

**IN THE MATTER OF THE POLICE
SERVICES ACT, R.S.O. 1990 AND
THE OTTAWA POLICE SERVICE**

AND

CONSTABLE JASON SAVORY #1558

CONSTABLE TREVOR DUNLOP #1573

CONSTABLE DAVID TURNBULL #9634

CONSTABLE TREVOR HART #1645

J U D G M E N T

APPEARANCES:

Ms. Christiane Huneault	Counsel for the Ottawa Police Service
Mr. David Anber	Counsel for the Complainant
Mr. William Carroll	Counsel for the Officers

BEFORE:

**Deputy Chief Terence Kelly
York Regional Police (Retired)
Hearing Officer**

JUDGMENT DATE:

November 30, 2011

JUDGMENT

CONSTABLE JASON SAVORY #1558
CONSTABLE TREVOR DUNLOP #1573
CONSTABLE DAVID TURNBULL #9634
CONSTABLE TREVOR HART #1645

NOVEMBER 30, 2011

DEPUTY CHIEF TERENCE KELLY (RETIRED): Before commencing with Judgment in this matter, I wish to thank Mr. William Carroll, Defence counsel; Ms. Christiane Huneault, the Service prosecutor, and Mr. David Anber, counsel for the Complainant, for their able arguments and exhibits tendered, all of which have assisted me in reaching my decision.

Constables _____ have pleaded not guilty to two counts each of Unlawful or Unnecessary Exercise of Authority, laid under the *Police Services Act*.

In general, the Rules of Evidence will be followed. If there is an easing of the rules it is essentially in an attempt to arrive at the truth while balancing the need for fairness towards the officers and the complainant, and also ensuring there is no denial of natural justice.

CHARGE NUMBER ONE: UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY alleges that on or about March 28, 2009, they did, without good and sufficient cause, make an unnecessary arrest of Mr.

CHARGE NUMBER TWO: UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY alleges that on or about March 28, 2009, they did use unnecessary force against Mr. while effecting an arrest.

The first witness for the prosecution, Mr. testified that on March 28, 2009, he was driving his vehicle westbound on Road towards his place of work when he came up behind a black that was driving all over the road. He stayed behind this vehicle, driving at 40 km/h, and followed this vehicle for approximately (10) ten minutes. The vehicle turned into a driveway without indicating a turn and stated that he blew his horn at the vehicle and continued on his way.

As he passed he looked in his mirror and realized he was being followed by a blue and white police car. He continued driving for approximately twenty minutes at speeds between 30 and 40 km/h. During this time he saw that the police vehicle's roof light was activated. Mr. stated that, as the vehicle passed him, the officer was looking at him. He continued to drive and noticed other police vehicles. Upon

approaching _____, _____ stated he pulled to the side and one of the police vehicles pulled in front of him and another one was behind him. Mr. _____ put his car in park and turned off the ignition and then started to remove his seatbelt. At this time one of the officers from the police vehicle in front of him exited his vehicle, walked to his car and banged on his window. He noticed the officer had a gun in his hand. Several other officers then approached his car and he was told by one of them to get out.

_____ stated that he was trying to get out of his vehicle when one of the officers pulled him out and threw him to the ground face down. He identified Constable _____ as the officer who had his gun out, stating that Constable _____ was in his face telling him things but he cannot remember what Constable _____ was saying. He was then handcuffed while lying on the ground and the officers were asking him for the paperwork pertaining to his vehicle. The officers subsequently removed his wallet containing the documents.

Mr. _____ stated that he received injuries to his forearm, which was bruised and bleeding as the result of being thrown to the ground. He also had pain in his right leg as a result of an officer's shoes and boots on his leg while on the ground. He stated that he didn't complain about it, he "just took the pain."

While on the ground he was picked up by two of the officers and leaned against his vehicle. One of the officers accused him of throwing something under the car seat. Mr. _____ denied this, telling the officers that he only

had cigarettes in his possession. The officers then searched his vehicle, pulling up the car seats and searched the trunk of his vehicle.

While standing beside the car, one of the officers told him that he was (1) following too close to the other vehicle and, (2) he had failed to stop for the police.

Mr. [redacted] stated that he told the officers that he didn't hear them as his windows were closed and his music was loud; that the CD he was playing has the same sound as a car siren on it and, as a result, he didn't realize what was going on that "it was not until he had turned down his radio that he realized what was going on."

