

Ontario Provincial Police Discipline Hearing

In the Matter of

Ontario Regulation 268/10

Made Under the Police Services Act, RSO 1990

And Amendments Thereto

AND

In the Matter of the

The Ontario Provincial Police

And

Sergeant R.C. (Randy) Cota, #7062

Charges: **Discreditable Conduct – Two Counts**

Before: **Superintendent Robin D. McElary-Downer**
Ontario Provincial Police

Appearances:

Counsel for the Prosecution: **Superintendent Mike Shard**
Ontario Provincial Police

Counsel for the Defence: **Mr. William MacKenzie**
Ontario Provincial Police Association

Hearing Dates: **September 20, 21, 2011**

REASONS FOR DECISION

Sergeant R.C. (Randy) Cota (Sgt. COTA) has been charged with two counts of Discreditable Conduct contrary to ss. 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

The particulars of the allegations are:

On or about January 24, 2010 you acted improperly in relation to a male party who had been arrested by other officers, in that you had your taser out without justification and made a comment similar to "Should I taser him now, or just taser him later".

And,

On or about January 24, 2010 you acted improperly in relation to a male party who had been arrested by other officers, in that without proper cause or justification you took hold of his shoulder and stated words to the effect "What's a McQUABBIE doing this far south".

Plea

Sgt. COTA pled not guilty to the allegations of misconduct.

Evidence

Before commencing, I would like to thank Mr. William MacKenzie, Defence Counsel for Sgt. COTA and Superintendent Michael Shard, OPP Prosecutor, for the manner in which they presented their evidence. I heard from seven witnesses, including the Public Complainant and Respondent Officer, and received eight exhibits, all of which have collectively assisted me in reaching my decision.

Exhibits entered during the hearing included:

Exhibit #5 - Letter of Authorization to serve as Adjudicator

Exhibit #6 - Schematic drawing of the Sebringville Detachment walkway / building entrance (Mr. McQuabbie)

Exhibit #7 - OIPRD complaint

Exhibit #8 - Transcript of Sgt. COTA's statement to Professional Standards Bureau (PSB)

Exhibit #9 - Duty Report – PC Julie Towton

Exhibit #10 - Transcript of Mr. McQuabbie's statement to PSB

Exhibit #11 - Schematic drawing of the Sebringville Detachment walkway / building entrance (PC Geurts)

Exhibit #12 - Schematic drawing of the Sebringville Detachment basement (Sgt. COTA)

The first witness called by Prosecution was Mr. Kelly McQuabbie. Mr. McQuabbie advised he is 29 years old and self employed. He is the Public Complainant in the matter that gave rise to this Tribunal. Mr. McQuabbie testified that on January 24, 2010 he was arrested in Listowel by the OPP. Following the arrest, he was transported from Listowel to Sebringville by a female officer, whose first name was Julie. Officer Julie made a brief stop at the Mitchell OPP office before continuing on to Sebringville. Mr. McQuabbie advised nothing of consequence occurred during the drive. He found Officer Julie friendly

and they just talked about regular stuff. He advised they were alone in the cruiser during the drive from Listowel to Sebringville.

Upon arrival at the Sebringville Detachment, Mr. McQuabbie stated he observed four to five officers, all in uniform, standing outside the door waiting to get him in. Officer Julie removed him from the rear left passenger seat of the cruiser. Mr. McQuabbie observed Sgt. COTA standing approximately eight to nine metres from the rear entrance door of the building with his back to the red brick wall. Sgt. COTA was standing alone on one side of the walkway, and other officers were directly across from him on the other side of the walkway. Mr. McQuabbie and Officer Julie walked toward the building entrance. Sgt. COTA was laughing and joking and when Mr. McQuabbie was approximately seven metres away from Sgt. COTA, Sgt. COTA pulled his taser out with his right hand and said something to the effect, "Should we taser him now or taser him later?" One of the male officers directly across from Sgt. COTA told him to put the taser away. Mr. McQuabbie walked by Sgt. COTA and the other officers. An officer ahead of Mr. McQuabbie opened the rear door and Mr. McQuabbie entered the detachment. The officers on the walkway, including Sgt. COTA, fell in behind him.

After entering the detachment, Mr. McQuabbie testified he turned left and walked toward the cell area. Sgt. COTA grabbed him from behind by placing his hands on his neck and back and said, "What is a McQuabbie doing this far south?"

Mr. McQuabbie stated he was lodged into a cell. After several minutes had passed, Sgt. COTA attended the cell area and engaged in a conversation with Mr. McQuabbie. The substance of the conversation was in relation to Mr. McQuabbie's family and getting on the right path of life. Mr. McQuabbie thought Sgt. COTA was trying to be friendly with him and he found his comments more calming. Mr. McQuabbie believed the conversation lasted two to three minutes. Mr. McQuabbie stated that during this conversation his brain went on record. He advised he has a relatively good memory, and other than having problems remembering names, he can remember details.

Mr. McQuabbie described the taser incident in more detail. He said when he first saw Sgt. COTA with it, he was approximately three - maybe six metres away from him. Sgt. COTA pointed the taser at him from waist level. He said the taser was in Sgt. COTA's right hand and that Sgt. COTA was wearing a police officer's uniform. He could see sergeant stripes on Sgt. COTA's arm.

Mr. McQuabbie said he was terrified when he saw the taser. He stated he is a First Nations man and there is a lot of tasing going on between police and First Nations people. In regard to Sgt. COTA's comment, - "What is a McQuabbie doing this far south?" - it made him feel angry and hostile.

Mr. McQuabbie prepared a drawing of the Sebringville Detachment parking lot and rear door. Superintendent Shard tendered the drawing as Exhibit #6.

In cross examination, Mr. McQuabbie testified he has not seen Sgt. COTA since January 2010. Mr. McQuabbie stated that approximately two weeks following the incident, his mother pulled up a picture of Sgt. COTA on the internet and asked him if it was the officer he was referring to. Mr. McQuabbie stated he looked at the picture very briefly but had no interest in seeing it. It was a picture of Sgt. COTA in uniform but not a police uniform.

