioned once that he was being harassed by the police.

Sergeant Irving testified that Mr. White was released unconditionally and he apologized for the inconvenience and provided him with a business card in the event Mr. White wanted to contact him. Mr. White then got on his cell phone but Sergeant Irving was not aware who he was speaking to.

Under cross examination Sergeant Irving testified that he asked Constable Sebaaly how many cards he believed Mr. White had and was told maybe 10 cards. Sergeant Irving stated that he did not specifically ask how many transactions Mr. White completed but was advised numerous ones.

Sergeant Irving testified after reviewing his statement to the OIPRD (Exhibit 9), he acknowledged he did not tell them about Constable Sebaaly briefing him on the nervousness of Mr. White.

Sergeant Irving testified at considerable length that it appeared to him Mr. White was holding between eight (8) to twelve (12) cards in his hand. Sergeant Irving was not aware of how many cards were in Mr. White hand when he walked into the bank and acknowledge that 9 cards were seized by Constable Sebaaly after the arrest.

Sergeant Irving testified that Mr. White does speak loud which was evident during the hearing however he was louder on the day in question.

During questioning by Mr. White, Sergeant Irving testified that it is more important to ensure someone's rights and civil liberties are not compromised as opposed to supporting a co-worker.

Sergeant Irving testified that he returned to his cruiser to do his notes and Constable Sebaaly spoke with the bank manager and he ultimately left the scene.

Sergeant Irving testified that the photographs of the cards were taken as part of the investigation and it did not matter whether the picture was taken before or after the cards were determined to be legitimate.

#### Evidence of Sergeant Jeff Caplan

Sergeant Caplan testified that he has been a member of the Durham Regional Police Service for approximately sixteen (16) years and that he was promoted in 2007.

Sergeant Caplan stated that he joined the Major Fraud Unit in 2004 as a Constable and when he was promoted to Detective he remained in this unit until the fall of 2013 thereby completing almost 10 years in the unit.

Sergeant Caplan indicated that as a Detective he became responsible to supervise other members within the Unit.

Sergeant Caplan testified that he was designated as an expert witness related to identity fraud. He achieved this designation as a result of years of investigations, managing a number of projects and educating the public and other police officers both nationally and internationally.

Sergeant Caplan indicated that members assigned to the Unit would take theoretical training related to their role and he would provide on the job training to them as well and that he was Constable Sebaaly's direct report for approximately one and a half (1 ½) years.

Sergeant Caplan testified on the number of courses Constable Sebaaly took one of which was a payment card course through the Canadian Police College which was a full week dedicated towards payment cards. However under cross examination Sergeant Caplan testified that he has never taken this course and although a good portion of the course would be related to ATM Fraud, he was not certain how much was.

Sergeant Caplan testified that Constable Sebaaly was a competent investigator and that he had no concerns about his abilities.

Sergeant Caplan testified that as an experienced officer and after reviewing Constable Sebaaly report he had no concerns. Under cross examination, Sergeant Caplan indicated that his position is based solely on the content contained within the report and is not aware of any other factors.

Under cross examination, Sergeant Caplan testified that he spoke with Constable Sebaaly about this incident however cannot recall when this took place. He stated that he did not feel Constable Sebaaly was seeking advice but more so some assurance that he was not out of line.

Sergeant Caplan testified that in his view a person who does more than one transaction and who has multiple cards would be suspicious to him. He continued and indicated that simply using two cards at an ATM is not grounds for arrest simply on its own.

Sergeant Caplan testified that he also carries a portable card reader with him in his capacity as a Patrol Supervisor.

Sergeant Caplan agreed with Mr. White on the premise that if a search was illegal anything obtained from that search would be illegal as well.

Mr. White asked Sergeant Caplan that if he entered a wrong PIN number when using his card if that would be illegal and Sergeant Caplan indicated it would not be.

## **Findings**

Sergeant Tom Irving #442 and Constable Toby Sebaaly #3492 are before this Tribunal each charged with two counts of Unlawful or Unnecessary Exercise of Authority and one count of Discreditable Conduct.

Submissions were heard by Mr. White the Public Complainant, Mr. Sinclair, representing the Durham Regional Police Service and Mr. MacKenzie, representing Sergeant Tom Irving and Constable Toby Sebaaly.

Mr. Sinclair provided me with twenty-two (22) cases (Exhibit 11), Mr. MacKenzie provided four (4) cases (Exhibit 12) and Mr. White did not provide any documentation for my consideration.

I will not recite these cases in their totality. I have read and considered the cases provided by counsel and while not every case has direct collation to the matters before me, I have found them to be informative with respect to my deliberations. These cases are for guidance with respect to findings pertaining to the allegations before this Tribunal.

In reaching a decision in this matter I have taken into account the submissions provided to me. I have studied the exhibits, reviewed my notes with respect to the witnesses who have appeared before this Tribunal and finally spent considerable time reviewing the transcripts of the Hearing.

My responsibility as a Hearing Officer, while ensuring procedural fairness and ultimately natural justice to both parties, is to listen to the testimony of witnesses, receive and review exhibits and weigh the evidence provided.