Entered at this time was **Exhibit Number 7, Tab 11 – copies of two Provincial Offence Tickets**, given to Mr. [redacted] at the scene.

Under questioning by the Service prosecutor, Mr. [redacted] stated that he was given the tickets by the officer and advised to go to court. After receiving the tickets he got into his car and left the area and proceeded to his workplace. Upon arrival he spoke with his supervisor and told his supervisor about his interactions with the police officers. He was advised by his supervisor to get to the hospital.

Entered at this time was **Tab 2 of Exhibit Number 7 – showing photographs identified as (1) his pants, (2) his shirt, (3) another**

photograph identified as his pants; all containing what Mr. described as "boot prints" from the officers at the scene. Also a fourth and fifth photograph which he identified as his legs showing bruises from the incident.

Mr. stated that he was at work for approximately ten minutes then left and went to the hospital after which he went home where he took some Aspirin for the pain and stayed there for the rest of the afternoon.

When asked about Ms. coming to the incident, Mr. stated that Ms arrived when he was leaning against his car. She initially stopped to talk to the police officers then came over to him.

Under questioning by his counsel, Mr. Anber, Mr. stated that he is 43 years old and has no criminal record other than traffic violations. At the time of the incident he lived with Ms

When asked about the pictures of his clothing, he stated that the marks on his clothing happened at the scene as a result of boot prints from the officers when he was lying face down.

With regard to the tickets he received from the officers, Mr. stated that he pleaded guilty to one of them as he was wrong not to stop because of his loud radio.

Under cross-examination by Defence counsel, Mr. stated that he

had never heard the outcome of his initial complaint to the Ottawa Police.

After further questioning by Defence counsel, he agreed that he did, in fact, receive a letter advising him of the outcome of the investigation,

When questioned what the distance was between his car and the black he was following, responded, (10) ten feet. Defence counsel then asked about the statement he gave to the officers who had originally investigated his complaint, telling them he was (6) six feet behind the car. then stated he can't remember the distance and that he was not tailgating.

When asked about his meeting with Dr. at the (Tab 3, Exhibit Number 7) he stated he advised the Doctor of the incident and said he was tailgating. Mr. stated that he does not recall saying that; he is aware what tailgating means, "Follow too close." That he didn't have to jamb on his brakes to stop.

Defence counsel questioned Mr. regarding his working hours that particular day. stated that he started work at 10:00 a.m. and that the drive from his residence to his workplace took him (20) twenty minutes and that the area where he was stopped was approximately 10 to 15 minutes from his workplace. He agreed it was after 10:00 a.m. when he was stopped by the police.

When asked if he was late for work that morning, Mr. replied that

he wasn't. However, he agreed with Defence counsel that he had told the original officer who interviewed him, Sergeant [REDACTED] that he was behind the black [REDACTED] for a period of time and agreed that the police cars had been behind him for approximately 20 (twenty) minutes before he was pulled over.

Mr. [REDACTED] stated that his music was up loud and that there was a CD on and there were siren sounds coming from the CD and that he had no way of knowing there were sirens coming from outside his vehicle. He also stated that he did not see any flashing lights. He turned his radio down to see what was really happening because he heard a siren and wanted to make sure if it really was a siren.

When questioned again why he would turn his radio down when he believed the sound of sirens was coming from his CD, [REDACTED] stated "just to be sure it was a police car because his windows were closed and he wanted to be sure he was hearing outside."

When questioned regarding the police car pulling in front of him and observing the other one behind him, [REDACTED] stated that he pulled his car over, stopped and did not move his car from that point. The officer got out of his car and approached him with a gun in his hand and banged on the window. He believes he then opened his car door stating that he was scared and that he was slowly taking off his seatbelt. An officer then reached into his vehicle and removed the seatbelt and pulled him from the vehicle and placed him on the ground face down.

Mr. [redacted] stated that he was told he was being arrested for failing to stop for the police under the H.T.A. (Highway Traffic Act). He said he believed he told the officers that he couldn't hear the sirens because his radio was too loud and that the reason he didn't stop was because he didn't think he had done anything wrong.

When asked about the pictures of his clothing, [redacted] stated that the marks got there from the police officers when he was on the ground. He does not know if he was actually kicked and not sure what happened when on the ground, but he felt feet on him.

When asked about the injuries to his arm, Mr. [redacted] stated there were scrapes on his arm and also blood on his hand, however, no pictures were taken of these injuries as the pain was more in his leg.