Mr. McQuabbie acknowledged he had a criminal record and listed some of his criminal convictions, including Assault Police. He referred to an incident where three officers had beat him with a baton and stated he should have complained then.

Mr. McQuabbie stated he filed his OIPRD complaint in May 2010 at the encouragement of his Probation Officer. Until then, Mr. McQuabbie did not think there was any use in complaining about police, because police investigate police. Defence tendered the OIPRD complaint as Exhibit #7.

Mr. McQuabbie was shown a copy of his OIPRD complaint and he acknowledged it was in his hand writing. Defence pointed out that in the complaint, Mr. McQuabbie alleged it was Officer Henry who pulled out the taser when he was in handcuffs being walked in. Mr. McQuabbie responded that he got things jumbled up sometimes. Mr. McQuabbie was questioned in regard to how sure he was the incident occurred on January 24, 2010 at 1600. Mr. McQuabbie said he was 88 percent certain the date was January 24, but qualified this by saying he was told to write down something approximate.

He was questioned in regard to his certainty of the time of the incident. Mr. McQuabbie stated he had been told to turn himself in at the Listowel Detachment at 2 pm. The police were not there when he arrived so he walked around to the rear of the building. He found two officers, Lindsay Wood and Julie who let him inside the detachment. He remained at the Listowel Detachment for maybe a couple of hours and then was transported by Officer Julie. Mr. McQuabbie stated the atmosphere at the Listowel Detachment was relatively relaxed. The police didn't want to fight like last time, so he, Mr. McQuabbie extended the same courtesy. After leaving Listowel, Mr. McQuabbie testified he and Officer Julie stopped in Mitchell briefly. Officer Julie introduced him to few officers and provided him a cigarette. They left after approximately 20 minutes. Officer Julie was driving and they were alone in the cruiser. They arrived at the Sebringville Detachment maybe two to three hours after he first attended Listowel.

After stopping at the Sebringville Detachment, Mr. McQuabbie stated he was transported to the Stratford jail to spend the night, and could not recall the officer who took him there.

Mr. McQuabbie advised that after spending the night at the jail, two officers picked him up in the morning and transported him back to the Sebringville Detachment for bail. He described one of the officers as a male with blue eyes and a bit of stubble on his face. He did not know the male officer's name. Mr. McQuabbie advised that another prisoner was transported the same time as he was but he did not know his name. He stated he did not recall having any conversation with the other prisoner. He stated that when they arrived at Sebringville, the cruiser was parked in the same spot as before, and he entered the through the same rear detachment door under the escort of a female officer. He did not recall seeing Sgt. COTA on this occasion nor did he see anyone with a taser. Mr. McQuabbie described the drive from the jail to the detachment as relatively uneventful. He stated both he and the other prisoner were taken out of the cruiser at the same time but he could not recall who entered the detachment first.

Following WASH court, Mr. McQuabbie stated he and the other prisoner were permitted to have a cigarette outside before they were returned to the Stratford jail. Mr. McQuabbie testified he was actually treated with respect on this date.

Mr. McQuabbie advised he remained 88 percent sure the date was January 24, 2010 when Sgt. COTA pointed his taser at him and he was 100 percent sure that Sgt. COTA placed his hands behind his neck.

Mr. McQuabbie stated he was interviewed by Detective Sergeant (D/Sgt.) Murray on June 16, 2010 in regard to his OIPRD complaint. Defence reviewed with Mr. McQuabbie the statement he provided D/Sgt. Murray. Mr. McQuabbie confirmed he described Sgt. COTA as being 6'3" tall and qualified this by stating Sgt. COTA was a little taller than himself. He confirmed he described Sgt. COTA to be around 220 to 240 pounds and in his 30s. He believed Sgt. COTA's name started with an H, and was Henry or Harry. He confirmed there was a male officer standing directly across from Sgt. COTA who was taller and slimmer and reasonably well mannered. He confirmed Sgt. COTA had sergeant stripes on both sides of his arms. He also confirmed he told D/Sgt. Murray that Sgt. COTA grabbed him from behind when he was in the detachment and said, "What's a McQuabbie doing this far south?"

Mr. McQuabbie testified Sgt. COTA had a sig and believed he was wearing a bullet proof vest over his shirt. When pressed about the vest, Mr. McQuabbie stated he wasn't sure if Sgt. COTA was wearing the vest and said he was only guessing.

Mr. McQuabbie stated he was escorted into the detachment by Julie. He thought she was behind him and had a hold of his left arm.

Mr. McQuabbie advised he is 6' tall - 185 centimetres and weighed 176 pounds. He advised the officer who drew the taser on him was at least two inches taller than himself. He stated the boots police wear make them taller.

At the request of Defence, Mr. McQuabbie stood beside Sgt. COTA. After doing so, he estimated Sgt. COTA's height to be 5'10 to 5'11 tall and weight around 170ish. When asked to explain the discrepancy, Mr. McQuabbie advised police get his own description inaccurate.

Mr. McQuabbie acknowledged that when he spoke to Duty Counsel, he did not complain about Sgt. COTA's actions. He explained he thought about being shot and said it was part of being brown.

Defence questioned Mr. McQuabbie further in regard to the description he provided of Sgt. COTA. Mr. McQuabbie stated Sgt. COTA pretended he was Native and gave him a sob story on why his eyes were blue. Mr. McQuabbie would not agree with Defence that the description he originally provided to D/Sgt. Murray, did not match the physical description of Sgt. COTA.

Prosecution called D/Sgt. John Murray as the next witness. D/Sgt. Murray testified he began his police career in 1983 with Peel Regional Police Service. In 1989 he joined the Tillsonburg Police Service and following an amalgamation, he joined the OPP in 2000. In 2009, D/Sgt. Murray was promoted to Sergeant and transferred to PSB.

