

JAN 04 2013

RECEIVED

**Ontario Provincial Police Discipline Hearing**

**In the Matter of**

**Ontario Regulation 268/10**

**Made under the Police Services Act, RSO 1990,**

**And**

**In the Matter of**

**The Ontario Provincial Police**

**And**

**Provincial Constable Justin R. Maguire #12713**

**Charge: Discreditable Conduct**

**Before:**

Inspector S. McDonald, Ontario Provincial Police Adjudicator

**Appearances:**

Counsel for the Prosecution: Ms. Jodi-Lynn Waddilove, Ontario Provincial Police

Counsel for the Defense: Mr. James Girvin, Ontario Provincial Police Association

Hearing Date: October 16, 17, 18, 2012

## **Particulars of the Allegations:**

The Notice of Hearing alleges that Provincial Constable Justin R. Maguire #12713 on or about April 20, 2010 you acted improperly in relation to two parties, MF and JC, at a vehicle stop in the Georgetown area. You:

- searched the parties and vehicle without proper authority to do so;
- looked under the front passenger seat while the female party was still seated in it;
- asked if they were going to do sexual things; and
- made a comment re wet t-shirt contests.

## **The Hearing:**

Provincial Constable Justin Maguire pled not guilty on October 16, 2012 of Discreditable Conduct pursuant to Section 2 (1)(a) (xi) of the Code of Conduct contained in the Schedule for Ontario Regulation 268/10, as amended. A hearing was held on October 16, 17, 18, 2012.

Mr. Michael Favro was the first witness to testify and advised that he was 28 years old and he lived in Mississauga, Ontario.

Mr. Favro testified that on 20 April 2010, he met with his friend Jessica Cybuchowski and they went for a drive in his 1997 black Lincoln Town car. They were talking about the country bar West 7 in Norval, Ontario. Mr. Favro drove to the bar to show Ms. Cybuchowski where the bar was located. He made a right turn into the driveway of the bar, went to the bottom of the driveway then completed a u-turn and left the lot going westbound on highway #7 towards Georgetown. Mr. Favro testified that he had not stopped his vehicle in the bar lot when completing his u-turn.

Mr. Favro testified that about seven minutes down the road he was pulled over by a police cruiser. Mr. Favro didn't recalled the exact time but that it was before 1:00am. Mr. Favro pulled his vehicle into the lot of the Price Chopper in Georgetown and stopped his vehicle just past the sidewalk in the parking lot. He advised that this was the closest lot from the time that he observed the roof lights on the police cruiser activate.

Mr. Favro had his window down when the officer approached his vehicle. He heard his name over the police radio. Mr. Favro testified that the officer came to the driver's door and he can't remember what he initially said then the officer asked "what are you guys doing out here?" The officer then leaned forward and asked Ms. Cybuchowski in the passenger seat "Are you guys out here to fuck?" Ms. Cybuchowski replied no and Mr. Favro said nothing. Mr. Favro testified that he was not asked for any identification, vehicle registration or insurance information.

Mr. Favro identified the officer as Provincial Constable Maguire.

Mr. Favro advised he was then asked to get out of the vehicle, empty his pockets and place his hands on the roof of the vehicle and he complied. Mr. Favro was then searched by Provincial Constable Maguire. He advised that Provincial Constable Maguire ran his hands all over him and undid his belt buckle, conducting a pat down search of him including the waist region down to his feet and pulling his pant pockets out. Mr. Favro did not say anything and could not recall if Provincial Constable Maguire said anything to him during the search.

After the pat down search was completed Mr. Favro testified that he was asked by Provincial Constable Maguire to stand in front of his vehicle about five feet from the front of the car. Provincial Constable Maguire then searched the inside of the vehicle starting with the driver's seat. Mr. Favro observed him lean into the vehicle and look under the seat then down the crack of the seat and went thru the consul. Mr. Favro testified that Provincial Constable Maguire was kneeling on the seat when he was looking thru the console. Mr. Favro advised that he could watch Provincial Constable Maguire from where he was standing and that the search of the driver's area took only a couple of minutes. Provincial Constable Maguire did not say what he was looking for.

Mr. Favro next observed Provincial Constable Maguire move to the driver's rear passenger portion of the vehicle and search there. Provincial Constable Maguire then moved to the passenger side of the vehicle and searched the rear passenger area then moved to the front passenger area where Ms. Cybuchowski was still seated.

Mr. Favro testified that at this point he moved closer to the vehicle. Provincial Constable Maguire commenced to search the front passenger area of the vehicle while Ms. Cybuchowski was still seated. Mr. Favro testified that during the search of the passenger front seat area he heard Provincial Constable Maguire ask Ms. Cybuchowski two questions about West 7, if she knew about the wet t-shirt contests there and if she did the wet t-shirt contests there. Mr. Favro could not remember the exact wording and was unable to hear or recall any reply by Ms. Cybuchowski.

Mr. Favro advised that during this portion of the search Provincial Constable Maguire was leaning into the vehicle, his head bent down under the seat. Mr. Favro observed Ms. Cybuchowski moving towards the driver's seat with her legs and trying to hold her skirt down. He thought it was weird the Ms. Cybuchowski was still seated in the vehicle while Provincial Constable Maguire conducted a search.

Mr. Favro observed Provincial Constable Maguire searched the purse of Ms. Cybuchowski next while still bent over into the passenger area of the vehicle.

Mr. Favro testified that Provincial Constable Maguire opened the purse and put his hand into the purse and he could not see the purse after that. He heard Provincial Constable Maguire say something like "be careful of him" to Ms. Cybuchowski. He took this to be a warning about himself.

Mr. Favro advised that it was while Provincial Constable Maguire was searching the purse that the second officer pulled up behind them, got out of his cruiser and approached Mr. Favro. He cannot recall the exact words but the second officer asked Mr. Favro "didn't you see me in the parking lot?" to which Mr. Favro replied no.

Mr. Favro testified that Provincial Constable Maguire stopped searching and both officers went to the trunk area of his vehicle and looked through the contents inside. Mr. Favro testified that his Walmart identification was in the trunk and one of the officers stated "he's not a gangster he works for Walmart" the trunk was closed and he was advised that he was good to leave. Mr. Favro could not recall who opened the trunk of his vehicle.

Mr. Favro advised he was not issued any ticket. Ms. Cybuchowski or himself were not asked for identification. Neither officer had asked for permission to search. He could not recall if he was asked about alcohol or drugs. He testified that the only explanation he received for being stopped was that he pulled out of the West 7 parking lot and it looked like he had seen the police parked there and left for that reason.

Mr. Favro testified that the second officer advised him that he was having a cigarette in the parking lot when Mr. Favro turned around. Mr. Favro testified that he did not see anyone parked in the West 7 parking lot as the entire lot was black and the second officer was driving an unmarked cruiser.

Mr. Favro advised after the officers left he drove to a nearby parking lot and discussed what had happened with Ms. Cybuchowski. Both felt very uncomfortable with what had happened and Mr. Favro made some phone calls to speak with a supervisor of the officers.

Mr. Favro felt that it was a fair distance from the West 7 lot to the Price Chopper and getting stopped by a different officer that the entire incident felt wrong. He felt humiliated by the comments about the wet t-shirt contest and the officer asking if they were out there to fuck. Mr. Favro added that the officer was not very professional at all and that he felt he was being belittled by the comments.

Mr. Favro testified that he made his initial complaint within minutes of leaving the Price Chopper lot and was later interviewed by Colleen McCormick and completed a statement and a complaint form. Ms. Waddilove entered the Office of the Independent Police Review Director (OIPRD) complaint form identified by Mr. Favro as Exhibit# 10.

Under cross examination by Mr. Girvin, Mr. Favro advised that he had not modified his vehicle except for the addition of the chrome rims and the flat black paint. He confirmed that there was no remote to start the vehicle and that the trunk had not been modified.

Mr. Favro advised Mr. Girvin that he felt the officer was not professional because he did not introduce himself or advise why he had stopped him and that his comments were inappropriate especially the 'out here to fuck" comment. Mr. Favro could not recall the first statement that Provincial Constable McGuire said before asking what they were doing or the tone of his voice when he first approached the vehicle.

Mr. Favro did not recall making any movement in the vehicle for his wallet prior to being stopped. He advised that the ownership and insurance for the vehicle were in the glove box but could not recall if he made any movement to get them out when he realized he was being stopped.

Mr. Favro agreed that the second officer advised him why he was stopped but was not sure if Provincial Constable Maguire advised him when he first approached.

Mr. Favro confirmed that after being stopped he was not told by Provincial Constable Maguire that because of officer safety concerns he needed to search him for weapons. He further confirmed that he was asked to empty his pockets on the roof of the vehicle and then Provincial Constable Maguire pulled his pockets inside out, undid his belt buckle and jiggled the pant waist. Mr. Favro could not recall when he got the items from his pockets back. During the search Mr. Favro could not recall if Provincial Constable Maguire used a flashlight.

Mr. Favro confirmed that when Provincial Constable Maguire found the pills in the vehicle he advised him that they were morphine pills for pain from his recent surgery. He advised that he had not taken any pills the day of the traffic stop.

Mr. Favro denied being warned or spoken to by Provincial Constable Maguire about speeding.

Mr. Favro confirmed that the vehicle had a button to open the trunk on the door and that there was no remote for the trunk or the doors. The vehicle doors were controlled by a keypad on the outside above the door handle.

