

MAY 22 2014

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Halton Regional Police Service Disciplinary Hearing

In the Matter of Ontario Regulation 268/10

Police Services Act, R.S.O. 1990

And Amendments Thereto:

AND

In the Matter of

The Halton Regional Police Service

AND

Constable Luis Arruda #0838

AND

Yves Charlemagne - Public complainant

Charge: Discreditable Conduct

Before:

Superintendent Chris Perkins

Halton Regional Police Service

Appearances:

Counsel for the Prosecution: Mr. Ken Kelertas – Halton Regional Police Service

Counsel for the Defence: Mr Paul Stunt – Halton Regional Police Association

Public Complainant: Mr. Yves Charlemagne

REASONS FOR DECISION

Constable Luis Arruda has been charged with one count of Discreditable Conduct contrary to the Code of Conduct as prescribed in Ontario Regulation 268/10, and therefore constituting Misconduct under the provisions of the Police Services Act, R.S.O. 1990, as amended.

The particulars of the allegations are that:

On February 16th 2013, at the Town of Oakville, in the Regional Municipality of Halton, while being a member of the Halton Regional Police Service and while on duty, he acted in a manner likely to bring discredit upon the reputation of the police service by being uncivil to Yves Charlemagne, a member of the public.

Constable Arruda has pleaded not guilty to the allegation of misconduct.

Evidence

Before commencing with my written decision, I would like to thank Mr. Paul Stunt, defence counsel for Constable Arruda, and Mr. Ken Kelertas, the Halton Regional Police Prosecutor, for the manner in which they presented their evidence. I heard from two witnesses; the public complainant and the respondent officer, and received six exhibits and a quantity of previous case decisions, all of which have collectively assisted me in reaching my decision.

Exhibits entered during the Hearing included:

- Exhibit #1 - Letter of Authorization to serve as Adjudicator
- Exhibit #2 – Letter of Authorization to serve as Prosecutor
- Exhibit #3 – Office of the Independent Police Review Director complaint dated 14 March 2013
- Exhibit #4 – Provincial Offence Notice #1839882B (copy) face page issued to Yves Charlemagne on 16 February 2013
- Exhibit #5 - Office of the Independent Police Review Director “Request for Review” document dated 2 June 2013
- Exhibit #6 – Rear of Provincial Offence Notice #1839882B with officer’s notes of HTA charge
- Exhibit #7 – Court transcript: Ontario Court of Justice, Provincial Offences Court: R v Yves Charlemagne, 25 July 2013

The only witness called by the Prosecution was the public complainant, Mr. Yves Charlemagne. Mr. Charlemagne provided his employment background and the location and general area of his home address, in the Third Line and Dundas area. He agreed that he made a complaint to the Office of the Independent Police Review Director, and this was entered as Exhibit #3. He agreed that he was familiar with the content and that he had reviewed it recently. The complaint follows in its entirety (verbatim):

"I will state that I have tremendous respect for all people who service in law enforcement. I have numerous friends who work through various districts but this incident has left an emotional scar for me as a person of color in terms of the conduct that was displayed by Officer #0838 (I am so furious that I will not even mention his name) on Saturday February 16, 2013.

I was only maybe 3 minutes away from going to my home, when I made a left at the intersection of Third Line and Pine Glen Rd, when suddenly Officer #0838 came behind me. I was a little surprised by being pulled over but I put down my window and waited for the officer to approach my vehicle. He then approached my vehicle and said that he pulled me over for using my cell phone while I was driving. Stunned and surprised, I told Officer #0838 that I was not on my cell phone and that he was mistaken. He then started to scream at me saying that I am lying and that I was not being truthful. Well that's when everything went very sour. I then told him twice I was not on my cell phone, he then got irritated and told me to take my hands off my steering wheel and have my hands raised. I said for what reason, and he said that this indicates to him if I am telling the truth or not. When I again said that Sir, I don't know what you saw but I did not use my cell phone as my cell phone is in my LEFT pocket of my jacket.. and then he screamed at me saying that I am lying while screaming at me with my hands raised while I am in my call. From there I said Sir I don't appreciate being called a liar and to prove to you, I will go slowly into my LEFT pocket to show you that I was not on my cell. As I did that, he proceeded to say that I was lying again for the third time. I then told him again I resent being called a liar and told him to just hurry up and give me my ticket because I felt completely humiliated and upset especially as a person of color. It then proceeded to him asking for me to get my license and insurance. As I was going to my glove compartment to retrieve my insurance, he then asks me if it's valid before I gave it to him. With emotions being extremely negative, I said to Officer #0838, Now why would I give you invalid insurance documents when that is against the law and I could be arrested for driving without it? Was there some racial connotation behind that? That would be pretty stupid of me Mr. Officer! From there he said Racial? Racial? Did I say something racial? I simply told him he knows exactly what he is doing and I told him to just hurry up and get my ticket and I said he's an idiot. So he then takes my license and insurance

information. He then simply drops them and the ticket on my chest and simply walks away without saying a word. Sarcastically, I pulled my head out of my window and I said You have a wonderful day Mr. Officer!

