

**ONTARIO PROVINCIAL POLICE DISCIPLINE HEARING  
IN THE MATTER OF ONTARIO REGULATION 268/10**

**MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,  
AND AMENDMENTS THERETO;**

**AND IN THE MATTER OF  
THE ONTARIO PROVINCIAL POLICE**

**AND**

**PROVINCIAL CONSTABLE J.P. (Jason) MOON, #13680**

**CHARGE: NEGLIGENCE OF DUTY and DISCREDITABLE CONDUCT**

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**DECISION WITH REASONS**

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**Before:** Superintendent Mike Bickerton  
Ontario Provincial Police

**Counsel for the Prosecution:** Ms. Claudia Brabazon  
Ministry of the Solicitor General

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

**Public Complainant:** Mr. Mitchell Hutchinson

**Hearing Date:** October 27, 28, 2020

*This decision is parsed into the following parts:  
PART I: OVERVIEW;  
PART II: THE HEARING;  
PART III: SUBMISSIONS, ANALYSIS AND FINDINGS; and,  
PART IV: DECISION.*

## **PART I: OVERVIEW**

**NOTE: This decision contains personal medical information of the public complainant. Great care should be taken to guard against improperly disclosing personal and confidential information.**

### **Parties to this Hearing**

Parties to this Hearing include:

- Provincial Constable (P/C) Jason Moon, represented by Mr. Bill MacKenzie;
- Ms. Claudia Brabazon represented the Ontario Provincial Police (OPP);
- The Public Complainant, Mr. Mitchell Hutchinson.
  - Mr. Hutchinson did not have legal representation however indicated he understood he had the right to do so. The hearing process and his role in it, was explained to him. He actively participated throughout the hearing process.

### **Background**

P/C Moon faces *Police Services Act (PSA)* misconduct charges in relation to a 2018 on-duty incident.

A hearing was held at West Region Headquarters in London, Ontario commencing on October 27, 2020 and concluded on October 28, 2020. Given the State of Emergency imposed in the Province of Ontario at the time due to Covid-19, the prosecution and public complainant participated via Skype.

### **Allegations of Misconduct**

The amended particulars of the allegations state:

#### **Count 1:**

P/C Moon stands charged with neglect of duty in that he did without lawful excuse, neglected or omitted promptly and diligently perform a duty as a member of the Ontario Provincial Police, contrary to section 2(1)(c)(i) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

Particulars of Allegations:

It is alleged on or about June 6, 2018 while on duty, that P/C Moon committed the following Neglect of Duty:

- Failed to adhere to the OPP, Police Orders 2.43 Search of Person, with respect to the second search of Mr. Hutchinson and
- Failed to adhere to the OPP, Police Orders 2.43 Search of Person, as he did not make adequate notes of the searches of Mr. Hutchinson.

### **Count 2:**

P/C Moon is alleged to have committed discreditable conduct in that he did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended.

Particulars of Allegations:

It is alleged on or about June 6, 2018 while on duty, that P/C Moon conducted a strip search of Mr. Hutchinson in a manner that was unreasonable.

P/C Moon knew or ought to have known his actions were discreditable.

### **Plea**

At the outset of the hearing on October 27, 2020, P/C Moon entered a plea of not guilty to his misconduct charge.

### **Decision**

I find an absence of evidence meeting the clear and convincing standard to establish misconduct in relation to both counts. I find P/C Moon not guilty of neglect of duty and not guilty of discreditable conduct.

My reasons for the decision are as follows:

## **PART II: THE HEARING**

*Due to the Covid 19 Pandemic this hearing was held, in part, via Skype. P/C Moon and Mr. Mackenzie, the hearing Officer, reporter, and defence witnesses were present at West Region OPP Headquarters. The public complainant and prosecutor participated via Skype.*

## **Exhibits**

The exhibits for this matter are listed in Appendix A.

## **Witnesses**

The Prosecution witnesses included the following:

- Mr. Mitchell Hutchinson, Public Complainant

Defence counsel witnesses included:

- P/C Jason Moon, Respondent Officer
- P/C Mark Kirkconnell
- P/C Josh Baran

## **Viva Voce Evidence**

This following is not meant to be an exhaustive overview of witness testimony and counsel submissions. I will speak to what I consider to be the most relevant evidence addressing the issues at hand and relevant evidence will be discussed in further detail within the analysis section.

## **Summary of Testimony**

### **Prosecution Witness**

Mr. Mitchell “Mitch” Hutchinson

*Evidence in Chief*

Mr. Hutchinson was 43 years old and lives in the Goderich area as he did on June 6, 2018. Mr. Hutchinson agreed he had marijuana on his person while operating his motor vehicle on that date.

By way of background, Mr. Hutchinson explained when he was in high school he was training for the track and field team at the YMCA. While Mr. Hutchinson was leaving, taking the stairs, the caretaker shut the lights off. Mr. Hutchinson subsequently lost his footing and fell down the stairs.

Mr. Hutchinson suffered a spinal cord injury. As a result doctors recommended double fusion surgery but because this was a new procedure at the time, Mr. Hutchinson declined. Mr. Hutchinson opted to pursue natural remedies such as yoga and acupuncture. In 1997 Mr. Hutchinson was prescribed marijuana for pain management.

In 2017 Mr. Hutchinson was working at the park (*believed to have been referring to the Provincial Park*). He was directed to use a wood chipper and was not trained to do so. As he was loading the machine one of the logs bucked from the machine and struck him in the head. Mr. Hutchinson suffered a resulting traumatic brain injury with optic nerve damage and a hole in his skull. The hole in his skull caused related ear issues and pressure on his brain. Additional symptoms resulting from Mr. Hutchinson's injury include dizziness, panic attacks and others.

Mr. Hutchinson explained his boss at the park lied to the Ministry of Labour and to Ontario Parks in order to cover it up. Mr. Hutchinson indicated his boss "had a badge" as she was the park warden and superintendent and "she did a lot of stuff to cover it up with the badge."

Approximately one month prior to the ride check occurrence Mr. Hutchinson said he spoke to the Workplace Safety Insurance Board (WSIB). Mr. Hutchinson had been hallucinating while driving, was seeing things and was seeing double at times. He told WSIB he should not be driving. WSIB told Mr. Hutchinson to continue driving as they felt if he gave up his license he would not get it back. The conversation with WSIB was according to Mr. Hutchinson and was not confirmed.

On June 6, 2018 Mr. Hutchinson was driving a Honda CRV on Bluewater Highway near Salford Road at about 1:25am when he came upon a Reduce Impaired Driving Everywhere (RIDE) check. Mr. Hutchinson agreed the Officers detected the odour of marijuana coming from inside of his vehicle and asked him to pull over to the side of the road. Mr. Hutchinson was asked for his driver's licence, ownership and insurance and he was having difficulty locating it. Mr. Hutchinson agreed Officers continued to investigate and as a result charged him with impaired driving and possession of cannabis (marijuana). Mr. Hutchinson ultimately pled guilty to careless driving.

Mr. Hutchinson handed Officer Foote, a female Officer, his insurance slip. Officer Foote told Mr. Hutchinson the insurance slip was expired and asked him to step out of the car. Officer Foote told Mr. Hutchinson that he would be handcuffed and put in a cruiser. Officers Moon, Kirkconnell, and Foote were present. Officer Moon patted down Mr. Hutchinson, checked his pockets and the waistband of his pants. Mr. Hutchinson explained during the first search he had double vision and blurred vision and he could not focus. Mr. Hutchinson did not remember which Officer did the first search but indicated he has since learned it was Officer Moon. The Officer who searched him also lifted his shirt up slightly as well.

Mr. Hutchinson was seated in a cruiser while the Officers searched his car. He was approached by Officer Foote who told him he was going to be searched again. She introduced P/C Moon who was going to do the search. Officer Foote held one arm and Officer Kirkconnell held the other while P/C Moon searched. Officer Moon told Mr. Hutchinson not to resist, not to move and not to say anything and to do what he was told. Mr. Hutchinson said he was turned sideways and they lifted up the back of his shirt. Officer Moon looked down the back of

Mr. Hutchinson's pants and boxers. P/C Moon then unbuttoned Mr. Hutchinson's pants and raised his shirt to just under his armpits. Mr. Hutchinson said he "was scared shitless." P/C Moon did not ask to undo Mr. Hutchinson's pants he just did it. Officer Moon pulled Mr. Hutchinson's pants down a couple of inches and checked his waistband. Officer Moon pulled the boxers away from Mr. Hutchinson's body but Officer Moon still could not see any baggy. Mr. Hutchinson explained he remembered Officer Moon had a flashlight because he did not think he could have seen anything without a flashlight.

Officer Moon saw the baggy and Mr. Hutchinson remembered thinking *he's going to have to go into my shorts to pull it out*. Officer Moon reached into Mr. Hutchinson's shorts and pulled out the baggy. Officer Moon showed the baggy to the other Officers and told Mr. Hutchinson "he was done." When Officer Moon pulled the bag out one of the cannabis joints fell onto the ground. Officer Moon picked it up and put it with the baggy.

Mr. Hutchinson recalled a fourth Officer being present, about eight yards away while he was being searched. He recognized the female Officer as being Officer McNichol, because they grew up in the same neighbourhood. Mr. Hutchinson saw Officer McNichol watching and did not know why she did not stop the search. Mr. Hutchinson felt they were very intent on stripping him. He did not hear Officer McNichol say anything.

Mr. Hutchinson was put back in the cruiser and was informed there would be a sobriety test at the hospital. They went to the hospital parking lot to do the test and waited 10 or 15 minutes at the hospital for the Officer who was going to do the testing to arrive. When the Officer arrived Mr. Hutchinson told him he was cold and he had a brain injury and could not do the test. The Officer's name was P/C Hall and he told Mr. Hutchinson to shut up and do what he was told. Mr. Hutchinson did the test and Officer Foote told him he performed poorly so they were trying to organize another test. While Mr. Hutchinson was in the cruiser with Officer Foote she told him about the charges and that she was arranging for a Drug Recognition Evaluation (DRE) Officer to conduct further testing. The closest DRE Officer was in Sebringville. Mr. Hutchinson told Officer Foote that he knew the police get excuses all the time. He had been a park ranger for 15 years and had heard it all but she (Officer Foote) had to believe him that he had a brain injury. Mr. Hutchinson explained he could not be in the car for more than 15 minutes. Officer Foote spoke to her supervisor and they put Mr. Hutchinson's handcuffs in front so he could hold "a barf bag". Mr. Hutchinson had been in the back of the cruiser for over an hour and had a panic attack and was "dry heaving". Officer Foote did not seem to care. He was squished in the back seat, he had a sore back and could not move. Mr. Hutchinson said he was scared and tired and did not know what was happening because they were driving all over Huron County with him after he told them he could not do this.