I have considered all the evidence of the witnesses and reviewed the exhibits submitted by counsel. The standard of proof to be reached in a matter such as this one is clear and convincing evidence. This was defined in Carmichael v Ontario Provincial Police May 21, 1998 (OCCPS) as:

*“There must be weighty, cogent and reliable evidence upon which a trier of fact acting with care and caution can come to a reliable conclusion that the officer is guilty of misconduct.”*

Mr. Sinclair reminded me of Jacobs v Ottawa Police Service and Mark Krupa (Public Complainant) May 27, 2015 (ONDC) where the court stated:

*“Police Discipline hearings remain civil proceedings, whose sanctions are administrative and related to employment matters. As such, the standard of proof remains the civil stand of proof on a balance of probabilities.”*

However I must acknowledge that in May 2016, the Ontario Court of Appeal in Jacobs addressed the standard of proof applicable to a finding of misconduct in the Police Services Act (PSA) and stated:

*“In my view, we are bound by the Supreme Court’s statement in Penner that the standard of proof in PSA hearings is a higher standard of clear and convincing evidence and not a balance of probabilities.”*

My understanding of clear and convincing evidence is that it is greater than a balance of probabilities but less than the threshold of beyond a reasonable doubt as defined in the Criminal Code. The evidence must be so clear, so reliable, and so convincing as to persuade me the allegations are true and the facts in issue satisfied.

Certain elements of the matters before me may pivot on the credibility of witnesses. It is the fundamental content of their evidence that is important and an examination of its veracity that will lead to the determination of whether the allegations are made out and reaches the standard of which is required under police discipline hearings.

The recognized and accepted test of credibility is found in the judgement of O’Halloran, Robertson and Bird J.A. in Faryna v Chorny, [1952] 2 D.L.R. 354 at paras. 10-12 (B.C.C.A.) where the Court stated that:

*“The Credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its*

*consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”*

This test will form the basis of my assessment of the witnesses.

Three primary witnesses testified before this Tribunal over a number of days and each provided their version of the events as they perceived they occurred. I do not expect that Sergeant Irving and Constable Sebaaly provide identical versions of the events, in fact, if they are identical then questions of collusion might arise; there should be consistency on the essential aspects.

During the hearing I did at times hear testimony from Mr. White, Constable Sebaaly and Sergeant Irving that without deeper reflection and consideration could be perceived as an issue with credibility.

Sergeant Caplan was a fourth witness who testified providing this Tribunal with information based on his years of experience related to fraud and identity theft investigations. Although Sergeant Caplan has been deemed an expert witness in this area, he did not provide expert testimony.

Mr. Sinclair in his submissions conveyed concerns that Sergeant Caplan expressed sympathy for Constable Sebaaly as he was facing disciplinary charges before a Tribunal. He further, albeit with subtlety, alluded that their previous working relationship and the fact that Constable Sebaaly sought his advice after this incident may be influencing his judgment on Constable Sebaaly's performance pertaining to this matter.

I dismiss this notion. It is completely reasonable for Sergeant Caplan to express concerns for a colleague and former member who he worked with for over a year and is facing allegations of misconduct. In my view, this honesty speaks to his credibility. Additionally there is nothing before me that would indicate Sergeant Caplan's testimony has been influenced by any previous working relationship with Constable Sebaaly.

Although a number of questions submitted to Sergeant Caplan by Mr. MacKenzie were generalized, they did ironically mimic the matter at hand. I am further mindful that a number of Sergeant Caplan's responses were based solely from the lens of the arrest report and discussion with Constable Sebaaly. Nonetheless I found Sergeant Caplan to be a credible witness and his testimony did provide value to this Tribunal.

Sergeant Irving's testimony related to the conversation he had with Constable Sebaaly upon his arrival contains, in my view, similar essential elements which were provided by Constable Sebaaly during his interview with the OIPRD, Examination in Chief and during Cross Examination. Sergeant Irving however introduced one element which was absent from any testimony of Constable Sebaaly.

Sergeant Irving testified that after receiving the initial information, he followed up and asked Constable Sebaaly approximately how many cards the individual had. Sergeant Irving indicated that Constable Sebaaly estimated it at being ten (10). I am mindful that Constable Sebaaly was asked several times

during cross examination about the number of cards Mr. White had in his hand. Constable Sebaaly repeatedly testified that he was not aware of the number of cards and simply indicated it was multiple.

This in my view is not a significant departure and does not erode the credibility of Constable Sebaaly. Sergeant Irving testified that Constable Sebaaly stated to him that the male:

*"...had numerous cards with him and he had been acting nervous...."*

Sergeant Irving sought additional information and asked Constable Sebaaly to estimate the number of cards. He did and offered it to be about ten (10). I do not see this as a major issue despite the number of questions by Mr. Sinclair surrounding this conversation. Constable Sebaaly's testimony is clear in that he observed multiple cards and did not know exactly how many. His Sergeant asked him to provide an estimate on the number of cards and he did.