Mr. Favro confirmed that Provincial Constable Maguire made the comments about the West 7 wet t-shirt contest to Ms. Cybuchowski while he was partially in the car. Mr. Favro did not believe the comments were directed at him.

Mr. Favro denied that the officers warned him about anything and confirmed for Mr. Girvin that he never asked the officers why they were searching his vehicle.

Mr. Favro disagreed with Mr. Girvin's suggestion that the only reason that he made the complaint was because Ms. Cybuchowski was upset with him for not doing anything. He advised Mr. Girvin that he made the complaint because what happened wasn't right and that he had done nothing to warrant the stop. He did not ask the officers why they stopped him because he thought they would eventually tell him.

When confronted by Mr. Girvin about details of the event missing from his original statement Mr. Favro advised that he only included the important things that needed to be addressed like the comments and the search. He agreed his memory was better at the time of the statement.

Under re-examination by Ms. Waddilove, Mr. Favro testified that he felt intimidated by the officers during the traffic stop and that was why he did not ask anything about the search or the stop.

The next witness to testify was Jessica Cybuchowski who advised that she was 22 years of age and lived in Mississauga.

Ms. Cybuchowski testified that on 20 April 2010 she was picked up by her friend Michael Favro and they went for a random drive to talk. They were driving in Mr. Favro's black Lincoln and she was sitting in the front passenger seat. She advised that they made their way to the Georgetown area and pulled into the driveway of the West 7 bar and turned around and continued driving. They did not see anyone in the parking lot of the West 7 bar. A short time after the OPP was behind them, the cruiser lights came on and they immediately pulled into a grocery store plaza in Georgetown and stopped.

Ms. Cybuchowski testified that Mr. Favro did not make any movements in the vehicle prior to the stop or the officer's approach. Upon the officer's approach she could not hear what he initially said but the officer did not ask for any licence or ownership or insurance. She could not recall if Mr. Favro said anything to the officer. The officer then asked Mr. Favro to step out of the vehicle and he got out. Ms. Cybuchowski identified Provincial Constable Maguire as the officer that conducted the stop and approached the vehicle. Ms. Cybuchowski could not hear what was being said but Mr. Favro put his hands on the roof of the vehicle and Provincial Constable Maguire conducted a pat down search of Mr. Favro.

After the completion of the pat down search Mr. Favro was asked to stand in front of the vehicle and Provincial Constable started to search the driver's seat area of the vehicle. Ms. Cybuchowski advised that at this time Provincial Constable Maguire popped the trunk of the vehicle by pushing a button on the door or the driver's side floor. He was crouched down searching under the driver's seat and asked her what they were doing at West 7 and if they had been drinking or doing drugs. She replied no that they were just driving. He then

moved his torso into the center of the vehicle with his legs outside searching the consul and found some prescribed medication for Mr. Favro which he looked at then put back. At this point Provincial Constable Maguire asked if they were doing sexual things. Ms. Cybuchowski replied no.

Ms. Cybuchowski testified that Provincial Constable Maguire had not advised why he was searching the vehicle or asked if he could search the vehicle.

Ms. Cybuchowski testified that she was wearing a short sleeve blazer and a pencil skirt with a pair of flats. She advised that the length of the skirt was just about knee length and that the skirt rode up a little when she was sitting.

Ms. Cybuchowski advised that upon completion of the search of the driver's area Provincial Constable Maguire moved around the rear of the vehicle shining the his flashlight into the back of the car. She does not believe that he opened the rear door of the vehicle. At this point a second officer arrived. Ms. Cybuchowski could not recall if it was one or both officers that searched the trunk of the vehicle; she had looked back briefly but couldn't see anything because the trunk lid was opened. They walked around to the passenger door and she unlocked and opened the door. Provincial Constable Maguire was standing with one hand on the door and the other on the roof rim of the door leaning down into the vehicle. He again asked her about alcohol and drugs, if they were doing sexual things, and asked her if she did the Thursday night wet t-shirt contest at West 7. She did not respond.

Ms. Cybuchowski was still sitting in the front passenger seat with the seatbelt on and had not been asked to exit the vehicle. She asked Provincial Constable Maguire if he would like her to get out of the vehicle and he replied no that she was fine where she was. Provincial Constable Maguire spoke in a serious tone and she did not believe that he was joking. He had not asked her name or for any identification. Ms. Cybuchowski believed that the second officer was standing behind him.

Ms. Cybuchowski testified that Provincial Constable Maguire next opened and closed the glove box, then crouched down by her legs looking under the seat. She still had her seatbelt on and moved her legs over towards the driver's seat and Provincial Constable Maguire's head was close to her knee. He again asked the questions about the wet t-shirt contest and if they were doing sexual things. She believed that he was looking up at her in the face when he asked the questions.

Ms. Cybuchowski advised that she felt very uncomfortable, her skirt had rode up three or four inches above her knees and she was not wearing stockings. She testified that if she moved her knee a centimeter it would have hit Provincial Constable Maguire's head above the ear. Ms. Cybuchowski asked again if he wanted her out of the vehicle.

Ms. Cybuchowski testified that Provincial Constable Maguire next opened her purse and rummaged through the contents opening a couple of cigarette packages. The purse was sitting on the vehicle floor beside her feet. He had not asked her if he could search her purse and he did not say why he was searching the purse. Upon completing the search of the purse he stood up.

Provincial Constable Maguire then asked Ms. Cybuchowski how she knew Mr. Favro. She advised him that they worked together. Provincial Constable Maguire stated that Mr. Favro looked kind of crazy and that she should be careful of him. Ms. Cybuchowski testified that these comments from Provincial Constable Maguire came across as more of a joke to her.

Ms. Cybuchowski testified that Provincial Constable Maguire did not touch her during the search and had not asked to search her person. She was never out of the vehicle during this search. Mr. Favro was at the front of the vehicle when the search of the passenger side was conducted.

Ms. Cybuchowski could not recall how things ended or the officers leaving. Mr. Favro got into the car and they sat and discussed what had just happened. Mr. Favro was upset that the officers had gone through everything and had not asked his consent. She told Mr. Favro about the search under the seat while she was still sitting there and the search of her purse. Mr. Favro then drove to another parking lot and called the OPP to complain.

Ms. Cybuchowski confirmed that Provincial Constable Maguire spoke in a serious tone and directed the questions about doing sexual things and the wet t-shirt contest at her not at Mr. Favro. She testified that she was still 19 at the time of the stop and felt very uncomfortable about the entire situation. She felt that the questions and the searching under the seat while she was still sitting in it were unacceptable.

Under cross examination Ms. Cybuchowski examined her statement to police given 17 May 2010 and agreed that she initially had not been sure about the trunk search as she had been looking forward. She also agreed that Mr. Favro when he realized he was being stopped by police got his wallet ready in his hand. She confirmed that Mr. Favro did not get the wallet from the glove box and he did not give any identification to Provincial Constable Maguire.

Ms. Cybuchowski confirmed that Provincial Constable Maguire when asking what they were doing at West 7 advised them that they had driven away fast from West 7. She denied that they were driving fast and believed that they were not speeding as Mr. Favro always drove the speed limit.

Ms. Cybuchowski confirmed for Mr. Girvin that when Provincial Constable Maguire was at the driver's door asking Mr. Favro to step out of the vehicle she did hear him ask Mr. Favro about drugs and alcohol. She advised that Provincial



Constable Maguire did not make comments to indicate any concern about the driving behaviour, any comments about officer safety or comments about weapons in the vehicle. Ms. Cybuchowski confirmed that she could not hear any conversation between Mr. Favro and Provincial Constable Maguire outside the vehicle during the pat down search.

Ms. Cybuchowski confirmed that the trunk opened while Provincial Constable Maguire was searching the driver's area of the vehicle but she did not see Provincial Constable Maguire push a button to open it.

Ms. Cybuchowski confirmed that in her statement she had said that initially when asking about doing sexual things Provincial Constable Maguire had commented that a lot of kids go there to do that referring to West 7. She agreed with Mr. Girvin's suggestion that the context was a commentary that Provincial Constable Maguire had observed other people going there for that purpose.

Ms. Cybuchowski could not recall exactly when the second officer arrived, only that it was after the driver's area of the vehicle had been searched.

Ms. Cybuchowski confirmed that Provincial Constable Maguire had asked her if she was there willingly.

Ms. Cybuchowski testified that her purse was on the floor of the vehicle and that neither she nor Provincial Constable Maguire picked the purse up during the search. He did not advise her that he was looking for a weapon or what he was searching for when he searched her purse and opened her cigarette packages in the purse.

In re-examination Ms. Cybuchowski agreed that regardless of the context of kids going there to do sexual things she did not find Provincial Constable Maguire's question appropriate.

Ms. Cybuchowski in response to the tribunal was not to sure if Provincial Constable Maguire could have seen if she was sitting on anything.

Provincial Constable Mark Swas was the next witness and testified that he has been a member of the Ontario Provincial Police since September 2000 and is presently assigned to Port Credit Detachment of the Highway Safety Division. He advised that in January 2009 Provincial Constable Maguire came to Port Credit Detachment and he was assigned as his coach officer.