When they arrived at Sebringville Detachment Mr. Hutchinson was drenched in sweat. He was taken inside where he waited for the DRE Officer. Officer Foote was followed by Officer Hall. Mr. Hutchinson did not see Officer Moon again that night.

Mr. Hutchinson originally complained to the OPP about the incident but did not mention the search. He explained that when he first complained he did not want to talk about it because he had been violated and felt like he was raped. Mr. Hutchinson did not tell his wife about it because he felt nobody needed to know.. When OIPRD began to investigate that was when he began to talk about it. He has since been diagnosed with Post Traumatic Stress Syndrome (PTSD). He felt that Officers and wardens have a badge and swear an oath and Officer Foote did not uphold the law. Mr. Hutchinson explained he has panic attacks when he sees police Officers or police cars. He has not driven since because he has no defence. He is scared to be around his children alone because Officer Moon could show up and say he (Mr. Hutchinson) was stoned and take his children away. Mr. Hutchinson said he has suffered extraordinary harassment from the police and gave examples of police setting up RIDE programs outside his house and trying to charge him with domestic assault when his wife was not home; this went on for months. Mr. Hutchinson felt that this was all because he (*believed to have been referring to PC Moon*) went down his pants and wrecked his life.

In 1997, following his back injury, Mr. Hutchinson had financial difficulties. He had been running businesses but was unable to work due to his injury. He went into a gas station he used to work at and robbed it by taking the night deposit. He was not caught but he turned himself in, pled guilty, and received a six month sentence.

Mr. Hutchinson has not had any dealings with P/C Moon since this incident occurred.

### *Cross Examination*

Mr. Hutchinson agreed that in addition to symptoms that may already have been discussed he also suffers from vertigo, dizziness, sweating, nausea and panic attacks. Mr. MacKenzie referred to medical reports. Mr. Hutchinson agreed that a 2019 report indicated he had undergone vision therapy and was diagnosed with a mild traumatic brain injury. He agreed his diagnosis included symptoms similar to post-concussion syndrome symptoms. Mr. Hutchinson suffers from headaches, blurred vision, attention deficit, confusion and memory lapses.

Mr. MacKenzie referred to a second medical report. Mr. Hutchinson agreed that his symptoms could present to others as anxiety and intoxication and that other people have thought he was intoxicated when he was not. Mr. Hutchinson gave an example when the child care service his daughter attended thought he was high and the police were called. He explained that he was not high but he had been to a medical appointment earlier in the day where he had stints removed from his nose following surgery. When Mr. Hutchinson got home that day P/C Moon came to his door and thought Mr. Hutchinson was stoned. This incident was prior to June 2018.

Mr. Hutchinson agreed that to manage his symptoms he had been prescribed medication which included cannabis for which he had a medical note from August 28, 2017. When he

went to have his fingerprints taken Mr. Hutchinson provided the note to the police and the possession of cannabis charge was eventually dropped. Mr. Hutchinson believed the letter was in his car on the evening of June 6, 2018, but he was not given a chance by police to find it.

Mr. Hutchinson agreed that around June 6, 2018 or just prior, he was concerned about his ability to drive due to his symptoms. He agreed that because of his symptoms he was a potential danger.

On June 6, 2018 he was driving to a friend's camper at the park so he did not have to drive in the morning as he had difficulties driving in the morning sun and his friend would take him to work. Mr. Hutchinson agreed that when he approached the RIDE he was experiencing hallucination type symptoms. Mr. Hutchinson explained that as he approached the RIDE check the police lights triggered symptoms in addition to hallucination i.e. dizziness, a lack of focus and anxiety and he was already tired.

Mr. Hutchinson said that on June 6, 2018 he had smoked marijuana as 6:00am, 18 hours prior to the RIDE check. He smoked one joint that was under one gram in quantity. He was not sure if the marijuana came from Whistler, the supplier he was registered with or if it came from elsewhere. He explained that he sometimes get marijuana from the Compassions Center in London as it works better than the product from Whistler. Mr. Hutchinson believed the marijuana found by the police was from the Compassion Center as that type was more odorific.

Mr. Hutchinson agreed that he had told OIPRD he was extremely symptomatic. He agreed that the marijuana had a strong odour and that it was fair to say the Officers could smell it. Mr. Hutchinson agreed he did not offer the marijuana to Officer Foote explaining that she did not ask for it; she asked if he had been using it. He was not given the opportunity to show his licence for marijuana.

Mr. Hutchinson agreed that he did not turn over the marijuana because, in the past, the police took it and made him go before a judge to get it back. On the night of June 6, 2018 he only had a small amount left and he needed it in the event of a panic attack during which he fears death. He had no money to get more marijuana and did not want what he had to be confiscated. Mr. Hutchinson said that he buried the marijuana deep in his pants so that the Officers would not take it.

Mr. Hutchinson explained he had placed the marijuana in the crease of his thigh and scrotum in an effort to hide it. He did not want to risk losing the marijuana so he stuffed it down his pants. He agreed that Officer Foote asked him to step out of the car and another Officer he thought was P/C Moon conducted a pat down search. He agreed he was not certain that it was Officer Moon who did the pat down. Mr. Hutchinson agreed that he still did not tell the Officers he had marijuana because they did not ask. Mr. Hutchinson was placed in Officer

Foote's cruiser while the police searched his car.

Officer Foote returned to her cruiser and could then smell marijuana in her car so the Officers asked Mr. Hutchinson to exit the car for another search of his person.

Mr. MacKenzie referred to page 33 of the OIPRD report where Mr. Hutchinson had indicated that while he was being searched by P/C Moon, Officer Foote was holding one arm and Officer Kirkconnell was holding the other and there was a whole pack of Officers behind them. Mr. Hutchinson explained that he sees double out of his right eye and indicated that maybe why he thought there were many Officers present.

Mr. Hutchinson could not remember if he was handcuffed while the search took place but agreed with the suggestion handcuffs were on. He was not certain if a flashlight was used and who may have had it. Mr. Hutchinson agreed he did not tell Officers he had a medical licence to possess marijuana because they did not ask. He stayed quiet so as not to agitate the Officers. He explained that, in the past, when he explained to Officers he had a licence they just said "yeah right." Although he was under arrest and asked to do a sobriety test he agreed he did not offer the information about being licenced. Mr. Hutchinson thought he would pass the sobriety test and repeated none of the Officers asked for his licence. He stated he was panicked and scared for his life and that he was not hiding anything he was just waiting for the opportunity.

At the Sebringville OPP detachment when Officer Baran asked Mr. Hutchinson if he had a license, Mr. Hutchinson told him he did. Prior to that point Mr. Hutchinson explained he had just been told to shut up, he had been manhandled, all of his rights had been taken away, he was outnumbered and outgunned, and he was scared he was going to be raped and put in a ditch. Mr. Hutchinson explained further that he was waiting for a real Officer who knew what they were doing i.e. a DRE Officer

Mr. Hutchinson agreed he was in Officer Foote's car for an hour and did not tell her. He explained he did not trust her. She did not give him a chance to get his paper work and she said everyone makes excuses.

Officer Baran conducted DRE testing and Mr. Hutchinson was charged with impaired driving and drug possession and was driven home by an Officer. He described Officer Baran as being kind and concerned for his well-being.

Mr. Hutchinson explained he pled guilty to careless driving because he accepted responsibility that he should not have been driving that night. He explained that he had a good rapport with some Officers from the Huron OPP but there are a few who do not do what they are supposed to. Mr. MacKenzie pointed out that Mr. Hutchinson had reported to OIPRD in his statement the Huron County OPP runs rogue and are known for harassing people. Mr. Hutchinson

explained there are certain individuals who run rogue.

Mr. Hutchinson agreed that it was two months following the incident that he complained to OIPRD. Mr. Mackenzie referred to the OIPRD report<sup>1</sup> and pointed out Mr. Hutchinson complained about Officer Foote and he referenced the fact that Officers found the bag with a small amount of cannabis that was tucked in his pants; Mr. Hutchinson agreed. Mr. MacKenzie read from page three of the report where Mr. Hutchinson's concerns were outlined and that Mr. Hutchinson did not describe a strip search. Mr. Hutchinson explained that it was because of the PTSD and that he did not want to talk about it at the time. Mr. Hutchinson confirmed he typed the report himself.

Mr. Hutchinson agreed he did not disclose the strip search to OPP Professional Standards Bureau (PSB) investigator, D/Sgt. DaCosta. PSB found Mr. Hutchinson's complaint unsubstantiated. Mr. Hutchinson appealed this decision to the OIPRD. The OIPRD investigated and interviewed Mr. Hutchinson in June of 2019, one year after the incident. He explained the OIPRD gave him a chance to talk about something he did not want to talk about, the strip search, but he did previously complain he was not happy with the search, he just went into more detail with the OIPRD. He agreed he did not initially complain about P/C Moon and that the whole situation has been a hard learning experience. On the day following his arrest Mr. Hutchinson explained he was hospitalized because he did not want to live in a world where police are corrupt. Mr. Hutchinson said he had to believe not all Officers are evil and he cannot be afraid of them.

Mr. Hutchinson agreed he had made an Ontario Human Rights complaint against the Officers for using his disability against him and that the complaints have great detail but did not reference a strip search. Mr. Hutchinson explained over the course of two years he was working with his mother and his wife on talking about it, but talking about the strip search causes him to have panic attacks and he did not like talking about it.

Mr. Hutchinson denied Mr. MacKenzie's suggestion that he had crafted the strip search in his mind. He explained that Officers were covering it up like his boss at the Provincial Park did. He said that P/C Moon put his hand right down there and pulled the bag of marijuana. He explained that the Officers wanted to find weed and took his clothes off and were lying to cover it up.

Before he left the witness stand, Mr. Hutchinson was given the opportunity to offer further evidence. He discussed how he has been working with a therapist. Mr. Hutchinson further stated that he was not into bad guys stuff and he was not a criminal. He could not understand why bad guys have badges and that this occurrence had screwed up his life. He did not believe he would get over having his clothes taken off and that the Officers obstructed justice and

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<sup>1</sup> Exhibit 11, OIPRD Report date stamped August 3, 2018

were not being truthful.