The more interesting question in my view is; did this somehow influence Sergeant Irving when he approached Mr. White to speak with him? Sergeant Irving testified that:

*"...it looked to me like there was, like, a good number of cards in his right hand. I would have guessed or estimated them to anywhere between eight and twelve cards...."*

We now know this is not accurate and it is clear based on the testimony from Mr. White and Constable Sebaaly that the number of cards Sergeant Irving thought to be between eight (8) and twelve (12) was in fact three (3).

Mr. Sinclair during his submissions stated:

*"...this evidence that he was holding 12 cards or what appeared to be 12 cards is yet another self-serving statement from these officers to try and justify or bolster the grounds for the arrest"*

The fact that Sergeant Irving was wrong cannot immediately taint his testimony. Sergeant Irving knew at the end of this event how many cards Mr. White had. Prior to his interview with the OIPRD and being aware that Mr. White was holding three (3) cards on that particular day could have adjusted this information to a number relative to what was seized. Sergeant Irving, from the evidence I have before me, had not documented that he felt Mr. White was holding approximately 10 cards anywhere and the reality is that he could have altered this number and no one would have known.

However he provided the OIPRD with his belief at the time and this continued during his examination in chief and cross examination. I will except that it was Sergeant Irving's honest belief that Mr. White was holding between and 8 and 12 cards. Sergeant Irving made no excuses for the difference in number and when Mr. Sinclair asked:

*"Someone with acceptable vision standing five feet away from an individual holding three credit cards should be able to ascertain that difference, shouldn't they?"*

Sergeant Irving responded by saying:

*"Well they should and to me, it looked like there was more than that."*

I disagree with Mr. Sinclair's position that this evidence is being presented to simply bolster the grounds for arrest. I appreciate Sergeant Irving's honesty.

Within Constable Sebaaly's arrest report (Exhibit 4, Tab 3 - page 6 of 21) it states:

*"As I was releasing WHITE I was approached by Kelly DAMOUR the branch manager who witnessed WHITE making the transactions at the ATM and also found it to be very suspicious as he did not make any withdrawals and advised that she was going to speak to me about it but had noticed I was already speaking with the male. She did not recognize the male as a regular client of that branch."*

During cross examination Constable Sebaaly confirmed that he was approached by the bank manager who expressed that she found the behaviour of Mr. White to be suspicious.

Mr. Sinclair then referred to Constable Sebaaly's interview with the OIPRD (Exhibit 7). Mr. Sinclair reminded Constable Sebaaly of the questioning from the OIPRD investigator Mr. Tom Andrew who suggested that Ms. Damour does not agree with his account. Mr. Sinclair stated:

*"..in fact, that she says that she went and spoke to you and told you that there was another vehicle that was suspicious and doesn't say that she considered Mr. White to be suspicious."*

Mr. Sinclair then offered to Constable Sebaaly that:

*"It's an awfully big discrepancy though, you'd agree with me, Officer?"*

Constable Sebaaly stated:

*"I would"*

Mr. Sinclair makes an understandable argument from his position as a prosecutor and one that I would expect. This has the potential to be a noteworthy piece evidence and something that could perhaps factor into the credibility of Constable Sebaaly.

However, it lacks supporting evidence and as a result little weight will be given to this suggestion by Mr. Tom Andrew. There is no evidence of Ms. Damour's interview with the OIPRD before this Tribunal. I am not aware if the information posed to Constable Sebaaly by Mr. Andrew's were verbatim responses from Ms. Damour, paraphrased in his own words or experts from a broader response. I am not aware of what the question was which may have invoked the suggested responses. In my mind this is key information which is absent for my objective consideration. Mr. Andrew's was not called as a witness nor was Ms. Damour. This second hand and arguably third hand information offered to this Tribunal simply cannot be considered reliable. Constable Sebaaly however did testify under oath and his

testimony regarding his discussion with Ms. Damour has contained similar elements throughout this Hearing and exhibits entered as evidence.

The conversation between Constable Sebaaly and Ms. Damour took place after the arrest of Mr. White and it would be impossible for this to have contributed to his grounds. In totality this discussion and suggested different versions of the content will not be a factor in my final decision.

Mr. Sinclair during his submission addressed the fact Mr. White walked passed Constable Sebaaly who was sitting in a marked police car and stated reasonably if he was intending to commit credit card fraud he might choose not to when there is an officer outside. Mr. Sinclair reminded the Tribunal that Constable Sebaaly testified that he arrived at the bank at 4:40 pm, essentially exited his cruiser and entered the bank. Exhibit 4, Tab 1, page 1 shows Mr. White at the ATM with Constable Sebaaly in the background. The time stamp on this first photograph is 4:44:56 PM.

Mr. Sinclair's position is that this five (5) minute difference demonstrates that Constable Sebaaly may have had reason to delay before going into the bank and this fundamentally undermines Constable Sebaaly's stated grounds to believe Mr. White was committing a criminal offence. Mr. Sinclair was not clear, in my mind, what inference he wanted me to take away from this. I can only assume that it is the position of the prosecution that Constable Sebaaly observed Mr. White walk passed the cruiser and after a period of time followed him in.

I remain mindful however that near the end of Mr. White's examination in chief he stated:

*"...the minute I walk into the bank, I went there and I saw this cruiser park and for some reason the minute I went there, here is this officer, Mr. Sebaaly exiting his cruiser and was right behind me.."*

This would suggest that Mr. White was in the bank when he saw the cruiser park and opposes his earlier testimony that he walked past the cruiser on his way into the bank.