The conduct that was displayed by Officer #0838 was very negative and very upsetting. If it wasn't for my wife, I was prepared to go to the #2 District in Oakville to lodge a complaint immediately that day. I am glad I didn't as I was very hurt and upset that it would not have been wise to do it at that time with the emotions I felt but even as I am writing this incident, it really is very disturbing and hurtful as I felt like I was some type of criminal which I am of course not. Your officer was wrong from him saying that I was on my cell phone, which I will prove in court and also that of his conduct. I know that everyone has their bad days but when he screamingly accuses me of being a liar numerous time and then has me raise my hand like I am some criminal, I would like his conduct especially towards those people of color who he interacts with as an officer, to be thoroughly reviewed by ways of sensitivity training. It was deplorable and it should not be tolerated.

I left a message with his sergeant, Sgt. Craddock who called me back February 20, 2013 to let me know what my options were after I told her that I would be issuing a complaint of Officer #0838. She told me that my options were to either her taking my report and then she would discuss the incident with him or I can issue it to the OIPRD site. Now while she seemed empathetic to my situation but told me that by discussing the matter with him, it would be handled internally. I chose this route to put a formal request so it can properly investigated. I just want Officer #0838 that his conduct was not becoming as an officer of the law and that he expressed disturbing tactics with this interaction with me. I hope he doesn't conduct himself like that with others in the public especially people of color. Please respond to know you received my complaint and advise me what the steps and outcome will be of this matter either by email or my mail."

Mr. Charlemagne went on to say he was a few minutes from his house when he was stopped by Officer Arruda. He stated he was surprised he had been stopped. He said that when the officer approached him he was told the reason he had been stopped was because he was on his cell phone. Mr. Charlemagne challenged this.

The officer repeated that he had seen Mr. Charlemagne on his phone, and he replied (his testimony) "no sir, I am not, I said no, sir, I was not on my phone. My phone is, I don't have my phone." Mr. Charlemagne indicated that at this point the situation went awry.

Mr. Charlemagne asserted that the officer then asked him to remove his hands from the steering wheel and when he asked why, the officer told him that this indicates whether or not he was telling the truth. He said they were basically going *"back and forth"* and the officer told him to stop lying. The officer repeated that he could tell if Mr. Charlemagne was lying by looking at the palms of his hands.

Mr. Charlemagne repeated his position that he was (his testimony) *"not on my phone"* and he then described the officer as *"screaming towards me"*. Mr. Charlemagne states that he knew the situation was now contentious so he indicated he was going to produce his phone, which was in his left pocket, to the officer. He says he told the officer at this point that he did not appreciate being called a liar. The officer asked for licence and registration and Mr. Charlemagne reached across to his glove compartment for them.

Mr. Charlemagne said that while he was reaching for his documents, the officer asked him if his insurance and registration were valid. Mr. Charlemagne found this odd and asked the officer if there was a racial connotation to that question. He followed with: *"you know he came to me and said racial, racial, did I say something racial? I said you know exactly what you are doing. I just went like that. I proceeded to give him my registration."*

Mr. Charlemagne said at this point he asked the officer to give him his ticket and called him an idiot. When the officer returned, he dropped the ticket and his information on his chest, so Mr. Charlemagne sarcastically responded with *"you sir, you have yourself a wonderful day"*. Mr. Charlemagne then drove home.

Mr. Charlemagne said he was alone in the car at the time. He said again the officer told him he had seen him on his phone and that's why he got stopped. At this point, Mr. Charlemagne said the officer wasn't belligerent or anything. Mr. Charlemagne denied being on the phone. He actually said again *"I don't have a phone"*.

He then agreed that he did, in fact, have his phone in his pocket. He stated that after the accusation and the denials, the officer began *"talking rude"* because it was going back and forth. He states the officer was *"speaking aggressively"* because *"I was responding to him telling him no I was not on my phone."*

When he was asked what talking aggressively meant, Mr. Charlemagne said *"talking loudly towards me, like you know not, I didn't find it like anything, to be honest, I am not here to say that he was, it was like something physical, I was scared for my life or anything."* He goes on to say he didn't think it was

necessary for the officer to take that tone with him. When pressed what he meant by tone, he stated *"loud, very demanding, coming at me, making me feel like I did something wrong"*. He advises he was *"pushing back towards it saying I was not. I was just as much, I was not afraid to let him know. I was not afraid to let him know that yes I disagree with your assessment."*

He described the officer's tone of voice was louder than how he was speaking when giving evidence. He describes his own voice as *"I wouldn't say I was yelling back at him.....I don't think I raised my voice."*

In response to a question of how he would describe the officer's body language, Mr. Charlemagne said: *"I found it, I personally found it like a little, for me I was startled by it because it was pretty.... I thought it was just a little bit tougher than usual for just a parking ticket, but I guess because, well I feel because of the conversation, the way that it was going, the way that it was, I was responding back to him, maybe you know, it just seemed aggressive to me in that tone. It's just like the body language didn't seem right to me, and especially with the request of him asking me to lift my hands from my steering wheel. This just didn't seem right to me."*

Mr. Charlemagne explained *"aggressive"* to mean the way the officer was speaking, and asking him to lift up his hands, and saying he was a liar.

Mr. Charlemagne indicated that he thought it was odd for the officer to ask if his documents were valid before he had actually retrieved them. He admits he asked if there was a racial connotation to this, and he meant that it was an odd thing to ask, so therefore that's how he felt. He admits this wasn't based on anything the officer had said, it was just his feeling.