## **Defence Witnesses**

P/C Kirkconnell

*Evidence in Chief*

PC Kirkconnell was in his third year of employ with the OPP and was assigned to the Clinton office of the Huron County OPP. At the time of the incident he had less than one year experience.

Regarding the events of June 6, 2018, P/C Kirkconnell was investigated by PSB for alleged misconduct and was cleared of any wrongdoing. On that date P/C Kirkconnell was doing RIDE with P/C's Moon and Foote in the area of Highway 21 and Sulford Road. P/C Foote had arrested a driver, Mr. Hutchinson who had approached the ride check. P/C Kirkconnell could not recall the kind of vehicle the driver was in. P/C Kirkconnell assisted with the towing of the vehicle. There was just he, P/C Moon and P/C Foote at the RIDE check. P/C Kirkconnell had no direct contact with Mr. Hutchinson. P/C Foote had advised P/C Kirkconnell that she had arrested Mr. Hutchinson for possession of marijuana under the Controlled Drug and Substance Act (CDSA).

P/C Kirkconnell was asked to assist with the search of Mr. Hutchinson's vehicle and all he found was garbage in the vehicle. P/C Kirkconnell could smell marijuana inside Mr. Hutchinson's vehicle. P/C Kirkconnell was not present when Mr. Hutchinson was searched as he was searching the vehicle at the time. P/C Kirkconnell called for a tow truck and completed the impound paperwork. P/C Kirkconnell did not see Mr. Hutchinson being removed from P/C Foote's cruiser for a second search.

P/C Kirkconnell was advised that Mr. Hutchinson said he was holding Mr. Hutchinson's arm during the second search. P/C Kirkconnell denied this and explained he never touched Mr. Hutchinson. P/C Kirkconnell did not see Mr. Hutchinson's boxers being pulled out or his clothing removed. He did not see any other Officers holding Mr. Hutchinson's arms. P/C Kirkconnell was on the opposite side of the highway on the shoulder. He described the area as well-lit and believed there were street lights nearby. P/C Kirkconnell never crossed the highway to the side Mr. Hutchinson was on. He did not shine a flashlight on Mr. Hutchinson or down his pants. P/C Kirkconnell believes the closest he was to Mr. Hutchinson was perhaps a car length away following the original stop. He had no conversation with Mr. Hutchinson.

P/C Kirkconnell was told by one of the other Officers that marijuana had been found but he could not recall who told him and he never saw the drugs himself. Following the towing of Mr. Hutchinson's vehicle, P/C Kirkconnell attended a missing person call. P/C Kirkconnell did not participate in either search of Mr. Hutchinson.

*Cross Examination – Ms. Brabazon*

P/C Kirkconnell was in his fourth month of policing at the time of this occurrence. P/C Kirkconnell was directed to page 83 of his notes where he wrote words indicating P/C Moon secondary search of male and found marijuana. P/C Kirkconnell agreed he had no first-hand knowledge of this. P/C Kirkconnell did not write down who told him this and agreed it may have been helpful to have written it down. P/C Kirkconnell explained that to him the term “secondary search” meant a second search was conducted. P/C Kirkconnell did not know where the marijuana was found.

P/C Kirkconnell explained his understanding that a strip search should never be conducted on the side of the road, that a supervisor should be present and that it involved the removal of clothing and was more thorough than a pat down search.

*Cross Examination - Mr. Hutchinson*

P/C Kirkconnell started the towing paperwork at 2:27am after he requested a tow truck. P/C Kirkconnell saw Officer McNichol toward the end of their ride checks. P/C Kirkconnell did not know if Officer McNichol was present when he was searching Mr. Hutchinson’s vehicle. P/C Kirkconnell agreed he described Mr. Hutchinson as being calm but he did not have close enough contact with Mr. Hutchinson to make a judgement regarding impairment. P/C Kirkconnell used a flashlight to search Mr. Hutchinson’s vehicle. When he was done he put the flashlight in his vest pocket.

Mr. Hutchinson had suggested P/C Kirkconnell was taller. I asked Mr. Hutchinson and P/C Kirkconnell how tall they were. Both responded 5’ 10”.

PC Baran

*Evidence in Chief*

P/C Baran has been with the OPP since 2014 and was assigned to the Oxford County detachment. P/C Baran had specific training with respect to impaired driving and drug recognition for impairment.

On June 6, 2018 he had occasion to make observation of Mr. Hutchinson. P/C Baran made his notes directly on a drug influence evaluation form face sheet.<sup>2</sup>

At 3:26am P/C Foote provided her grounds for arrest. At 4:07am P/C Baran received custody of Mr. Hutchinson. P/C Baran described in detail his evaluation process. During the process Mr. Hutchinson told P/C Baran about his medical challenges and that he had been prescribed

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<sup>2</sup> Exhibit 12, Drug Influence Evaluation Form

marijuana. Among P/C Baran's observations was the fact he saw green leafy specs on the tongue and teeth of Mr. Hutchinson. P/C Baran indicated this combined with the odour of marijuana detected was not consistent with Mr. Hutchinson's claim that he had not smoked for 18 hours.

P/C Baran formed the opinion that Mr. Hutchinson's ability to operate a motor vehicle was impaired by drug.

*Cross Examination - Ms. Brabazon*

P/C Baran explained that when a person's systolic blood pressure reading is 176 or higher, medical treatment would be sought.

P/C Baran was not involved with the prior investigation of Mr. Hutchinson. His only involvement was as a DRE. P/C Baran did not know if Mr. Hutchinson's brain injury could affect his performance on the test.

*Cross Examination - Mr. Hutchinson*

Mr. Hutchinson made a statement confirming there was no way he could have passed the test. Mr. Hutchinson asked P/C Baran why he told the Crown and P/C Foote that Mr. Hutchinson tested positive for THC. P/C Baran explained the toxicology report indicated a positive test for the metabolite of THC.

*Ultimately I stopped this line of questioning as it was not relevant to the allegations against P/C Moon.*

P/C Moon

*Evidence in Chief*

P/C Moon was in his ninth year with the OPP. Prior to his employment with the OPP P/C Moon was a Correctional Officer and prior to that he was with the Canadian Military for 9 years. He was assigned to the Huron County Detachment, Goderich office as he was in June of 2018. He was a first class constable at that time assigned to front line patrol duties.

P/C Moon had conducted RIDE checks many times in the past. He explained that Officers typically decided amongst themselves where and when RIDE was going to be conducted. He was not a trained breathalyzer operator or DRE.

On June 6, 2018 at approximately 12:42am he began conducting RIDE checks with P/C's Foote and Kirkconnell. They were operating separate cruisers. They chose the location of Highway 21 and Sulford Road as vehicles would approach over a hill and around a curve and

there were no escape routes.

At 1:29 am a vehicle approached the RIDE check that was driven by Mr. Hutchinson. P/C Foote approached the driver and had conversation with him. P/C Foote indicated that she could smell marijuana. P/C Moon was not too far away from P/C Foote and he also smelled fresh marijuana. P/C Moon was aware that case law had established the fresh smell of marijuana provided grounds for arrest. P/C Foote placed Mr. Hutchinson under arrest for possession of marijuana. There were no other civilian vehicles present at the RIDE check at that time, traffic was light and all three cruisers had their emergency lights on.

P/C Foote was at the driver's side window and P/C Moon was slightly behind her on the driver's side and could also smell marijuana. P/C Foote asked Mr. Hutchinson to exit his vehicle and he was handcuffed to the rear. P/C Moon frisk searched Mr. Hutchinson, because he was male, but did not find anything. Mr. Hutchinson was placed into the rear of P/C Foote's cruiser.

Mr. Hutchinson's description of the first search was accurate. P/C Moon explained that during the initial search he checked Mr. Hutchinson's pockets, raised his shirt to check the waistline, crumpled clothing, checked pant legs and ankle area and Mr. Hutchinson's shoes. P/C Moon said that the search was conducted incident to Mr. Hutchinson's arrest and was conducted to locate evidence of the offence, weapons or items that may be used for escape.

Following Mr. Hutchinson being placed in the cruiser, P/C Moon assisted P/C Kirkconnell with the search of Mr. Hutchinson's vehicle. P/C Moon did not find anything of interest i.e. drugs or paraphernalia in the vehicle and noted it was cluttered. P/C Moon noticed that the smell of marijuana was disappearing from the vehicle. Mr. Hutchinson had not advised that he was a medical marijuana user.

As nothing had been found in Mr. Hutchinson's vehicle, P/C Moon and P/C Foote returned to P/C Foote's cruiser. They opened the door and immediately smelled the strong odour of marijuana. P/C Moon formed the opinion that marijuana was on Mr. Hutchinson's person. Mr. Hutchinson was asked to step out of the cruiser and he complied. P/C Moon began a second search of Mr. Hutchinson. When P/C Moon raised Mr. Hutchinson's shirt he could see 1-2 centimeters of a plastic bag sticking out of the waistband of Mr. Hutchinson's pants. P/C Moon speculated the baggy may have shifted when Mr. Hutchinson was getting in and out of vehicles. Mr. Hutchinson had remained handcuffed during both searches. P/C Moon stated there was no specific difference between the first and second search except that the second time he saw the baggy. / P/C Moon did use a flashlight when he searched the vehicle but he did not believe he or anybody else used one when Mr. Hutchinson was searched. He explained there were street lights close by that provided illumination.

P/C Moon did not know where P/C Kirkconnell was during the second search but believed he was still at Mr. Hutchinson's vehicle. P/C Moon knew P/C Foote was standing in close

proximity because when he found the marijuana he handed it to her. Neither P/C Kirkconnell nor P/C Foote searched Mr. Hutchinson.

P/C Moon found a plastic zip lock sandwich bag with three marijuana cigarettes, one partially burnt, inside the bag and handed it to P/C Foote. Mr. Hutchinson was then seated back in P/C Foote's cruiser.

Mr. Hutchinson was described as having been lethargic, having glossy eyes, and had been slow to respond. P/C Foote arrested Mr. Hutchinson for impaired operation at this point. P/C Moon had no further interaction with Mr. Hutchinson.

At the time of Mr. Hutchinson's arrest P/C Moon had been a police Officer for seven years and a correctional Officer prior to that. He had conducted many frisk searches in the past. He was a defensive tactic instructor as a correctional Officer and taught search techniques.