On June 10, 2010 he was assigned to investigate Mr. McQuabbie's public complaint. Through his investigation, D/Sgt. Murray identified Sgt. COTA as the Respondent Officer. On July 8, 2010 he placed a telephone call to Sgt. COTA. They discussed the complaint and it was during this conversation that Sgt. COTA suggested the officer with the taser could possibly be an ERT officer. Sgt. COTA assured D/Sgt. Murray it wasn't him and offered to prepare a Duty Report. Sgt. COTA advised he did not need to call the OPPA – again because it wasn't him. Sgt. COTA acknowledged he remembered Mr. McQuabbie because he was Indian.

On July 9, 2010 D/Sgt. Murray met with Sgt. COTA in London and provided him with a copy of the complaint and an Order for a Duty Report. After reading the complaint, Sgt. COTA offered to provide an

audio statement. When the statement was completed and the recorder was turned off, Sgt. COTA asked the D/Sgt. who said he had his taser out. When D/Sgt. Murray advised it was reported in an officer's Duty Report, Sgt. COTA stated it was ignorant on the part of the officer.

Prosecution tendered the transcript of Sgt. COTA's statement as Exhibit #8.

On August 11, 2010 D/Sgt. Murray contacted Sgt. COTA. Sgt. COTA was upset and remained adamant that D/Sgt. Murray had the wrong person. Sgt. COTA stated he only spoke to the Complainant once and it was in the cell area, not outside. Sgt. COTA advised that other officers must be mistaken or making stuff up. Sgt. COTA wanted to take a polygraph and asked D/Sgt. Murray to do a photo line up.

On October 12, 2010 D/Sgt. Murray received an email from Sgt. COTA stating he had located his notebook and would send his entries to him. D/Sgt. Murray advised he received Sgt. COTA's notes on October 25, 2010.

D/Sgt. Murray advised he received a Duty Report from PC Julie Towton. Prosecution tendered the Duty Report as Exhibit #9.

In cross examination, D/Sgt. Murray acknowledged that Mr. McQuabbie identified two officers, PC Lindsay Wood and Officer Henry, in his original OIPRD complaint. D/Sgt. Murray explained that Mr. McQuabbie later withdrew two portions of his complaint which left him only to identify the officer who had pointed the taser. D/Sgt. Murray confirmed Sgt. COTA was never identified in the original complaint. D/Sgt. Murray testified he knew PC Rod Herbert and knows a number of officers from the Perth County Detachment. He confirmed that PC Herbert had contact with Mr. McQuabbie the night of his arrest. D/Sgt. Murray described PC Herbert as having a thin build and 5'10 to 5'11" tall.

D/Sgt. Murray advised because Mr. McQuabbie failed to identify the Respondent Officer, his investigation involved a review of the Perth County Detachment duty roster to determine who carried tasers. He focused on the roster dates, 23 and 24 January 2010. D/Sgt. Murray detailed the names and shifts officers worked and who carried tasers. D/Sgt. Murray advised he determined Sgt. COTA was working dayshift, 6 am to 6 pm on January 24, 2010 and that he carried a taser.

D/Sgt. Murray testified he recorded an audio statement from Mr. McQuabbie on June 16, 2010. D/Sgt. Murray testified Mr. McQuabbie was sure that the date the taser was pointed at him was January 23, 2010. However, D/Sgt. Murray testified he narrowed the Respondent Officer down to Sgt. COTA who worked on January 24, 2010 because Sgt. COTA was familiar with Mr. McQuabbie's family.

Defence reviewed in detail Mr. McQuabbie's statement with D/Sgt. Murray. Defence tendered Mr. McQuabbie's statement as Exhibit #10.

D/Sgt. Murray testified he was not concerned with the five month delay in Mr. McQuabbie lodging his complaint. Following his investigation, he accepted Mr. McQuabbie's version of events and was not concerned that Mr. McQuabbie stated the pointing of the taser occurred on January 23 rather than January 24, the day Sgt. COTA was working.

D/Sgt. Murray advised he attempted to locate but was unsuccessful, the prisoner, Mr. Hogan who had been transported to the Sebringville Detachment with Mr. McQuabbie on January 24, 2010. He advised that at the time of his search, he learned Mr. Hogan was out east in Glace Bay. He advised he was

satisfied by the information provided by PC Manley that Mr. Hogan was already in the detachment when Sgt. COTA made the comment about the taser.

D/Sgt. Murray testified that Sgt. COTA was adamant that he was not outside the detachment when Mr. McQuabbie was brought in and adamant he had not drawn his taser.

D/Sgt. Murray advised when he interviewed Sgt. COTA in London, Sgt. COTA did not have his notebook readily available.

D/Sgt. Murray confirmed that PC Julie Towton only transported Mr. McQuabbie from the Listowel Detachment to the Mitchell Detachment and that she did not transport him further to the Sebringville Detachment, as Mr. McQuabbie believed.

Prosecution called PC Margaret Geurts as the next witness. PC Geurts has been employed with the OPP for four years. She is posted to Perth County and assigned to the Mitchell Detachment.

She testified she was working dayshift, 6 am to 6 pm on January 24, 2010. On that date, Sgt. COTA requested she and PC Manley attend the Sebringville Detachment to assist with WASH court. She arrived at the Sebringville office around 7 am to prepare the paperwork. At approximately 9 am, Sgt. COTA asked her and PC Manley to attend the Stratford jail and pick up the prisoners, Mr. McQuabbie and Mr. Hogan. They attended the jail and transported the prisoners back to the Sebringville Detachment. She testified she drove with Mr. McQuabbie seated behind her and Mr. Hogan behind PC Manley. It took approximately fifteen minutes before they returned to the Sebringville office. She parked the cruiser in the space closest to the rear door entrance. She noticed Sgt. COTA holding the door open for them just as she parked. PC Geurts exited the cruiser and opened the rear left door of the cruiser for Mr. McQuabbie. Mr. McQuabbie stated to her, "Is he serious or is he being funny?" She did not know what Mr. McQuabbie meant by this. PC Geurts looked over toward Sgt. COTA and saw his taser in his hand. The taser was pointed down, and she could not recall which hand Sgt. COTA had it in.