Provincial Constable Swas testified that he had a good recollection of the incident on 20 April 2010 although some details or events may not be as accurate. He advised that the only notes that he had were not in his notebook but in the duty report that had been submitted. He testified that he had not made any notes on the incident because he was there assisting for officer safety

reasons and in the end there were no charges laid or any other factor that he believed would have made this incident reportable. He believed himself to be assisting for officer safety reasons and once his standby involvement was concluded there was no reason to record any information as he was not the primary officer.

Provincial Constable Swas advised that on 20 April 2010 he was working evenings with Provincial Constable Maguire. He had parked his stealth cruiser in the parking lot of the West 7 bar about 100 metres from the entrance before 1:00am. He was standing outside his vehicle having a cigarette when he observed a silver grey older model Lincoln start to enter the parking lot about two car lengths then immediately u-turn to exit the lot and continue westbound on highway 7.

Provincial Constable Swas was aware that Provincial Constable Maguire had just completed a traffic stop on highway 7 west of his location. He contacted Provincial Constable Maguire by personal cell phone and advised him of the town car with shiny rims west bound on highway 7 heading towards him. Provincial Constable Swas believed that the actions of the vehicle were very suspicious. He believed that the driver of the vehicle would have seen him in the parking lot and his actions seemed to be trying to evade police. He advised Provincial Constable Maguire of his suspicions during the phone call and told him to investigate further if he observed the vehicle. He then proceeded westbound on highway 7 to assist. Provincial Constable Swas heard Provincial Constable Maguire on the radio conducting a traffic stop.

Provincial Constable Swas initially did not observe the traffic stop and drove past. He eventually located the traffic stop in a parking lot on the north side of highway 7 and confirmed that it was the vehicle that he had observed at the driveway of West 7. He parked his vehicle to the rear and left of Provincial Constable Maguire's vehicle. He observed a male standing in front of the driver's corner of the stopped vehicle and Provincial Constable was visually inspecting the inside of the vehicle floorboards and under the driver's seat.

Provincial Constable Swas testified that Provincial Constable Maguire approached him at the rear back corner panel of the vehicle and briefly advised him that the vehicle had taken a while to stop and the driver had been reaching around in the vehicle and that he had some safety concerns. Provincial Constable Maguire advised him that he was searching the vehicle for officer safety reasons.

Provincial Constable Swas approached and spoke with Mr. Favro and asked him if he had not seen him parked in the lot of West7 and that his actions were suspicious. Mr. Favro advised that he had not seen the police cruiser.

Provincial Constable Swas testified that he observed Provincial Constable Maguire move to the front passenger area of the vehicle where a female was sitting. At some point the passenger door opened and Provincial Constable Maguire did a visual inspection of the floorboard area. Provincial Constable Swas advised that he never observed Provincial Constable Maguire enter inside the vehicle from the passenger side that his visual inspection was done from outside the vehicle with a flashlight. Provincial Constable Swas observed the female present a purse to Provincial Constable Maguire.

Provincial Constable Swas testified he asked Mr. Favro why he was at West 7 and he replied that he was showing his friend where he used to go. Provincial Constable Swas advised that Provincial Constable Maguire at this point overheard the comment and over the roof of the vehicle asked Mr. Favro if he used to go there on Z103.5 nights for the wet t-shirt contest on Thursday nights. Mr. Favro responded yes that he used to go there.

Provincial Constable Swas advised that both he and Provincial Constable Maguire moved to the rear of the vehicle and Mr. Favro offered to open the trunk for them. He opened the trunk using a remote device. Both looked in the trunk and there was nothing in plain view located in the trunk.

Provincial Constable Swas advised that they were satisfied that no further action was required, Provincial Constable Maguire had done a records check and advised Mr. Favro that they were free to go.

Provincial Constable Swas did not recall any of the items in the trunk of the vehicle and did not recall if there was anything relating to the employment of Mr. Favro.

Provincial Constable Swas testified that the incident was an investigation and that he was assisting on the investigation but did have some part of involvement. He advised that in his opinion the grounds for the investigation were that at 1:00am on a Tuesday morning the vehicle came into the parking lot observed a police cruiser, u-turned and exited the lot in his view to evade police and then coupled with Provincial Constable Maguire's information that the vehicle was speeding, took time to pull over, when attempting to stop pulled into a private lot a significant distance from the roadway and the driver was reaching around in the vehicle prior to the stop.

Ms. Waddilove asked if the totality of the circumstance gave the grounds to stop and search the vehicle and the persons. Provincial Constable Swas believed that for the totality of the circumstances of the stop Provincial Constable Maguire was in the best position to make a decision on what actions were to be taken and that he was not going to second guess him at the time of the stop. After completion of the stop he was given all the information by Provincial Constable Maguire and believed that the actions of Provincial Constable Maguire were

justified. Provincial Constable Swas testified that given all the circumstances his concern for officer safety would have been heightened.

In response to Ms. Waddilove Provincial Constable Swas provided his understanding of investigative detention as if you believe that certain people are possibly involved in a criminal occurrence but do not meet an arrest threshold then you can detain for further investigation. He advised that there would probably be a requirement of something more than mere suspicion. In this incident he advised that the suspected criminal activities could have been break and enter, going to the west7 location to consume narcotics, suspicion of firearms due to the avoidance of police.

Provincial Constable Swas advised that when checking under the driver's seat Provincial Constable Maguire's torso may have breached the interior of the vehicle.

Under cross examination Provincial Constable Swas confirmed that he initially drove past where the vehicles were stopped as he didn't see them even with the cruiser emergency lights activated.

Provincial Constable Swas confirmed that during this entire incident all persons were cordial and Provincial Constable Maguire acted in a professional manner. He did not make any observations indicating that Mr. Favro was intimidated.

Provincial Constable Swas recalled a reference to Mr. Favro working at Walmart but could not recall how it came about.

Provincial Constable Justin Maguire was the next witness. Provincial Constable Maguire testified that he made notes in relation to the 20 April 2010 incident on 24 April 2010. He explained that at the time of the traffic stop he initially perceived it as an officer safety issue but then it became a minor detention with no charges and he felt that a notebook entry at a later time would suffice. He continued on his shift and had traveled back to the detachment where he intended to do his notes but was dispatched to assist at a serious personal injury motor vehicle collision. The investigation of the collision required that he complete his notes for the collision immediately for the investigators. He completed the collision notes and omitted to include the notes on this traffic incident. He then went on four days off and upon returning to work was notified by his supervisor to complete his notes and make a niche entry with as much detail as possible on this traffic stop on highway 7 in Georgetown. At the time of making the notes he was not aware that a complaint had been made against him. Provincial Constable Maguire testified that he would have done the notes as soon as was practical but that he was dispatched at 4:45am to the serious collision and he just forgot to do the notes on this incident.

Provincial Constable Maguire testified that on 20 April 2010 he was working general patrol duties in the area from Highway 25 in Acton east on highway 7 to Norval. At 1240 hrs he received a call from Provincial Constable Swas informing him that he had been sitting in the lot of West 7 and observed a grey Lincoln with large chrome enter into the lot and do an evasive u-turn evading contact with police and then head westbound on highway 7. Provincial Constable Swas requested that Provincial Constable Maguire stop the vehicle.

Provincial Constable Maguire testified that he observed the Lincoln west bound on highway 7 and turned around to follow it. He paced the vehicle at 80 km/hr in a posted 60km/h zone for a distance of one kilometre. He queried the licence plate of the vehicle and learned that it was registered to Michael Favro of Mississauga Ontario. He decided to initiate a traffic stop for speeding and for the suspicious driving information relayed from Provincial Constable Swas and activated his emergency lights. Provincial Constable Maguire advised that the Lincoln continued for twelve to fifteen seconds before stopping in the lot of the Price Chopper and continued 50 meters into the lot before stopping.

Provincial Constable Maguire observed two occupants in the vehicle. He testified that he was on high alert do to the information of the evasive u-turn, the speed of the vehicle, the registered owner not being from the area, the length of time it took before the vehicle pulled over and the location and depth into the parking lot where the vehicle eventually stopped. He formed the opinion at the time that the driver or passenger of the vehicle were going to attempt to either flee or were trying to lure him off the roadway to attempt some sort of criminal activity against him.

Provincial Constable Maguire testified that he advised dispatch of the traffic stop, exited his vehicle and approached the Lincoln. Provincial Constable Maguire advised that as he approached the vehicle he observed the driver bent over reaching down over towards the floorboard. Provincial Constable Maguire testified that at this point in his opinion the driver was reaching for some sort of weapon.

Provincial Constable Maguire testified that he observed the window was partially down in the vehicle and asked the driver to show his hands and he complied by putting his hands out the window. Provincial Constable Maguire approached the vehicle and saw the male driver and a female passenger. He asked the driver if he had observed his partner in the West 7 parking lot and if he was aware that he was speeding. The driver replied no to both questions. Provincial Constable Maguire then asked the driver to step out of the vehicle and placed the driver under investigative detention and informed the driver that he had concerns about a possible weapon in the vehicle. Provincial Constable Maguire next informed the driver that he was not under arrest and that Provincial Constable Maguire was going to conduct a pat-down search for officer safety reasons. The driver agreed. Provincial Constable Maguire instructed the female passenger to keep

her hands where they could be seen and not to move in the vehicle. Provincial Constable Maguire had the driver place his hand on the vehicle and conducted a pat down search locating several bulk items and asking the driver to remove these items from his pockets and place them on the vehicle. There were no weapons located.