He agreed that when interviewed by Sergeant [redacted] he told him the injuries were to his right leg, but he also agreed with Defence counsel that in the medical report of Dr. [redacted] that it was his left leg that was injured. However, the photos he took were of his right leg. Mr. [redacted] stated that it was his left leg that was injured.

Mr. [redacted] agreed with Defence counsel that during his testimony in this Tribunal he indicated it was his right leg that was injured. He said he made a mistake and that it was the left leg that sustained the injuries. He also agreed with Defence counsel that the pictures presented regarding the injuries show no bruising or swelling.

When questioned further by Defence counsel about the distance he was driving behind the black Mr. agreed that he was following the other vehicle within (6) six feet and that it was too close. He also agreed that police had the right to stop him. With regard to the two Provincial Offence Tickets, he agreed he pleaded guilty to a charge of making unnecessary noise, although he did not know what he had pled guilty to when he was in court.

Under re-examination by the Service prosecutor, Mr. was asked if he was clear on the distance he was traveling behind the other vehicle. He replied between (6) and (10) feet; that he could see the bumper and the exhaust of the vehicle.

The next witness for the prosecution, Ms. , testified that she has been friends with Mr. for the past five years. On March 28, 2009, she received information to go to the area of on Road as there were (8) eight police officers surrounding

Upon arrival, she observed (4) four officers on scene and two police cars. One of the cars was on the driver's side of Mr. car and the other one was on the opposite side.

Mr. was talking to two young police officers, Constables and As she was going to approach Mr. Constable asked her to come over to him so that he could explain what happened. She was advised that was stopped for road rage and following too close;

that they had attempted to pull him over with their lights and sirens, but he wouldn't pull over and they thought it was a stolen vehicle. She was further advised that Mr. [redacted] was being charged with H.T.A. offences. She was then questioned if [redacted] took drugs or alcohol. She stated that the officer speaking to her was polite and nice

Ms. [redacted] further testified that Mr. [redacted] asked her to call their workplace as he was late and she noticed at this time he was limping.

Ms. [redacted] returned to her workplace and Mr. [redacted] went home to change his clothing. On arriving back at work, Mr. [redacted] showed her his arm that had a cut on it. Ms. [redacted] stated that she placed a bandage on it for him and later Mr. [redacted] came to her and said he was going to the hospital as he had a pain in his upper leg and wanted to get checked out.

Ms. [redacted] was shown the photos from **Exhibit Number 7** and identified them as the ones she took to show the bruising on his leg and the marks on his clothing.

Under questioning by Mr. Anber she stated that Constable [redacted] told her that Mr. [redacted] was not under arrest. At this time, [redacted] was speaking to the two other officers. She also stated that the officer speaking to her mentioned that [redacted] would not pull over because his music was too loud. When asked about the clothing she photographed, she stated that she could see marks on the shirt that looked like boots.

Under cross-examination by Defence counsel, Ms. [redacted] stated that there appeared to be a footprint on [redacted] shirt and was the reason she took pictures. Also, there was dirt on his pants, but didn't see any marks on them that resembled the marks on his shirt.

When shown the photo (4) of Mr. [redacted] leg indicating a bruise above the knee, Ms. [redacted] agreed with Defence counsel that the photo does not appear to show bruising above the knee.

She stated that when discussing the incident with Constable [redacted] she was told that Mr. [redacted] would be free to go after he got his tickets. Ms. [redacted] reiterated that when speaking to Constable [redacted] he told her about the "Road Rage" and "Following Too Close" and about using the lights and sirens in an attempt to pull [redacted] over and that [redacted] would not pull over. Constable [redacted] stated that [redacted] turned something innocent into a more serious event and that they thought the vehicle was stolen in the context of him not pulling over. She described Constable [redacted] as polite and nice and that he answered all her questions. Ms. [redacted] recalls [redacted] speaking to the other officers and noticed that [redacted] car doors, along with the trunk, were open and that his wallet was on the roof of the car.

The next witness for the prosecution, Sergeant [redacted] testified that he is presently a member of the [redacted] and in May of 2009 he was assigned the complaint of Mr. [redacted] Entered at this time was **Exhibit Number 9 – Book of Documents of the Ottawa Police Service.**

Sergeant [redacted] stated that, after being assigned the complaint, he reviewed the complaint, identified the officers, sent them a copy of the complaint and directed the officers involved to respond to it in writing.