PC Geurts testified the walk from the cruiser to the detachment door was approximately ten feet. When she looked again in the direction of Sgt. COTA she no longer saw the taser and assumed he had holstered it. Sgt. COTA held the door for them. She escorted Mr. McQuabbie in and PC Manley escorted Mr. Hogan in. PC Geurts did not hear any comment with respect to the taser, and thought if one had been made, she would have heard it.

PC Geurts testified she was not sure the order they all entered the detachment but believed Mr. McQuabbie was in first.

PC Geurts was not sure what Sgt. COTA did when he entered the detachment but remembered he was in the cell area having a very friendly conversation with Mr. McQuabbie. She believed the conversation had something to do with them both knowing the same person. She advised that PC Templeton was in the cell area helping lodge the prisoners. PC Geurts could not recall any other officers being outside the detachment when they first arrived, other than herself, PC Manley and Sgt. COTA. She advised no other officer carried a taser that day. She stated she did not work January 23, 2010.

PC Geurts drew a sketch of the detachment parking lot and rear entrance door which Prosecution tendered as Exhibit #11.

In cross examination, PC Geurts testified she was in the presence of Mr. McQuabbie from the time they arrived at the Sebringville Detachment to the point where he was lodged into the cell. She never observed Sgt. COTA squeeze Mr. McQuabbie's shoulders in the hallway. She testified Mr. McQuabbie never complained to her about Sgt. COTA pointing his taser nor did he complain about Sgt. COTA touching him in the hallway. PC Geurts advised that following WASH court, she transported Mr. McQuabbie back to the Stratford jail.

Prosecution called PC Darryl Manley as the next witness. PC Manley joined the OPP in 2001. In September 2009, he transferred to the Perth County Detachment.

PC Manley testified he was working dayshift, 6 am to 6 pm on January 24, 2010. At 8:46 am he arrived with PC Geurts at the Stratford jail and picked up two prisoners, and transported them back to the Sebringville Detachment where they were lodged. During the transport, he advised PC Geurts drove and he sat in the front right passenger seat of the cruiser. He did not recall the seating positions of the two prisoners, other than they were in the back seat of the cruiser. The return drive from the jail to the Sebringville Detachment took thirteen minutes. Upon arrival to the detachment, Sgt. COTA met them at the back door and held it open. PC Manley testified he became aware of Sgt. COTA's presence sometime after he got his prisoner out of the cruiser. PC Manley recalled that a comment was made about a taser but could not remember the sequence of events and whether the comment was made inside the detachment or outside. He could not remember the context that the taser comment was made in. He could not recall if Sgt. COTA was wearing his duty belt or if he had a taser. PC Manley could not remember if Sgt. COTA entered the detachment before the officers and prisoners or followed in last.

PC Manley testified Sgt. COTA had a conversation with Mr. McQuabbie about some family and although he could not remember where the conversation took place, he believed it may have been in the cell area.

In cross examination, PC Manley agreed the prisoner transport was a fairly routine event for him. It was for this reason when he was asked to write a Duty Report five and one half months later, he had limited recollection of the event.

PC Manley testified he would have remembered if he saw Sgt. COTA point a taser. He testified he never observed Sgt. COTA squeeze Mr. McQuabbie's shoulders. He did recall however that Sgt. COTA and Mr. McQuabbie had a friendly conversation.

PC Manley testified he allowed the prisoners to have a cigarette outside the detachment before they were returned to the Stratford jail.

In re-examination, PC Manley testified he recalled very little of the event but remembered a taser comment had been made because he had not been around the use of tasers very much.

Prosecution called PC James Templeton as the next witness. PC Templeton testified he has been a member of the OPP since September 2008 and he is posted to the Perth County, St. Mary's Detachment.

PC Templeton testified that on January 24, 2010 he was working dayshift, 6 am to 6 pm. At 8:15 am he was on the road when he was requested by Sgt. COTA to assist with WASH court paperwork and lodging some prisoners. PC Templeton advised he attended the Sebringville Detachment and was in the lodging

area when the prisoners arrived. PC Templeton described the hallway leading from the rear detachment door to be long. From his vantage point, he could see persons in the hall as soon as they turned the corner from the rear door. On this date, he observed officers, PC Geurts, PC Manley and Sgt. COTA along with Mr. McQuabbie in the hallway although he could not remember the order they were in. He lodged Mr. McQuabbie into the cell. He found Mr. McQuabbie cooperative and calm. Mr. McQuabbie did not report he had a taser pointed at him nor did he complain about someone squeezing his shoulders.

In cross examination, PC Templeton was shown a copy of the Prisoner Log Sheet. After reviewing the sheet, PC Templeton remembered Sgt. COTA spoke to Mr. McQuabbie while he was in the cell.

Defence called Sgt. COTA as the first witness. Sgt. COTA has been employed with the OPP for the past 24 years. In August 2009, he was promoted to the rank of Sergeant and posted to the Perth County Detachment. In August 2010, he transferred to the James Bay cluster and is currently assigned to the Moosonee Detachment. In January 2010, he was working as a Sergeant at Perth County and reported to the administration centre in Sebringville.

In July 2010, he became aware through his Staff Sergeant that he was the Respondent Officer of a public complaint. The allegation was he had threatened somebody with his taser. Sgt. COTA testified he was adamant with his Staff Sergeant that it was not him because he never threatened anyone with his taser nor had he ever drawn his taser when he was at Perth County.

Sgt. COTA testified D/Sgt. Murray contacted him on July 8, 2010 and advised him of the public complaint. Sgt. COTA agreed to meet with D/Sgt. Murray in London on July 9, 2010. Sgt. COTA advised he did not have his notebooks available for the meeting because they were at his detachment in Moosonee.

On July 9, 2010, Sgt. COTA testified he met with D/Sgt. Murray and reviewed the OIPRD complaint. He testified he was 100 percent adamant that he did not threaten anyone with his taser. Sgt. COTA advised he waived his right to speak to with the OPPA and asked D/Sgt. Murray to audio record his statement.

Sgt. COTA testified that at first he didn't know who D/Sgt. Murray was talking about in regard to the complaint but he then made the connection when the Detective mentioned the McQuabbie comment.