OPP Police Orders<sup>3</sup> pertaining to search policy was read. P/C Moon explained the authority to search Mr. Hutchinson came from him being arrested and that he complied with policy with respect to his searches of Mr. Hutchinson. P/C Moon explained he conducted two frisk searches in accordance with training and that there were no members of the public present; there was three Officers and Mr. Hutchinson. P/C Moon was quite certain Sgt. McNichol was present for the search of Mr. Hutchinson and he was not certain when she arrived at the scene.

P/C Moon concurred with the observations of P/C Foote regarding indicia of impairment they believed to have been displayed by Mr. Hutchinson and that he did not smell alcohol. Mr. Hutchinson's description of Officers holding his arms during the second search did not happen. P/C Foote and P/C Kirkconnell had no physical contact with Mr. Hutchinson during the search. P/C Moon did not raise Mr. Hutchinson's shirt to just below his armpits. P/C Moon did not look into Mr. Hutchinson's boxers nor had he ever done that to anyone, anywhere. P/C Moon did not reach into Mr. Hutchinson's boxers to retrieve the baggy from his groin area. He explained he saw the baggy so there was no reason to have reached into Mr. Hutchinson's pants nor would he have.

P/C Moon was referred to the complaint Mr. Hutchinson made to OIPRD where Mr. Hutchinson described the baggy as having been tucked into his pants. P/C Moon stated that description by Mr. Hutchinson sounded accurate as he found the baggy in Mr. Hutchinson's waistband. P/C Moon was not initially named as a respondent Officer but at some point OIPRD designated all involved Officers as respondents. There were no concerns in Mr. Hutchinson's complaint regarding the search. PSB investigator D/Sgt. DaCosta conducted the initial investigation but P/C Moon was not interviewed. PSB found the complaint unsubstantiated. Mr. Hutchinson

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<sup>3</sup> Exhibit 9 – Police Orders search policy

appealed to OIPRD and a second investigation by them occurred.

On June 19, 2019, more than a year after the incident, P/C Moon learned that OIPRD had designated him as a respondent. The OIPRD did not indicate this was in relation to an alleged strip search. On July 10, 2019 P/C Moon was interviewed by OIPRD and during the pre-amble to the interview P/C Moon learned of the allegation a strip search had occurred. P/C Moon indicated he was surprised because he knew he had not conducted a strip search and he was not particularly concerned at that time. P/C Moon was not provided any details in advance of the interview so he was not able to prepare in any way. P/C Moon had his notebook with him during the interview but no other documents or material.

P/C Moon was referred to his notes<sup>4</sup> and read the notebook entries pertaining to this occurrence. P/C Moon then explained his procedure for making notes; that he makes his scratch notes directly into his notebook and followed by a more detailed summary. After P/C Foote left the scene with Mr. Hutchinson, P/C Moon and P/C Kirkconnell continued RIDE checks. Upon completing RIDE P/C Moon was immediately dispatched to a missing person occurrence possibly involving a stolen vehicle. He again made scratch notes for this call and had intended to complete the summary.

P/C Moon testified that the scratch notes did depict the grounds for the search and the results and he believed it was the bare minimum required by him. He explained that following scratch notes, when he was able, he normally writes a header and summary in his notes. In regard to the missing person occurrence P/C Moon explained he knew the involved persons and had a licence plate number to provided further details. P/C Moon did not record a description of Mr. Hutchinson's clothing in his notes.

P/C Moon acknowledged that when he was interviewed by OIPRD in July of 2019 that he gave an incorrect description of the clothing Mr. Hutchinson was wearing. P/C Moon had not turned his mind to the clothing Mr. Hutchinson had been wearing prior to the interview. P/C Moon stated the clothing Mr. Hutchinson was wearing did not change where the marijuana was found i.e. the waistband.

Following the missing person occurrence, at 4:01am P/C Moon was dispatched to a personal injury motor vehicle accident. P/C Moon arrived at 4:17am to find a vehicle in the middle of the road and on fire. P/C Moon found the male associated with the vehicle, naked in the ditch. The male had severe burns to over 50% of his body. There had not been a collision. P/C Moon spoke with the male who told P/C Moon that he had doused himself in gasoline and set himself on fire as he did not want to live any more. The male explained that after he lit himself ablaze he could not bear it and got out of the vehicle. P/C Moon explained it was in the top five worst things he had ever seen including in the military. P/C Moon explained the smell would never

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<sup>4</sup> Exhibit 17 – P/C Moon's notes

leave him. P/C Moon recalled the flesh on the man's legs slumping off of the bone like socks. When the man left the scene he was alive but later died.

P/C Moon made scratch notes regarding this incident and at 7:52 he wrote the summary in his notebook. He explained that by the end of his shift, following the suicide, he had no thoughts about the three joints found on Mr. Hutchinson and forgot to summarize the notes. He was off duty on scheduled days off for the four days that followed and never remembered to summarize his notes regarding Mr. Hutchinson.

The first time P/C Moon was aware of an issue with his notes was when he received the Notice of Hearing (NOH) for the charges before this tribunal. P/C Moon explained it was his practice to summarize his notes following scratch notes and considered himself a good note taker. P/C Moon did not approve of the practice of making scratch notes on loose pieces of paper and felt it was inefficient. P/C Moon has never been criticized for his note taking practices and explained that he received unsolicited compliments from a Crown Attorney<sup>5</sup> regarding his note taking in relation to a September 2018 matter.

P/C Moon agreed that his notes were minimal and he would normally have written more. His notes did contain the grounds for the search and the result but his normal process of summarization was derailed by the suicide call.

PC Moon re-stated he absolutely did not strip search Mr. Hutchinson.

#### *Cross Examination - Ms. Brabazon*

P/C Moon agreed that his training regarding note taking included that notes should have enough detail to refresh the memory of the writer and that notes were not intended to include all that was said. Whenever possible notes should be made chronologically. P/C Moon was familiar with the term "LE" (Late Entry) meaning the writer was noting something that happened earlier. P/C Moon has used "LE" in his notes at times. P/C Moon agreed that in an impaired by drug investigation Officers should record specific observations.

P/C Moon believed that he complied with policy albeit the bare minimum of what was required i.e. the grounds for the search and the outcome. Ms. Brabazon suggested P/C Moon made detailed notes about the other incidents but not about Mr. Hutchinson. P/C Moon disagreed and pointed out that his notes regarding the missing person were not as complete as he normally would have made them and he forgot to summarize that call for service as well. P/C Moon agreed that his sparse notes could have been problematic in court and that he would have had to rely on his independent recollection.

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<sup>5</sup> Exhibit 15, Letter From Crown Attorney

P/C Moon agreed that neither search was included in his notes nor other details were not written down. P/C Moon said he could have relied on his independent recollection but again acknowledged the missing information could be problematic for a Crown Attorney in court.

Ms. Brabazon suggested that it was reasonable to expect due to gravity and movement that the baggy should have fallen further down inside Mr. Hutchinson's pants. P/C Moon explained that he did not consider the physics but knew when Mr. Hutchinson got out of the cruiser the baggy was visible. P/C Moon suggested he must have missed it the first time. P/C Moon denied reaching into Mr. Hutchinson's pants.

P/C Moon explained that P/C Foote was close by when he searched Mr. Hutchinson and when he found the marijuana he handed it to P/C Foote. P/C Moon did not know precisely where P/C Kirkconnell was but P/C Moon could not see him.

P/C Moon did have a prior interaction with Mr. Hutchinson over concerns expressed by a child care worker that Mr. Hutchinson was impaired when he picked up his child from daycare. This occurred about a year before in 2017. P/C Moon went to Mr. Hutchinson's home and spoke with him. P/C Moon believed Mr. Hutchinson was impaired but could not put him behind the wheel of a vehicle, so he issued Mr. Hutchinson a warning regarding impaired driving. P/C Moon believed, but was not certain, that he reported the incident to the Children's Aid Society as the occurrence involved child safety concerns. P/C Moon stated that the previous call had no bearing whatsoever on the June 2018 interaction with Mr. Hutchinson. P/C Moon had no other interaction with Mr. Hutchinson other than he believed, but was not certain, that Mr. Hutchinson worked at Tim Horton's at one point and they may have crossed paths there.

P/C Moon explained that he makes scratch notes in his notebook then, when he is able, he writes the heading "summary" and then makes more detailed entries. He pointed to the suicide call as an example. P/C Moon explained that Mr. Hutchinson's matter slipped his mind following the suicide call.

#### *Cross Examination - Mr. Hutchinson*

*Some of Mr. Hutchinson's cross examination took the form of further statements and not questions of the witness. Because Mr. Hutchinson is the public complainant he was afforded some latitude.*

Mr. Hutchinson began by explaining his health challenges and he thanked P/C Moon for his service.

Mr. Hutchinson explained that, as a result of the incident on June 6, 2018 his life had been destroyed and has suffered from PSD (believed to have meant PTSD) ever since. Mr. Hutchinson explained he lost his trust in the OPP and was afraid of what the OPP would do to

him.

Mr. Hutchinson explained a machine cannot show he is impaired and it was the symptoms of his injuries that sometimes cause him to appear to be impaired to others. Mr. Hutchinson explained he needed to be understood and not judged.

P/C Moon testified it was a very short period of time between when Mr. Hutchinson was asked for his identification and when he was asked to step out of the car as, due to the fresh smell of marijuana he was arrested. Mr. Hutchinson indicated he wanted more time to get his medical prescription papers and had he been allowed, this all could have been avoided.

P/C Moon testified that, in June of 2018 marijuana was still illegal but it was and remains his practice to ask if a person being investigated had prescription. On the evening in question P/C Moon was not the arresting Officer and not all Officers ask for a prescription. P/C Moon explained that, because P/C Foote is female, he was asked to search Mr. Hutchinson. P/C Moon stated he did not undo Mr. Hutchinson's pants or pull them up or down and that when Mr. Hutchinson got out of the cruiser the baggy was visible.

Regarding the incident in 2017, P/C Moon explained he did not arrest or approach Mr. Hutchinson at the day care facility. P/C Moon believed Mr. Hutchinson was impaired and agreed he may have used the word "stoned." P/C Moon explained his training and experience as a police Officer and former correctional worker in recognizing if people of under the influence of drugs. Mr. Hutchinson explained he was not stoned that day that he had stints removed from his sinus earlier that day. Mr. Hutchinson asked why P/C Moon did not ask for his prescription during the 2017 incident. P/C Moon explained he wasn't arresting Mr. Hutchinson he was warning him or he would have asked for a prescription.

