

**IN THE MATTER OF AN ARBITRATION PURSUANT TO  
ss. 124 (3) of the POLICE SERVICES ACT, R.S.O. 1990, c. P.15 (Rights Dispute)**

**BETWEEN:**

Toronto Police Association  
(The "Association")

**AND**

Toronto Police Services Board  
(The "Board")

AND in the matter of the individual grievance of John Oosterhof

**ARBITRATOR:** William A. Marcotte

**APPEARANCES:**

**FOR THE ASSOCIATION:**

H. Black, Q.C.  
J. Oosterhof, grievor  
M. Weatherall, dir. of legal serv.  
W. Jackson, Toronto Police Assn.  
and others

**FOR THE BOARD:**

M. Hines, counsel  
D. Matzanke, articling student  
M. Chen, L.R. analyst  
D/Sgt. E. Reilly  
V. Trasmundi

Hearings held in Toronto on March 4 and 12; April 29; May 10; June 16 and July 28, 1999.  
Written submissions received by September 8, 1999.

Interim award issued April 9, 1999.

## AWARD

In the Interim award dated April 9, 1999, I state, relevant for our purposes, as follows at page 2:

The grievance before me, dated June 17, 1998 claims that the grievor, John Oosterhof, "has been denied legal indemnification contrary to the provisions of the collective agreement." The relevant provisions of the collective agreement are as follows:

### Article 23 - LEGAL INDEMNIFICATION

- 23:01 Subject to the other provisions of this Article, a member charged with but not found guilty of a criminal or statutory offence, because of acts done in the attempted performance of [sic] good faith of his/her duties as a police officer shall be indemnified for the necessary and reasonable legal costs incurred in the defence of such charges.
- 23:02 Notwithstanding clause 23:01, the Board may refuse payment otherwise authorized under clause 23:01 where the actions of the officer from which the charges arose amounted to a gross dereliction of duty or deliberate abuse of his/her powers as a police officer.

Relevant to the purposes of this Interim award, the grievor was charged with committing an assault contrary to the Criminal Code. The charge resulted from a recommendation made by D/Sgt. E. Reilly who had conducted an investigation of a complaint filed on February 4, 1991 by Mr. V. Trasmundi. Mr. Trasmundi's complaint stemmed from his arrest by the grievor and his partner, Const. M. Ferry, on January 29, 1991. During the course of his investigation D/Sgt. Reilly, among other things, reviewed a video tape of the grievor, Const. Ferry and Mr. Trasmundi in the "sally port" (i.e., an area that police officers and those they have arrested go through on entering a police station) of Division 51. The grievor was acquitted of the charge of assault in his criminal trial in January 1993. Notwithstanding the acquittal, the Board refused to indemnify the grievor for his legal costs in connection with his trial, amounting to some forty-two thousand dollars.

I also state, relevant to the merits of the grievance before me, as follows at page 17:

. . . I find . . . that the transcript of the grievor's criminal trial in the instant case is relevant to the subject-matter in dispute before me and, therefore, while hearsay in nature, is admissible in evidence at least to the extent that it must be considered by me for purposes of determining the grievance at hand. I also find that the grievor's acquittal and the transcript of his criminal trial are *prima facie* evidence of a

performance in good faith of his duties as a police officer *Re Metropolitan Toronto Board of Commissioners [of Police and Metropolitan Toronto Police Association (February 23, 1989) unreported (Shime)]* which evidence is subject to rebuttal evidence.

D/Sgt. Reilly's evidence is that on or about October 28, 1991, "the investigation I was given concerned specifically an incident at fifty-one Division in the sally port and it was explained to me this matter was captured on videotape." He was not assigned to investigate any other portion of Mr. Trasmundi's February 4, 1991 complaint concerning his arrest on January 29, 1991. The copy of Mr. Trasmundi's complaint before me, while incomplete, makes reference to the manner of his treatment by the grievor and Const. Ferry at the time of his arrest, approximately 2:00 a.m., in the Mt. Pleasant/Eglinton area on January 29, 1991. The portion of the complaint before me makes no reference to the sally port incident and D/Sgt. Reilly testified there was no reference to it in the complaint.

In the course of his investigation, D/Sgt. Reilly reviewed Mr. Trasmundi's record of arrest which indicates, as reported by the grievor, three charges against him: "impaired driving"; "failure to provide breath sample", and, "assault with intent to resist arrest", all three charges (of which Mr. Trasmundi was later acquitted) arising from the encounter in the Mt. Pleasant/Eglinton Avenue area. The arrest record also indicates, "No", in regard to "complaint received" from Mr. Trasmundi. Under the heading, "medical notes (physical condition - injuries - mental history and specific medical problems or medication to be taken)", it is written that Mr. Trasmundi "claims heart [and] kidney problems, no other apparent injury." Also, the arrest record indicates that neither an "injury report" nor a "force report" was submitted by either Const. Ferry or the grievor. A "force report" is to be submitted pursuant to regulations by a police officer in the following circumstances relevant to our purposes:

#### 4.8.4 REPORT OF FORCE

A member who, during the performance of duty, uses force which results in an injury being sustained to a person, or where a complaint is then made or may later be made respecting the use of force, shall forthwith:

- notify his Duty Staff Sergeant

- file a report, in triplicate, of all relevant circumstances of the incident for his Unit Commander, who shall immediately forward one copy to his (Staff) Superintendent and one copy to the Chief of Police, who shall report the incident to the Board and the Public Complaints Investigation Bureau.

An "injury report" is to be submitted when:

#### 4.8.5. REPORT OF INJURY

A member who, during the performance of duty, takes into custody a person who has sustained an injury other one referred to in Section 4.8.4, shall forthwith:

- notify his Duty Sergeant
- file a report, in triplicate, of all relevant circumstances of the incident for his Unit Commander who shall immediately forward one copy to his (Staff) Superintendent.