Mr. Charlemagne agreed when shown a copy of the PON (Exhibit #4) it was the one he was issued. He said that after he got the ticket, he went home and spoke to his wife about it. He describes himself as *"pretty upset"* about it. He felt he wanted to go directly to the police station to complain but that his wife suggested he calm down a little first. He repeated several times how upset he was. Mr Charlemagne then explained his actions in making the formal complaint with the OIPRD, and his subsequent discussion with Sgt Craddock (Constable Arruda's supervisor) about the incident. He also stated he spoke with Detective Wright (Professional Standards Bureau) who explained to him that their investigation had determined there was *"....nothing. They said everything was, everything that Officer Arruda did was fine, there was no discrimination or anything of the sort."*

Mr. Charlemagne stated that he responded to the OIPRD determination in writing, and he specifically wanted to stress why he filed the report the way he did. He was then shown his response (Exhibit #5) and agreed he was the author of the "Request to Review" the outcome of the original complaint. This document follows in its entirety (verbatim):

"I clearly understood that this would have been the predictable outcome though I disagree with it. My points of contention with this outcome are as follows which I feel was lost completely within my complaint:

- 1. The officer asking me to lift my hands off my steering wheel and implying that I was lying on 3 occasions when I told him that my cell phone was in my left pocket and was never in my right hand as he implied when he told me he saw me on my phone while driving which I expressed to him that I was not and that I don't appreciate being called a liar.*
- 2. As I was retrieving my insurance and registration info from my glove compartment, he asked me if it they were valid BEFORE I handed them to him. That is where I asked was there a racial connotation with that as I told the officer "Why would I be giving you invalid documents when that is against the law and I could be charged and arrested for doing that?" as I stated within the complaint. I thought that was strange and negative question to ask me before he even had the documents in his hands.*

These are the reason why I am issued a complaint based on those 2 crucial points."

Under cross examination, Mr. Charlemagne agreed that he does own an iPhone (or similar device) and it has a blue component to it. He stated he has been pulled over by the police in the past, but only twice and both were a very long time ago.

He agreed that when he was pulled over by Constable Arruda he denied he had a phone. He implied this was an error in "wording", and he meant to imply he was not using the phone, but still agreed that he actually stated he did not have a phone.

Mr. Stunt read from the transcript of the Provincial Offences Court trial of Mr. Charlemagne, asking him if he said, when cross examining the officer: "Officer did I not state to you when you came to my vehicle that I did not have my cell, that I did not have my cell phone?" Mr. Charlemagne agreed he had asked that question and the officer replied (in Court) "Yes you denied having a cell phone correct."

When asked about the length of time between the traffic stop and the trial, yet still asserting he did not even have a phone with him at the time, Mr. Charlemagne responded: *"That's what the report says and that's what I did. Unfortunately, as I said before, the wording was incorrect on my part."*

Mr. Charlemagne stated that the traffic stop was his first interaction with a member of the Halton Regional Police. When he was asked if there was any reason in his mind why he would be treated differently than anyone else, Mr. Charlemagne responded with a description of an incident from a few years ago where he felt he was being followed by a police car, he used the word *"trailed"*. He thought it was odd that at 9 pm, a police officer would do a U turn and follow him. He was never stopped, and the police car remained a considerable distance behind him. He felt he was being singled out, and the incident raised some suspicion in his mind about the conduct of that officer.

Mr. Charlemagne said he did not report this matter or take it any further because he was not able to record the licence plate of the police vehicle as it was too far away. He suggested it was further away from him than 100 metres.

Mr. Stunt put it to Mr Charlemagne that after being stopped and first denying he had a phone with him, then admitting he had a phone but it was in his pocket, Constable Arruda said he knew he was using the phone, he'd seen it in his hand, and said: *"don't lie to me, or words to that effect."* Mr. Charlemagne repeated that the two of them continued to go *"back and forth"* about the use of the phone. Mr. Charlemagne said Constable Arruda was yelling at him at this point about lying. He admitted the officer was polite initially, but that he took issue with the denial about the phone. He said he didn't appreciate being called a liar.

Mr. Charlemagne said he was convicted at Provincial Offences Court, and there was some discussion with Mr. Stunt at this point about the use by Mr. Charlemagne of an *"attorney"* at his trial, and the manner in which the matter ended up going to trial.

Mr. Charlemagne stated he was not *"mad"* at the scene but became *"furious"* when he got home. He also admitted to being *"sarcastic"* at the end of the interaction, and that he called the officer an idiot. He stated that Constable Arruda did not call him any names. He denied that he refused to take the ticket from the officer and repeated that Constable Arruda dropped the ticket and his papers on his chest. He then said that he did not take the documents when he was offered them and that he had in fact refused to take them. This was because he was furious.

Mr. Charlemagne did not agree that he was mistaken in his assertion about the officer telling him to remove his hands from the steering wheel. He inferred again that the officer told him he could tell he was lying by looking at his hands. He agreed that he told Sergeant Craddock in his conversation with her that it was lucky he had been stopped in a public place. When asked to clarify this Mr. Charlemagne said: *"it was basically a suggestion of how the conversation was going that voices would have been raised, probably voices because of him and I, both of us were getting pretty intense I thought in that situation."*

Mr. Charlemagne said he told Detective Wright (Professional Standards) that he could prove he wasn't using his phone by producing phone company records, but he never produced them because he was told it wasn't relevant.