Provincial Constable Maguire testified that he asked the driver what they were doing and he responded that they were out for a cruise and he was showing his friend different establishments that he used to go to. The driver had identified himself as the owner of the vehicle Mr. Favro. Provincial Constable Maguire was satisfied with this identification because he had observed Mr. Favro's driver's licence picture prior to the stop on the cruiser mobile work station.

Provincial Constable Maguire testified that at this point Provincial Constable Swas arrived. Provincial Constable Maguire spoke with Provincial Constable Swas at the rear of the vehicle advising of his safety concerns based on the length of time the vehicle took to stop, the reaching around in the vehicle by the driver and that he had concerns that there was a weapon in the vehicle. Provincial Constable Maguire instructed Provincial Constable Swas to maintain a visual on Mr. Favro, which he did from the front driver's side of the vehicle.

Provincial Constable Maguire testified that he then conducted a cursory search of the driver's area of the vehicle. He was standing outside of the vehicle, hunched over leaning down, bent at the waist with his head ducking down underneath the bench seat to observe if he could see any weapons using his flashlight. He then moved to the rear of the vehicle looking in the rear of the vehicle with his flashlight around the trunk to the front passenger area of the vehicle. He observed the passenger window partially rolled down.

Provincial Constable Maguire advised that he asked the female passenger what she was doing, and how she knew Mr. Favro and if there was anything illegal in the vehicle. She replied that she was out for a cruise with her friend, that they worked together at Walmart and that to her knowledge there was nothing illegal in the vehicle.

Provincial Constable Maguire testified that the passenger door was then opened and the female passenger asked him if he wanted to search her and he advised her that wasn't necessary and asked her to stay still in the vehicle. He then observed a purse on the floor to the left of the passenger's foot. He advised the female passenger that he had some officer safety concerns and that if she consented she could just open her purse so he could verify that there was not a weapon in the purse. The female stated "Certainly, not a problem" and opened the purse and handed it to Provincial Constable Maguire who looked in the purse did not observe anything illegal and handed the purse back to her.

Provincial Constable Maguire testified that he then dropped to one knee and observed under the passenger seat and floorboard area not finding anything of concern. He advised that in his estimation he was one foot from the female passenger's body.

Provincial Constable Maguire advised that he may have asked the female passenger something about sex things but has no recollection of asking the female that question.

Provincial Constable Maguire advised that upon completion of the search he then stood up and told the passenger to stay in the vehicle. He overheard a conversation between Provincial Constable Swas and Mr. Favro who was stating that he was showing his friend where he used to go. Provincial Constable Maguire asked Mr. Favro if he used to go to Nashville North and Mr. Favro replied yes he used to go on Thursday nights. Provincial Constable Maguire then asked "Oh you used to go there on Z103.5 wet t-shirt contest nights" and Mr. Favro replied yes he used to go there on those nights.

Provincial Constable Maguire then went to the rear of the Lincoln and was joined by Provincial Constable Swas. They discussed what they had in relation to charges for this stop and jointly decided that a warning on the speeding would suffice.

Provincial Constable Maguire testified that it was during this period that Mr. Favro made a statement to the effect that "you guys can search my vehicle. You can do whatever you want." Provincial Constable Maguire explained to Mr. Favro that it was not necessary to search his vehicle and that the only reason that he had searched the vehicle in the driver's area was because of his safety concerns due to the movement in the vehicle upon his approach. Mr. Favro then produced some form of key fob and opened the trunk remotely. Provincial Constable Maguire looked into the trunk with his flashlight and did not observe any weapons or anything criminal.

Provincial Constable Maguire testified that he was instructed by Provincial Constable Swas to ensure that Mr. Favro had no outstanding warrants. Provincial Constable Maguire confirmed this at his cruiser then went to the Lincoln and advised Mr. Favro that he would be getting a break on the speeding and apologized to him if he and his partner came off aggressive to him and advised him next time he is stopped by police not to move inside the vehicle. Provincial Constable Maguire then got into his cruiser and left. He testified that the time of the stop commenced at 1242am and completed at 1252 am.

Provincial Constable Maguire when asked by Mr. Girvin for more details on possibly asking about sexual things testified that he has no recollection of posing the question to Ms. Cybuchowski but may have. He explained that he is familiar with the area and the crime that is done the Georgetown area is mainly break

and enters and thefts from vehicles. He testified that the West 7 lot specifically is used by people at nighttime for consuming illegal narcotics or alcohol and for engaging in sexual activities. He again stated that it was quite possible that he may have asked her the question.

Provincial Constable Maguire testified that he found it unbelievable that Mr. Favro had not seen Provincial Constable Swas parked at West 7 parking lot.

Provincial Constable Maguire advised that during the traffic stop he had a second conversation with Ms. Cybuchowski and had asked her if she was there willingly. He observed her to look fairly young about 19, 20 years of age and Mr. Favro was 27 years and he wanted to verify that there were no issues before he released Mr. Favro to continue to drive her around.

Provincial Constable Maguire testified that during this traffic stop he reverted back to his training as it was not your typical traffic stop. He had a heightened sense of officer safety based on the evasive driving and the reaching around within the vehicle. He was in a heightened state of awareness because Provincial Constable Vu Pham had just been killed in the line of duty and that played into his heightened sense of officer safety. He had also four months earlier seized a weapon and ammunition from a vehicle and arrested three males. Provincial Constable Maguire testified that he referred to it as his officer's sense or the hair standing up on the back of his neck as he was approaching Mr. Favro's vehicle that something wasn't right. Provincial Constable Maguire testified that "I was fully prepared for Mr. Favro at that time to withdraw a weapon mainly a firearm and engage in some sort of a gun fight with me at that point".

Under cross examination by Ms. Waddilove, Provincial Constable Maguire identified a copy of five pages of his notes including the late entry relating to his incident. A copy of the notes was entered as Exhibit #11.

Provincial Constable Maguire confirmed that he did not make any notes at the time of the traffic stop on 20 April 2010. He had made some notations on the vehicle dash pad and was intending to transcribe those into his notebook later however mistakenly forgot to put them in as he was busy with a personal injury collision. He spoke with his Sergeant about this when he returned to duty and was advised that a late entry in his notebook would suffice.

Provincial Constable Maguire testified that he was dispatched to the collision at 4:45 am. He confirmed for Ms. Waddilove that he was back on the road after the traffic stop at 12:52am and that there were no significant calls that he could recall between that time and the dispatch to the collision.

Provincial Constable Maguire agreed with Ms. Waddilove's suggestion that there was more than sufficient time to for him to make his notebook entry. Provincial Constable Maguire testified that after the traffic stop he attended a Tim Horton's



with Provincial Constable Swas and met a Peel Regional Sergeant there. They conversed over some Tim Horton's for approximately two hours. He may have assisted Provincial Constable Swas with some traffic stops but made no notebook entries in relation to anything. He went back to the detachment for five minutes prior to being dispatched to the collision. He agreed that he had a three and one half hour time period that he could have made his notes of this traffic stop.

Provincial Constable Maguire testified that his belief of investigative detention was that if individuals may be connected to a criminal activity but it is below reasonable and probable grounds to arrest you detain the person to conduct an investigation into whether or not there's any criminal activity being done or about to be done and depending on that outcome you would proceed on charges or some sort of understanding as to the events that are happening.

Provincial Constable Maguire agreed that there are times when an officer has grounds to conduct a traffic stop but not the grounds to search the vehicle or its occupants. He further agreed that more than mere suspicion is required to search a vehicle and the people in the vehicle.

Provincial Constable Maguire confirmed that he had a clear view of the driver of the vehicle, Mr. Favro, when he leaned over towards the centre floorboard area of the vehicle. Provincial Constable Maguire clarified that when he said clear view he meant that it was unobstructed by any window tint or objects in the rear widow of the vehicle. He could clearly see within the vehicle.

Provincial Constable Maguire did not agree that this action by Mr. Favro was normal, in his experience, that people being stopped did get their licence ready. He explained that Mr. Favro's movement was abnormal because it was "the complete forward flexion of his torso going forward reaching for something". Provincial Constable Maguire testified that he could see Mr. Favro's hands moving within the vehicle. He testified that with this movement coupled with the driving, the failing to stop, pulling into the back of the parking lot of the unopened store, Mr. Favro not being from the area and the evasive u-turn information from Provincial Constable Swas he formed the opinion the Mr. Favro was getting a hand gun ready to engage in a gunfight with him. Provincial Constable Maguire testified that he was absolutely one hundred percent prepared for Mr. Favro to exit his vehicle and start shooting at him. He advised that he had gone to "condition orange" and placed his hand on his gun and directed the driver to show his hands out the window.

When questioned further about seeing Mr. Favro's hands in the vehicle Provincial Constable Maguire retracted that statement. He could not see his hands. He testified that he could see Mr. Favro move his shoulders and his arms moving and that his hands are attached to the arms so they would be moving also.

Provincial Constable Maguire agreed that it could have been a possibility that Mr. Favro was looking for his driver's licence, ownership or insurance however at that point in time his mindset was that Mr. Favro was preparing a firearm. He confirmed that this was his personal suspicion and that he had received no information that there was a firearm in the vehicle.