P/C Moon stated Sgt. McNichol was not present during the search of Mr. Hutchinson and was not certain if she arrived after Mr. Hutchinson had left the scene. He agreed it could have been before but was quite certain she was not present when Mr. Hutchinson was searched. P/C Moon explained he did not see Sgt. McNichol and would have noticed if his supervisor had arrived.

P/C Moon was uncertain if it was he or P/C Kirkconnell who called a tow truck. Police radio transmissions<sup>6</sup> were played. P/C Moon identified his voice on the radio recording at about time stamp 7:55. He explained he was attempting to confirm that a tow truck had been dispatched. P/C Moon remained uncertain as to whom it was that initially called the tow truck.

Mr. Hutchinson inquired as to why more notes were not made between 1:30am and 3:10am and P/C Moon explained he and P/C Kirkconnell had continued stopping vehicles at the RIDE

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<sup>6</sup> Exhibit 18, Radio Transmission Recordings

check point.

P/C Moon recorded Mr. Hutchinson's arrest occurring at 1:29am and the first search followed shortly thereafter. At about 1:52am the second search was performed. The second search was performed because when P/C Moon and P/C Foote returned to the cruiser to speak with Mr. Hutchinson they were struck by the strong odour coming from within the cruiser. P/C Moon felt it was obvious the marijuana was with Mr. Hutchinson in the cruiser. P/C Moon did not call P/C Hall nor was it his decision to call him. P/C Moon was not present when Mr. Hutchinson interacted with P/C Hall as that took place in a different location.

### **PART III: SUBMISSIONS, ANALYSIS AND FINDINGS**

#### *Submissions: Ms. Brabazon*

Ms. Brabazon cited the test for neglect of duty in *Gottschalk*<sup>7</sup> including two aspects being the member was required to perform a duty and the member failed to do so in a prompt and diligent manner. Count one identified two areas of misconduct, search and notetaking. The member must show whether they had a lawful excuse for not performing the duty. Neglect of duty is not absolute and there must be willfulness to a degree that crosses the line from a performance issue to misconduct.

Ms. Brabazon cited *Mousseau*<sup>8</sup> which outlined that hindsight should not be improperly applied and the misconduct must be viewed in light of the circumstances that existed at the time. Ms. Brabazon suggest I accept the evidence of Mr. Hutchinson with respect to the way the incident has affected him.

There is corroboration surround the fact that Mr. Hutchinson was searched twice and it was during the second search that the evidenced diverged. Mr. Hutchinson testified the baggy was in his crotch area and the Officer reached in to get it. P/C Moon testified he found it in the waistband. Ms. Brabazon referred to *Golden*<sup>9</sup> and suggested if I were to accept Mr. Hutchinson's version of events that what he described would be a strip search and it should have been conducted at the detachment.

P/C Moon explained he responded to two calls following the RIDE checks and the nature and seriousness of the calls led to an honest mistake in not completing his notes. Ms. Brabazon emphasised the challenges a Crown Attorney in a prosecution may have faced because there was so much missing from the notes and that the missing notes met the test for neglect of

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<sup>7</sup> *Superintendent Paul Gottschalk and Toronto Police*, 2003 CanLII 85796 (ON CPC)

<sup>8</sup> *Constable Steven Mousseau and the Metropolitan Toronto Police Force*, 1981 CanLII 3042 (ON CPC)

<sup>9</sup> *Ian Vincent Golden v. Her Majesty The Queen* [2001] 3 S.C.R. 679, 2001 SCC 83

duty. The matter involving Mr. Hutchinson was most likely to have gone to court and P/C Moon could have made a late entry.

Paragraph 101 in *Golden* outlines what constitutes a strip search and that I should consider the necessity for the second search or could it have waited and been conducted at the detachment.

A credibility test must be applied to the evidence of P/C Moon and Mr. Hutchinson and cited *R. v. W.(D.)*<sup>10</sup> as providing the test for credibility. The clear and convincing standard of proof must be applied which is less than beyond a reasonable doubt but higher than the balance of probabilities.

*Submission: Mr. Hutchinson*

*Mr. Hutchinson's submissions included some statements and assertions not addressed in evidence. As he was the public complainant he was, again, afforded some latitude.*

Mr. Hutchinson suggested the case was sabotaged because P/C Moon's notes were incomplete and Mr. Hutchinson could not research what happened because the notes were incomplete.

Mr. Hutchinson submitted he was strip searched by P/C Moon and that if P/C Moon needed to do so he should have taken Mr. Hutchinson to the detachment. Mr. Hutchinson submitted had he been taken to the detachment he would have complied with the strip search. He did what he was asked of the Officers and did not resist them in any way.

Mr. Hutchinson indicated he had a fear of talking about the incident because no one would believe him. Mr. Hutchinson had been working on talking about it.

Mr. Hutchinson did not show his prescription because he was not permitted to do so and that he was controlled and sabotaged and told to shut up. He was certain Sgt. McNichol was at the scene for a half hour. Mr. Hutchinson stated his human rights and privacy rights were taken away and he was not treated as a human. Mr. Hutchinson was concerned that no witnesses said where P/C Kirkconnell was and it was not tracked.

Mr. Hutchinson stated there was no THC in his system. He tried his best to cooperate but it was out of his control and he was not given the opportunity to explain. The entire incident was not recorded properly and Mr. Hutchinson feels it was a cover up. He was scared and he was strip searched but for some reason Officers are looking the other way. Mr. Hutchinson wanted people to understand what he goes through as a result of his injuries. He explained he keeps

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<sup>10</sup> *R. v. W.(D.)* [1991] 1 S.C.R. 742

seeing a ditch beside the highway and suggested he could have ended up in the ditch if Officers got mad at him. Sgt. McNichol was there and Mr. Hutchinson had no way to defend himself.

#### *Mr. MacKenzie - Submissions*

P/C Moon worked a shift that was in excess of 14 hours on June 5/6 2018. While acknowledging the notes were not as complete as they could have been, Mr. MacKenzie suggested that the notes cover what was required by policy. Mr. MacKenzie submitted policy required incidents should be fully documented and suggested, in this case they were not.

Mr. MacKenzie suggested that P/C Moon's notes would have been properly completed had it not been for the suicide call where the victim set himself on fire. It was P/C Moon's practice to make scratch notes and then summarize details in his notes. He intended to do this but never got around to it. The suicide incident was an emotional one and three joints and a baggy did not come back to P/C Moon's mind at the end of the shift. P/C Moon did not turn his mind to it given what he had just dealt with.

Mr. MacKenzie suggested the issue of notes was "piled on" by OIPRD as the issue was never raised by the public complainant. OIPRD never notified P/C Moon that he was a respondent because of a strip search allegation and an allegation about his notes so he was not able to prepare.

Mr. MacKenzie submitted the notes sufficiently covered off what was required by policy but agreed they paucity could have been problematic in court. In this case there is a clear "lawful excuse" defence. This was an oversight and an honest mistake on the part of P/C Moon at the end of a 14 ½ hour shift.

Mr. MacKenzie cited page 25 of the *Cowley*<sup>11</sup> addressing matters crossing from a performance issue to misconduct. Mr. MacKenzie cited *P.G.*<sup>12</sup> at paragraphs 83-85 where inadvertence and an honest mistake provides an answer to the charge.

The *Blowes-Aybar*<sup>13</sup> also reflected at paragraph 12 repeated the assertions from *P.G.* that an honest mistake is a lawful excuse. P/C Moon is normally a detailed note taker as exemplified in exhibit 15.

Regarding discreditable conduct, P/C Moon was initially not complained about by Mr. Hutchinson. A year after the event OIPRD notified P/C Moon he was a respondent but no details were provided. Ultimately charges were laid in relation to the strip search allegation.

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<sup>11</sup> Exhibit 16, Defence Book of Authorities, *Toronto Police v. Hill and Cowley*, [1988]

<sup>12</sup> *P.G. v. Ontario* (Attorney General), [1996] O.J. No. 1298

<sup>13</sup> *Toronto Police v Blowes-Aybar* [2003] CanLII 85809 (ON CPC)

With respect to credibility, Mr. MacKenzie suggested there was nothing that corroborated Mr. Hutchinson's story. Mr. Hutchinson complained to OIPRD two months following the incident in a detailed document he drafted himself. Mr. Hutchinson said the baggy was "tucked into his pants." This corroborates what P/C Moon described. P/C Moon wrote in his notes where he found the baggy before he had any sense or inkling there would be a complaint. Mr. Hutchinson did not complain and said it was because it was too traumatic to talk about. If it were traumatic then he should not have been able to say the baggy was tucked in his pants. The majority of the complaint was regarding P/C Foote.

Mr. Hutchinson never told D/Sgt. DaCosta about a strip search. The complaint was unsubstantiated. Mr. MacKenzie suggested it was unclear as to how, after the OIPRD became involved, that the issue of the strip search arose and became the entire focus of the investigation.

Nothing corroborated Mr. Hutchinson's story and his credibility should be assailed. P/C Moon has consistently denied strip searching Mr. Hutchinson and stated that he would never have conducted a strip search on the side of the road. Mr. Hutchinson said P/C Foote and P/C Kirkconnell were holding him. There was no evidence that P/C Kirkconnell was even near Mr. Hutchinson or that anyone held him as he was searched. P/C Kirkconnell saw "nothing of the sort" relating to a strip search of Mr. Hutchinson. Mr. Hutchinson did not appear to have been truthful with respect to his cannabis consumption on the day in question. He admitted to having smoked earlier in the day but had green leaves on his teeth. He explained the green leafy material was from lasagna he had eaten.

P/C Baran formed the opinion that Mr. Hutchinson was impaired and completed a detailed report.<sup>14</sup>

Mr. Hutchinson's explanation that he was scared so he hid his marijuana did not make sense. He had a prescription to possess it yet he chose to hide it; which makes no sense. Mr. Hutchinson's medical reports were not submitted because they are private, but they reflect his symptoms can make him appear intoxicated. Other symptoms include blurred vision, attention deficit, confusion, and memory lapses. Mr. Hutchinson said seeing the flashing lights as he approached the RIDE check had a hallucinatory effect and he was sweating.