Sgt. COTA testified he vehemently denied that he was at the back door of the detachment and pointed his taser when interviewed in July 2010. Sgt. COTA testified that to this day, he has no recollection of being at the door when the prisoners arrived. Sgt. COTA testified however that after hearing the testimony of PC Geurts and PC Manley, he must have been at the door as they say. He stated that he knows PC Geurts in particular to be an extremely honest officer and therefore he accepted and respected her evidence.

Sgt. COTA testified he did speak to Mr. McQuabbie in the cell area. He recalled doing this when he was interviewed by D/Sgt. Murray in July 2010. Sgt. COTA explained that he overheard an individual in the office comment that one of the prisoners in the cells was an Indian guy. Sgt. COTA's interest immediately peaked and upon checking the prisoner's name he saw that it was a Mr. McQuabbie. Sgt. COTA testified he is familiar with the McQuabbie surname and knows the family to be Ojibway. Sgt. COTA explained that years ago, he was heavily involved in land claim discussions as the Chief of his First

Nation community and it was during this time he met with some McQuabbies who bordered his community.

Sgt. COTA testified that he went to the cells where Mr. McQuabbie was, and in his own native Algonquin language, said, "What's a McQuabbie doing this far south?" Sgt. COTA explained he meant no disrespect by the comment but rather greeted Mr. McQuabbie in this manner as a friendly ice breaker. He advised Mr. McQuabbie responded in English. They exchanged a friendly conversation in regard to some family members Sgt. COTA knew. Sgt. COTA said the conversation was pleasant and he recalled that he wished Mr. McQuabbie well.

Sgt. COTA gave evidence in regard to his typical day as a Sergeant at the Perth County Detachment. He testified that he generally reported for duty fifteen minutes early. He would immediately attend the Sergeant's office with his lunch box in hand, and following a briefing, he would relieve the night shift Sergeant. On any given day he would have approximately eight to ten officers report to him from four different offices. He would complete the Log On sheet for the officers and forward it to the PCC.

Sgt. COTA testified that since his interview with D/Sgt. Murray, he has had an opportunity to review his notebook entries. He advised he was off duty on January 23, and he worked dayshift, 6 am to 6 pm on January 24, 2010.

Sgt. COTA testified that the morning of January 24, 2010 was a particularly hectic morning. In addition to sorting out his platoon officers, he advised he was asked to conduct follow up in regard to a robbery that had occurred the night before. Specifically, he was requested by the Area Crime Sergeant to interview the victim of the alleged robbery as police suspected public mischief. Sgt. COTA testified that in addition to being consumed with the robbery, the telephone never stopped ringing.

Sgt. COTA testified that if he followed his routine, then logically at some point he would have gone downstairs to kit up with his duty belt, use of force and taser. He could only guess at best that on January 24, 2010 his kitting up was delayed due to the numerous distractions this particular morning brought. Sgt. COTA explained he normally cycles his taser before attaching the cartridges. Sgt. COTA testified that if this was the case, and again he had no independent recollection, he may have been coming back up the stairs with his taser in hand when he heard on his portable the officers arrive 10-7 at the back door with prisoners. Sgt. COTA stated he would have naturally opened the door to allow easy access. Sgt. COTA explained he would have no other reason for being at that door. Sgt. COTA testified that if he opened the door he may have also been in the process of holstering his taser. He testified he had no independent recollection of doing this - he simply was trying to offer some reasonable and logical explanation for what had been seen by Mr. McQuabbie and PC Geurts.

Sgt. COTA testified that he is left handed and his taser is holstered on the right side of his duty belt. To access his taser he uses the cross draw method.

Sgt. COTA testified he is 5'11" tall and weighs 176 pounds. He has been this height and weight since grade 12.

Sgt. COTA testified he wears the regular police uniform. On January 24, 2010 he would have been wearing a long sleeved shirt with his sergeant epaulettes attached to both shoulders. Sgt. COTA testified that he has always worn his bullet proof vest under his shirt as opposed to the outer wear option, because he believes it looks neater.

Sgt. COTA testified he did not have any conversation with Mr. McQuabbie other than what was discussed in the cell area.

Sgt. COTA testified it is his normal practice to sign out a fresh taser at the start of each shift. He advised there has, however, been occasion when he has accepted a taser direct from a sergeant who was going off duty. He advised it is his practice to always cycle a taser before mounting the cartridges, however, he also knows there have been occasions when he has not had time to do so.

Sgt. COTA testified that in addition to offering to take a polygraph and participate in a photo line-up, he inquired about the cell surveillance tapes. He learned that because the recording system had not been turned on manually, video coverage did not exist.

Sgt. COTA was cross examined. He completed a sketch of the detachment basement layout and staircase which led to the rear detachment door. Prosecution tendered the sketch as Exhibit #12.

Sgt. COTA testified he remembered making the - "McQuabbie this far south" - statement because the name McQuabbie created a memory. He testified he did not remember opening the door that day because opening a door for someone is an every day event. Sgt. COTA acknowledged he would have remembered being outside the detachment if he had pointed his taser at someone.

The next witness called by Defence was Mr. Andrew Hogan. Mr. Hogan is 44 years old and resides in Stratford. He testified that his recollection of January 24, 2010 was somewhat unclear. However, he did recall being in police custody that day and had been taken to the Sebringville Detachment. He recalled another prisoner at the Sebringville Detachment had given him a cigarette. Mr. Hogan testified he did not recall seeing a taser being pointed at himself or the other prisoner. Mr. Hogan testified he never heard any comment like, "Should I taser him now or later?" Mr. Hogan testified he would have remembered if a taser had been pointed at him or another person.

Mr. Hogan testified that the other prisoner appeared relaxed and never complained to him about a taser on their ride back to the Stratford jail.

In cross examination, Mr. Hogan testified he did not have a clear recollection of first arriving at the Sebringville Detachment. Mr. Hogan did not recall any conversation in regard to "What's a McQuabbie doing this far south?"

Submissions

Mr. MacKenzie began his submissions by stating he believed there was a basis for a non-suit motion and it existed at the completion of the Prosecution's case. He was reluctant however to file one as it would have precluded Sgt. COTA from testifying.