Provincial Constable Maguire confirmed that although he had no recollection of asking the question it is possible that he did ask Ms. Cybuchowski "Were you out there to do sexual things". He explained that he may have asked the question in an attempt to confirm why they were at the West 7 parking lot based on his knowledge of why people went there at night. He did not believe Mr. Favro's explanation and was convinced that something was happening in the vehicle. Provincial Constable Maguire confirmed that he did not confront Mr. Favro about his story as to why they were at the West 7 lot.

Provincial Constable Maguire testified that Ms. Cybuchowski was acting nervous and seemed uncomfortable more than the average person does during a traffic stop. He confirmed that he asked the question if she was being held against her will and was advised that she was not.

Provincial Constable Maguire confirmed that he had never acquired Ms. Cybuchowski's name or age and that he never made any notations about any of the conversations or questions he had with her.

Provincial Constable Maguire confirmed that Mr. Favro and Provincial Constable Swas were standing at the front driver's side of the vehicle when he asked Mr. Favro about the wet t-shirt. He advised that he had completed the search of the passenger area and had stood up when he interjected himself in the conversation.

Provincial Constable Maguire explained to Ms. Waddilove that he believed what he conducted on the vehicle was a cursory search and it was not a search. He explained that a cursory search of the vehicle was with his flashlight looking for what he could see in plain view. He believed this to be different from a search of a vehicle which he explained would involve actually going into the different compartments of the vehicle including the engine compartment and the trunk, moving objects and having a detailed look.

Provincial Constable Maguire confirmed that his actions in relation to the vehicle were not what he believed to be a search. He could not explain what it was termed under but did not consider it a search. If he had conducted a search he would have lifted up the back seats and floor mats and removed items from the vehicle.

Provincial Constable Maguire agreed that his looking into Ms. Cybuchowski's purse was a search. He further agreed that his pat down search of Mr. Favro at the side of the vehicle was one form of a search of a person.

Provincial Constable Maguire testified that he asked Mr. Favro about the Thursday night wet T-shirt contests at West 7 as an investigative means of confirming that he knew about the bar and corroborate his reasoning for making an evasive u-turn.

Provincial Constable Maguire estimated that it was less than two minutes from the time he stopped the vehicle until Provincial Constable Swas was on the scene.

Provincial Constable Maguire denied the suggestion that he opened the trunk of the vehicle. He asserted that the trunk was opened by Mr. Favro with a remote device.

Provincial Constable Maguire confirmed that he looked in the glove box of the vehicle but did not physically touch anything in the glove box. He did not open the glove box as it was already opened at the time he approached the passenger side of the vehicle.

Provincial Constable Maguire testified that his only grounds for looking in the purse was that it was in the immediate vicinity where he had observed Mr. Favro reaching and it would be quite easy to conceal a weapon in the purse. He confirmed that he asked for her consent to look into her purse for a weapon. He confirmed that he looked inside Ms. Cybuchowski's purse but did not recall physically putting his hands in the purse. He did not agree that he opened her cigarette package. He took physical possession of the purse looked in it with is flashlight then gave it back to her and she placed it back on the floorboards inside the vehicle. The search of the purse was before he looked under the passenger seat.

Provincial Constable Maguire testified that he does not know how the passenger door was opened. He observed that the female passenger was wearing a short skirt or dress. He testified that his torso or head did not enter the vehicle when he was looking under the passenger seat.

Provincial Constable Maguire agreed with Ms. Waddilove that his actions of looking under the seat could have been perceived by a young woman in a skirt as a very uncomfortable thing. He testified that his focus was on his officer safety and verifying that there was not a weapon there. He denied that his actions could have been perceived as trying to look up her skirt.

Provincial Constable Maguire agreed that in his statement on 01 September 2010 to Professional Standards Bureau he had said that she put the purse on the

ground after the search and that he opened the door of the vehicle. He now recalls that it was not the ground but the floorboards.

Provincial Constable Maguire testified that he never asked Ms. Cybuchowski to exit the vehicle when he was looking in the passenger area. He confirmed that she did offer to get out of the vehicle when he was approaching the front passenger area. He explained Provincial Constable Swas was on the scene and had Mr. Favro at the front of the vehicle and he thought it safer to have her remain in the vehicle.

Provincial Constable Maguire explained that he knew Mr. Favro worked at Walmart through his conversation with Ms. Cybuchowski. He did not recall seeing any Walmart identification in the trunk. He does recall a comment being made about "he's not a gangster he works at Walmart" but cannot recall if it was himself or Provincial Constable Swas that made the comment. He testified that the comment was not made towards Mr. Favro but among themselves.

Provincial Constable Maguire articulated his grounds for conducting the vehicle stop and the search of the vehicle and its occupants as:

- the evasive u-turn from Provincial Constable Swas
- the speed of the vehicle
- the registered owner of the vehicle not being from the area where located
- the time of the morning – 1:00am
- the length of time it takes for the vehicle to stop, 12-15 seconds
- the location off the road in the parking lot that the driver chose to stop
- the reaching within the vehicle of the driver as Provincial Constable Maguire approached

Provincial Constable Maguire confirmed that in his experience 12-15 seconds for a vehicle to stop was a highly long time for the vehicle to stop in an unconfusing situation like this with no other traffic. He further added that he has rarely come across a person that takes that long to stop.

Provincial Constable Maguire confirmed that his perception as he approached the vehicle was that there was potential for serious bodily harm or death to himself at that point. At the end of the stop he advised that he realized that there was just some confusion and that they were just out for a drive.

Provincial Constable Maguire explained the training "plus one" rule to Ms. Waddilove as considering that every vehicle has an additional gun in it.

Provincial Constable Maguire testified that he believed that his authority to conduct the search was based in common law due to his officer safety concerns that there was a weapon in the vehicle.

Provincial Constable Maguire disagreed that he worked backwards in giving his testimony to justify his search of the purse because he had no grounds originally. He further denied that he made his notes after the incident and tried to legitimize his actions after the fact.

Ms. Waddilove inquired that if Provincial Constable Maguire was at such a heightened state and had such suspicions why did he approach the vehicle and didn't wait for back-up. He explained that he believed that Provincial Constable Swas would only be a short time behind him and would be backing him up.

Provincial Constable Maguire confirmed that he apologized at the end of the incident to Mr. Favro because he could tell by Mr. Favro's body language that he was a little confused as to why this was happening to him. Provincial Constable Maguire testified that he explained what his concerns were regarding Mr. Favro's actions and apologized if they came off harsh or aggressive.

Provincial Constable Maguire testified that he believed he was professional in his actions and interactions throughout the traffic stop.

In summation Mr. Girvin puts forth that the four points in the Notice of Hearing on happened. He suggests that it is ultimately how the events happened and the threads of evidence from each witness that connects the events. Mr. Girvin argues that the events must be viewed in totality and not as singular events. He suggests that the evidence before the tribunal does not rise to the level of the clear and convincing standard required in this tribunal.

To assist the tribunal Mr. Girvin provided a submissions booklet, Exhibit#12, which he referenced containing the following:

- Ontario Provincial Police orders 2.37 Traffic Enforcement/Road Safety pages 1 thru 5 inclusive
- R. v. Kang-Brown [2008]1 S.C.R. 456
- Hill v. Hamilton- Wentworth Regional Police Service Board 2007 SCC41
- Toronto (City) Police Service v. Phipps [2010] O.J. No. 4283
- R. v. Nasogaluak [2010] 1 S.C.R. 206
- Oleszewski v. Ottawa (City) Police Services Board [2012] O.J. No. 895
- SIU News Release 12-OCI-145, 26 July 2012
- Mousseau v. Metropolitan Toronto Police Force, 06 July 1981, OPC,
- Hassan v. Peel Regional Police Service, 30 June 2006, OCCPS

Mr. Girvin points out in OPP order 2.37.2 Initiating the stop that it is stressed that "there is no such thing as a low-risk stop" and that these stops must be carried out with the safety of the officer and the public in mind at all times. He draws my attention to the bullet that indicates officers must be aware of the risk of hazards to officers from the persons being stopped.

Mr. Girvin asks that the tribunal keep in mind the evidence of Provincial Constable Swas during his cross examination that he believed that Provincial Constable Maguire's conduct was appropriate, consistent, courteous and professional. Mr. Girvin reminds me that Provincial Constable Swas was the senior officer that evening and also was Provincial Constable Maguire's coach officer.

Mr. Girvin puts forth that Mr. Favro in his testimony clearly had an interest and was not a credible or reliable witness. He asserts that Mr. Favro's credibility is undermined by his clear desire for a finding of guilt. Mr. Girvin points out the obvious contradiction in Mr. Favro's evidence that Provincial Constable Maguire asked "if going to fuck" which was not the evidence of Ms. Cybuchowski or Provincial Constable Maguire. Mr. Girvin asserts that Mr. Favro was trying to put himself in the best light through his testimony and overall is not a reliable witness.

Mr. Girvin submits that Ms. Cybuchowski was honest and straightforward and for the most part a credible witness but that her memory was not clear on all things. Mr. Girvin highlighted in Ms. Cybuchowski's testimony on the questions about doing sex things once she had her memory refreshed she appreciated the broader context from the statement.