With respect to the five (5) minutes time difference one would have to assume that the ATM time management system was synchronized with the item Constable Sebaaly used to note the time he arrived. Common sense tell me there was likely a difference and I note that during this Hearing the time difference between my phone and the clock on the wall was approximately nine (9) minutes. This five (5) minute difference in my view is likely less but regardless it is not pivotal to the matter at hand.

I am not convinced that Mr. White walked past the cruiser considering his conflicting statements however Constable Sebaaly during his testimony never suggested otherwise. Quite simply Constable Sebaaly indicated he arrived, exited his cruiser, entered the bank and this is when he first observed Mr. White.

Mr. Sinclair referred to a number of instances where Constable Sebaaly's testimony was absent from being documented in his notes and or arrest report.

An officer cannot predict every possible question he or she may be asked whether it be at a Criminal Trial, Hearing or other venue. The fact that certain elements are not in Constable Sebaaly's notes or arrest report does not, in the matter before me, automatically deter from his credibility. It is the essential elements which must be captured and even this, is subjective to some extent dependent on the individual officer.

During cross examination there was some discussion between Mr. Sinclair and Constable Sebaaly regarding the reason Mr. White was at the ATM. Mr. Sinclair stated:

*"...So your evidence is that he told you he was checking his balances?"*

Constable Sebaaly replied:

*"Yes. He mentioned something about balances and mortgages..."*

Mr. Sinclair responded with:

*"Do you have a specific recollection of him saying that it was in relation to his mortgage?"*

Constable Sebaaly replied:

*"Yes"*

Some limited discussion occurred about Constable Sebaaly's arrest report and the fact it did not mention anything about Mr. White checking his mortgage and that he was just checking his balances.

Constable Sebaaly agreed with Mr. Sinclair that the arrest report did not say anything about mortgages.

Mr. Sinclair suggested that Constable Sebaaly did not tell the OIPRD anything about Mr. White providing and explanation that he was checking his mortgage. Constable Sebaaly replied:

*"If I didn't say mortgage then it is fine, I know he was referring to balances".*

It is evident from my review of Constable Sebaaly's interview with the OIPRD (Exhibit 7) that his response is consistent with his testimony at the hearing regarding this specific element. On page 30 of Exhibit 7 Constable Sebaaly, during his OIPRD interview, stated:

*"..He just said that he; he came to this branch to check his balance and mortgage".*

Mr. Sinclair in his submissions stated that Constable Sebaaly while under cross examination offered for the first time that there was a male between him and Mr. White. While it was Mr. White's evidence there was not anyone between them and this demonstrated inconsistency and undermines Constable Sebaaly's credibility.

However Constable Sebaaly's interview with the OIPRD (Exhibit 7, page 4) clearly suggests otherwise when he states:

*"In the line up, there was one person waiting in line, then behind him was a tall gentleman, black male in question, was in line. There was another person behind him and then I was the last person in line."*

Mr. Sinclair further raised a concern that it was the first time Constable Sebaaly indicated that the individual between himself and Mr. White was a black male and again questioned Constable Sebaaly's credibility. Simply put, the details of the individual between Mr. White and Constable Sebaaly is not relevant and it detracts from the matter at hand.

I am not convinced Mr. White actually knows for certain that there was not an individual behind him other than Constable Sebaaly. During Examination in Chief Mr. White could not recall if there was someone beside him at the ATM however previous to this he testified that when he arrived inside the bank both ATM's were occupied.

Under examination in chief, Mr. White was referring to Exhibit 4 Tab1 Page 1 and was asked by Mr. Sinclair what it appears Constable Sebaaly was doing. Mr. White stated:

*"Appears like he's monitoring me or he was coming in or appears that he was monitoring me."*

This response would suggest to me that Mr. White was uncertain what Constable Sebaaly was doing. It is evident however that Constable Sebaaly is not within two (2) or 3 (three) feet as Mr. White suggested in his OIPRD interview and is more consistent with Constable Sebaaly's evidence that he remained approximately 8 feet away from Mr. White until he approached next available ATM.

Other than Mr. White's testimony there is no evidence to support Constable Sebaaly was any closer than the first photograph depicts (Exhibit 4, Tab 1, Page 1). Additionally I struggle with the concept that an officer trained in surveillance techniques would overtly and purposely move in so close to an individual they were observing.

With respect to Mr. White's testimony pertaining to the photographs in Exhibit 4 Tab 1, I offer the following. It is only representative of 36 seconds. Mr. White repeatedly testified that he kept looking back to see where the officer was and that he did not expect someone to be so close. He remembers the officer standing directly behind him and this caused him concern. Only one of the six photographs depicts Constable Sebaaly standing behind Mr. White and clearly Constable Sebaaly at this point is not impeding anyone's personal space. The other 5 photographs unmistakably are when Constable Sebaaly is standing beside Mr. White at the ATM. In one photograph it appears Constable Sebaaly is smiling at Mr. White, in two other photographs Constable Sebaaly is looking directly at the ATM he was using and in the other two photographs Mr. White and Constable Sebaaly appear to be looking at each other.