Mr. Charlemagne agreed that he told Detective Wright he did not want the Halton Police to do the investigation into his complaint because he felt they would be biased. He acknowledged the implication was that the whole service was biased, because of this single exposure to a member of that Service. He also said that having lived in Oakville for eight years, this was his first he had ever been stopped in Halton. His words in this regard: *"well because, when you see certain things and read certain things. When you read certain things in the paper about, certain things about police conduct and such like that, and also as well I do watch the news as well, obviously I have my own view on things. I said I was going to pursue the option I think that's best for me. That's what I did."*

He repeated that he had no interaction with the police other than this traffic stop and the one incident he recalled where he thought he was being trailed. This is what led him to think he would not get an unbiased investigation. *"I am only here because it was the conduct. I am not trying to imply anything. As I said before I am not here to imply about Constable Arruda's heart. I know nothing about that. That's not what I am here for."*

He said he did not appeal the decision of the Provincial Offences Court, and he was content with the result. He agreed Halton is a pretty homogenous kind of community, but that he is still entitled to his opinion. He acknowledged that Constable Arruda did not make any comment that suggested that his skin colour induced anything. Mr. Charlemagne said: *"Sir I did not say that. I did not say that. I said again racial connotation was when proceeding in regards to getting my documents. I thought it was very odd to ask me that particular question at that time that way."* Mr Charlemagne went on to reiterate how he thought it was highly irregular to ask about the validity of documents before they had been produced.

He stated the whole traffic stop took a little more than one minute. He did not agree that his anger over the incident has influenced his view of the case.

Constable Arruda then gave his evidence. He has been a police officer for 34 years and is currently assigned to the #2 District (Oakville) District Response Unit, the mandate of which is traffic enforcement.

Constable Arruda's evidence was similar to that provided in the Provincial Offences Act trial. He was in an unmarked police vehicle and on seeing vehicles waiting in a queue to make a left turn, he slowly drove past on the right using the opportunity to look into the interiors of the vehicles to see if anyone was using a hand held communication device. He described how he saw Mr. Charlemagne stopped at the lights and pull a cell phone from his right coat pocket. He saw him rest his elbow on the centre console. He was close enough to see it was an Apple iPhone, and had a blue type of skin on it. The phone was in his right hand. He stopped Mr. Charlemagne after they had turned the corner.

Constable Arruda described how he uses certain criteria to determine if someone is going to get a ticket or a verbal warning. This criterion is based on a wide spectrum of behaviour he witnesses when they are stopped. Some drivers are humble and contrite and admit the offences; others are deceitful and try to avoid the issue. Others blatantly lie about the matter, saying they were wearing their seat belt or they did stop at the stop sign etc.

The officer stated that he asked Mr. Charlemagne why he was texting today, his standard approach to 99% of traffic stops involving this offence. He described Mr Charlemagne's response as immediately putting his hands up in the air, and he found that odd. He said to the officer "*what phone?*", and flipped his hands back and forth as if to show they were empty. Constable Arruda said that Mr. Charlemagne's assertion that he was told to remove his hands from the steering wheel is untrue, and in fact, it is a safety issue to ensure a driver's hands are where they can be seen easily. He then said that the driver told him he did not have a phone. At this point the officer said "*put up my hand and I said Sir*", then *explained my observations to him.*" The officer described his tone at this point as the "*voice of authority*", loud enough to be heard over the din of surrounding traffic.

After producing his Driver's Licence, and on indicating his permit and insurance card were in the glove box, the officer asked him if his documents were valid. Constable Arruda said that many people don't realize their permits expire, or have insurance cards that are out of date.

He stated that he did not treat this traffic stop any differently than any other one, and nor was there anything about Mr Charlemagne's skin colour that influenced his handling of the matter. He denied being belligerent and said that he made it clear to the driver that he did not like the fact that he was not being truthful and was being dishonest. This was in relation to two issues – the first that he said he was not on a phone, and the second that he was putting his hands back and forth as if to suggest he did not have a phone, but then he pulled a phone out from his pocket. His words: *"so there is those two points where I said stop lying, you are being dishonest. I put my hand up and I said Sir, look here, stop, cease and desist with any more because I really don't want to hear any more from you, give me your documents, and he proceeded to show his Driver's Licence, ownership and insurance."* The officer *"absolutely unequivocally"* denies yelling at Mr. Charlemagne.

The officer said he was taken aback by Mr. Charlemagne's comment about racism based on the question about the vehicle documents and his conduct overall. He felt the racism comment was bizarre, and Mr. Charlemagne followed it with *"you know what you are doing"*. He took the documents back to the police vehicle and wrote the ticket.

He later got a Court notice, went to the trial date and Mr. Charlemagne was convicted. He said his evidence at trial was identical to that provided today. The officer gave some evidence about his training with respect to dealing with people of different ethnicities.