Mr. MacKenzie submitted that if I accept Mr. McQuabbie's evidence, then I have to accept that the incident occurred on January 23, not January 24, the day Sgt. COTA was working. Mr. MacKenzie pointed out the allegations laid out in the Notices of Hearing specify the date of incident was January 24, 2010, however Mr. McQuabbie testified the incident occurred on January 23, 2010.

Mr. MacKenzie submitted that the comment made by Sgt. COTA, - "What's a McQuabbie doing this far south?" - was by no means intended to be insensitive. It was intended by Sgt. COTA to be an ice breaker and nothing more.

Mr. MacKenzie pointed out the number of discrepancies in Mr. McQuabbie's evidence. He submitted that Mr. McQuabbie was mistaken in his description of Sgt. COTA. Mr. McQuabbie was mistaken in his OIPRD complaint when he identified Officer Henry as the one who pulled out his taser and then assaulted him from behind. Mr. MacKenzie suggested Mr. McQuabbie's identification of Sgt. COTA during the Hearing could be termed as an 'in dock' given Sgt. COTA was the obvious choice - the officer who was seated beside Defence. Mr. MacKenzie pointed out that Mr. McQuabbie testified there were four to five officers at the back door waiting for him when he arrived. Both PC Geurts and Manley testified there was only one - Sgt. COTA. Mr. McQuabbie testified he was seven to ten metres away when Sgt. COTA pulled out his taser but PC Geurts testified the cruiser was only approximately ten feet away from the back door.

Mr. MacKenzie pointed out Mr. McQuabbie waited three and one half months before lodging his complaint. He suggested I should be very concerned about the time delay and more so concerned about Mr. McQuabbie's motivation for laying a complaint against Sgt. COTA. Mr. MacKenzie suggested Mr. McQuabbie's version of events was clearly embellished. Either that, or PC Geurts and Manley must be extremely blind and deaf given they neither heard nor saw Mr. McQuabbie's version of events.

Mr. MacKenzie stated I needed cogent and reliable evidence to base a finding of guilty, and in this matter it did not exist.

Superintendent Shard began his submissions by pointing out I required clear and convincing evidence to determine a finding of guilt and the evidence must be weighty, cogent and reliable. He submitted it is unfortunate the complaint was not lodged sooner and that the delay can account for the memory of witnesses to be weaker.

Superintendent Shard pointed out the evidence supports the incident occurred on January 24, 2010 and he is satisfied that Mr. McQuabbie was confused in regard to the date and who transported him to Sebringville from Listowel.

Superintendent Shard submitted that the identification of Sgt. COTA flows more from Mr. McQuabbie's statement rather than the identification he made during the Hearing.

Superintendent Shard submitted that PCs Geurts, Manley and Templeton provided significant evidence in regard to proving the allegations of misconduct. He submitted that Mr. McQuabbie exited the cruiser and said to PC Geurts, "Is he serious or kidding?" PC Geurts looked in the direction Mr. McQuabbie was looking and saw the taser in Sgt. COTA's hand. PC Manley testified he heard a comment about a taser which supported Mr. McQuabbie's allegation that Sgt. COTA said, "Should I taser him now or taser him later?"

Superintendent Shard submitted that Sgt. COTA initially denied being outside the detachment but has now accepted that he was there. Sgt. COTA did not accept this when he was originally told by D/Sgt. Murray that another officer saw him at the door with the taser in his hand.

Superintendent Shard submitted that Mr. McQuabbie and Sgt. COTA both agree that Sgt. COTA stated "What's a McQuabbie doing this far south?" He submitted Sgt. COTA made the comment in the hallway after squeezing Mr. McQuabbie's shoulders. It is clear by Mr. McQuabbie's evidence the comment was insulting and while it may have not been intended to be that way by Sgt. COTA, Mr. McQuabbie took it to mean, "Why are you off the reserve?"

Superintendent Shard submitted that clear and convincing evidence had been presented to support a finding of guilty.

Findings

Sgt. COTA has been charged with two counts of Discreditable Conduct contrary to ss. 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

The particulars of the allegations are:

On or about January 24, 2010 you acted improperly in relation to a male party who had been arrested by other officers, in that you had your taser out without justification and made a comment similar to "Should I taser him now, or just taser him later".

And,

On or about January 24, 2010 you acted improperly in relation to a male party who had been arrested by other officers, in that without proper cause or justification you took hold of his shoulder and stated words to the effect "What's a McQUABBIE doing this far south".

During this Tribunal, I heard the testimony of seven witnesses and received a total of eight exhibits. I have reviewed the evidence at length and as a result, I have concluded the following facts have been proven:

- On January 23, 2010 Mr. McQuabbie was arrested in Listowel by PCs Lindsay Woods and Julie Towton.
- Mr. McQuabbie was transported from the Listowel Detachment to the Mitchell Detachment by PC Towton.
- Mr. McQuabbie was transported from the Mitchell Detachment to Sebringville by PC Rod Herbert. From Sebringville, he was transported to the Stratford jail to spend the night.
- On January 24, 2010 Mr. McQuabbie was picked at the Stratford jail along with prisoner, Mr. Hogan, by PCs Geurts and Manley and returned to the Sebringville Detachment for WASH court.
- Upon arrival at the Sebringville Detachment, the two prisoners and officers were met by Sgt. COTA, who had opened the door for them.
- At some point, as Sgt. COTA held the door open, he had his taser out and in his hand.

- A comment in regard to the taser was made by someone at or near the door where they entered.
- And, at some point, while at the Sebringville Detachment, Sgt. COTA commented to Mr. McQuabbie, "What's a McQuabbie doing this far south?"

Where my challenge lays is did Sgt. COTA have his taser out without justification and make the comment, "Should I taser him now or taser him later?" And further, did Sgt. COTA without proper justification take hold of Mr. McQuabbie's shoulders when he stated words to the effect, "What's a McQuabbie doing this far south?"

Mr. McQuabbie testified that both allegations did in fact occur.