D/Sgt. Reilly also obtained the grievor's and Const. Ferry's memo books of their work shift on January 29, 1991. The memo book is filled out in accordance with regulations by police officers and, pursuant to regulation 4.14.2 ". . . shall record such data as required in accordance with established procedures [and] details of any matter which he deems necessary in the performance of his duties." There is no mention made of the sally port incident in either the grievor's or Const. Ferry's memo book, the latter's book clearly reflecting that Const. Ferry had copied what the grievor had written in his concerning Mr. Trasmundi's arrest.

When D/Sgt. Reilly asked the grievor for a statement concerning Mr. Trasmundi's complaint, the grievor, as was his right to do so, did not provide one. In an earlier statement of June 7, 1991, the grievor states, "On the advice of my counsel I have nothing to say." Const. Ferry, however, had provided a statement on June 7, 1991, which includes the following, relevant to our purposes:

Both the accused and [the grievor] were in my presence during the course of the arrest and processing of the defendant, and at no time was the defendant punched at any time. At no time did the defendant request to see a doctor or specific lawyer.

D/Sgt. Reilly testified that Const. Ferry's statement was not useful because it did not specifically address the sally port incident.

D/Sgt. Reilly said that in the course of his investigation he also contacted Mr. Trasmundi by telephone and when asked for a statement concerning the sally port incident, Mr. Trasmundi had said that he "didn't want to cooperate" and did not provide a statement to D/Sgt. Reilly.

In a statement regarding Mr. Trasmundi's complaint, Sgt. Patterson who was the "booking" sergeant at 51 Division on January 29, 1991 states, in effect, that he did not observe any of the sally port incident. There is also no mention of Mr. Trasmundi in Sgt. Patterson's memo book.

On the basis of his investigation, which included review of Mr. Trasmundi's medical information relevant to the time in question but which did not produce any information from the grievor, Const. Ferry or Mr. Trasmundi that informed the issue as to what had occurred in the Division 51 sally port on January 29, 1991, D/Sgt. Reilly, on January 6, 1992, charged the grievor with assault under the Criminal Code. The charge record states, relevant to our purposes, as follows:

On the 29<sup>th</sup> of January 1991, Vincenzo Trasmundi, was arrested by [the grievor], and his partner, constable Ferry. He was charged with impaired driving, fail to provide a breath sample, and assault to resist arrest.

The complainant, Trasmundi was transported to 51 division, for a breath test and while he was waiting in the sally port at 51 division, prior to being admitted into the booking hall, the complainant Trasmundi, was kned in the groin by [the grievor].

At the time of this assault, Trasmundi was handcuffed, with his hands behind his back. This incident was recorded on videotape.

D/Sgt. Reilly who did view the videotape while testifying before me, testified that "my belief, at that time, was that I had reasonable and probable grounds to lay the charge of assault [against the grievor]." It was his testimony that after having reviewed "many times, long and short versions" of the videotape of the January 29, 1991 incident in the sally port, it was primarily on the basis of what he observed on the videotape that led him to charge the grievor; "What I saw was essentially an assault".

In regard to the matter of the grievor's actions towards Mr. Trasmundi on January 29, 1991 as means of defending himself and taking physical control of Mr. Trasmundi, D/Sgt. Reilly testified that the

grievor's training would include standing behind the prisoner and holding their handcuffed hands and other strategies besides kneeling a person in handcuffs.

The videotape recording before me starts at 2:16:47 a.m. on January 29, 1991, some sixteen minutes after Mr. Trasmundi had been arrested by the grievor and Const. Ferry. When the recording begins, the grievor, Const. Ferry and Mr. Trasmundi are standing on the landing at the top of a short staircase. The size of landing leaves little room for another person, if any. There is a "Notice" on the wall facing the staircase. On the left side of the landing is a metal guard rail. On the right side of the landing is the doorway (not visible on the recording which shows a wall) that enters directly into the booking room. The location of the video recorder is such that it is almost directly on a line with the wall that has the Notice on it and at a distance where the entire staircase is visible. That is, the three individuals are being recorded from the back, from a distance estimated to be 15 to 20 feet away by Sgt. Patterson in his testimony at the grievor's trial, i.e., close enough that the word "Notice" is discernible and words on it, while not legible, are easily seen as individual markings. Mr. Trasmundi is standing facing the notice, almost directly in front of it. Const. Ferry is on his left, on the guard-rail side, more or less parallel with Mr. Trasmundi. The grievor is standing behind Mr. Trasmundi and to Mr. Trasmundi's right, i.e., towards the wall-side of the landing. The left side of Mr. Trasmundi's body and his head are clearly visible, while his right shoulder and right side are not visible due to the grievor's location.