After receiving and reviewing the statements of the officers (**Tab 2, Exhibit Number 9**) he collected additional material from Mr. [redacted]; medical reports and photographs. He then contacted Ms. [redacted] and received a written statement from her. He then obtained any communication transmissions of the incident and drove the route of the incident to familiarize himself with it.

On September 28, 2009, he interviewed Mr. [redacted] at Professional Standards, stating that the initial complaint was brief and wanted Mr. [redacted] to expand on it. After the interview, Sergeant [redacted] reviewed all the evidence he had gathered regarding the complaint to finalize his investigation and make a decision on the matter.

When questioned by the Service prosecutor, Sergeant [redacted] agreed he never interviewed the officers involved as he felt he had all the necessary information he required in their written statements.

In his review, Sergeant [redacted] came to the conclusion that there was no evidence of improper conduct on behalf of the officers.

Under questioning by Mr. Anber, Sergeant [redacted] agreed that he was relatively new to [redacted] and this was his third file. He also

agreed that Mr. [redacted] had wanted counsel with him during his interview with Professional Standards, however, Mr. [redacted] did not appear to be uncomfortable during the interview. Sergeant [redacted] also agreed with Mr. Anber that, during his interview, Mr. [redacted] mentioned about his car being searched and that there was no mention of this in his report.

Under cross-examination by Defence counsel, Sergeant [redacted] relayed his police experience prior to working in [redacted] which included 14 (fourteen) years in various units in an investigative capacity.

When questioned as to the contents of the written statements by the officers, Sergeant [redacted] stated that their statements, together with their duty notes, were thorough and detailed and there were no inconsistencies. He agreed with counsel that Constable [redacted] did not take part in the arrest or removal of [redacted] from the vehicle. He also agreed that the search of [redacted] vehicle was not part of the complaint.

When responding to a question from Defence counsel, Sergeant [redacted] stated the officers mentioned that their firearms were drawn at various times during the investigation.

When asked about the interview of Mr. [redacted] at [redacted] Sergeant [redacted] stated that Mr. [redacted] had no issues with the interview being taped; that he was comfortable during the process and understood and responded to the questions asked of him.

The first witness for the defence, Police Constable [redacted] testified that on March 28, 2009, he was with Constable [redacted] traveling northbound on [redacted] Road in a marked police vehicle. Constables [redacted] and [redacted] were traveling behind him in another marked vehicle.

At the location of [redacted] Road and [redacted] he observed two vehicles driving northbound. One of the vehicles, a [redacted], Ontario marker [redacted], was observed traveling within a few feet behind a black [redacted]. The driver of the [redacted] appeared agitated, swerving within his lane and waving his hands. The [redacted] was driving below the posted speed limit and made a turn eastbound into a private drive. As this vehicle was making this maneuver, the [redacted] suddenly braked causing the rear end of the vehicle to rise. Constable [redacted] stated that it appeared to him that both vehicles were going to collide. The driver of the [redacted] was honking his horn and continuing to wave his hands.

Upon witnessing this, Constable [redacted] activated his roof lights. The [redacted] continued to drive northbound and, at this time, Constable [redacted] also activated his siren. With the roof lights and siren activated, the [redacted] continued northbound at speeds of (60) sixty and (70) seventy km/h with no response from the driver, who appeared to be looking towards the passenger side of his vehicle.

The second marked police vehicle, containing Constables [redacted] and [redacted] passed the [redacted] on the right shoulder, and assisted in making a Tandem stop of the [redacted].

Once in front of the [redacted] the lead vehicle containing Constables [redacted] and [redacted] slowed down causing the [redacted] to slow down and stop. Constable [redacted] observed Constables [redacted] and [redacted] get out of their vehicle.

Constable [redacted] stated that he started to exit his vehicle when he noticed that the [redacted] was starting to move again. He got back into the police vehicle to move his vehicle and observed Constable [redacted] drawing his sidearm, banging on the [redacted] window while giving verbal commands to the driver of the [redacted]. The [redacted] then came to a full stop.

Constable [redacted] then approached the vehicle. Constable [redacted] was telling the driver to get out of the vehicle. The vehicle door opened, however, the driver was not exiting the vehicle. [redacted] stated that he and [redacted] removed the driver from the vehicle and placed him on the ground to restrain him and place handcuffs on him. The driver held his hands under his chest and they were forcibly removed to his back area, where he was handcuffed. At this time he was placed under arrest and cautioned for Failing to Stop for Police.