To guide me in my determination of this matter, I refer to a quotation of Justice O'Hallaran in Faryna v. Chorny (1952) 2 D.L.R. (B.C.C.A.) 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 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 will first examine the evidence of Mr. McQuabbie.

Mr. McQuabbie stated he was transported from the Listowel Detachment to Sebringville by Officer Julie, after a brief stop at the Mitchell Detachment. I know through the evidence of D/Sgt. Murray and Exhibit #9, (PC Towton's Duty Report), Mr. McQuabbie was mistaken. He was transported by PC Julie Towton from Listowel to Mitchell and then from Mitchell to the Sebringville Detachment by PC Rod Herbert.

Mr. McQuabbie testified Officer Julie escorted him inside the Sebringville Detachment. I know Mr. McQuabbie was mistaken on this point. Based on the testimony of D/Sgt. Murray and Exhibit #9, PC Towton did not transport nor escort Mr. McQuabbie into the Sebringville Detachment on the date of his arrest. Rather, PC Geurts escorted Mr. McQuabbie into the Sebringville Detachment, on the day following Mr. McQuabbie's arrest.

Mr. McQuabbie testified that when he arrived at the Sebringville Detachment there were four to five officers waiting outside to get him in. In Exhibit #10, I note that Mr. McQuabbie told D/Sgt. Murray that two of the officers were female. Specifically, he stated, - "They were female, female officers that had been response to actually making it very clear that their machine guns in their car and whatnot so yeah" - "...and because for related charges they had a lot of uh women officers there to make sure I wasn't a, a big deal, giving them a hard time." PCs Geurts and Manley testified there was only one officer, Sgt. COTA, not four or five officers. Mr. McQuabbie's reference to the machine guns and exaggerated number of officers present provided me insight into Mr. McQuabbie's ability or lack thereof to accurately interpret the events as they unfolded on January 24, 2010.

Mr. McQuabbie testified that the officer who had his taser out and made the comment, - "Should I taser him now or taser him later?" - had sergeant stripes on both arms. Unless Sgt. COTA was wearing his

outer wear jacket, and I heard no evidence to suggest he was, I know Mr. McQuabbie was mistaken on this point. Sergeants wear their rank epaulettes on both shoulder shirt flaps – the stripes are not sewn on their sleeves.

Mr. McQuabbie testified the officer was wearing his bullet proof vest on the outside of his shirt. He later stated he was not positive about this. Sgt. COTA testified he always wears his vest under his shirt, not over.

Mr. McQuabbie testified that the comment, - "Should I taser him now or taser him later?" - was made when he was approximately seven metres away from the officer. PC Geurts stated the walk with Mr. McQuabbie from the cruiser to the rear door was only ten feet.

Mr. McQuabbie described the officer with the taser as being taller than himself, and was approximately 6'3" tall and weighed anywhere between 220 to 240 pounds. Mr. McQuabbie's description failed to match Sgt. COTA's physique of 5'11 and 176 pounds. When Sgt. COTA and Mr. McQuabbie stood side by side during the Hearing, it was event to me there was a significant height difference, with Mr. McQuabbie being the taller of the two.

Mr. McQuabbie further described the officer as having darkish skin. I noted during the hearing that Sgt. COTA's skin looked slightly tanned, like he had spent some time outdoors. I am not sure he has the same colour in mid winter. I personally would not describe his skin colour as darkish, but I am mindful this is a personal opinion.

Mr. McQuabbie confirmed that in his OIPRD complaint, he identified the officer as Officer Henry. He confirmed that during his interview with D/Sgt. Murray he advised the officer's name started with an H, and may have been Harry or Henry. Based on D/Sgt. Murray's testimony, I accept that it was PC Rod Herbert who transported Mr. McQuabbie from the Mitchell Detachment to Sebringville. Mr. McQuabbie's physical description and name of the officer who pointed the taser considerably failed on both fronts to match Sgt. COTA.

Mr. McQuabbie testified Sgt. COTA drew and pointed his taser using his right hand. This is not consistent with Sgt. COTA's evidence, who testified he is left handed and uses the cross draw method to access his taser.

Mr. McQuabbie drew a diagram of the cruiser's position in relation to the back door. PC Geurts drew a diagram of the same thing and both were entered as Exhibits #6 and #11, respectively. I noted a marked difference between the two diagrams. Mr. McQuabbie's diagram indicated the walkway leading to the rear door as fairly long. PC Geurts diagram indicated the cruiser was parked snug against the detachment garage and in close proximity to the rear door.

Several times during his testimony, Mr. McQuabbie became defensive and agitated. He directed sarcasms and name calling toward Mr. MacKenzie. At one point, I had to ask Mr. McQuabbie to be mindful of his comments.

In overview of Mr. McQuabbie's evidence, I believe he testified to the best of his ability and that he testified according to his recollection based on his perception of the events on January 24, 2010. I emphasize the words, recollection based on perception. I am convinced based on his evidence and comparing it to all other evidence presented during this Tribunal, that Mr. McQuabbie's interpretive

skills on January 23 and 24, 2010, were not aligned with reality. While I believe it reasonable to accept some inconsistencies, Mr. McQuabbie's testimony had so many inconsistencies and inaccuracies; I find it difficult to accept him as a reliable witness.

With respect to credibility, Mr. McQuabbie testified he was treated well by the officers in Listowel and Mitchell. He accordingly responded to this treatment in a positive manner. Mr. McQuabbie also testified that the day he returned to the Sebringville Detachment for WASH court, he was actually treated with respect. While I accept Mr. McQuabbie was confused on his dates, he in essence testified that he was treated with respect the same day he alleged Sgt. COTA pointed the taser at him. I cannot justify in my own mind, the two contradictory statements.

Further, during his testimony, Mr. McQuabbie became defensive, sarcastic and agitated with Mr. MacKenzie. Based on his own testimony coupled with my independent observations of Mr. McQuabbie, I am satisfied that he would have not tolerated a taser being pointed at him without justification. I believe that if the taser had truly been pointed at him and the physical grabbing had truly taken place, Mr. McQuabbie would have retaliated in some way. I base this finding on Mr. McQuabbie's testimony where he stated, "The atmosphere at the Listowel Detachment was relatively relaxed. The police didn't want to fight like last time, so I extended the same courtesy." To the contrary, police witnesses as well as Mr. McQuabbie testified in regard to his cooperation while at the Sebringville Detachment.