Mr. Girvin points out that it is difficult to reconcile the consent to search the purse. Ms. Cybuchowski states that she did not consent and Provincial Constable Maguire states that she did consent. He suggests that Ms. Cybuchowski was not a co-complainant and had no axe to grind. There are two different versions and both may be telling the truth and they both have the same level of credibility on the consent for the search of the purse issue. Mr. Girvin points out that there is no obligation to make a finding either way, and in the totality of the evidence one cannot be sure what transpired.

Mr. Girvin points out that Ms. Cybuchowski indicated that Mr. Favro thought he was going to get stopped and recalled him getting his wallet ready. Mr. Favro had no recollection of this.

In commenting on the search of the passenger area Mr. Girvin submits that Provincial Constable Maguire was not cognizant of his proximity to Ms. Cybuchowski and thought he was further away. Mr. Girvin points out that after the fact Provincial Constable Maguire appreciated how Ms. Cybuchowski may have felt during the search.

Mr. Girvin submits that Provincial Constable Swas was clear, honest and forthright in his evidence. He points out that Provincial Constable Swas was very clear on his evidence that Provincial Constable Maguire was speaking to Mr. Favro when the comments about the wet t-shirt contest were made.

**Mr. Girvin argues that Provincial Constable Maguire not asking Ms. Cybuchowski to step out of the vehicle during the search was reasonable in the circumstances but perhaps not optimal. He points out that there is no specific policy on how to conduct a search and in asking her to stay seated Provincial Constable Maguire was using his judgement and discretion.**

**Mr. Girvin submits that Provincial Constable Maguire did not make notes of this incident until later due to the other activities that he was involved in. He points out that this hearing is not about completing notes in a timely manner. Both Provincial Constable Maguire and Provincial Constable Swas believed that this was a brief incident with nothing reportable coming from it. They have both acknowledge not making timely notes. Mr. Girvin asserts that there is no evidence of collusion.**

**Mr. Girvin argues that this entire situation was the result of the accumulated suspicious conduct of Mr. Favro as described by Provincial Constable Maguire. There were significant officer safety concerns raised by that conduct which are confirmed by Provincial Constable Maguire's initial interaction with Mr. Favro. Mr. Girvin asserts that there is no evidence to support that this was a fishing expedition by Provincial Constable Maguire. He submits that the biggest factors to be determined are the information Provincial Constable Maguire conveyed to Mr. Favro and Ms. Cybuchowski and was there consent for the search of the purse.**

**Mr. Girvin argues that the actions of Provincial Constable Maguire meet the reasonable officer standard. He submits that his actions were reasonably necessary given the totality of the circumstances.**

**Mr. Girvin submits that the test for credibility is recognized in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at paras.10-12(B.C.C.A.). He points out that credibility is not a competition and it is possible that both witnesses are credible but both wrong. It is reasonable that this proceeding could be satisfied that the evidence is not clear to allow for a determination.**

**Mr. Girvin draws my attention to *R. v. Kang-Brown* [2008]1 S.C.R. 456 which he submits gives a good overview of reasonable suspicion. He submits that Provincial Constable Maguire did not stop and search on a hunch but that it was based on an incremental increase in a number of factors that led to his actions which were completely appropriate.**

**Mr. Girvin acknowledges the semantics of "looked but didn't search" and agrees that in fact a search was conducted but it was an appropriate search consistent with Provincial Constable Maguire's training.**

**Mr. Girvin advised that he included several cases in his submission book Exhibit#12 to assist the tribunal in how an officers conduct should be assessed,**

not on a level of perfection but on reasonableness of the conduct at the time taking in to consideration all of the circumstances.

Mr. Girvin drew my attention to *Hassan v. Peel Regional Police Service*, 30 June 2006, OCCPS at page 8 where the objective test for discreditable conduct is referenced. He argues that given the entire circumstances it was appropriate for Provincial Constable Maguire to ask if "they were there to do sexual things?"

Mr. Girvin entered a copy of the In Service Training Block 2009 Student Guide as Exhibit# 13 to provide general information and background on the officer training. He advised that this document was provided to Provincial Constable Maguire in block training and that the checkmarks were added to the document by Provincial Constable Maguire about one and one half months ago in 2012.

Mr. Girvin submits that in totality Provincial Constable Maguire's conduct does not bring discredit to the Ontario Provincial Police and the evidence does not satisfy the clear and convincing standard. He argues that the search by Provincial Constable Maguire was reasonable and that Provincial Constable Maguire's evidence that he advised the individuals of what he was doing and obtained their consent was unchallenged. Mr. Girvin asserts that there was nothing untoward in searching the passenger area and asking if they were there to do sexual things and that Provincial Constable Maguire's actions were driven the entire time by his concern for officer safety.

In summation Ms. Waddilove submits that Provincial Constable Maguire communicated no reasons for the traffic stop, the search of Mr. Favro, the vehicle search or the search of Ms. Cybuchowski's purse to either Mr. Favro or Ms. Cybuchowski. She further submits that he made inappropriate comments and abused his professional authority.

In support of her arguments and to assist the tribunal Ms. Waddilove provided a submissions booklet, Exhibit#14, which she referenced containing the following:

- Excerpt from *Legal Aspects of Policing*, Ceyskens, Paul *Legal Aspects of Policing*, Vol 1 ( Salt Spring Island, B.C.: Earls court Legal Press, Inc., 1994) at 5.9 (a)
- Excerpt from *Legal Aspects of Policing*, Ceyskens, Paul *Legal Aspects of Policing*, Vol 1 ( Salt Spring Island, B.C.: Earls court Legal Press, Inc., 1994) at 7.6 (d)
- *Cate and Peel Regional Police Service* (July 17, 1998, OCCPS)
- *Drennan and Hamilton – Wentworth Police Service* (August 6, 1996, OCCPS)
- *Grainer and Ontario Provincial Police* (January 21, 2003, OCCPS)
- *Maguire and Ontario Provincial Police* (February 27, 2012)
- *Mancini and Courage* (August 12, 2004, OCCPS)
- *Vogelzang and Ontario Provincial Police* (December 22, 2011)



- R. v. Simpson (1993), 12 O.R. (3d) 182
- R. v. Mann, [2004] 3 S.C.R. 59, 2004 SCC 52
- Advanced Patrol Training Investigative Detention study guide

Ms. Waddilove reviewed the evidence of Mr. Favro and submits that he complained minutes after the event. She asserts that page 2 of the OIPRD complaint form, Exhibit #10 is only a summary of the complaint. Ms. Waddilove draws my attention to the excerpt from Legal Aspects of Policing, Ceyskens, Paul Legal Aspects of Policing, Vol 1 (Salt Spring Island, B.C.: Earls court Legal Press, Inc., 1994) at 7.6 (d) where the standard of the articulation of the complaint is discussed. Ms. Waddilove points out that this standard is not high.

Ms. Waddilove submits that Mr. Favro is a lay person and testified without notes. He relied on his memory after two years and was very clear, forthright independent and recounted significant detail. She submits that he was not shaken under cross examination and was a capable credible witness.

Ms. Waddilove reviewed the evidence of Ms. Cybuchowski and points out that she was consistent with Mr. Favro in that they did not see anyone parked in the lot of West 7. She further points out that both Mr. Favro and Ms. Cybuchowski also agreed that Provincial Constable Maguire did not ask anyone for identification. Ms. Waddilove points out that Ms. Cybuchowski was nineteen years old at the time of the event and was asked on more than on occasion by Provincial Constable Maguire if they were there to do sexual things. Ms. Cybuchowski felt uncomfortable when Provincial Constable Maguire was searching under her seat while she was still seated and she tried to turn her legs away towards the driver's side to avoid this. Ms. Waddilove points out that Ms. Cybuchowski was in a short skirt with bare legs when Provincial Constable Maguire was looking under her seat and she offered to get out of the vehicle but he said no. Ms. Cybuchowski testified that she felt humiliated.

Ms. Waddilove submitted that Ms. Cybuchowski felt that Provincial Constable Maguire was rude during the traffic stop and had directed both the sex and wet t-shirt inquiries to her. Ms. Waddilove asserts that Ms. Cybuchowski was forthright, compelling and believable in her evidence and had no hidden agenda or motivation and is a very credible witness.

Ms. Waddilove submits that Provincial Constable Maguire had the lawful authority to stop the vehicle but did not have the authority to search the purse of Ms. Cybuchowski. He had speculated a gun battle or that the occupants would take flight which may justify the pat down search but not the search of the vehicle or the purse.

Ms. Waddilove draws my attention to the difference in Provincial Constable Maguire's testimony that the purse was on the floorboards and his statement in

September 2010 that the purse was on the ground. She submits that this makes his story suspect and should not be relied upon.

Ms. Waddilove reviewed the evidence of Provincial Constable Maguire. She submits that 12-15 seconds to pull over is a reasonable time. She points out that Provincial Constable Maguire was clear about his safety concerns as he saw Mr. Favro lean in the vehicle as he approached. She argues that he did not have the grounds to go beyond the pat down search of Mr. Favro. She further asserts that the lack of details in his notes regarding the vehicle search, the search of the purse and any details on his concerns for Ms. Cybuchowski's safety or his perceived threat points out the lack of sincerity in those concerns.

Ms. Waddilove submits that the effectiveness of policing rests on the confidence the public has in the integrity of the police in exercising their powers. She puts forth that the purpose of discipline process is designed to maintain that public confidence. She draws my attention to the cases submitted in Exhibit #14 dealing with discreditable conduct as a result of inappropriate comments and conduct.