Constable Arruda was asked again about the allegation directed at him that he behaved differently because of Mr Charlemagne's skin colour: *"The fact he was a man of colour never entered my mind. By me asking for Driver's Licence was not a result of him being a man of colour. I stopped him because he had committed an offence which I observed and which is an offence against the Highway Traffic Act. I wanted to stop him to advise him of that offence. Based on the interaction I had with Mr. Charlemagne and my observations, I felt, I felt that he deserved a provincial offence ticket. There was no contrite. He was not contrite. He was obstinate and was untruthful and he didn't meet the criteria for me to give him a warning."*

The officer stated that he asks every driver he stops if their documents are valid or are in order. He said the whole interaction with Mr. Charlemagne was one minute and six seconds long. He stated he knew there would be no more conversation between the two after the issue of racism was raised, so he went back to his car and wrote the ticket. On his return he extended the ticket and the vehicle documents in

his hand but Mr. Charlemagne would not take them, so he waited what he felt was a reasonable time, about 15 seconds, and then dropped them inside the vehicle on the driver's lap.

The officer does not recall being called an idiot, but does recall Mr. Charlemagne's sarcastic comment about having a nice day. He ignored this remark.

Under cross examination, Constable Arruda was asked to clarify his expression "*voice of authority*" and he reiterated that it was loud enough to be heard above the sound of background noise. He denied that this could be construed in some quarters as yelling. The officer said that volume, tone and inflexion is what separates yelling from a tone of command. He was asked several times to further explain this issue:

"Speaking with a voice of authority is approaching a vehicle, walking with confidence, walking professional and speaking with a volume that he can clearly understand from the interior cabin of his vehicle. There is no way speaking with authority could be construed in my opinion as yelling. I did not yell at Mr. Charlemagne. I never yelled at Mr. Charlemagne. There was no reason for me to."

Constable Arruda repeated that he felt Mr. Charlemagne did not deserve a warning because of the manner in which he denied having a phone. When he was asked if everyone who got angry got a ticket, the officer provided an example where this was not the case. He reiterated his criteria for determining how a traffic stop is going to end up.

The officer stated that he was obliged to engage the driver in a conversation about the use of the phone in order to determine if it was an emergency call. He agreed that at some point he told Mr Charlemagne he was lying to him. When pressed about why this was necessary, the officer said that it is important that drivers are told they are not being truthful. He denied that telling a driver he is lying is superfluous. The officer explained that at times, a driver will be untruthful but when faced with the evidence they will revert to apologising and suggesting "*officer you are right.... Mr. Charlemagne did not.*"

Constable Arruda's recollection is that Mr. Charlemagne actually called him a racist. He denied that the comment was actually a question about whether there was a racial connotation to asking for the documents. He said it was very clear; Mr. Charlemagne called him a racist, and followed it with "*you know what you are doing*".

Submissions

Both Mr. Kelertas and Mr. Stunt provided the Tribunal with very able and succinct final submissions, dealing with (among other things) such matters as credibility, the definition of incivility, standards of proof, and what could constitute misconduct by a sworn member of a police service. Various cases were also cited and provided as reference. I don't feel it necessary to echo these submissions in their entirety in order to arrive at a decision.

Mr. Kelertas repeated the two issues to be decided: was it uncivil to call Mr. Charlemagne a liar during the traffic stop, and if the officer was screaming (as described by Mr. Charlemagne) does this amount to incivility and therefore misconduct?

Mr. Kelertas suggested that the role of the police is to respect the rights of the public and to help citizens, and that the public expect they will be treated with courtesy and respect.

Mr. Kelertas asserts that there was no need for confrontation as part of Constable Arruda's investigation and no need in the circumstances for the officer to accuse Mr. Charlemagne of lying. He submits there was no purpose behind calling him a liar. In fact nothing good came from this statement and it actually inflamed the situation.

Mr. Kelertas submits that if Constable Arruda was in fact "*screaming*" at the driver, as was given in evidence, then this is clearly uncivil behaviour. This was a simple traffic stop with a seemingly cooperative albeit somewhat annoyed driver. There was nothing in the circumstance that called for anything but limited interaction between the driver and the officer.

Mr. Kelertas offered that the matter before the Tribunal comes down to an issue of credibility. He refers to the case of Faryna and Chorny, the accepted test for a trier of fact in determining credibility.

Mr. Stunt submitted that Mr. Charlemagne was convicted in the Provincial Offences Court, and that this should be balanced against his claim initially to Constable Arruda that he did not have a phone with him, not that he wasn't using it or holding it. He submits that he repeated this position several months later at Court. This, asserts Mr. Stunt, speaks to his credibility.

Mr. Stunt posits Mr. Charlemagne's credibility suffers even more from his evidence about thinking a Halton police vehicle trailed him one night a few years ago. Mr. Stunt called this story "*vague and inconsistent.*" Mr. Stunt claims this raises the issue of Mr. Charlemagne having some internal bias

against the police that pre-existed and some paranoia about the police, all of which speak to his credibility.

Mr. Stunt said that Mr. Charlemagne's evidence about racism should also speak to his credibility. The matter was raised by him, not the officer. He described himself as "*furious*" and had to be calmed down by his wife when he got home. He had to wait to make the complaint. He also admits he refused to take the documents back, after the ticket had been written, despite the fact that most of the documents were his own property.

Mr. Stunt took no issue with the definition of what is uncivil, but the issue is how the Tribunal views the interaction and who it holds to account for it. Mr. Stunt emphasized that this was a simple traffic stop for the officer; he saw the man committing an offence and stopped him. The driver was not candid with the officer and he was challenged about this.