It does not fit that Mr. McQuabbie would have remained cooperative or had a pleasant conversation if in fact Sgt. COTA had just intimidated him with a taser or grabbed him in the hall. I therefore find Mr. McQuabbie's testimony lacked significant creditability and I cannot give weight to his evidence.

Sgt. COTA testified that to this day, he cannot recall greeting the officers and prisoners at the rear door of the detachment on January 24, 2010. He conceded during this Tribunal that he must have been at the door when the prisoners and officers arrived. Sgt. COTA attempted to explain what he would have been doing there and why his taser may have been in his hand, but again, he had no independent recollection.

Although I cannot deem Sgt. COTA as a reliable witness in regard to the taser allegation because of his lack of recall, I did find some logic in his explanation. I draw on my former experience as a Detachment Commander where I have personally witnessed on numerous occasions Sergeants load all their use of force options, save and except the taser, in the weapons vault. They delay the holstering of their taser, until after they return to their office, where they then run the test cycle and mount the cartridges. It therefore seems logical to me that Sgt. COTA could have had the taser in his hand when he left the gun vault, climbed the stairs and opened the rear door as he passed by - all this while he still had the taser in his hand.

I accept Sgt. COTA has no recollection of opening the back door. I accept that he may not have kitted up till well after shift commencement. I accept that he was distracted with the business of the day and to remember opening a door would bear no relevance to him. He admitted that on occasion he did not test cycle the taser before holstering. He admitted that on occasion, he has accepted a taser direct from the out going shift sergeant rather than sign one out. He admitted making the comment, "What's a McQuabbie doing this far south?" I believe Sgt. COTA delivered his evidence to the best of his ability and found him forthright and honest.

PC Geurts testified that she saw Sgt. COTA standing at the rear door when she arrived with the prisoners. She said she saw Sgt. COTA with the taser in his hand and when she looked again, it wasn't there. She testified she escorted Mr. McQuabbie into the detachment. She did not hear Sgt. COTA comment, - "Should I taser him now or taser him later?" - and thought she would have heard it had it been said. She testified she remained in Mr. McQuabbie's presence until he was lodged into the cell. She did not see Sgt. COTA touch Mr. McQuabbie in the hall. Other than corroborating Mr. McQuabbie's evidence that he said, -"Is he serious or is he kidding?" - and confirming that Sgt. COTA had the taser in his hand, she corroborated nothing else. PC Geurts offered some fairly significant evidence in this regard. I found PC Geurts honest in her recollection of events and I believe if she had more to offer she would have. I give significant weight to PC Geurts' evidence.

I heard from D/Sgt. Murray. I believe S/Sgt Murray did a fulsome and commendable investigation based on the evidence and complaint put forth. I believe Sgt. COTA had his taser out when he opened the back door. I believe based on the evidence put before me that Sgt. COTA was in the process of kitting up - with the holstering of his taser being the last piece of equipment to secure. While this speaks to extremely poor judgment on Sgt. COTA's part, given he was opening the door for prisoners, I do not believe it was done so for the purpose to intimidate, joke or threaten.

I am satisfied that a comment was made about the taser after the officers and prisoners arrived at the detachment. PC Manley testified he heard a comment about a taser but could offer no more. Mr. McQuabbie testified Sgt. COTA said, "Should I taser him now or taser him later?" Given I have found Mr. McQuabbie unreliable and lacking in creditability, I cannot give weight solely on his interpretation and or perception as to what was said. To do so, would be a stretch.

I am satisfied Sgt. COTA said, "What's a McQuabbie doing this far south?" I am satisfied this comment was made to Mr. McQuabbie in the cell area and not in the hallway. PC Guerts, Manley and Templeton observed no interaction between Sgt. COTA and Mr. McQuabbie in the hallway. I therefore believe Sgt. COTA did not have any contact with Mr. McQuabbie in the hallway where it is alleged he grabbed his shoulders.

Mr. McQuabbie testified the comment made him feel angry and hostile. Superintendent Shard submitted that Mr. McQuabbie took it to mean, "Why are you off the reserve?" Generally, persons who make disparaging remarks are expected to have known, or ought to have known their comments were unwelcoming. I am not convinced that anyone could have known or ought to have known the comment, - "What's a McQuabbie doing this far south?" - was offensive. I accept Sgt. COTA's evidence that the comment was delivered as an ice breaker and he had no intent to offend.

Generally, I found Mr. Hogan honest and truthful. By his own admission, he does not have a clear recollection of January 24, 2010. Mr. Hogan testified he would have remembered if he had a seen a taser pointed at him or another person and I think he would have remembered something as significant as this had it occurred. Mr. Hogan did recall being transported along with another prisoner and did recall having a cigarette with the prisoner. I accept Mr. Hogan's testimony and will weigh it accordingly in my decision.

Sgt. COTA, will you please stand.

Based on the totality of evidence I have heard in this Tribunal, and in consideration of the allegation that on or about January 24, 2010, you acted improperly in relation to a male party who had been arrested

by other officers, in that you had your taser out without justification and made a comment similar to - "Should I taser him now, or just taser him later?" - I have not found clear and convincing evidence to substantiate the allegation. I find you not guilty of Discreditable Conduct as charged.

And,

Based on the totality of evidence I have heard in this Tribunal, and in consideration of the allegation that on or about January 24, 2010, you acted improperly in relation to a male party who had been arrested by other officers, in that without proper cause or justification you took hold of his shoulder and stated words to the effect - "What's a McQuabbie doing this far south?" - I have not found clear and convincing evidence to substantiate the allegation. I find you not guilty of Discreditable Conduct as charged.

A handwritten signature in black ink, appearing to read "R. D. McElary-Downer". The signature is stylized with a large, sweeping initial "R" and "D".

Robin D. McElary-Downer
Superintendent
OPP Adjudicator

Dated: November 4, 2011