Mr. Hutchinson, a 43 year old man, did not explain he had a prescription and allowed himself to be arrested and searched without telling anybody he had the marijuana on him. He watched the police search his vehicle knowing they were not going to find the marijuana in there. Mr. MacKenzie suggested none of this made sense and that Mr. Hutchinson brought suspicion upon himself.

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<sup>14</sup>Exhibit 12 - Drug Influence Evaluation Report

Mr. Hutchinson had some disdain or animus for the Huron OPP describing them as “running rogue”. It did not make sense that Mr. Hutchinson said he would have cooperated with a strip search had he been taken to the detachment yet he was traumatized by it on the side of the road saying he felt raped.

Mr. Hutchinson’s evidence is not cogent or reliable. He was hallucinating before he interacted with police and there was no evidence to support that he was strip searched.

*Ms. Brabazon Reply:*

Ms. Brabazon pointed out that corroboration is not required for Mr. Hutchinson and there was no burden upon him. Ms. Brabazon indicated there were two searches and only one was documented and this did not meet requirements.

*Mr. Hutchinson Reply:*

Mr. Hutchinson indicated he was protecting his medicine as best he could and he was allowed to put it wherever he wanted. Mr. Hutchinson stated that his disability does not make him a liar.

### **Prosecution Cases**

*Gottschalk v Toronto Police Service, 2003 CanLII 85796 (ON CPC)*

Excerpts:

52. *The disciplinary offence of neglect of duty is found at section 2(1)(c)(i) of the Code. A police Officer is guilty of such misconduct if he or she “without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of the police force”.*

53. *As was noted by the Commission at page 1375 of Hewitt and Devine:*

*Essentially, this is a two part test. As the Commission stated in Soley and Ontario Provincial Police (1996), 3 O.P.R. 1098 (O.C.C.P.S.) at page 1100:*

*The charge of neglect of duty is a serious charge under the Code of Conduct. To be convicted of this charge, it must be shown that:*

*The member is required to perform a duty, and the member failed to perform this duty because of neglect, or did not perform the duty in a prompt or diligent manner.*

*Once proven, the member, to avoid discipline, must show that:*

*[The member] had a lawful excuse for not performing the duty in the prescribed manner.*

55. *It is also worth noting that neglect of duty is not an absolute offence. The law is clear that there must be either “willfulness” or “a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct”. See P.G. and Attorney General of Ontario and Police Complaints Commissioner supra., at page 28 and Pollock v. Hill and Cowley supra., at pp. 25-26.*

**Analysis:** The excerpts outline key issues for my consideration with respect to neglect of duty:

- I. The member was required to perform a duty.
- II. The member failed to perform this duty because of neglect, or did not perform the duty in a prompt or diligent manner.
- III. Whether or not the member had a lawful excuse
- IV. Was there a degree of willfulness or neglect that would make the matter cross from a performance concerns to a matter of misconduct.

*Constable Steven Mousseau and the Metropolitan Toronto Police Force, 1981 CanLII 3042 (ON CPC)*

Excerpt

*6. The reasonableness of an Officer's conduct must be examined in light of the circumstances as they exist at a particular time. An Officer is expected to use discretion and judgment in the course of his duties on many occasions. The police Officer's discretion or judgment ought not to be examined scrupulously by the benefit of hindsight, but it is essential to examine the circumstances under which the Officer exercised discretion or independent judgment to see to what extent discretion was warranted.*

**Analysis:** I must be cautious in reviewing an Officer's conduct under a microscope, with the benefit of hindsight and should consider what an Officer was faced with at the time of their misconduct.

*Constable Wendy Bromfield and The Hamilton Police Service, 2003 CanLII 75380 (ONCPC)*

I did not find this case of particular assistance.

*R. v. Golden, 2001 SCC 83 (CanLII), [2001] 3 SCR 679*

Excerpts:

*47 The appellant submits that the term “strip search” is properly defined as follows: the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of*

a female), or undergarments. This definition in essence reflects the definition of a strip search that has been adopted in various statutory materials and policy manuals in Canada and other jurisdictions. In our view, this definition accurately captures the meaning of the term “strip search” and we adopt it for the purpose of these reasons. This definition distinguishes strip searches from less intrusive “frisk” or “pat-down” searches, which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee’s genital or anal regions. While the mouth is a body cavity, it is not encompassed by the term “body cavity search”. Searches of the mouth do not involve the same privacy concerns, although they may raise other health concerns for both the detainee and for those conducting the search.

101 In this connection, we find the guidelines contained in the English legislation, P.A.C.E. concerning the conduct of strip searches to be in accordance with the constitutional requirements of s. 8 of the Charter. The following questions, which draw upon the common law principles as well as the statutory requirements set out in the English legislation, provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the Charter:

1. Can the strip search be conducted at the police station and, if not, why not?
2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. Will the strip search be authorized by a police Officer acting in a supervisory capacity?
4. Has it been ensured that the police Officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police Officers involved in the search be no more than is reasonably necessary in the circumstances?
6. What is the minimum of force necessary to conduct the strip search?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the arrestee’s genital and anal areas without any physical contact?

10. *If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?*
11. *Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?*

*102 Strip searches should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported to the police station. Such exigent circumstances will only be established where the police have reasonable and probable grounds to believe that it is necessary to conduct the search in the field rather than at the police station. Strip searches conducted in the field could only be justified where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting Officers or other individuals. The police would also have to show why it would have been unsafe to wait and conduct the strip search at the police station rather than in the field. Strip searches conducted in the field represent a much greater invasion of privacy and pose a greater threat to the detainee's bodily integrity and, for this reason, field strip searches can only be justified in exigent circumstances.*

*105 In light of the constitutional requirements set out above for a valid strip search incident to arrest, we are of the view that the search at issue in this appeal was unreasonable, and violated the appellant's rights guaranteed under s. 8 of the Charter. In this respect, it is critical to underscore that where the reasonableness of a strip search is challenged, it is the Crown that bears the onus of proving its legality. It thus must convince the court on a balance of probabilities that either (1) reasonable and probable grounds, as well as exigent circumstances existed, and therefore, a strip search "in the field" was warranted and was conducted in a reasonable manner; or (2) that reasonable grounds existed, that the strip search was carried out at a police station, and conducted in a reasonable manner. Because strip searches are of such an invasive character, they must be considered prima facie unreasonable. It is up to the state to rebut this presumption because it is in the best position to know and explain why the search took place, and why it was conducted in the manner and circumstances that it did. This onus rests upon the Crown in any case involving a strip search, as defined in these reasons.*

**Analysis:** The Supreme Court of Canada has adopted the definition of strip search to be:

*“the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person’s private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments”.*

The additional excerpts outline legal requirements and considerations with respect to strip searches. OPP policy and procedure was drafted pursuant to the tenets identified.

*R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 (page 758)

Excerpts:

*Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:*

*First, if you believe the evidence of the accused, obviously you must acquit.*

*Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.*

*Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.*

**Analysis:** The excerpted portion of this decision guides me through considerations as I assess witness credibility in particular the evidence of P/C Moon.

### **Defence Cases**

*Toronto Police v Blowes-Aybar* 2004 CanLII 34451 (ON SCDC)

The underlying ONCPC decision was overturned on appeal. The underlying decision cites issues and consideration covered in other cases submitted.

*Toronto Police v. Hill and Cowley*, 1988

As previously addressed page 25 of the *Cowley* addresses considerations regarding matters crossing from a performance issue to misconduct.

*P.G. v. Ontario (Attorney General)*, [1996] O.J. No. 1298

Excerpts:

76 *The Board's decision regarding s. 1(c)(i) of the Code reads:*

*It is surely one of the most basic and necessary duties of a **police** Officer involved in the investigation of criminal offences that he or she properly record and advise necessary witnesses of relevant dates, and most of all, the trial date.... Nevertheless, we are unable to conclude that there is clear and convincing evidence of intentional misconduct by the subject Officer. We do not, however, read para. 1(c)(i) as restricted to intentional misconduct.*

**Analysis:** Aspects of the offence of neglect of duty call for consideration of intentional behaviour but intentional behaviour is not a requirement of the section.

83 *In Pollock v. Hill (a decision of the Board of Inquiry, dated November 19, 1992) The Board wrote: A finding of a breach of the Code of Offences is a serious finding against an individual Officer which may result in major penalties under the police complaints legislation. Therefore, we will not find the Officers guilty of neglect of a duty to supervise unless there was some element of wilfulness in their neglect or unless there was a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct.*

84 *Accepting the Board's findings of "inadvertence", on this record, the only logical conclusion is that the appellant made an honest mistake - he did what he undertook to do but he did it imperfectly.*

85 *Even assuming that the appellant had some kind of a "duty" in this case (which I have already found he did not), without deciding the parameters of s. 1(c)(i), on this record, I am prepared to say that an honest mistake provides an answer to the charge.*

**Analysis Paragraphs 83-85:** Although the specific case considered in *P.G.* involved supervisory Officers I believe the principles can generally be applied to all allegations of Neglect of duty under the specified sections.

The following passage; "*some element of wilfulness in their neglect or unless there was a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct*" to me, means willfulness i.e. a degree of knowledge and/or intent is required or unless the neglect was egregious or blatant then the offence of neglect of duty is not established.

An honest mistake can excuse or at least significantly mitigate neglect of duty allegations. If a tribunal concludes an honest mistake was made then, in my view the tribunal ought not find an Officer guilty.

## Overview of Allegations

On June 6, 2018 Mr. Hutchinson, the public complainant, came upon a RIDE check being conducted by P/C's Moon, Foote and Kirkconnell. P/C Foote approached Mr. Hutchinson and could smell fresh marijuana coming from within his vehicle. Mr. Hutchinson was arrested for possession of marijuana as it remained an offence in June of 2018.

P/C Foote is a female Officer so P/C Moon conducted the search of Mr. Hutchinson incident to arrest. No marijuana was found on Mr. Hutchinson's person and he was seated in P/C Foote's cruiser. Officers searched Mr. Hutchinson's vehicle and did not find marijuana. P/C Foote and P/C Moon returned to P/C Foote's cruiser. When they opened the door they could smell fresh marijuana and formed the opinion that the marijuana was either in the back seat of the cruiser or on the person of Mr. Hutchinson.