At 2:16.47 a.m., Const. Ferry has his right hand on Mr. Trasmundi's left arm, which is handcuffed behind his back to his right arm. Const. Ferry is reading aloud the Notice which is to the effect that the sally port is under visual and audio surveillance. The grievor is not in physical contact with Mr. Trasmundi; he is holding a briefcase in his right hand and his left arm is by his side. While Const. Ferry continues reading, at 2:16:50, he drops his hand from Mr. Trasmundi's arm. Mr. Trasmundi starts to speak, beginning with the phrase, "I . . . to see the sergeant", and while all his following words are not discernible because he is speaking in a low voice and there is some background noise which sounds like a garage door closing, the words "to complain" are discernible as are words in reference to his treatment at the time of his arrest. At 2:16.56, Mr. Trasmundi stops speaking. Const. Ferry has also stopped speaking and his head has turned from the Notice and he is now looking in the direction of Mr. Trasmundi and the grievor. Mr. Trasmundi moves slightly to his right

and, while his head and body are no longer visible due to the grievor's position, his feet can be seen to move through roughly some forty-five degrees. At 2:16:57, just fractions of a second before 2:16:58, Mr. Trasmundi starts speaking again. His first two words are, "Never mind", spoken in a different voice than his earlier remarks; they have a somewhat truculent tone and are followed by unintelligible remarks because he has lowered his voice. Just after Mr. Trasmundi can be heard to say, "Never mind", the grievor lifts his left arm and moves slightly to his own left. The grievor can be seen to pause and to adjust his stance. Then, with apparent force, he abruptly raises his right leg and delivers a knee into Mr. Trasmundi's body at 2:17:00 a.m. In so doing, the grievor moves slightly to his left and Mr. Trasmundi's head is again visible, facing in the direction of the wall. Mr. Trasmundi's upper body and head bend forward. The grievor turns to his right, placing his left arm around Mr. Trasmundi's neck and Mr. Trasmundi hits the wall. The grievor hands Const. Ferry his briefcase from his right hand, grabs hold of his own left hand, and pushes Mr. Trasmundi through the booking room door. At 2:17:08 the grievor moves off camera, through the doorway. At 2:17:09 the booking room video recording shows the grievor's arms and hands still to be around Mr. Trasmundi's neck. He walks Mr. Trasmundi to a bench and sits him on it at 2:17:10. Just as Mr. Trasmundi is being seated, the booking sergeant enters from a doorway on the other side of the room and the grievor is heard to speak, ending with the phrase, "and resisting".

After the grievor had been charged with assault, Const. Ferry provided another statement, dated January 31, 1992, regarding Mr. Trasmundi's arrest. Relevant for our purposes, the difference between his January and June statements is that in the latter, Const. Ferry makes no reference to his June 7, 1991 statement, "At no time did the defendant request to see a doctor or a specific lawyer." However, some time after January 31, 1992, Const. Ferry, who had by this time reviewed the videotape, did provide the following statement relevant for our purposes:

When we arrived at 51 Division, the accused was taken out of the cruiser and led up to the door leading to the sally port. We then entered the sally port and led the accused to the top of the stairs located outside the booking room. My partner and I then stopped on the top stair landing where I read a metal plate and its content to the accused. The plate explains to the accused that he is on camera and is under visual observation. This instruction is read to accuseds [sic] before they are paraded according to Force Policy.

While reading the sign the accused started to make comments to my partner. I stopped reading until he would listen to what I would say. The accused continued to talk and I then looked at him waiting to see if he would stop talking. I then started to glance back at the sign, I then noticed from the corner of my eye that my partner had to take physical control of the accused. We then entered the booking hall.

Following a pre-trial conference on March 6, 1992 and a preliminary inquiry on May 1, 1992, the grievor was indicted on May 25, 1992 for assault on Mr. Trasmundi. His criminal trial occurred over three or four days, commencing on January 4, 1993. At his trial, the grievor explained why he had kneed and placed a headlock on Mr. Trasmundi on January 29, 1991. The transcript indicates, as follows, at pp. 136-7:

... I advised Constable Ferry [who was reading the "Notice at the landing in the sally port], maybe he should stop and wait until the sally port door had closed properly as there was a considerable amount of background noise. It was during that time while I was speaking to Constable Ferry that Mr. Trasmundi, who was now standing in front of me, turned around and faced me. Mr. Trasmundi then spat on me. I pushed Mr. Trasmundi up against the wall and I attempted to knee him in his thigh and I was unsuccessful. I believe I hit Mr. Trasmundi closer to his hip area.

Q. What was your reason for kneeing, officer?

A. To defend myself again. I did not underestimate Mr. Trasmundi at this point.

Q. That very moment in time when he spat upon you, what was your concern?

A. My concern was that he would spit on me again or he may even push me backwards off the steps.

Q. And how do you expect he would achieve this?

A. He could either lean up against me or he could by taking a step push me backwards.

Q. Was Mr. Trasmundi saying anything in the sally port area before he spat [sic] upon you?

A. He was saying something, exactly what I don't know, although there was a considerable amount of profanity used.

Q. And the tone of voice he used when speaking in the sally port area prior to the spitting?

A. Aggressive

The grievor's testimony at his trial, during which he was shown a videotape of the January 29, 1991 sally port incident, is that he was trained to knee someone "in the thigh area. Apparently there is a nerve group there and it is painful . . . . There is no injury. It's used to incapacitate, not to injure." The grievor said that he placed Mr. Trasmundi in a headlock because, "That way I could bring his

head up to my chest, control his movement in that respect. There is always a possibility that he could bring his head backwards and headbutt my face or headbutt me in the chin." In cross-examination, the grievor said that he chose to knee Mr. Trasmundi because he thought "it was my only option" at that time. While he made no mention of having done so in examination-in-chief, in cross-examination the grievor said, "That's correct", in response to the question, "Is it correct that the only person that you told that to actually [i.e., being spit upon by Mr. Trasmundi] was your partner?" Also in cross-examination at his trial, the grievor disagreed, when it was put to him, that Mr. Trasmundi, in turning around to face him, did not turn all the way around, i.e., did not turn his body so as to be completely facing him. In re-examination, the grievor testified that it was "a split second" after Mr. Trasmundi had spit on him that he had reacted by way of kneeing Mr. Trasmundi.