Ms. Waddilove also draws my attention to R. v. Simpson (1993), 12 O.R. (3d) 182 and R. v. Mann, [2004] 3 S.C.R. 59, 2004 SCC 52 for my guidance on investigative detention and search.

Ms. Waddilove included in Exhibit#14 a copy of the Investigative Detention Study Guide with portions identified for my review.

Ms. Waddilove points out that Provincial Constable Maguire admits that he possibly could have asked Ms. Cybuchowski if they were there to do sexual things.

Ms. Waddilove submits that Provincial Constable Maguire testified that this event had a cordial ending. She points out that to the contrary both Mr. Favro and Ms. Cybuchowski were consistent in their testimony that they both wondered what had just happened and both felt humiliated and that this was not a professional police stop. Neither Mr. Favro nor Ms. Cybuchowski testified that Provincial Constable Maguire apologized at the end of the traffic stop.

Ms. Waddilove asserts that the evidence is clear and convincing and that there should be a finding of guilty of discreditable conduct.

#### **Findings:**

The allegation of misconduct against Provincial Constable Maguire is that on or about April 20, 2010 he acted improperly in relation to two parties, MF and JC, at a vehicle stop in the Georgetown area. He:

- searched the parties and vehicle without proper authority to do so;
- looked under the front passenger seat while the female party was still seated in it;
- asked if they were going to do sexual things; and
- made a comment re wet t-shirt contests.

I have considered all the evidence of the witnesses and reviewed all materials submitted by counsel. I thank Mr. Girvin and Ms. Waddilove for their presentation of the case and assistance in their submissions.

The standard of proof for this tribunal is clear and convincing meaning there is weighty, cogent, reliable evidence upon which a trier of fact, acting with care and caution, can come to a reasonable conclusion that the officer is guilty of misconduct.

There were four people involved in this incident. As pointed out at times by counsel all four have differences in their recollection of the incident. This can be expected and does not prevent their evidence from assisting in making a determination. It is the essential content of their evidence that is important and the credible manner in which they have testified.

The credibility of a witness is one of the important determining factors in reviewing evidence. 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:

"The credibility of an interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried a conviction of the truth. The test must be to 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 a 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.

Mr. Favro testified in a confident manner and at time had difficulty remembering. I recognize that Mr. Favro is a lay person and testified without notes. His testimony was consistent with portions of Ms. Cybuchowski and Provincial Constable Maguire's testimony. Mr. Girvin points out the obvious contradiction in Mr. Favro's evidence that Provincial Constable Maguire asked "if going to fuck" which was not the evidence of Ms. Cybuchowski or Provincial Constable

Maguire. On this point I agree that Mr. Favro's recollection is inconsistent with all of the other testimony.

I do not agree with the assertion by Mr. Girvin that Mr. Favro was trying to put himself in the best light and his credibility is undermined by a desire for a finding of guilt. Mr. Favro explained to the best of his recollection what transpired, his opinion of why he thought this was wrong and not the manner in which police officers should conduct themselves. A witness's strong opinion on a matter does not negate their credibility. I found Mr. Favro to be a credible witness but that his reliability due to his difficulty in recalling some portions of the event causes me to consider the weight that is placed on his evidence particularly where uncorroborated.

Ms. Cybuchowski testified in an honest, straightforward, confident manner. She willingly clarified her evidence when given the assistance of her statement by counsel to refresh her memory. She was compelling and believable in her evidence. I found Ms. Cybuchowski to be a very credible witness.

Provincial Constable Swas admitted that he did not make any notes of the incident and his recollection of the incident was assisted only by his duty report that he had submitted earlier. His explanation for the lack of documentation in his notebook was that he believed himself to be assisting for officer safety reasons and once his standby involvement was concluded there was no reason to record any information as he was not the primary officer. I find this explanation weak and concerning coming from an officer charged with the responsibility of training probationary constables.

Despite this concern I found Provincial Constable Swas's testimony on the vehicle u-turn and his suspicions to be forthright and honest. His admission about the lack of notes does go to his integrity. I found Provincial Constable Swas to be a credible witness.

Provincial Constable Maguire in evidence in chief testified that he made notes in relation to the 20 April 2010 incident on 24 April 2010. Provincial Constable Maguire testified that he would have done the notes as soon as was practical but that he was dispatched at 4:45am to the serious collision and he just forgot to do the notes on this incident. It was only under cross examination he confirmed for Ms. Waddilove that he was back on the road after the traffic stop at 1252am and that there was no significant calls that he could recall between that time and the dispatch to the collision. He agreed that he had a three and one half hour time period that he could have made his notes of this traffic stop. The lack of notes and the flippant attitude expressed by Provincial Constable Maguire that he just forgot I find disturbing particularly given his testimony of his lack of activities during the next three and one half hours on the morning of 20 April 2010.

Provincial Constable Maguire gave evidence in a clear straight forward manner at times. His evidence articulating his grounds for the stop, detention and subsequent pat down search of Mr. Favro I found to be forthright. I believe in his effort to ensure the tribunal understood his heightened sense of officer safety he enhanced his descriptions of the event and his concern. This is not to say that I found him to be untruthful in this particular evidence only that he improved the truth for his own benefit. I believe this to be a result of his inexperience and lack of confidence in his original grounds. This impacts on his reliability but I do not find that it is fatal to that reliability when dealing with the facts of the vehicle stop, his approach and the pat down search. I found him to be credible in his evidence in this same area.

Provincial Constable Maguire's recollection was not clear in his evidence about the search of the front passenger area of the vehicle, and the statements made regarding the questions about doing sexual things. I found this unclear memory to be evasive and self serving. I believe him to be accurately recalling only what would benefit him. I do not find his evidence reliable on these issues.

Mr. Girvin submits that the events in the Notice of Hearing did happen on there face and argues that the events must be viewed in totality and not as singular events. I disagree with this assertion. I view the events in the Notice of Hearing falling into two categories. The first category is the search of the parties and vehicle and if Provincial Constable Maguire had proper Authority to conduct those searches which encompasses the first bullet in the Notice of Hearing. The second category deals with the conduct of Provincial Constable Maguire while conducting those very searches and encompasses the last three bullets in the Notice of Hearing. Although most definitely related I do not agree that the event has to be viewed in its totality to make any determinations.

I will deal first with the search of the parties and vehicle and if Provincial Constable Maguire had proper authority to conduct those searches.

The evidence of all witnesses agrees that Mr. Favro was driving his vehicle accompanied by Ms. Cybuchowski on 20 April 2010. The vehicle did a u-turn in the lot of the West 7 Bar in Norval Ontario and continued westbound on Highway 7 towards Georgetown, Ontario.

Provincial Constable Swas testified that:

- He had parked his cruiser in the parking lot of the West 7 bar before 1:00am.
- He observed a silver grey older model Lincoln start to enter the parking lot about two car lengths then immediately u-turn to exit the lot and continue westbound on Highway 7.

- He believed that the actions of the vehicle were very suspicious. He believed that the driver of the vehicle would have seen him in the parking lot and his actions seemed to be trying to evade police.
- He called and advised Provincial Constable Maguire of his suspicions and told him to investigate further if he observed the vehicle.
- Provincial Constable Swas testified that Provincial Constable Maguire approached him at the rear back corner panel of the vehicle and briefly advised him that the vehicle had taken a while to stop and the driver had been reaching around in the vehicle and that he had some safety concerns.

Provincial Constable Maguire testified that his grounds for conducting the vehicle stop and the search of the vehicle and its occupants were:

- the evasive u-turn from Provincial Constable Swas
- the speed of the vehicle
- the registered owner of the vehicle not being from the area where located
- the time of the morning – 1:00am
- the length of time it takes for the vehicle to stop, 12-15 seconds
- the location off the road in the parking lot that the driver chose to stop
- the reaching within the vehicle of the driver as Provincial Constable Maguire approached

In *R. v. Simpson* (1993), 12 O.R. (3d) 182 Mr. Justice Doherty quoted *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.C.A.) Justice Ashworth:

“In the judgement of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person’s liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such duty, involved an unjustifiable use of powers associated with that duty.”

Justice Doherty went on to say:

“In deciding whether an interference with an individual’s liberty is authorized under the common law, one must first decide if the police were acting in the course of their duty when they effected the interference.”