Mr. Stunt submitted that despite Mr. Kelertas' comments about the officer calling Mr. Charlemagne a liar, this was contrary to the evidence. In his view, the evidence showed that the officer told him to stop lying. Mr. Stunt said that Mr. Charlemagne set out to deceive the officer at the onset, and then continued with that attempt at deception right through to his trial. Mr. Stunt submitted that some of the evidence of Mr. Charlemagne was not accepted by the Justice of the Peace during the trial.

Findings

The allegation of misconduct against Constable Arruda is that on February 16th 2013, he acted improperly during a traffic stop of the public complainant, Mr. Charlemagne. The substance of the allegation is that the officer was uncivil during this interaction. The statement of particulars identifies this incivility as accusing Mr. Charlemagne of lying and screaming at him.

A police officer commits misconduct if he (or she) engages in discreditable conduct, in that he (or she) uses profane, abusive or insulting language or is otherwise uncivil to a member of the public.

In Mr. Charlemagne's original complaint to the OIRPD, there was a somewhat muted suggestion that racism may have played a part in this episode. The original Professional Standards Bureau investigation into the matter determined this was unfounded, and this decision was endorsed on review by the

OIPRD. Therefore this aspect does not form part of the allegations before me. The issue to be decided by the Tribunal is solely the particulars in the notice of hearing; that being incivility.

Having said that however, the spectre of racism raised its head again during testimony at the hearing. It has therefore meandered its way into the totality of the evidence put before the Tribunal, and must be considered if it can assist in any way in leading me to a logical conclusion in this matter.

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

There were only two people involved in this incident. Much of what occurred during their interaction on that day is not disputed. Mr. Charlemagne was stopped by Constable Arruda. They had a conversation centred on the premise of whether Mr. Charlemagne had had a cell phone in his hand at one point. A Provincial Offence Notice was subsequently issued. There is little doubt that quite early during the interaction, the traffic stop became somewhat disagreeable. What is in dispute are the words spoken by Constable Arruda, and the manner in which he said them.

This case therefore pivots on the credibility of the two 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 allegation is made out and reaches the standard of being clear and convincing.

The recognized and accepted test for credibility is found in the judgement of O'Halloran, 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:

. . . But the validity of evidence does not depend in the final analysis on the circumstance that it remains contradicted, or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time. If a trial Judge's finding of

credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie. **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. In addition to the testimony of the two witnesses, some evidence can also be adduced from the OIPRD complaint (written by Mr. Charlemagne), and from the Provincial Offences Court transcript of the POA trial.

Mr. Charlemagne testified at the Hearing in a passionate and candid manner. His verbal testimony was similar in content to his version of events as he laid them out in his OIPRD complaint. There was one notable conflict however very early on in his testimony. As he was describing his initial contact with Constable Arruda, Mr. Charlemagne said he replied to the officer: *"I don't have my cell phone. My cell phone is in my pocket"*then when the officer says he saw him on his phone, he said: *"No, sir, I was not on my phone. My phone is, I don't have my phone."* This is at variance with his written complaint, where he says he responded (in that instance) with *"I was not on my cell phone"*. Although this may

seem a subtle difference, it actually speaks to the very essence of the matter. If he didn't have his cell phone with him, then he couldn't possibly have been on it. In his testimony he later said "I was not..." and brought himself back to his position that he was not (and never had been) "on" his phone while he was driving. This issue surfaced several times during the Hearing.

The most compelling evidence of Mr. Charlemagne's culpability in the traffic offence is found in the Court transcript. Mr. Charlemagne pleaded not guilty to the Highway Traffic Act charge and was convicted after a trial. During that trial, while cross examining Constable Arruda, he asked:

Q *Officer, did I not state to you when you came to my vehicle that I did not have my cell, that I did not have my cell phone?"*

A *Yes. You denied having a cell phone, correct.*

Q *Okay. Did I, when I, obviously, okay, when I came and I said that my cell phone was in my right, was, excuse me, my cell, excuse me, I'm a little nervous. But when I came up and I, when you approached, when you spoke to me a few times about my cell phone and I was denying that I had my phone, that I used my phone, did I not say that I had my phone in my left pocket?*

A *Later on you revealed you had the cell phone but it was in your left pocket, correct.*

In the Provincial Prosecutor's summation he clearly lays out the distinction between "using" and "holding" a handheld communication device and makes it very clear to Mr. Charlemagne that merely holding the device (at whatever point while driving in a motor vehicle) makes out the offence. Mr. Charlemagne then makes repeated denials of ever "using" the phone, and seems to avoid the issue of merely handling it. In his own words, he completely skirts the issue of holding it.

Mr C. *Thank you Your Worship. Very simply, my case is I was not even on my phone and I wasn't driving, like I was not, I was not on my cell phone when the officer, that's basically the essence of my, the whole entire matter for me. So that's basically my defence.*

COURT *Just before we go on; did you understand the essence of the prosecutor's submissions that simply holding the phone while operating a motor vehicle is sufficient? It does not have to be operating. It does not have to be receiving or transmitting.*

Mr C. *I clearly understand what you're saying Your Worship. I was not on my phone.*

COURT *Alright.*

Mr C. *And that's basically the essence of my thing. I was not even on my phone.*

There was an allegation made by Constable Arruda that Mr. Charlemagne had the phone in his hand while he was driving. When he was first stopped, Mr. Charlemagne plainly stated he did not even have a phone with him. He was being untruthful. He lied. He eventually admitted that he had a phone in his pocket, but continued with his assertion that he had not been using it. Perhaps in his mind, he hadn't been "using" it, but the offence is committed by holding it, and he was, and has been, told this on many occasions. His words at his own trial bear this out. He never actually denies that at some point he held the phone.