Regardless the photographic evidence before me, I will accept that Mr. White perceived Constable Sebaaly was innately close to him.

Under cross examination Mr. White admitted he was angry with Constable Sebaaly for requesting his credit cards and personal information. Mr. MacKenzie stated:

*"..you were raising your voice with the officer....."*

Mr. White replied:

*"The way I am talking to you now is the way I was talking to the officer"*

Exhibit #8 which is the audio recording of Constable Sebaaly requesting a Sergeant to attend his location via his portable radio suggests otherwise. I am satisfied through previous testimony that the only two voices you could hear are that of Constable Sebaaly and Mr. White. The audio segment in which you can hear Mr. White in the background is very brief and what he is saying is unclear, however what is evident is that his voice is elevated and certainly exceeded the level to which he was addressing this Tribunal during his cross examination.

Perhaps it is proper at this time for this Tribunal briefly address Mr. White's actions and behaviour. Simply put he did nothing wrong. He was at the bank for personal reasons and felt uncomfortable with Constable Sebaaly's perceived behaviour. I will accept that he felt this officer in full uniform was attempting to ascertain his personal information. This made him suspicious of the officer and subsequently nervous and uncomfortable. Mr. White was under no legal authority to give his bank cards to Constable Sebaaly upon request and I have no issues with Mr. White become angry with the officer and audibly expressing this. It is very clear to me that Mr. White was not attempting to commit or committed any criminal offence.

There are subtle discrepancies in Mr. White's testimony which may reflect some gaps within his independent recollection however they are not so serious that I have concerns about his credibility. I believe Mr. White provided this Tribunal with candid responses of the events as they occurred from his perspective and recollection.

Equally, both Constable Sebaaly and Sergeant Irving in my view were open with counsel when under cross-examination and did not attempt to embellish their positions or observations. They provided counsel with reasonable and plausible responses, again from their individual perspective, to the questions put to them. I found them to be credible witnesses. Their evidence to some extent is corroborated by each other.

Police officers are entrusted with powers which may gravely affect the liberty of a subject. The officers' conduct must be analyzed as a whole, in context, having regard to all the sources defining acceptable conduct.

Police officers seldom have the luxury or relaxed contemplation when determining whether a potential criminal offence is unfolding before them. Therefore, some element of common sense is required in assessing the conduct of police officers. Police officers on occasion have to make quick decisions without the ability to resort to legal advice.

<b>Count 1</b>	<b>Sergeant Tom Irving</b>	<b>Unlawful or Unnecessary Exercise of Authority</b>
<b>Count 1</b>	<b>Constable Toby Sebaaly</b>	<b>Unlawful or Unnecessary Exercise of Authority</b>

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

In Ontario the Code of Conduct provides that a police officer commits unlawful or unnecessary exercise of authority where the police officer “without good and sufficient cause make an unlawful or unnecessary arrest” or “uses any unnecessary force against a prisoner or other person contacted in the execution of duty”.

There are two compulsory elements that must be established to find a breach of this provision. There must be:

1. An unlawful or unnecessary arrest **and**,
2. The officer must not have had good or sufficient cause to make the arrest.

Section 495 (1) of the Criminal Code in part states:

*“a police officer may arrest without a warrant; a person who, on reasonable grounds he or she believes has committed a criminal offence or is about to commit an indictable offence.”*

The factors to be considered in order to establish reasonable grounds for arrest can be found in R v Storrey (1990) 1 S.C.R.. 241 where the courts states:

*“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 justified 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 make the arrest.”*

Constable Sebaaly is a practised police officer who had about seven (7) years of Service at the time of this incident. Additionally, prior to this incident he had recently completed two and a half (2 ½) years assigned to the Organized Crime section of the Major Fraud Unit. It is evident from Constable Sebaaly’s testimony and that of Sergeant Caplan this experience provided Constable Sebaaly with enhanced knowledge as it related to credit card and identify theft investigations.

Constable Sebaaly’s observations of Mr. White in the bank were consistent throughout his testimony. In my view the key tangible elements that Constable Sebaaly used to determine his reasonable grounds for arresting Mr. White are the essentially the following:

- Mr. White was holding multiple cards in his hand
- Mr. White did not have wallet in his hand
- Mr. White conducted two transactions at the ATM but did not deposit or receive funds
- He observed Mr. White look at him a few times through the ATM mirror
- He observed Mr. White turns his head a number of times to look back
- Mr. White at one point turned around and looked at him
- Mr. White appeared to be nervous
- When he approached Mr. White who was in his car he had multiple cards in his hand
- When he was speaking to Mr. White he was evasive and uncooperative

Each of these elements were in fact corroborated by Mr. White during his testimony. Mr. White testified that he was holding three (3) cards while inside the bank and his wallet was in his back pocket. He did not deposit or receive funds as he was simply checking the balances on two of his Visa cards. Mr. White said that he felt the officer was too close to him and was looking in the mirror and looking back to see where the officer was. Mr. White testified that the officer was making him nervous so he stopped his transactions and went back to his car. When approached by Constable Sebaaly he was holding the same three bank cards and he testified that he was angry with Constable Sebaaly for demanding to see his personal items.