In specific regard to the sally port incident of January 29, 1991, the grievor's testimony before me, in examination-in-chief and cross-examination, is that Mr. Trasmundi spat on him and that he kneed him and placed him in a headlock in order not to be spat on again and to take physical control of Mr. Trasmundi. Relevant for our purposes, the grievor's testimony before me on the salient issues at hand is in accord with the testimony given at his trial.

In his testimony at the grievor's trial, Const. Ferry said, at pages 69-70 of the transcript before me:

Q. And then pick it up from there [i.e., on the landing in the sally port], what did you observe and hear?

A. I started reading the sign. I approximately, maybe two or three sentences or read half the sign and Mr. Trasmundi continued to make comments. He was yelling. I couldn't tell what he was saying, but he was yelling in a loud tone of voice. I believe what he was saying was directed at my partner. I looked at him because I couldn't - - .

Q. . . . And the gist of what he was saying or yelling?

A. I don't recall at that particular moment what he said. I was trying to read the sign. And when he started making those comments I looked over at him, waiting for him to stop so I could do my job and read the sign. And he did stop briefly for about a second and then I turned my head back to continue reading the sign. That's when I heard an altercation beside me. And when I turned around I saw [the grievor] regain physical control of Mr. Trasmundi. First thing I saw when I turned around was [the grievor] holding him in a headlock position. It happened very quickly. And then we entered the booking hall.

Q. I understand that at some point later on you spoke to [the grievor] about what happened there?

A. That is correct. Immediately after leaving the booking hall area we brought the accused to the report room where we intended on processing him, doing all the paperwork as such. I asked [the grievor] what happened to provoke the incident in the sally port .... And [the grievor], his response was "He spat on my jacket."

In cross examination, Const. Ferry said that after informed of Mr. Trasmundi having spit on the grievor he did not make any observations of the grievor's jacket at that point.

Mr. Trasmundi, while summoned to appear at the grievor's trial, did not testify because he left the court before doing so. In his testimony before me, Mr. Trasmundi testified in regard to the events in the sally port on January 29, 1991.

Mr. Trasmundi said, "All three of us were standing there, I'm in the middle. At one point, I turned to my right and said to the officer who beat me up [i.e., the grievor], my exact words, 'I guess you know I'll have to report you to the desk sergeant' in a sarcastic way. He [the grievor] spun me around and kneed me. He brought his knee up, touched my groin and it ended up in my gut. It grazed my groin and [up into] my stomach area." Mr. Trasmundi said that in making his remarks to the grievor in turning to the right, he had turned "only my head, not my full body." He said, "Never, at any time" had he spit at the grievor; "he's twice my height. I could have maybe at his belt buckle." Mr. Trasmundi said that by the time the grievor had spun him around, he did not think he had turned his head far enough to the right to have spit at the grievor. He said that when he was kneed by the grievor, he had "buckled" forward as to fall, and that "they both sort of lifted me up and the door flung open . . . and they sort of flung me through the door", where Mr. Trasmundi ended up "on a wooden bench inside the door." Mr. Trasmundi said that by this time, "I was hurting, I was in no shape to walk", and had said, "I can't breathe, I can't fucking breathe. My objective was to address the person who laid his hands on me," i.e., the grievor. He did not mention to the desk sergeant or anyone else at that time, his physical condition in regard to his arrest or the incident at the sally port. He said that as concerns the desk sergeant, "I felt he wasn't doing anything to stop what was happening to me."

In cross-examination, Mr. Trasmundi said one of his first criminal offences was an armed robbery of a gas station that had been unplanned by himself and three others. His first offence was for

stealing property when he took a car for a joy-ride. His record indicates a propensity to take cars he doesn't own, involvement with prostitutes, and, weapons charges. When he has worked, it was hard physical labour, installing tile and marble. He said the Paradise Riders club he belongs to is not an "outlaw" motorcycle club but, as a member, he is aware the membership includes some narcotic-drug users.

In regard to the sally port incident, Mr. Trasmundi said he was "helped up the stairs because I was in pain" and that his wrists were hurting which, "I had said", while being driven to Division 51. He was sure that one of the officers was reading the sign to him at the top of the stairs while he was standing between the grievor and Const. Ferry. He, at one point, turned his head to the right. He has a clean memory of his remark to the grievor. He said he had not mentioned this at the grievor's preliminary hearing; "I wasn't asked that. I just answered [what he was asked]." When asked if he remembered being asked by the Crown Attorney at the grievor's preliminary trial if he had said anything just before being kneed, Mr. Trasmundi said, "Not in those words. I think he was alleging if I had instigated him or not and I denied it." In regard to having spit at the grievor, Mr. Trasmundi said, "I'd have to look straight up to spit in his face." He denied having spit on the grievor's shirt and added, "I called him a coward at a later time, in the police station". He agreed that in his view, he had been arrested for no reason and that he had been beaten for no reason. He said he had not told the desk sergeant he did not want to go to the interview room with the grievor because he had kneed him but would have, "If I was a masochist." He agreed he had made no mention of having been beaten at the time of his arrest. He said that, in regard to not having mentioned his treatment in the sally port in the booking room, "Nobody took heed . . . It gets to the point where . . . no one is listening, so you just shut up." When asked why there is no mention of the grievor having kneed him in the complaint he had filed, Mr. Trasmundi said, "That was a drop in the bucket of that whole situation. I'm sorry the bigger incident isn't on tape."