The driver, now known as [redacted] stated that he had no drugs on him and that he couldn't hear the sirens as his music was loud in his vehicle. Mr. [redacted] was assisted to his feet and was now leaning against his vehicle.

Constable [redacted] stated that they completed a background check on [redacted] and found he had no criminal history. A decision was then made to deal

with the matter under the Highway Traffic Act rather than Criminal. After he was given two Provincial Offence Tickets, Mr [redacted] complained about being kicked in the face and began limping. At this time he was offered assistance for his injuries, but declined the offer.

Under cross-examination by the Service prosecutor, Constable [redacted] stated that he had followed Mr. [redacted] vehicle for approximately (1) one minute prior to activating his emergency lights; that he activated the lights as [redacted] vehicle began to accelerate. Once the vehicle was pulled over, Constable [redacted] checked the licence plate number of the vehicle. Constable [redacted] agreed with the prosecutor that there was no pursuit in this case; that he began to slow down when the second police vehicle pulled in front of him.

When questioned about his movements once the [redacted] vehicle was stopped, [redacted] stated that as he was exiting his vehicle the [redacted] was starting to move and, as a result, he got back into his police vehicle. On approaching the vehicle, commands were given to [redacted] to get out. [redacted] was not responding to them which resulted in him being removed from his vehicle. He was placed on the ground. At this time [redacted] had his arms locked in front of him so both he and [redacted] removed his arms to his back and handcuffed him. A few moments later he was brought to his feet. His identification was removed from his wallet and the glove compartment and the trunk of his vehicle was searched.

When questioned regarding the charges being laid under the H.T.A., [redacted]

stated he had made that determination after he had completed the checks on Mr. [redacted] and the vehicle. [redacted] was in handcuffs while the necessary paperwork was completed. He then removed the handcuffs and gave him the Provincial Offence Tickets and explained the court process to him.

Under cross-examination by Mr. Anber, Constable [redacted] stated that the investigation began upon observing [redacted] actions behind the vehicle driving slowly in front of him. When asked about the black [redacted] driving erratically, [redacted] stated that he didn't observe this. When questioned about the actions of Mr. [redacted] stated that he observed his vehicle swerving in his lane.

When questioned about stopping Mr. [redacted] vehicle, Hart explained the use of a Tandem stop and the training he had received with regard to this procedure, and that there was communication between the two police vehicles regarding initiating this maneuver.

Constable [redacted] further stated that when the three vehicles initially stopped, [redacted] vehicle began to move again although he cannot say for sure that [redacted] vehicle completely stopped.

Under questioning about approaching [redacted] vehicle and removing him, Constable [redacted] stated that as they approached the vehicle his recollection was that the windows were closed and he could not hear music playing. Along with Constable [redacted] he removed [redacted] from the vehicle and

grounded him. At no time did he observe the knees of any officers on back.

Under re-examination by Mr. Carroll, Constable [redacted] agreed that there was no effort on the part of Mr. [redacted] to stop prior to him activating his roof lights. He also agreed with counsel that when [redacted] was removed from his vehicle he held his hands in front of him and they were not visible to the officers.

The next witness for the defence, Police Constable [redacted] testified that he prepared his notes and duty book on the day of the incident; that he never placed his hands on Mr. [redacted] as he exited the vehicle after being stopped. He observed Constable [redacted] draw his service revolver and that he drew his to cover

Under cross-examination by the Service prosecutor, [redacted] stated that he exited his vehicle after [redacted] vehicle was forced to stop as the result of the Tandem maneuver. When he exited his vehicle he drew his service revolver to cover Constable [redacted]. He recalls observing [redacted] vehicle moving towards Constable [redacted]

When asked if he had spoken to Ms. [redacted] at the scene, Constable [redacted] stated that he advised Ms. [redacted] about the reasons for [redacted] being stopped and his subsequent arrest. At this time [redacted] was talking to Constables [redacted] and [redacted]

Under cross-examination by Mr. Anber, Constable stated that he recalls Mr. vehicle moving towards Constable and agreed that it is not noted in his compelled statement or in his duty notes.

When questioned regarding the Tandem stop of vehicle, Constable stated that there was communication involved between the two police vehicles and that he was using hand signals.

Under questioning regarding the length of time they followed vehicle with lights and sirens activated, responded, between (2) and (3) minutes; that both police vehicles had their emergency equipment activated following the vehicle for approximately (1) one kilometer; and he has no recollection of the vehicle slowing down prior to the Tandem stop.