Mr. Sinclair offered Detective William Wowchuk, Detective Constable Brad Bernst and Detective Constable Ronald Popowich v Thunder Bay Police Service where two (2) of these three (3) officers were found guilty of Unlawful or Unnecessary Exercise of Authority. Additionally the OCPC decision which upheld the Hearing Officers findings was also submitted. This case in my view bears little resemblance to the matter before me. The officers in this case were conducting surveillance in the area of a suspected drug distributor. They stopped and arrested Mr. Burns as he pulled out of the laneway near this suspected distributor. There was no observation made on which residence Mr. Burns may have been at, there was no drug transaction observed and it was unknown if the suspected target was even home. Mr. Burn's was stopped and subsequently arrested based primarily on the fact he was pulling out of the laneway. Constable Sebaaly observations are very clear and specific unlike the matter offered. I do not see any connection between the two matters that I can draw from.

Mr. Sinclair submitted R v Brown 2012 (OCA) which he believed to be highly relevant. Constable Manafo observed Mr. Brown fully extend his right arm with a closed fist towards a second person. He could not tell whether the person was a male or female. Additionally this second person did not extend their hand towards Mr. Brown or reciprocate in any way the gesture made by Mr. Brown. Both separated and Mr. Brown walked away with his right hand by his side and it remained closed. Constable Manafo's partner testified that he did not notice anything about Mr. Brown's conduct that would have cause him to be suspicious.

From the evidence I have there is little correlation between R v Brown and the matter before me. It is my view that Constable Sebaaly's observations of Mr. White were more substantive than what Constable Manafo offered for his reasonable grounds for arrest. In particular there was no hand to hand interaction observed.

Finally, with respect to R v Tudeau, I have reviewed this matter and again believe it offers little to assist me. Constable Foster accepted an explanation from Mr. Tudeau about the credit card that was located in his jacket and that it belonged to his girlfriend. The Court determined that based on this acceptance, from an objective perspective, how observing the cell phone, SIM card and manila envelopes in the front seat of the car would alter his primary belief and provide him grounds to arrest Mr. Tudeau for possession of stolen credit cards. Constable Sebaaly never testified that he accepted Mr. White's explanation as to what he was doing in the bank.

In my view the subjective element that Constable Sebaaly required for reasonable grounds to arrest Mr. White was achieved. Constable Sebaaly's observations on that day as well as his experience, knowledge and training as an investigator within Major Fraud provided him an honest belief that Mr. White was committing or about to commit a criminal offence.

The sole remaining issue pertaining to the first allegation of misconduct both officers are facing is whether Constable Sebaaly's belief was reasonable in the circumstance thereby meeting the objective requirement. It is not important whether Constable Sebaaly's belief was accurate or not but weighted on the test of reasonableness and probability.

Mr. Sinclair asked that I use common sense with respect to my findings during his submissions. The Supreme Court of Canada in R v Storrey (1990) articulated:

*"The case law states that "common sense" must prevail in assessing the objective qualities and weight must be given to the immediate circumstances at the time of arrest"*

Common sense guides me to believe anyone who is standing at an ATM and observes an individual looking at them through the ATM mirror as well as looking over their shoulder at them and generally acting nervous would find this to be unusual behaviour and likely suspicious behaviour. To think otherwise in my view would be naive.

Further it is my position that someone standing in the place of Constable Sebaaly at the same time, making the same observations with the same knowledge, experience, training and purposefully avoiding to concentrate on individual pieces of evidence would support, from an objectively based perspective, that reasonable ground did exist to arrest Mr. White. In my view as it relates to this incident Constable Sebaaly training and experience is necessary in determining objective reasonableness. If this is dismissed innocent actions observed by a "reasonable person" may have very different meanings or perceived to be irrelevant.

Mr. White's activities were clearly visible and independent of themselves, each of the observations made by Constable Sebaaly or a reasonable person would not meet the threshold necessary to form reasonable grounds to make an arrest. However Constable Sebaaly made it very clear during his testimony that it was the totality of his observations which formed his belief and not simply one or two elements.

Ironically, it is my view, that Mr. White himself through his testimony provides support with respect to the required objective point that is necessary. Constable Sebaaly's observations of Mr. White's actions and behaviour were validated by Mr. White himself.

I did not find Constable Sebaaly overzealous or reckless during his interaction with Mr. White, in fact it is my view he took a measured response. He testified that after Mr. White declined to turn over his credit cards he asked if he could leave. At this time Constable Sebaaly testified that he informed Mr. White he could not leave and that he was being detained for investigative purposes. I believe Constable Sebaaly when he testified that he read Mr. White his rights to counsel. Mr. White testified that this did not occur, however it is evident that he was upset at the time and perhaps he does not recall this happening.

Constable Sebaaly requested that a Sergeant attend his location. There is some difference in opinion on whether Mr. White requested to see a Sergeant or if it was offered to Mr. White by Constable Sebaaly. This point is not relevant in any case. A Sergeant was requested by Constable Sebaaly and both he and Mr. White waited for Sergeant Irving's arrival. This in my view demonstrates that Constable Sebaaly exhibited patience.