In Justice of the Peace P. MacPhail's summing up he says:

If I could summarize your evidence it was that you were not operating that device, you were not using your telephone, you were not making calls, you were not receiving calls, you were not texting. However, the offence does not require that someone be operating their telephone, either by voice communication or text communication. It requires as a minimum the Court be satisfied that the driver was holding that device, and the un-contradicted evidence of the charging officer is that for at least a period of time while stationary facing southbound on Third Line you were holding that device.

*I listened carefully to your own testimony and while I'm satisfied that you were not operating that device, because that's what you've told the Court; **I heard no evidence that would contradict the officer that at a minimum you were holding that device.** Based on the charging officer's clear, precise, detailed evidence as to how and when you came to hold that device, the manner in which you held it, the relative duration of time during which you held it at the red light facing southbound, the Court is satisfied that all elements of this offence have been proven. The charge has been proven beyond a reasonable doubt and a conviction must enter.*

By Mr. Charlemagne's own admission, the traffic stop went "sour". He was an active participant in this, both by his words and actions. He lied about having a phone with him, and then continued with his ruse

that he had never been using a phone, despite hearing that this was not necessarily the suggestion. The officer saw it in his hand. The officer cannot, of course, categorically say he was “using” it. It’s enough that it was in his hand. This was an affront to Mr. Charlemagne, and he fervently continued this subterfuge during the traffic stop. He repeated it again at his trial, and on several instances during his testimony at this Hearing as well.

By his own admission he was furious at the interaction that had occurred. At varying times, he says he was called a liar, or that he was told to stop lying. Either way, the inference is he was not telling the truth, although there may be a distinction in the spectrum of civility between being called a liar and being told to stop lying. This is semantics. The simple fact is; he didn’t tell the truth - at first.

In Mr. Charlemagne’s original OIPRD complaint, his first sentence reads: *“I will state that I have tremendous respect for all people who service in law enforcement. I have numerous friends who work through various districts but this incident has left an emotional scar for me as person of color in terms of the conduct that was displayed by Officer #0838 (I am so furious that I will not even mention his name) on Saturday February 16, 2013.”*

During the traffic stop, the Hearing heard that when Mr. Charlemagne was asked to produce his permit and insurance and as he was reaching for them, the officer asked if they were valid. Mr. Charlemagne took great exception to this, and this is where the question of racism first surfaced, entirely at Mr. Charlemagne’s bidding. He repeated this concern in his response (his second “crucial point”) letter to the original OIPRD finding. He seemed to place considerable significance on being asked about the validity of the documents.

Under cross examination when pressed about the somewhat nebulous concept of racism in this incident, Mr. Charlemagne indicated that he did not trust the Halton Regional Police Service, and this was due, in part to what he had read or seen about the conduct of police generally. This is rather at odds with his *“I have tremendous respect”* comment. He then volunteered what can only generously be referred to as a curious incident where he claims he was *“trailed”* by a police vehicle one evening. This then, forms the basis for his distrust.

During his testimony, and contrary to his original complaint, he somewhat downplayed the issue of racism, claiming it was his belief that asking a question about documents made him feel uneasy. In both his original complaint and in evidence he acknowledges he said *“you know what you are doing”* after the

officer asked how could he possibly suggest he was a racist. In this context, these words have an almost sinister connotation.

Constable Arruda testified that there was nothing unusual about asking a driver if their documents are valid prior to them being produced. He stated he regularly did this, as it often resulted in him finding expired paperwork. There is in fact, nothing nefarious whatsoever in this gentle enquiry of a driver operating a motor vehicle. I will go one step further and add, that as police officer of some 33 years' experience myself, this is common place. Personally I ask that question of every motorist I stop, apart from the potential startling replies/admissions offered, it is a way to keep the general flow of the traffic stop going; a way to continue to engage the driver in conversation.

That Mr. Charlemagne felt offended by this is unfortunate. To make the leap from taking personal offence to suggesting there may be a racial connotation is reprehensible. I think this thought process tends to reveal the level of anger and frustration Mr. Charlemagne was feeling at the time. In the cold light of hindsight, it all seems rather nonsensical. As previously noted, the issue of potential racism does not form part of the allegation of the specific charge faced by Constable Arruda, but I think it germane to the issue at hand; what exactly took place during that traffic stop, and whether the explanation for it speaks to the credibility of a witness.

Mr. Charlemagne's recollection of the traffic stop was that the officer asked him to remove his hands from the steering wheel and to hold them up. He said that the officer told him he could tell if he was lying by looking at his hands. Constable Arruda's testimony is that this did not happen. His evidence was that Mr. Charlemagne held his hands up of his own accord and turned them as if to show that he did not have a phone. On the basis of a common sense probability, I find that the officer's evidence in this regard is more accurate.