He was then asked about his observations of Constable approaching vehicle and stated that he observed approaching the vehicle with his gun drawn and banging on the car window. At that time he drew his own service weapon in reaction to drawing his and that he was concerned for officer safety.

The next witness for the defence, Constable testified that he was proceeding northbound on Road in a marked police vehicle with Constable when he heard a horn sounding ahead of him. He observed a black vehicle pull into a driveway and noticed that the marked police vehicle ahead of him, containing Constables and had

activated their roof lights and siren. Ahead of them was a moving at speeds between (50) fifty and (60) sixty kilometers.

He noticed that was making hand signals and it was agreed that they would make a Tandem stop in an attempt to stop the . Contact was made with Communications regarding this maneuver. stated they passed both vehicles on the right-hand shoulder, pulling in front of the and slowing down. eventually brought his vehicle to a stop which resulted in the stopping behind him and the second police vehicle behind the

Constable then exited his vehicle and, while doing so, noticed the in drive coming towards him. At this time he drew his firearm and made verbal commands for the driver to stop. He stated that he backed towards his vehicle in an attempt to avoid any contact with the . While he was beside the driver's door of the he banged on the window to get the driver's attention. At this time the driver of the was leaning towards the centre consol. stated that he was focused on the driver's hands and made a demand to the driver to show his hands.

At this time Constable approached the vehicle, opened the driver's door, telling the driver to remove his seat belt and get out of the car. The driver was not responding to these commands. then removed the driver from the vehicle, assisted by Constable . The driver was responding about not having drugs on him. assisted the other officers with subduing in an attempt to control his hands and place

them behind his back.

When asked by counsel if he had kicked [redacted] stated that he may have knelt on him in an attempt to get control of his hands, but at no time did he kick or punch Mr. [redacted]. Mr. [redacted] was eventually handcuffed and then stood up. [redacted] stated that there was no complaint made by Mr. [redacted] in his presence about any injuries. [redacted] was subsequently given two Provincial Offence Tickets. After receiving the tickets he complained of injuries, that he had been kicked in the head. Upon hearing this, Constable [redacted] offered [redacted] medical assistance and that he could have an ambulance attend. Mr. [redacted] declined any assistance.

Under cross-examination by the Service prosecutor, Constable [redacted] stated that he was in the second police vehicle when he heard the horn blowing and observed the emergency equipment on Constable [redacted] vehicle being activated. They followed the vehicle for approximately (20) twenty to (30) thirty seconds before they activated their emergency equipment, stating that the vehicle, a [redacted], was traveling between (50) fifty and (60) sixty km/h and, as a result, a Tandem stop was initiated.

When asked about the Tandem stop, Constable [redacted] stated he believed the [redacted] had come to a stop after they had completed this maneuver. He exited his vehicle to go to the passenger side of the [redacted] and at this time the vehicle started to come towards him. He recalls the driver's head looking towards him and then looking down at the consol. As the vehicle

approached the back bumper of his vehicle he drew his service firearm and hit the window as he thought the vehicle was going to hit him. Once he banged on the window the driver stopped the vehicle. He could see one of the driver's hands on the steering wheel but could not see the other hand as he was leaning over. [redacted] and [redacted] eventually removed the driver from the vehicle. He then assisted the officers in handcuffing the driver.

Under questioning from Mr. Anber, Constable [redacted] stated that he gave a compelled statement to Professional Standards on June 29, 2009. When asked about arresting the driver, Mr. [redacted] Constable [redacted] stated that they had the grounds due to the failure of Mr. [redacted] to stop for the police when requested to do so.

Mr. Anber then questioned [redacted] with regard to the Tandem stop of [redacted] vehicle. [redacted] responded saying that he had received hand directions from Constable [redacted] in the other police vehicle and that he advised Communications that they were going to conduct a Tandem stop.

(At this point in the proceedings a tape was played with Constable [redacted] on the radio to the dispatcher and the other police vehicle, with advising that they were going to cut over and going to pass on the outside, slow slow slow.)

When asked about approaching [redacted] vehicle, [redacted] stated that the vehicle started moving again towards him at an angle. [redacted] appeared to

be leaning to the right of the consol and, as a result, he could not see his hands. agreed with counsel that he used force on in an attempt to assist the other officers getting control of his hands but at no time did he have his foot on Mr. back.