Sergeant Irving arrived and spoke briefly with Constable Sebaaly. Shortly after this conversation Sergeant Irving spoke with Mr. White. Mr. White continued to exercise his right not to arbitrarily turn over his credit cards to be scanned by the police. Sergeant Irving testified that from his conversation with Constable Sebaaly and subsequent observations of Mr. White he also believed there were the necessary grounds to arrest Mr. White. This also supports the objective requirement that is needed. As a result Mr. White was arrested by Constable Sebaaly in the presence of Sergeant Irving. Mr. White agreed with Mr. Sinclair that Constable Sebaaly told him he was under arrest however later testified that that he did not recall being told he was under arrest and was not 100% certain. Mr. White was handcuffed, searched and placed in the back seat of Constable Sebaaly's Cruiser. Constable Sebaaly testified that he read Mr. White his Rights to Counsel and Sergeant Irving corroborated this.

Additional cards with magnetic strips were located in Mr. White's wallet as well as the three (3) he had in his hand while sitting in his car. In total these nine (9) items (Exhibit 5) were scanned and determined to be legitimate and Mr. White was shortly thereafter released unconditionally.

Mr. Sinclair during his submission offered that Constable Sebaaly and Sergeant Irving failed to consider other alternative options that would have not required Mr. White to be unlawfully arrested.

Mr. Sinclair submitted that Mr. White himself offered to go inside the bank with Constable Sebaaly to have his cards validated as he did not want his personal identification scanned by the police. Mr. Sinclair submitted that regardless if the bank was open or not due to the time of day, there was the option for Constable Sebaaly to speak with someone at the bank as staff members were still inside. This option would have validated the cards Mr. White had were in fact not compromised and prevented his unlawful arrest.

I do accept Constable Sebaaly justification for not going into the bank with Mr. White. Although he cited a few reasons such as officer safety and that the bank was closed, the strongest rationale which he articulated was the fact he lost continuity of the cards. Although he observed multiple cards in Mr. White's hand inside the bank, he lost sight of these cards when Mr. White returned to his car. Although Mr. White did have cards in his hand when Constable Sebaaly spoke with him while at the vehicle he could not confirm these were the same cards as observed in the bank. Constable Sebaaly offered that it was possible that compromised cards could have been placed elsewhere and legitimate cards obtained and presented to him. This in my view is a sensible premise which Constable Sebaaly offered and although going into the bank was an option, when viewed in totality from an investigative perspective it would not have been useful.

Secondly, Mr. Sinclair suggested that Constable Sebaaly could have simply filed a report to be investigated at a later time. Again, although this was an option it does not necessarily mean it is viable. Constable Sebaaly testified that in his mind it was not an option as he believed Mr. White had committed a criminal offence involving credit cards. He did not want to allow this activity to continue. For Mr. White's benefit I will stress that this is only an example and in no uncertain terms am I suggesting he was involved in any criminal activity. However, if these cards were in fact compromised I believe the individual whose identity and information was being used and the bank being victimized may have an issue with an officer allowing the offense to possibly continue only to have the matter investigated at a later time. Common sense tells me a reasonable person would expect the police officer to investigate the matter which Constable Sebaaly did. I accept that filing a report, under the circumstances before Constable Sebaaly was not a practical or a responsible option.

During this hearing it was inferred at times that racial discrimination was a predominant factor, it is clear this is simply an opinion that had no supporting evidence. There is nothing to indicate that there was anything in the circumstances of the arrest that would make me suspect it was on any other ground. There is no indication that the arrest was made because Constable Sebaaly or Sergeant Irving was biased toward Mr. White and any notion of racial discrimination is simply not supported.

The allegations of an unlawful or unnecessary exercise of authority in that both Sergeant Irving and Constable Sebaaly without good and sufficient cause made an unlawful or unnecessary arrest has not been proven with clear and convincing evidence nor on a balance of probabilities. To this end, I find Sergeant Irving and Constable Sebaaly **NOT GUILTY** on the count of misconduct pursuant to clause 2(1)(g)(i) of the Code of Conduct, Ontario Regulation 268/10, as amended under the *Police Services Act*.

<b>Count 2</b>	<b>Sergeant Tom Irving</b>	<b>Unlawful or Unnecessary Exercise of Authority</b>
<b>Count 2</b>	<b>Constable Toby Sebaaly</b>	<b>Unlawful or Unnecessary Exercise of Authority</b>

In the matter before me the second allegation of misconduct is tightly bound by the first. The prosecution's position is that merely grabbing someone's arm although it may not be described as excessive, if it is a consequence of an unlawful arrest, the use of force is unlawful and subsequently constitutes an assault. Mr. MacKenzie agreed with the premise that if this Tribunal found the arrest unlawful the use of force would be deemed unlawful as well.

Although my ultimate decision regarding this second allegation of misconduct may be evident I feel compelled to address a few matters.