Mr. Hutchinson stepped out of the cruiser and P/C Moon conducted a second search of Mr. Hutchinson. Versions of events diverge at this point. P/C Moon testified that during the second frisk search he saw the baggy containing the marijuana in the waistband of Mr. Hutchinson's pants. Mr. Hutchinson testified he had positioned the baggy in his groin area between his thigh and scrotum and that P/C Moon had pulled out his underwear and pants and reached in to retrieve the baggy from his groin area.

P/C Moon gave the baggy to P/C Foote who had been standing nearby. P/C Foote maintained custody of Mr. Hutchinson from this point forward and P/C Moon had no further contact with him. P/C Moon continued RIDE checks with P/C Kirkconnell until being dispatched to an unrelated call for service.

### **Issue:** Strip Search

The Supreme Court of Canada in *R. v. Golden* defined a strip search as having occurred when the following has taken place:

*“the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments”.*

Mr. Hutchinson described his shirt being raised up to his armpit level, his pants being unbuttoned, his pants and undergarments being pulled from his body in a manner that would have somewhat exposed his genitals or buttocks, and P/C Moon reaching into his pants to retrieve a baggy concealed between Mr. Hutchinson scrotum and thigh. By definition any one of these actions and certainly when combined would constitute a strip search.

## **Issue:** Credibility and Reliability of a Witness

Essentially my ultimate findings in this matter will be largely based of the credibility and reliability of two witnesses, P/C Moon and Mr. Hutchinson.

I will begin my analysis by stating that the issue at hand is the conduct of P/C Moon and evidence related to allegations on the Notice of Hearing. There were a number of issues raised in evidence and submissions that spoke to the actions of others that are not directly related to the misconduct allegations before me.

I consider credibility, from a lay person's perspective, to be when a witness presents that they sincerely believe they are speaking the truth. Reliability relates to the actual accuracy of their testimony. In determining this, I consider a witness's ability to accurately observe, recall and recount the events in issue. A credible witness may give, in some cases, unreliable evidence.

In assessing credibility I turn my mind to and was guided by the established tenets outlined in jurisprudence that I have learned through training and experience. I am guided by the established principles.

Not specifically submitted I am familiar with and will consider the often cited case of *Faryna v. Chorny*<sup>15</sup> from which the *O'Halloran* test was derived:

*The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of 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.*

### **P/C Moon**

P/C Moon was not required to testify in his own defence but chose to do so. Part of the allegations against him included that his notes were sparse in relation to his involvement in the investigation of Mr. Hutchinson. P/C Moon relied upon independent recollection as well as the notes that he did make.

P/C Moon answered all questions from his counsel, the prosecution and the public complainant in a forthright manner without evasion or apparent equivocation. P/C Moon was professional and respectful throughout his testimony. There were times where P/C Moon showed displeasure in himself for not having completed his notes for this and another unrelated incident.

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<sup>15</sup> *Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171 (B.C.C.A.),

P/C Moon explained that he was involved in a particularly troubling and distinctly visually and otherwise gruesome occurrence where a man committed suicide by dousing himself in gasoline and setting himself on fire. P/C Moon had conversation with the victim before he was transported to the hospital and later died. As P/C Moon testified about this incident significant emotion surfaced. P/C Moon's reaction to recalling this event was genuine, spontaneous and was clearly unexpected. When P/C Moon explained that he forgot to revisit his notes regarding Mr. Hutchinson's matter and an unrelated investigation it could not have been more unaffected or believable.

P/C Moon denied pulling Mr. Hutchinson's shirt up under his armpits. P/C Moon denied pulling up, or out, on Mr. Hutchinson's underwear, P/C Moon denied seeing Mr. Hutchinson's underwear, and P/C Moon denied reaching into Mr. Hutchinson pants to retrieve the baggy. P/C Moon was steadfast and consistent as to how he found the baggy in Mr. Hutchinson's waistband. P/C Moon seemed fully aware that if he searched Mr. Hutchinson on the side of the road as was alleged it would have been improper. P/C Moon testified he never searched Mr. Hutchinson the way it had been alleged nor had he ever or would he conduct such a search.

Although his notes were sparse and lacked many important details, P/C Moon testified they were made at the time, at the scene, on the side of the road. Page 72 of P/C Moon's notes described at 01:52 "marijuana located baggie in front waistband." I consider this to represent truthfulness as to where P/C Moon found the plastic bag. When considering the shortcomings and much missing important information in P/C Moon's notes it would have been showing incredible foresight for him to have written this entry for any disreputable purpose i.e. to cover up an improper strip search.

P/C Moon made statements that were not necessarily favorable to himself and agreed, for example, that his sparse notes could be problematic. P/C Moon answered questions from Mr. Hutchinson, the public complainant, regarding unrelated occurrences from the past when he (P/C Moon) did not have to. There was no advantage for P/C Moon to have done so and he seemed to want to provide answers to questions that had lingered in Mr. Hutchinson's mind and to try and set the record straight.

I find, in consideration of all of the circumstances and evidence available to me that P/C Moon's account of his interaction with Mr. Hutchinson on June 6, 2018 was reasonable, probable and believable. I find that a practical and informed person would recognize P/C Moon's version of events to be in harmony with the preponderance of possibilities.

## Mr. Hutchinson

Mr. Hutchinson has suffered two traumatic events in his life that resulted in substantial injuries and have, sadly, left him afflicted with resulting symptoms. Mr. Hutchinson fell down a flight of stairs as a teenager causing a severe spinal injury resulting in chronic pain. In 2017 Mr. Hutchinson suffered a severe head injury resulting in a traumatic brain injury when he was struck in the head with a log while at work. As result of his injuries Mr. Hutchinson has continued to experience symptoms including pain, vertigo, nausea, sweating, dizziness, panic attacks, hallucinations, double vision, blurred vision, attention deficit, confusion, and memory lapses. Mr. Hutchinson agreed that his symptoms had been mistaken for intoxication in the past as they can, in fact, make him appear intoxicated.

Mr. Hutchinson has undergone medical procedures and has been prescribed medication as part of his treatment regime. In August of 2017 Mr. Hutchinson was prescribed cannabis. Mr. Hutchinson's medical challenges do not by any means impugn his credibility and reliability. Some of the long term symptoms and results of his injuries may inform his perspective.

Mr. Hutchinson said that not long before this incident he had reported concerns to the WSIB about his continued driving because he was seeing things and seeing double. On June 6, 2018 Mr. Hutchinson testified that as he approached the RIDE check he began to experience symptoms including dizziness, lack of focus, and anxiety triggered by the flashing police lights.

Mr. Hutchinson testified that he was arrested and eventually charged with impaired operation and possession of cannabis. Following his first arrest Mr. Hutchinson described being searched by an Officer he believed was P/C Moon but his vision was blurry so he is not sure who searched him. Mr. Hutchinson stated the Officer went into his pockets, lifted his shirt, but not much, and patted around his waistline before putting him in a cruiser. Mr. Hutchinson said P/C Kirkconnell was present at this time. P/C Kirkconnell testified he had no interaction with Mr. Hutchinson and was not near him at any point that he could recall. P/C Moon corroborated that P/C Kirkconnell did not participate at all with the search of Mr. Hutchinson's person.

Mr. Hutchinson testified that P/C Foote returned to the cruiser where he was sitting and introduced P/C Moon. Mr. Hutchinson described being physically held by P/C Moon and P/C Kirkconnell and a second search was conducted. Mr. Hutchinson testified at one point that he saw "a whole pack" of Officers behind P/C Moon and P/C Kirkconnell but explained he was seeing double and may have been mistaken. P/C Kirkconnell and P/C Moon testified that P/C Kirkconnell did not participate in either search of Mr. Hutchinson and had no physical contact with him. P/C Moon testified that Mr. Hutchinson was handcuffed to the rear during both searches.

Mr. Hutchinson said that P/C Moon then pulled up his shirt and pulled out his pants and boxers and looked down inside his boxers. P/C Moon is then said to have undid Mr. Hutchinson's

pants and raised his shirt to chest level just below his armpits. P/C Moon then pulled Mr. Hutchinson's boxers straight out from his body and looked down his pants with a flashlight. He said that P/C Moon saw a baggy, reached into his shorts and pulled it out. Mr. Hutchinson said Sgt. McNichol, a female Officer, was watching all of this and he felt the police were intent on stripping him. P/C Kirkconnell and P/C Moon did not recall seeing Sgt. McNichol present while Mr. Hutchinson's vehicle or his person was being searched and both Officer believed Sgt. McNichol arrived toward the end of their RIDE checks. P/C Moon denied searching Mr. Hutchinson in the manner it was referred to. P/C Moon testified that when Mr. Hutchinson exited the cruiser his shirt was raised slightly and when P/C Moon checked the waistband he saw the baggy. P/C Moon strongly denied reaching into Mr. Hutchinson's pants.

Mr. Hutchinson remained with P/C Foote for further processing.

Mr. Hutchinson explained that he did not mention the search or express concerns about it as he felt like he was raped and did not want to talk about it. He said the first time he was able to talk about it with anyone was when he spoke to OIPRD investigators. He explained that since the incident he had been diagnosed with PTSD and that if he see's Officers or a police vehicle it can trigger a panic attack. Mr. Hutchinson described being subjected to continued extraordinary harassment by the OPP and gave the example of RIDE checks outside of his house.

Mr. Hutchinson was employed as a park warden when he suffered the head injury in 2017. He indicated that his boss, the park superintendent, "had a badge" and used it to cover up what had happened to him. Mr. Hutchinson testified that he had, in the past described the Huron OPP as "running rogue" and clarified that only some Officers at that detachment are rouge. Toward the end of his testimony Mr. Hutchinson made a general statement that he did not understand why "bad guys have badges." In exhibit 11, on page three of his complaint to OIPRD, Mr. Hutchinson wrote: "*these are the Huron county OPP and they make up their own rules...*" These statements gave me pause to consider if Mr. Hutchinson held some animus toward people in authority "with badges" and how it might inform my assessment of credibility and reliability. If a predisposition and degree of mistrust in persons in authority with badges was held by Mr. Hutchinson it could have affected his perceptions and consequently his reliability.