The next witness for the defence, Police Constable testified they were northbound on Road when they heard a vehicle honking its horn. At this time he observed the marked police cruiser in front of them with its lights flashing and the sirens being activated. They were traveling approximately (30) thirty feet behind it. Although they were not aware of the situation, he activated his emergency lights and sirens,

While going onto the overpass he observed Constable making hand gestures with his right hand indicating he was going to make a stop. Constable stated that he made the pass of the vehicles and, at this time he could hear Constable on the police Communications saying, slow, slow, slow. Once in front of Mr. vehicle he slowly reduced his speed, controlling the speed of vehicle until he stopped. Constable exited the passenger side of their vehicle and, at this time, noticed that vehicle began to move forward to the right of their vehicle. exited his vehicle and upon reaching car noticed that it had stopped moving. He opened driver door and asked him to take his seat belt off and to get out of the car. did not reply to his demands other than to slowly remove his seat belt. He again told to get out and on the ground, He then reached in and took him

by the shoulder and, with the assistance of Constable [redacted] removed him and placed him on the ground. At this time [redacted] kept his hands underneath him. Both hands were pulled behind him and he was subsequently handcuffed. Constable [redacted] stated that they used reasonable force to accomplish this. Once [redacted] was handcuffed he noticed that his right thumb was cut. He went to the rear of his vehicle to get a bandage. Upon returning he stood next to [redacted] and at no time did [redacted] complain about any injuries.

Under cross-examination by the Service prosecutor, Constable [redacted] stated that the lights and siren on his vehicle were activated for about (1) one kilometer; that he initially had no knowledge why Constable [redacted] had activated his lights and siren. [redacted] stated that while following the [redacted] vehicle on the overpass, he noticed [redacted] reaching to his right.

After [redacted] vehicle came to a full stop, [redacted] stated that he approached the vehicle and told the driver twice to remove his seat belt. [redacted] did not initially respond to his demands so he reached in and removed him from the vehicle in an attempt to place him on the ground. [redacted] was tensing up and not complying with the commands. Once on the ground he was handcuffed.

When questioned by Mr. Anber, [redacted] stated that he saw [redacted] reaching over to his right when they were following him; that they were

involved in a Dynamic situation with regard to the incident; that everything happens extremely quickly and you have to act accordingly.

In his submissions, Defence counsel stated that the evidence of the four officers was clear, truthful and to the point. Given the situation the officers were confronted with regarding the driving and subsequent actions of Mr.

the response of the officers to this situation was consistent with their training and they had the lawful right to proceed in the manner they did given their concerns for the safety of themselves and that of the general public.

With regard to the evidence of Mr. the Defence counsel stated it was confusing and unreliable, pointing out a number of inconsistencies in his evidence; his initial statement that he never received notification of the outcome of the first investigation, and then agreeing with counsel that he had, in fact, received notification. His denial of following the black too close, and then admitting he was driving too close to the vehicle when confronted with **Exhibit Number 7 (Tab 3) the medical report where he stated that he was "tailgating, that he didn't hear the sirens."** His confusion over which leg was injured during the altercation, and his explanation of why he was unable to hear the sirens from the police vehicles, nor observe the emergency lights that were activated.

In her submissions, the Service prosecutor states there was no extenuating

factor for the officers to pull Mr. [redacted] car over in this fashion; that Constable [redacted] exited his vehicle with a false sense of urgency and, further, there was no necessity for any of the officers to draw their sidearm and that the arrest of Mr. [redacted] in this situation was not necessary and, therefore, they had no justification to physically restrain him,

In their submissions, both defence and prosecution argued about the credibility of the witnesses and the reasons, or lack of them, in the arrest and removal of Mr. [redacted] from his vehicle.

Counsel for the complainant, Mr. Anber, stated that the issue in this case is not credibility between Mr. [redacted] and the officers; the issue relates to the use of force and the arrest of Mr. [redacted].

Mr. Anber spoke to the language barriers faced by Mr. [redacted] and his difficulty in recalling certain parts of the investigation and his subsequent responses to questions asked of him and, as a result of this, Mr. [redacted] evidence could be problematic in these areas. Mr. Anber stated that with regard to Mr. [redacted] actions, everything was not right, that he was slow to comply with the officers, however, there were other tools available to the officers, that there was no need for the grounding of Mr. [redacted] under the Highway Traffic Act.