He further states that:

**“In my opinion, where an individual is detained by police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some ‘articulable cause’ for the detention.”**

**I find that in stopping the vehicle and the short detention of Mr. Favro and Ms. Cybuchowski, Provincial Constable Maguire was acting in the course of his duties and articulated the reasons for the stop appropriately in his evidence to meet the required standard.**

**The next question is whether the search was justified.**

**In R. v. Mann, [2004] 3 S.C.R. 59, 2004 SCC 52 the court said:**

**“Although there is no general power of detention for investigative purposes, police officers may detain an individual if there are reasonable grounds to suspect in all circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances. These circumstances include the extent to which the interference with the individual liberty is necessary to the performance of the officer’s duty, to the liberty interfered with, and to the nature and extent of the interference. At a minimum, individuals who are detained for investigative purposes must be advised, in clear and simple language, of the reasons for detention. Investigative detentions carried out in accordance with the common law power recognized in this case will not infringe the detainee’s rights under s.9 of the Charter. They should be brief in duration, so compliance with s.10 (b) will not excuse prolonging, unduly and artificially, any such detention. Investigative detentions do not impose an obligation on the detained individual to answer questions posed by police. Where a police officer has reasonable grounds to believe that his safety or the safety of others is at risk, the officer may engage in a protective pat-down search of the detained individual. The investigative detention and protective search power must be distinguished from an arrest and the incidental power to search on arrest.”**

**Provincial Constable Maguire testified that he advised Mr. Favro of his reasons for stopping the vehicle and his officer safety concerns. Mr. Favro testified that he could not recall the first portion of his conversation with Provincial Constable Maguire. Ms. Cybuchowski testified that she could not hear the conversation outside of the car between Mr. Favro and Provincial Constable Maguire. I accept the evidence of Provincial Constable Maguire that he informed Mr. Favro of the reason for stopping him.**

**Provincial Constable Maguire testified that the vehicle pulled off the roadway into an empty parking lot and upon his approach to the vehicle he observed Mr. Favro**

lean forward towards the centre of the floorboard area. I believe that this action of Mr. Favro viewed with the other reasons articulated by Provincial Constable Maguire leading up to the stop support Provincial Constable Maguire's heightened officer safety concerns and his grounds for the pat-down search of Mr. Favro. I further believe that the leaning forward of Mr. Favro into the centre area of the floor of the vehicle, justifies the search of the vehicle. The evidence heard places Ms. Cybuchowski's purse to the left of her legs near the centre on the floor of the vehicle. This was the area in which Mr. Favro was observed moving. I believe that it is a reasonable and logical extension of the protective search power recognized in common law to include the search of the purse as it is in the immediate area where Mr. Favro had access upon Provincial Constable Maguire's approach and was still very accessible to Ms. Cybuchowski.

I find that Provincial Constable Maguire had the authority to search Mr. Favro and the vehicle and purse in the area which Mr. Favro had access to during his movements as Provincial Constable Maguire approached.

The evidence of the search of the trunk is unclear. Mr. Favro testified that he could not recall how the trunk got open. He testified that the trunk does not have a remote to open it, but is controlled by a button on the driver's door. In his statement attached to the OIPRD complaint form, Exhibit#10 he stated that the officers popped the trunk open after the vehicle had been searched and searched the trunk without his consent just prior to leaving.

Ms. Cybuchowski testified that she does not recall how the trunk got open but that it opened while Provincial Constable Maguire was searching the area of the driver's side. She testified that the trunk was searched by both officers prior to the search of the passenger area.

Both Provincial Constable Maguire and Provincial Constable Swas testified that Mr. Favro opened the trunk of the vehicle by using a remote device and consented to the search of the trunk while they were both standing at the rear of the vehicle.

There was no other evidence to confirm if the trunk operated remotely or by a button on the side of the driver's door.

The evidence is not clear on the issue of consent. Mr. Favro, Provincial Constable Maguire and Provincial Constable Swas on this point were clear in their evidence and there is nothing to lift one version above the other. I am unable to make a determination regarding whether there was consent for the search of the trunk. On this portion of the search the evidence is not clear and convincing.



The second category deals with the conduct of Provincial Constable Maguire while conducting those very searches and encompasses the last three bullets in the Notice of Hearing.

All witnesses agree that Ms. Cybuchowski did not leave the vehicle during the entire incident. Ms. Cybuchowski testified she was wearing a short sleeve blazer and a pencil skirt, bare legs and a pair of flats. She advised that the length of the skirt was just about knee length and that the skirt rode up a little when she was sitting. This evidence was unchallenged.

Ms. Cybuchowski testified that when Provincial Constable Maguire stood at the opened passenger door, she asked if he would like her to get out of the vehicle and he replied no that she was fine where she was. He then crouched down by her legs looking under the seat. She still had her seatbelt on and moved her legs over towards the driver's seat and Provincial Constable Maguire's head was close to her knee. She felt very uncomfortable, her skirt had ridden up three or four inches above her knees and she was not wearing stockings. She testified that if she moved her knee a centimeter it would have hit Provincial Constable Maguire's head above the ear. Ms. Cybuchowski asked again if he wanted her out of the vehicle.

Provincial Constable Maguire testified that he was one foot away from Ms. Cybuchowski's body. He agreed that in hindsight he could understand how she may have felt uncomfortable. Mr. Girvin in summation commented that Provincial Constable Maguire was not cognizant of his proximity to Ms. Cybuchowski and thought he was further away.

I find the actions of Provincial Constable Maguire in conducting the search underneath the seat while Ms. Cybuchowski was seated inappropriate. He was conducting a search for a possible weapon. He had another officer on scene who had the ability to keep both the driver and the passenger under observation and control if he had removed the passenger from the vehicle. I do not accept his evidence that he felt it was safer if she remained seated in the vehicle. Given the nature of what he was looking for and his previously articulated reasons it is hard to understand why he would not want to ensure that the passenger was not sitting on anything that could cause him harm. I find Provincial Constable Maguire's statement completely illogical and self-serving.

In these circumstances the action of a police officer crouching down, placing his head below seat level, shining a flashlight around and under the seat and floor, and looking under the seat area while a female passenger dressed in a short skirt with bare legs was sitting in the seat is unacceptable. The inappropriateness is compounded by the fact that the Ms. Cybuchowski asked on two separate occasions if Provincial Constable Maguire wanted her to get out. Ms. Cybuchowski's questions confirm her discomfort with the inappropriateness

of the actions of Provincial Constable Maguire. Her questions should have been a signal for Provincial Constable Maguire.

Mr. Favro testified that after initially approaching the vehicle Provincial Constable Maguire leaned in and asked what they were doing there and if they were there to fuck. This evidence was not corroborated by any other evidence from any other witness. On this point I put no weight in Mr. Favro's evidence.

Ms. Cybuchowski testified that Provincial Constable Maguire asked her on two separate occasions while conducting the search of the vehicle if they were there to do sexual things. She testified that she responded "no" to the first question. Provincial Constable Maguire testified that he could not recall if he asked her that question but admitted that it may be a possibility. I accept Ms. Cybuchowski's evidence on this point. As stated earlier I find Provincial Constable Maguire's lack of recall evasive and self serving.

Provincial Constable Maguire had asked investigative questions and received answers from Mr. Favro and Ms. Cybuchowski regarding drugs or alcohol. He had received an explanation as to why they were at the West 7 driveway and turned around. I can see no justification in these circumstances for inquiring as to their possible sexual activity. The question was inappropriate. The officer's knowledge that people go to the parking lot for various illegal activities and to engage in sexual activities does not lessen the inappropriateness of the question.

The fact that Provincial Constable Maguire made comment about a wet T- shirt contest is not in dispute. Ms. Cybuchowski gave evidence that she believed the comment was directed towards her.

Provincial Constable Maguire testified that he made the comment as he stood by the passenger door. The comment was an interjection into a conversation between Mr. Favro and Provincial Constable Swas. The comment was made in an effort to confirm Mr. Favro's knowledge of and attendance at the West 7 bar.

Mr. Favro testified that during the search of the passenger front seat area he heard Provincial Constable Maguire ask Ms. Cybuchowski two questions about West 7, if she knew about the wet t-shirt contests there and if she did the wet t-shirt contests there. Mr. Favro could not remember the exact wording and was unable to hear or recall any reply by Ms. Cybuchowski. Mr. Favro has no recollection of any conversation between himself and Provincial Constable Swas.

Provincial Constable Swas confirmed in his evidence that he was speaking with Mr. Favro about West 7 and Provincial Constable Maguire at this point overheard the comment and over the roof of the vehicle asked Mr. Favro if he used to go there on Z103.5 nights for the wet t-shirt contest on Thursday nights. Mr. Favro responded yes that he used to go there.

I accept the evidence of Provincial Constable Maguire that the wet t-shirt comment was directed at Mr. Favro based on the corroboration of Provincial Constable Swas.

I do not accept the evidence on this point of Mr. Favro. He recalls comments about the wet t-shirt contest in general being made by Provincial Constable Maguire, while at the passenger side of the vehicle. He has no recollection of conversation with Provincial Constable Swas. I cannot put much weight in his evidence.

Ms. Cybuchowski's location at the time of the comment by Provincial Constable Maguire explains how she would have thought he was talking with her. There is no evidence that she could hear or was aware of a conversation between Provincial Constable Swas and Mr. Favro into which these comments were interjected. I believe that she sincerely believes that her evidence is true however I believe that she is honestly mistaken as to who the comments were directed towards.

I do not find that in these circumstances the comment by Provincial Constable Maguire regarding the wet t-shirt contest was improper.

I find the search underneath the passenger seat while Ms. Cybuchowski remained seated and the question regarding if they were there to do sexual things in these circumstances inappropriate, unprofessional and offensive to what the reasonable expectation of the community would be in this circumstance.

**DECISION:**

**Based on all the evidence, I am convinced and the evidence is clear that Provincial Constable Maguire on 20 April 2010 acted improperly in relation to two parties, MF and JC, at a vehicle stop in the Georgetown area. He:**

- **looked under the front passenger seat while the female party was still seated in it; and**
- **asked if they were going to do sexual things;**

**I find Provincial Constable Maguire guilty of Discreditable Conduct as stated in these two particulars of allegation in the notice of hearing.**

  
\_\_\_\_\_  
S. McDonald, Inspector

December 17, 2012  
Date