Mr. Hutchinson explained that he felt like he was "raped" and he could not speak about what had happened to him until a year later with OIPRD investigators. I draw no conclusion from the following observation as no specific medical or other expert evidence was called that would inform me as a lay person to arrive at a conclusion. On page two of exhibit 11, Mr. Hutchinson's OIPRD complaint stamped August 3, 2018, approximately two months following the interaction with P/C Moon et al. Mr. Hutchinson wrote: "*The OPP searched my car and found nothing and then searched me and found a plastic bag that was tucked into my pants that contained a small amount of Cannibas (sic) which they confiscated.*"

Mr. Hutchinson explained his reasons for not disclosing the strip search allegation was trauma informed; that is, it was too traumatic for him to talk about. I have over 30 years police experience, the majority of which was spent investigating major crimes and homicides. Based on experience and training, certainly not as an expert, I would not expect a traumatized person to have used a specific term like the word “tucked” as a means of avoiding an upsetting memory described as “rape.” I find it more likely than not that a traumatized person would not have specified by using a word like “tucked.” I am not questioning the way Mr. Hutchinson feels but I do question the validity and reliability of the memory from which his feelings were derived. There is no evidence upon which Mr. Hutchinson should have been made to feel like he was “raped” based his recollection that an Officer reached into his pants. This is especially true when Mr. Hutchinson indicated during this tribunal that he would have complied with a strip search had it been done at the detachment. The act is either traumatizing or it is not. I cannot see how a change of location would completely mitigate the trauma described by Mr. Hutchinson as “rape.”

In exhibit 11 Mr. Hutchinson summarized four areas of concern on page three. Mr. Hutchinson’s concerns were that he was not given the opportunity to produce identification, that he was ignored when he told Officers he had a prescription for cannabis, that Officers ignored his explanation of having a brain injury, that he was driven far away which caused him pain and discomfort. There is no mention or even a hint of any search concerns.

Mr. Hutchinson presented as a well-spoken person who has been dealt some difficult challenges in life due to a workplace injury and previous accidental injuries. With respect to credibility, I find that Mr. Hutchinson presented that he believes the search happened as he described which would have constituted a strip search. The inconsistencies outlined render his evidence unreliable. I have considered probability versus improbability of described events and have asked myself if certain aspects of testimony were reasonable. For example:

- Mr. Hutchinson’s claim he was held by P/C Kirkconnell and P/C Moon. Both Officers were clear, P/C Kirkconnell did not interact with speak with or have any physical contact with Mr. Hutchinson. Mr. Hutchinson was apparently handcuffed to the rear. There would be no advantage for the Officers to have been untruthful about this explanation.
- Mr. Hutchinson described several more Officers being present at one point but stipulated he was not certain as he was seeing double. The evidence is clear that Mr. Hutchinson was in the presence of three OPP Officers.
- Mr. Hutchinson made assertions unsupported by evidence such as his suggestion the Officers were intent on stripping him and to take off his clothes.
- Mr. Hutchinson described extreme harassment he had suffered since the incident without providing any evidence or specific examples.
- Mr. Hutchinson felt he was “raped” and that he was going to “end up in the ditch” at the hands of Officers. I accept that Mr. Hutchinson felt this way. I do not find that any

evidence existed upon which a practical and informed person would similarly conclude that the behavior of P/C Moon and other Officers created an environment where Mr. Hutchinson perceived he was raped or was in imminent danger. In essence I accept Mr. Hutchinson's description of how he felt but, based on the evidence, I do not understand why he felt this way. I do not find that a practical and informed person would readily recognize Mr. Hutchinson's perceptions as reasonable or evidence based.

For reasons stated I find Mr. Hutchinson's evidence was generally credible in that I find he believed what he said to be true. For reasons outlined I do not find Mr. Hutchinson's evidence reliable on salient points at critical times related to the allegations against P/C Moon.

The credibility of other witnesses was not challenged specifically nor was it at issue.

**Issue:** Standard of Proof

It is well established that the standard of proof in *Police Services Act* hearings is one of clear and convincing evidence. From training and experience I am aware the courts did not enter into a detailed analysis defining what clear and convincing evidence means to the lay person. The general notion identified was that it falls somewhere between the standards of the balance of probabilities and beyond a reasonable doubt.

To me clear and convincing means the evidence upon which I arrive at a finding must demonstrate that an allegation is substantially more likely to be true than false; that is to say evidence which is clear, convincing, reliable, and persuasive.

Count One - Neglect of Duty

The particulars of allegations states:

*It is alleged on or about June 6, 2018 while on duty, that P/C Moon committed the following Neglect of Duty:*

- *Failed to adhere to the OPP, Police Orders 2.43 Search of Person, with respect to the second search of Mr. Hutchinson*

**Analysis:** This aspect of the allegation was referring to the contention that P/C Moon conducted a strip search of Mr. Hutchinson. I do not accept that Mr. Hutchinson's description of the second search conducted by P/C Moon is reliable. P/C Moon denied doing anything that would constitute a strip search. I do not find that a strip search, in any form, took place.

The evidence was considerably short of clear, convincing that P/C Moon breached OPP orders

or policy<sup>16</sup>.

- *Failed to adhere to the OPP, Police Orders 2.43 Search of Person, as you did not make adequate notes of the searches of Mr. Hutchinson.*

**Analysis:** Police Orders states:

*“In all instances when a uniform member searches a person for any reason, the grounds for the search and its results shall be fully documented in the uniform member’s OPP notebook”*

P/C Moon made approximately 6-8 lines of notes relating to Mr. Hutchinson; three lines related to the search. P/C Moon suggested, while sparse, his notes met the minimum requirement according to policy i.e. the grounds and the results. I disagree with this suggestion. P/C Moon conducted two searches of Mr. Hutchinson. The first, immediately following Mr. Hutchinson’s arrest by P/C Foote and the second, sometime after the arrest when a search of Mr. Hutchinson’s vehicle was completed. Further observations of the diminishing detectable odour within Mr. Hutchinson’s vehicle and odour detected in the police cruiser were made. These were just some of the significant points absent from P/C Moon’s notes. I know from training and experience that the assertion by an Officer that he/she has an independent recollection of a series of significant points not recorded in their notes can, as suggested by Ms. Brabazon, be problematic in court.

P/C Moon explained his method of note taking where he records scratch notes directly into his notebook and then summarizes later with more detail. I agree with the suggestion that this is a more efficient and certainly less problematic manner of keeping notes than to write scratch notes on separate pieces of paper. P/C Moon had examples of this toward the end of his shift on June 6, 2018 on an unrelated matter. There was no evidence nor suggestion that P/C Moon ever made poor notes or had note taking deficiencies brought to his attention. On the contrary, exhibit 15 is an example of a Crown Attorney offering praise, for, amongst other items, P/C Moon’s note taking abilities.

P/C Moon explained that after dealing with Mr. Hutchinson he became involved in a particularly troubling traumatic event involving a suicide. P/C Moon worked about 14 ½ hours and at the completion of his shift he forgot to summarize his notes regarding Mr. Hutchinson’s matter and another unrelated matter. He did not turn his mind to these matters after dealing with the particularly difficult suicide investigation. I accept P/C Moon’s explanation for why he did not complete his notes satisfactorily.

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<sup>16</sup> Exhibit 9 - OPP Police Orders 2.43

*P.G. v. Ontario* as well as *Gottschalk v Toronto Police Service* make it clear that I must consider whether there is an element of willfulness regarding P/C Moon's neglect to complete his notes and whether it crossed the line from a performance concern to misconduct. Jurisprudence further makes it clear that an honest mistake is an answer to the offence of neglect of duty.

I have accepted P/C Moon's explanation as to why he forgot to complete his notes. By all accounts this is an isolated incident and does not cross the line from a performance concern to misconduct. The effects of trauma exposure on emergency responders has been well documented and has received significant attention in recent years. Employers, including the OPP have gone to great lengths to appropriately recognize and support employees who struggle due to exposure to trauma. I cannot imagine people in the communities we serve finding it acceptable to tell an Officer who saw and experienced what P/C Moon did at the suicide call that it does not matter, that we do not care, and we do not accept that it took his mind off of other tasks like completing his notes from earlier in his shift; when it is clear that it did.

P/C Moon did not complete his notes satisfactorily. I consider it to be an anomaly to his standard practice and therefore a performance issue rather than misconduct. Further, I accepted P/C Moon's explanation as to why he did not complete his notes and consider it an honest mistake rather than misconduct.

#### Count Two - Discreditable Conduct

The particulars of allegations states:

*It is alleged on or about June 6, 2018 while on duty, that P/C Moon conducted a strip search of Mr. Hutchinson in a manner that was unreasonable.*

*P/C Moon knew or ought to have known his actions were discreditable.*

**Analysis:** Mr. Hutchinson described a search conducted by P/C Moon in the second instance that would meet the definition of a strip search. P/C Moon steadfastly denied committing any such acts described by Mr. Hutchinson that would constitute a strip search. This issue is one of credibility and reliability of Mr. Hutchinson's and P/C Moon's evidence. I have addressed this elsewhere. I have found Mr. Hutchinson's evidence unreliable. I do not find that a strip search, in any form, took place.

#### **PART IV: DECISION**

For reasons outlined above I find an absence of evidence meeting the clear and convincing standard to establish misconduct in relation to both counts. I find P/C Moon not guilty of neglect of duty and not guilty of discreditable conduct.



K.M. (Mike) Bickerton  
Superintendent, OPP Adjudicator

Date electronically delivered: March 23, 2021

## Appendix A

The following exhibits were tendered during the hearing:

- Exhibit 1: Delegation - Adjudicator Superintendent Taylor (Comm. Carrique)
- Exhibit 2: Delegation – Adjudicator Superintendent Bickerton
- Exhibit 3: Designation - Prosecutor, Inspector Doonan
- Exhibit 4: Designation – Prosecutor, Inspector Young
- Exhibit 5: Designation - Prosecutor, A/Inspector LePage
- Exhibit 6: Designation - Prosecutor, All Officers
- Exhibit 7: Designation – Prosecutor, A/Inspector Fournier
- Exhibit 8: Designation – Prosecutor, Ms. Brabazon
- Exhibit 9: Police Orders – Section 2.41 and 2.43
- Exhibit 10: P/C Moon notes
- Exhibit 11: OIPRD complaint (3 Aug 2018)
- Exhibit 12: DRE Influence Report
- Exhibit 13: CFS Toxicology Report
- Exhibit 14: OIPRD complaint (19 Jun 2019)
- Exhibit 15: email from Crown Attorney to P/C Moon
- Exhibit 16: Defence Authorities
- Exhibit 17: P/C Moon redacted notes
- Exhibit 18: Audio recording of radio calls
- Exhibit 19: Prosecution Authorities