While there remains some difference in opinion with respect to how the arrest was facilitated it is clear from the evidence, regardless of what version I tend to believe, it was not excessive. Mr. White testified that he was grabbed by his shirt, in the area of his neck. He was uncertain which hand Constable Sebaaly used and believed it was only by one hand. Constable Sebaaly conversely testified that he grabbed Mr. White by his upper left arm when he effected the arrest. This evidence was corroborated by Sergeant Irving. Constable Sebaaly testified that Mr. White was cooperative and very little effort had to be used as Mr. White willingly exited his car. Mr. White testified that he cooperated with the Constable Sebaaly while exiting his car and stated:

“I wouldn’t say it’s, it’s a lot of force but force was used.”

Mr. White further testified that although he thought what the officers did was unlawful; he stated they were both professional.

As a result of being handcuffed behind his back, chronic tendonitis to Mr. White’s left shoulder was aggravated. Mr. White has been managing tendonitis and degenerative changes to his shoulder joints for the past four years as diagnosed by his doctor (Exhibit 4 Tab2).

While it is unfortunate Mr. White’s lingering shoulder issues were aggravated as a result of being handcuff it was by no means a result of excessive force or unprofessional behaviour. The fact that Mr. White was handcuff behind his back is not an issue for this Tribunal to address and this decision, in my view, should ultimately reside with and at the discretion of the officer.

The allegations of an unlawful or unnecessary exercise of authority in that both Sergeant Irving and Constable Sebaaly used unnecessary force against a prisoner or other person contacted in the execution of their duty has not been proven with clear and convincing evidence nor on a balance of probabilities. To this end, I find Sergeant Irving and Constable Sebaaly NOT GUILTY on the count of misconduct pursuant to clause 2(1)(g)(ii) of the Code of Conduct, Ontario Regulation 268/10, as amended under the *Police Services Act*.

<b>Count 3</b>	<b>Sergeant Tom Irving</b>	<b>Discreditable Conduct</b>
<b>Count 3</b>	<b>Constable Toby Sebaaly</b>	<b>Discreditable Conduct</b>

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

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

The Ontario Civilian Commission of Police Services has expressed the following approach regarding the meaning of “likely” to bring discredit upon the reputation of the police force in: Silverman v. Ontario Provincial Police:

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

Mr. Sinclair’s submissions related to this last allegation were limited and for the most part predicated on the basis of finding both officers guilty with respect to Count 1 and Count 2. Mr. Sinclair did suggest that even if this Tribunal was to conclude that the arrest was in fact lawful, it would still be able to discern that if the circumstances of the arrest were known to the community it would bring the reputation of the Service into disrepute.

Mr. MacKenzie position was if this Tribunal finds the arrest to be lawful, then the allegations of discreditable conduct (Count 3) falls by that very finding.

I disagree with Mr. MacKenzie’s position on this point. Simply based on the rationale that I have found the arrest to be lawful does not automatically erode, in my view, the allegation of Discreditable Conduct delineated in Count 3 of the respective Notice of Hearings. The allegation is that both Constable Sebaaly and Sergeant Irving acted in a disorderly manner or in a manner prejudicial to discipline or like to bring discredit upon the reputation of the police force.

The Durham Regional Police Service works tirelessly at developing and maintaining a positive image in the community. It is this image that enhances the reputation of our Service in the eyes of the community it serves.

The public’s perceptions about the lawfulness and legitimacy of law enforcement are important principles for judging policing in a democratic society. Lawfulness means that police comply with constitutional, statutory and professional norms. Legitimacy is linked to the public’s belief about the police and its willingness to recognize police authority.

The totality of their conduct must be considered and what the reasonable expectations of the community are, not simply based on whether or not the arrest was lawful.

I remain steadfast in my belief that Constable Sebaaly had reasonable grounds to arrest Mr. White having achieving both the subjective and objective requirements. I also believe that a reasonable person would be able to discern that the actions of both officers were conducted in good faith. I feel strongly that our community would expect an officer who believes he or she has reasonable grounds to believe a criminal offence has been or is about to be committed, to act and protect their community from a potential crime. The fact that Constable Sebaaly’s belief was not accurate does not automatically mean his conduct and that of Sergeant Irving’s is discreditable. Police Officers are wrong from time to time and in the matter before me both officers adhered to their professional code of conduct and within the framework established by legislated authorities.

Our community expect police officers amongst other things to treat community members fairly, deliver policing services professionally and ethically, recognize and respect the rights and needs of individuals, work in partnership with the community to reduce crime and be respectful and helpful.

I do not see a marked departure from these principles in the conduct of Constable Sebaaly and Sergeant Irving. Mr. White himself described them both as being professional which must be a factor in my determination. There is nothing before me that would indicate that the actions of either officer were discreditable in any way and the reputation of the Durham Regional Police Service was compromised by this event or the actions of both officers.

The allegations of discreditable conduct in that both Sergeant Irving and Constable Sebaaly acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force has not been proven with clear and convincing evidence nor on a balance of probabilities. To this end, I find Sergeant Irving and Constable Sebaaly NOT GUILTY on the count of misconduct pursuant to clause 2(1)(xi) of the Code of Conduct, Ontario Regulation 268/10, as amended under the *Police Services Act*.



Inspector Todd Rollauer

January 9<sup>th</sup>, 2017

Date