Mr. Kelertas submitted that it was inappropriate for Constable Arruda to suggest Mr. Charlemagne was lying because it was not necessary. Once he had formed the requisite grounds to issue a ticket, he should have simply done so. The discussion about lying served no purpose but to inflame an already contentious situation. Constable Arruda's testimony was that he felt it necessary to tell the driver he was lying, or being deceitful, or untruthful; his evidence was that often times, a driver will then admit the offence. I agree. It is incumbent, (in my view) for an officer to let a driver know they are not being honest if they have been caught. Absent that conversation, a traffic stop would be an odd affair – for

example: a driver is stopped for not wearing a seatbelt, denies this and says he was wearing one. Without any conversation whatsoever, the officer returns to the police vehicle and writes a ticket.

Constable Arruda testified that a driver's admission of the offence is part of the criteria that addresses whether the matter will end with a ticket or a warning. A driver should be given the opportunity, in Constable Arruda's view, to make amends for an initial deceitful response. In the case at hand, the issue of what exact words were spoken was never truly settled. Constable Arruda said he said "stop lying". Mr. Charlemagne said he did not appreciate being called a liar. I find it a perfectly reasonable assumption to believe you are being called a liar if someone has told you to stop lying. Notwithstanding that the question of exactly what was said, and how often, was never adequately explored, I find that Constable Arruda did intimate to Mr. Charlemagne that he was lying. This was a statement of fact.

Mr. Charlemagne testified that Constable Arruda almost immediately "*screamed towards me*", and in general his tone was inappropriate for a simple traffic stop. He also testified in considerable detail (and further wrote in his complaint) that the issue of whether or not he had been using or held a phone went back and forth several times. It became contentious he said. He described himself as furious. He was sarcastic and called the officer an idiot. He said: "*it was basically a suggestion of how the conversation was going that voices would have been raised, probably voices because of him and I, both of us were getting pretty intense I thought in that situation.*"

Clearly Mr. Charlemagne was frustrated at being stopped and at being caught with a phone in his hand. His denial was not appreciated by Constable Arruda, and they exchanged words. The entire episode lasted about one minute. Constable Arruda emphatically denies yelling in any fashion whatsoever, and went further by saying he had no need to. He said in evidence he knew there was no point in continuing the conversation as Mr. Charlemagne was simply unreasonable.

Constable Arruda is facing this charge based on an allegation that he screamed at Mr. Charlemagne. At various points in his testimony, Mr. Charlemagne described the officer's behaviour as "*talking loudly*", "*speaking aggressively*", "*screaming towards me*" and "*talking rude*". Without delving into dictionary definitions of specific words, I think there is a notable distinction between screaming and yelling. Screaming conjures up a verbalization that does not consist of coherent words. I find that given all the evidence this inference is nothing more than an histrionic description of the exchange. Further, I find Constable Arruda's evidence that he unequivocally did not (even) yell at Mr. Charlemagne to be more probable. At worst, I find that the officer may have raised his voice in dismay when it was suggested his

actions were motivated by racial prejudice, a suggestion a reasonable person would find distasteful and unfounded.

Although Mr. Charlemagne was very ardent about his version of the event, and the behaviour of both participants, I find that his description of it is somewhat clouded by his emotions. His frustration and anger have led him to erroneously slant his perception of what occurred. I have little doubt he genuinely believes he has been victimized, but I accept the evidence of Constable Arruda as a more accurate account of what actually occurred. He is a police officer of some 34 years' experience whose current assignment is almost exclusively traffic enforcement. His evidence was forthright and consistent. There were no contradictions or irregularities in his testimony under cross examination, and his recollection of much of what occurred simply made more sense.

The test to determine the threshold for discreditable conduct is most adroitly articulated in the case of Girard v Delaney a 1995 decision that indicates the "test is primarily an objective one" and that the conduct must be measured against the "reasonable expectations of the community". The Ontario Civilian Commission on Police Services has taken the following approach regarding the meaning of "likely" to being discredit upon the reputation of the police force:

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

An older case; that of Khoury, (a decision from the former Police Complaints Board) in 1985, states:

"...the Board should apply the test of whether the community or a reasonable person, would see the conduct as uncivil or likely to discredit the force."

The fundamental issue to be determined in this case is whether Constable Arruda was uncivil to Mr. Charlemagne, a member of the public he stopped on February 16th 2013. This incivility is alleged to have two components; calling Mr. Charlemagne a liar, and screaming at him.

Based on the totality of the evidence put before me, I find that Constable Arruda did not scream at Mr. Charlemagne. Although I cannot determine with certainty the precise words spoken in relation to the "liar" component of this case, I do find that Constable Arruda did suggest to Mr. Charlemagne, in some

fashion, that he was lying when he denied having a phone with him. In these circumstances, I do not find this to be uncivil.

Using the test noted above, I find that the reasonable expectations of the community would be in line with Constable Arruda's version of events in this case, and that in no fashion did his behaviour constitute incivility. The prosecution did not meet its burden of proving this allegation to me on clear and convincing evidence and accordingly, I find Constable Arruda not guilty of the charge of discreditable conduct.

A handwritten signature in black ink, appearing to read 'Chris Perkins', followed by the number '#3406' written in a similar cursive style.

Chris Perkins

Superintendent

Hearing Officer

21 May 2014