The issue to be determined in this award is whether or not the Board properly exercised its ability pursuant to art. 23.02 of the collective agreement, when it refused payment of the grievor's legal costs in his defence of the criminal charge of assault against Mr. Trasmundi in the 51 Division sally port on January 29, 1991. As previously indicated in this award, the grievor's acquittal is *prima facie* evidence of attempted performance in good faith of his duties in the sally port on January 29,

1991, i.e., that he did not, pursuant to art. 23.02, treat Mr. Trasmundi in a manner that was a "deliberate abuse of his . . . powers as a police officer." Therefore, the onus is on the Board to establish on the evidence that the grievor's conduct was not an attempted performance in good faith of his duties but, rather, that his conduct was a deliberate abuse of his powers as a police officer. The standard against which all the evidence before me is to be measured is that of a balance of probabilities, and not the criminal standard of beyond a reasonable doubt which applied in the case of the grievor's criminal trial. As stated in *Re Metropolitan Toronto Board of Commissioners Of Police (Shime) supra* at pp. 7-8:

. . . it is trite to say that the standard of proof in arbitration which is a civil matter differs from a criminal prosecution. In this respect it is useful to refer to the judgment of the Supreme Court of Canada in *Hanes v. Wawanesa Insurance Company* 1963, S.C.R. 154: 36 D.L.R. (2d) 718 where the court said:

"The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases.. The case may be proved by a preponderance of probability, but there may be degrees of probability within the standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion".

See also *Re Metropolitan Toronto Police Services Board and Metropolitan Toronto Police Association (August 12(?), 1995) unreported (Brandt)* where the standard of proof, a balance of probabilities, in civil cases is approved of as being "commensurate with the occasion" and not viewed as an exact precise standard. That case also deals with the matter of onus of proof in terms of which party bears the onus and confirms, at page 17, that the onus of proof in the instant case is properly on the Board.

As concerns the evidence before me, the Board argues, firstly, that it establishes that Mr. Trasmundi did not spit on the grievor in the sally port. In that regard, it acknowledges that there is a short period of time when Mr. Trasmundi's head is not visible but contends that it is highly improbable, given its analysis of the videotape in regard to the timing of Mr. Trasmundi's speaking and the physical requirements of breathing and speech as well as the placement of Mr. Trasmundi's feet, that Mr. Trasmundi had sufficient time to gather spittle in his mouth and project it at the grievor during the period where his head is not visible. The Board argues that I should find Mr. Trasmundi's version of this event to be credible and, hence, find that he did not spit at the grievor. It argues, also, that I should not accept the grievor's version, i.e., that Mr. Trasmundi did spit on him, because it is not credible given the evidence of the videotape not only in regard to the spitting itself but, also, in regard to the videotape and the grievor's and Const. Ferry's evidence of the circumstances appertaining to the sally port incident. Further, the Board urges that I find the grievor's version of the sally port events to lack credibility for reason that his version of the events surrounding Mr. Trasmundi's arrest lack the flavour of being convincing of the truth, based on the evidence of the grievor, Const. Ferry and Mr. Trasmundi in regard to their descriptions of events in evidence before me, including the discrepancies between the grievor's and Const. Ferry's versions of the circumstances and events of Mr. Trasmundi's arrest as well as their version of how their attention was first drawn to Mr. Trasmundi.

Secondly, the Board submits that even if I accept the grievor's version and find that Mr. Trasmundi did spit on the grievor, the grievor's physical responses directed at Mr. Trasmundi were unwarranted. In that regard, the Board argued that the grievor was knowledgeable of techniques through his training that would have protected him from being spit on again which involved less force than he used on Mr. Trasmundi. Thus, it submitted, the grievor used excessive force on Mr. Trasmundi and in so doing, deliberately abused his powers as a police officer.

Section 25 of the *Criminal Code of Canada* states, relevant for our purposes, as follows:

25.(1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law

(b) as a peace officer or public officer . . .

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(3) . . . a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

In regard to s.25 (1), the following is contained in *Martin's Criminal Code, 1999*, cc/68, relevant to our purposes:

. . . it must be shown that the specified person acted on *reasonable grounds* and used *only as much force as was necessary* to achieve that purpose. If the actions of the person exceed the scope of activities authorized or required by law or the force used was more than that which was necessary to achieve that protected purpose, this subsection will not apply to exclude liability.

(Emphasis in original.) Of all the cases submitted, I note that *Re S/Sgt. Allen Magda and Const. Wm. Sheppard and The Board of Inquiry (Oct. 23, 1992) unreported (Ont. Ct.J.)* is particularly relevant to my determinations. In that case, there had been a complaint by a citizen that the "degree of mistreatment and the injuries suffered for the violation that I have committed is not justified" in regard to his treatment by the two above-named police officers. The Chief of Police had dismissed the complaint. However, the Public Complaints Commissioner ordered a Board of Inquiry to hear the citizen's allegations of maltreatment. As a result of the inquiry, S/Sgt. Magda and Const. Sheppard were found "guilty of misconduct in that each had used unnecessary violence" contrary to the Code of Offences set out in regulations under the *Police Act*. The Board of Inquiry decision was the subject matter of an appeal. At p.36 of the decision, the Court, in reference to s.25 (1) and (3) of the *Criminal Code*, asks, relevant to our purposes, as follows:

XV. How should the trier of fact apply those statues to a particular set of facts?

1. *Eccles v. Bourque* (1973), 14 C.C.C. (2d) 279, 281 (B.C.C.A) Robertson J.A. (for majority):

The purpose of s.25 (1) is twofold: it absolves of blame anyone who does something that he is required or authorized by law to do, and it

empowers such person to use as much force as is necessary for the purpose of doing it.

2. *Regina v. Bottrell* (1981), 60 C.C.C. (2d) 211, 218 (B.C.C.A.) [a case submitted by the Association] Anderson J.A.

(4) In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude.

(6) It is the belief of the police officer in the light of all the circumstances that is important.