Having listened carefully to all the witnesses and read the exhibits entered pertaining to this matter, I agree with the submissions of the Defence

counsel and the Service prosecutor that this case is indeed one of credibility. I also take into consideration the submission by Mr. Anber regarding the removal of Mr. [redacted] from his vehicle and his subsequent arrest.

There is no doubt whatsoever that credibility plays an important role here and, in making that comment, I am mindful of the fact that the onus is always on the Service prosecutor to prove its case on clear and convincing evidence before this Tribunal.

The term "clear and convincing evidence" means there must be weighty, cogent and reliable evidence upon which a trier-of-fact, acting with care and caution, can come to a reasonable conclusion that an officer is guilty of misconduct.

I closely observed the demeanour of the four police officers on the witness stand during their evidence-in-chief and cross-examination. Their evidence was given in a thoughtful and straightforward manner. It was clear that these four officers, traveling in two separate police vehicles with the intent of finding a location to have breakfast, reacted to a situation that caused them concern about the actions of the driver of a vehicle proceeding ahead of them.

The officers were open with counsel when under cross-examination and did not attempt to embellish their positions or observations. They provided counsel with reasonable and believable responses to all questions put to them and I am satisfied that the answers given were reasonable under the

circumstances at that time. I found them to be credible witnesses. Their evidence is supported in part by the complainant, _____ while under cross-examination by defence counsel.

Under cross-examination when asked why he turned his radio down, Mr. _____ stated, and I quote: "Because I – to see what if is really was happening. Cause I heard the siren. I turned it down." End quote. Mr. _____ went on to state that the CD he was playing also had siren sounds on it and he turned it down just to be sure.

It is clear from his evidence that Mr. _____ was fully aware of the police vehicles behind him as the emergency lights had been activated prior to the sirens and this would have been observed by _____ yet he chose to disregard them. The actions of Mr. _____ and his refusal to stop his vehicle would clearly cause concern and give reasonable suspicion to any police officer in these circumstances as to the intent of the driver ahead of them to the point they, quite properly, made the decision to make a controlled stop of the vehicle to avoid getting into a pursuit and endangering other members of the public.

It is also clear from the evidence presented in this Tribunal that the officers did not arbitrarily select Mr. _____ vehicle for no reason given the actions of Mr. _____ in response to the attempt by the police to pull him over, and his refusal to do so. They had probable cause to stop the vehicle and subsequently arrest Mr. _____ for his failure to do so.

During his evidence-in-chief, Mr. [redacted] responded in a relaxed manner to the Service prosecutor and his counsel, Mr. Anber. However, under cross-examination by Mr. Carroll, the defence counsel, Mr. [redacted] was confused and appeared to resent questions which were quite properly put to him.

I do not accept the proposition that Mr. [redacted] had difficulty understanding the questions put to him after observing his demeanour while giving evidence-in-chief and also under cross-examination.

I also take note from the evidence of Ms. [redacted] who attended at the scene and who was living with Mr. [redacted] for a number of years at the time; that she was advised by Constable [redacted] of the circumstances of the incident and that Mr. [redacted] had turned something innocent into a more serious event; that they thought the vehicle was stolen in the context of him not pulling over. Upon describing Constable [redacted] Ms. [redacted] stated that he was polite towards her and that he answered all her questions.

Pertaining to this matter, I refer to a quotation of Justice O'Hallaran in Faryna v. Chorny (1952) 2 D.I.R. (B.C.C.A) is deserving of assistance to this Tribunal where, among other things: "The credibility of interested witnesses, particularly in a case of conflict in evidence, must reasonably be subjected to an examination of the consistency of their stories with the possibilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such cases must be its harmony with the preponderance of the probabilities, which a practical and informed

person would readily recognize as reasonable in that place under these conditions.”

I find as a fact that the evidence of Mr. [redacted] regarding the facts surrounding the events on March 28, 2009, is entirely inconsistent with the preponderance of the probabilities that rationally emerge out of all the evidence in this case.

It is the Judgment of this Tribunal that the prosecution has failed to prove its case on clear and convincing evidence and I find Constable

Badge Number [redacted] Constable [redacted] Badge Number [redacted]

Constable [redacted] Badge Number [redacted] ; and Constable [redacted]

Badge Number [redacted] not guilty of the charges of Unlawful or Unnecessary Exercise of Authority as they relate to Counts Number 1 and 2.

Terence Kelly

Terence Kelly
Deputy Chief (Retired)
York Regional Police Service
Hearing Officer