The quotation in *Re Magda and Sheppard v. Board of Inquiry*, i.e., paragraph 4 of *Re R. v. Bottrell supra*, was cited with approval in *Re Peterborough Community Police Service Discipline Hearing (March 20, 1998) unreported (R.J. Fitches, Sept., O.P.P. Adjudicator)*, a decision in regard to the use of physical force by a police officer in removing three students from a high school dance. See *Re The Metropolitan Toronto Police Services Board and The Metropolitan Toronto Police Association (May 27, 1998) unreported (Jackson)* where consideration is also made of: the circumstances in which physical force was used by a police officer; that physical force used cannot be measured with exactitude, and the belief of the police officer who used the force in those circumstances, for purposes of determining whether or not a police officer had abused his power. The same arbitrator, in *Re The City of Barrie Police Services Board and The Barrie Police Association (July 26, 1994) unreported*, found at p.14 that even where a police officer exercises "bad judgment" or a "mistake", such error does not necessarily lead to the conclusion that the officer was not acting in an attempted good faith performance of his duties, again, in consideration of the circumstances in which the police officer made the decision.

I concur in the approach in the above submitted cases to a determination of whether or not a police officer used excessive force towards a citizen and in so doing, abused his or her powers as a police officer. However, what first must be determined in the instant case is whether or not the grievor had any reason to use force against Mr. Trasmundi in the sally port on January 29, 1991. If I find that

Mr. Trasmundi did not spit on the grievor, and spitting is recognized as an assault as was D/Sgt. Reilly's evidence, then it must be found that the grievor had no cause to use physical force against Mr. Trasmundi and, thus, did abuse his power as a police officer to take and maintain control of an individual in circumstances such as those on January 29, 1991. If I find that Mr. Trasmundi did spit on the grievor, it must then be determined whether or not the amount of force used by the grievor, in light of those same circumstances and in light of the grievor's beliefs relevant to his decided-upon course of action, was excessive bearing in mind that this consideration wants for exactitude. If I find that it was not excessive, the grievance will succeed. If I find that it was excessive, then it must be found that the grievor did abuse his powers as a police officer and, therefore, that the Board did properly exercise its authority pursuant to art. 23.02 of the parties' collective agreement in deciding not to indemnify the grievor for his legal costs at trial.

As to whether or not Mr. Trasmundi did or did not spit on the grievor, what can be observed on the videotape neither corroborates Mr. Trasmundi's testimony that he did not nor the grievor's testimony that he did. Mr. Trasmundi's head is not at all visible in the crucial few seconds prior to the grievor's actions towards Mr. Trasmundi, who, by this time, had moved his feet such that he was facing toward the wall and not towards the Notice. Further, there is a very brief period of time during which Mr. Trasmundi's head is not visible when he is not speaking. That is, given Mr. Trasmundi's silence and the position of his feet, it is possible that he could have spit on the grievor by quickly turning his head through some ninety degrees and then spitting on the grievor. In any event, Mr. Trasmundi's testimony as to his other actions in the sally port are not inconsistent with what can be observed on the videotape. In other words, there is harmony between Mr. Trasmundi's versions of his conduct on the sally port landing and his conduct as observed on the videotape save for the matter of spitting.

In *Re Walbar Canada and United Steelworkers of America, Local 9236 (1997)*, 68 L.A.C. (4<sup>th</sup>) 149 (*Marcotte*), I address the matter of the credibility of a witness at p.162 as follows:

The credibility of a witness is addressed in *Faryna v. Chorny [1952] 2 D.L.R. 354 (O'Halloran J.A.) (B.C.C.A)* at pp. 356-8 as follows:

If a trial Judge's findings of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunity for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, . . . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject this story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Thus, to the extent that Mr. Trasmundi's testimony is in harmony with what is observed on the videotape, the lack of discrepancy leans to the credibility of his version of events, i.e., that he did not spit on the grievor.

There are, however, a number of discrepancies between the grievor's versions of events and what is observed to occur on the videotape. Mr. Trasmundi is not speaking in a loud voice. Care in listening is required even at the times when the background noise has ceased. At times his words are clearly intelligible and at others his words cannot be heard as the volume of his speech drops. When Mr. Trasmundi interrupts Const. Ferry's reading of the "Notice", he states "I . . . to complain to the sergeant as soon as I get in there . . . fucking . . . by that . . ." While Mr. Trasmundi did use a profanity, there is certainly not a "considerable amount" as testified by the grievor. His tone of speech, moreover, is difficult to describe as "aggressive" on this occasion of speaking as the grievor

describes it, but rather, has a tenor more akin to the tone of a normal statement even when the words are not discernible. And, while the grievor testified that Mr. Trasmundi had not said on the sally port landing words to the effect that he would be complaining to the sergeant, this statement is audible and intelligible from Mr. Trasmundi. Moreover, while the grievor's evidence is that Mr. Trasmundi's speech was slurred, where Mr. Trasmundi words are not intelligible it may be due to the lowering of his voice or to slurring of them. However, the words that are discernible are not slurred.

There is another discrepancy between what is observable on the videotape and the grievor's evidence concerning events on the landing. The grievor testified at his trial that Mr. Trasmundi "turned around and faced me" prior to spitting on him. Moreover, in reference to having testified that Mr. Trasmundi had turned to face him, the grievor made it clear in his cross-examination at trial that he meant, turned around completely so as to be fully facing the grievor. The videotape reveals that Mr. Trasmundi's feet have not turned completely towards the grievor, but are facing towards the wall at an angle half-way towards the grievor at the moment the grievor begins to reach towards Mr. Trasmundi, and which reach is the start of the grievor's actions which he testified were in response to having been spit on. That is, Mr. Trasmundi has not turned his body to directly face the grievor.

Further, review of the videotape reveals that as the grievor used his left arm in reaching towards Mr. Trasmundi he moved slightly to his left, which movement blocked Mr. Trasmundi from the videotape recorder, the position of which was well-known to the grievor given his evidence of having been in the Division 51 sally port some 200 times prior to January 29, 1991. Also from observation of the videotape, it can be observed that neither of these actions on the part of the grievor were abrupt. Rather, he moves his arm and body in flowing motions without apparent suddenness as one might normally do in reaction to an unexpected event.

In addition, from the time the videotape begins until the grievor is observed to reach towards Mr. Trasmundi and move to his own left, neither Const. Ferry nor the grievor maintains physical contact with Mr. Trasmundi. While Const. Ferry's right arm is seen to be holding the grievor's left arm at the start of the videotape, Const. Ferry dropped his hand when the grievor interrupts him in his reading of the "Notice". That is, while the grievor's evidence of Mr. Trasmundi's behaviour, i.e.,

an "aggressive" tone of voice and a "considerable amount of profanity", is suggestive of someone who warrants careful scrutiny, the lack of physical contact with Mr. Trasmundi seems at odds with the tenor of Mr. Trasmundi's conduct that arises from the grievor's version. That is, whatever may have been the circumstances surrounding Mr. Trasmundi's arrest some sixteen or so minutes beforehand, neither Const. Ferry nor the grievor demonstrated wariness of Mr. Trasmundi becoming resistant or uncooperative by way of maintaining physical control of him. Yet, before me the grievor testified that due to Mr. Trasmundi's prior behaviour, while in the sally port, "I would not underestimate his strength."

Also, I note the grievor's testimony that he kned Mr. Trasmundi, among other things, to stop him from spitting on him again. However, in taking the time to reach for him and using his knee on Mr. Trasmundi for that purpose, the grievor left himself open to be spit on again, given the evidence in regard to the very brief time in which Mr. Trasmundi is said to have first spit on him in the first place.

Further, the videotape reveals that after Mr. Trasmundi stopped speaking, one of the two police officers makes a monosyllabic statement. There is then a very brief time when nothing can be heard and when Mr. Trasmundi's head is not visible. During this pause, neither Const. Ferry nor the grievor is seen to move or react in any manner. Then Mr. Trasmundi begins to speak again. He begins by saying "Never mind" in a truculent or dismissive tone. He continues to speak. It is when he continues to speak that the grievor uses his left arm to reach towards Mr. Trasmundi's body. Const. Ferry reaches towards the grievor with his arm. The grievor pauses briefly and, then, knees Mr. Trasmundi with his right leg followed by the headlock. That is, it is only after Mr. Trasmundi has begun speaking again when the grievor reacts towards Mr. Trasmundi, followed by Const. Ferry's reaching towards Mr. Trasmundi. In other words, it appears from the videotape that the grievor did not act towards Mr. Trasmundi during the pause when Mr. Trasmundi's head is not visible but, rather, the grievor appears to have reacted to Mr. Trasmundi's dismissive statement, "Never mind . . ." Yet, at his trial, the grievor, in re-examination, testified that it was but "a split second" after Mr. Trasmundi has spit on him that he reacted to this behaviour.

All this is to say that there are a number of significant discrepancies between the grievor's evidence and the videotape evidence, and without reference to Mr. Trasmundi's evidence, such that when taken together, these detract from the harmony between the grievor's version of events and what is discernible on the videotape prior to his physical actions towards Mr. Trasmundi. To that extent, the credibility of the grievor's testimony, that Mr. Trasmundi did spit on him, is put into question.

On the basis of the review of all the evidence before me, I find on a balance of probabilities, that Mr. Trasmundi did not spit on the grievor on January 29, 1991. I find that the discrepancies in the grievor's own evidence and the discrepancies between his version of events and the version that is observable from the videotape detract from the credibility of the grievor's statement, that Mr. Trasmundi did spit on him, to the point where I do not find this statement to be credible.

If I am wrong in finding that Mr. Trasmundi did not spit on the grievor, I find that the grievor did use excessive force in his actions towards Mr. Trasmundi in response to having been spit upon. What is striking from the videotape is the deliberateness and forcefulness with which the grievor kned Mr. Trasmundi, and then forcefully placed him in a headlock while Mr. Trasmundi's head can be seen to be travelling downwards in response to having been kned by the grievor. Indeed, the grievor can be observed to prepare himself by physically adjusting his stance in order to knee Mr. Trasmundi after reaching towards Mr. Trasmundi with his left arm and, then, sharply and rapidly lifting his knee into Mr. Trasmundi's body. At the time he was kned, Mr. Trasmundi had both hands handcuffed behind his back. Mr. Trasmundi's medical report a few days later indicates his weight as being 150 pounds. The police reports indicate 155 or 170 pounds and further, a height of either 5' 6" or 5' 7 inches. The grievor is 6' 5 1/2" tall and he testified that he weighed some 225 pounds in January 1991. In other words, Mr. Trasmundi is a much smaller man than is the grievor, as is evident from the videotape. And, while Mr. Trasmundi said that at the time of the incident he worked with marble and tile, a physically demanding job, the size and weight advantage were clearly in the grievor's favour who also testified that he is strong for his size.

As to why the grievor kned Mr. Trasmundi, his testimony before me is that he did so to prevent Mr. Trasmundi from spitting on him again. At his trial, the grievor testified that he was also concerned that Mr. Trasmundi "may even push me backwards off the steps." Also, it is the grievor's testimony

that he placed Mr. Trasmundi in a headlock in order to gain control of his head, presumably, also, in order to prevent further spitting and to prevent being "headbutted" by Mr. Trasmundi.

In the instant case, D/Sgt. Reilly upon review of the videotape, determined that the grievor had assaulted Mr. Trasmundi and, hence, pursuant to art. 23.02 of the collective agreement, did deliberately abuse his powers as a police officer to use physical force in taking or maintaining physical control of Mr. Trasmundi on January 29, 1991. Further, the Board determined that it was proper for it not to pay the grievor's legal costs in knowledge of the grievor's testimony at trial that Mr. Trasmundi had spit on him and that he had kneed him in order to prevent that from happening again, and, out of concern on his part of being headbutted, or, pushed backwards off the landing by Mr. Trasmundi.

The grievor is a police officer whose training entailed taking and maintaining control of people in exercising his duties as a police officer. It was his testimony that he was trained to incapacitate someone by a blow to a nerve bundle in the thigh by way of, for example, kneeling them in that spot. It is also not in dispute, as was D/Sgt. Reilly's evidence, that police officers are trained to physically control individuals in other ways, for example, standing behind them and holding the handcuffs or thumb or finger of someone handcuffed behind their back. In other words, I accept that the grievor had been trained to use a variety of techniques in order to take physical control of someone in Mr. Trasmundi's circumstances. Therefore, the question to be answered is did the grievor, in kneeling Mr. Trasmundi and then placing him in a headlock, use force excessive to what was necessary in the circumstances that occurred on January 29, 1991?

In deciding this matter, I am mindful, firstly, that police officers can properly use physical force in taking or maintaining control of someone they have arrested as in the case of Mr. Trasmundi on January 29, 1991. I also appreciate that the nature of police work and the circumstances in which they must deal with someone they have arrested require judgments concerning the exercise of their above referred-to power should it become necessary to use physical force. I concur in *Re The Metropolitan Toronto Police Services Board and The Metropolitan Toronto Police Association (May 27, 1998) unreported (Jackson) at p. 24 as follows:*

In that award [*M.G. Picher, Thunder Bay, 1990*] Mr. Picher identified several themes running through this line of awards:

. . . the awards disclose some acceptance on the part of labour arbitrators that the rights of police officers as employees often involve special considerations which might not obtain in another workplace... In the exercise of their functions police officers share a certain solitude, as well as other sources of stress that reflect a realm of experience that may not be readily understood by all civilians.

A further theme reflected in the jurisprudence is any understanding that police officers [sic] frequently function in relatively undefined gray areas where the limits of lawful conduct may not be readily discernible or easily measured.

Additionally, since they are necessarily in contact with crime, they are exposed to the stress of dealing with some of the most unsavoury of society's characters, as well as some of life's most unfortunately [sic] victims.

An appreciation of these various factors has caused boards of arbitration to apply both caution and compassion in the assessment of the conduct of police officers, particularly in relation to defining in a fair and realistic way the ambit of the exercise of an officer's duty.

In other words, arbitrators are mindful of and sensitive to the unique working environment of the police officer and try very hard to be fair and realistic in defining the word "duty" for purposes of legal-indemnification provisions.

Further, I concur in the view that in determining whether an amount of physical force is or is not excessive, regard must be had "to the circumstances as they existed at the time the force was used [and that a police officer] could not be expected to measure the force used with exactitude" and, also, that it is important to take into account "the belief of the police officer in light of all the circumstances [surrounding his or her use of physical force]" *Re Regina v Bottrell supra*.

In regard to the amount of force used by the grievor on Mr. Trasmundi, after having reviewed the videotape many times, I am struck by four observations concerning the sequence of events: the stillness of the grievor, Const. Ferry and Mr. Trasmundi; the lack of physical control of Mr. Trasmundi by either Const. Ferry or the grievor; the low tone and unhurried speech of Mr. Trasmundi and, then, the forceful physical actions of the grievor towards a notably smaller man.

When the grievor's explanation for his actions are taken into account, his actions, in light of the above circumstances in the sally port and in light of the notable difference between the grievor's and Mr. Trasmundi's physical sizes, take on the appearance of excessive use of force. What is also notable is that the grievor's chosen response, kneeling Mr. Trasmundi prior to placing him in a headlock, created a circumstance where Mr. Trasmundi was in the position to spit on the grievor, and which possibility the grievor said he was acting to prevent from happening again.

Having found that the videotape evidence and the grievor's explanation of his actions towards Mr. Trasmundi on January 29, 1991 lead to the conclusion that his actions take on the appearance of a use of excessive force, it remains to be determined whether or not the Board properly exercised its authority, pursuant to art. 23.02 when it decided not to indemnify the grievor for his legal costs. In my view, and I so find, it was not unreasonable for the Board to not indemnify the grievor for his criminal trial legal costs. I find that the evidence before me, on a balance of probabilities, establishes that the grievor did use excessive force on Mr. Trasmundi on January 29, 1991 and, thus, I find it was not unreasonable for the Board to conclude that the grievor had deliberately abused his powers as a police officer.

Based on all the foregoing, I find that the evidence establishes, on a balance of probabilities, that Mr. Trasmundi did not spit on the grievor on January 29, 1991 in the Division 51 sally port. Thus, on this finding, I find the grievor did abuse his powers as a police officer and, thus, I find that it was proper for the Board not to indemnify the grievor for his legal costs pursuant to art. 23.02 of the Agreement.

If I am wrong in making this finding, I find that it was not unreasonable for the Board to determine that the grievor had abused his powers as a police officer by way of use of excessive force towards Mr. Trasmundi on January 29, 1991 in the Division 51 sally port and, therefore, properly determined not to indemnify the grievor for his legal costs.

The grievance, therefore, is denied.

Dated at Toronto, this 27<sup>th</sup> day of September, 1999.

William A Marcotte  
William A. Marcotte  
Arbitrator