

IN THE MATTER OF: Law Enforcement Review Act
Complaint #3041

AND IN THE MATTER OF: An Application pursuant to S. 13 of
The Law Enforcement Review Act
R.S.M. 1987, c.L75

BETWEEN:

H.E. and M.F.E.

Complainants/Appellants,

- and -

CONSTABLE K.L.

Respondent.

Proceedings had and taken January 8, 1998

Reported by: Roberta Baty, Special Examiner

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

1 Proceedings had and taken before The Honourable
2 Judge Harold ff Gyles, at the Court House, 408 York Avenue,
3 in the City of Winnipeg, in the Province of Manitoba, on the
4 8th day of January, 1998.

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7 APPEARANCES:

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9 Mr. H.E. and Ms. M.F.E. appeared on
10 their own behalf.

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12 Mr. Paul R. McKenna appeared on behalf of the Respondent.

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1 JANUARY 8, 1998, 10:00 A.M.

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3 **THE COURT:** You are the complainant and the
4 applicant, are you, sir?

5 **MR. E:** : Yes, your honour.

6 **THE COURT:** What is your full name?

7 **MR. E:** : I would like to say something
8 before we actually start. First of all, M.F.E.

9 is around looking for parking, she isn't here right
10 now.

11 **THE COURT:** Oh.

12 **MR. E:** Secondly, we are both political
13 students, political science students, and we are not
14 lawyers.

15 **THE COURT:** That's fine.

16 **MR. E:** : We also seek Legal Aid, and they
17 told us we wouldn't be able to have a lawyer present for us
18 for Thursday, which is today. I don't know if we get Legal
19 Aid when the lawyer will be able to --

20 **THE COURT:** I understand. Mr. McKenna, you
21 are representing the respondent?

22 **MR. MCKENNA:** I am, your honour, yes.

23 **THE COURT:** Well, do you think that the other
24 applicant will be present shortly? We could have a--

25 **MR. E:** She was looking for parking. I

1 don't know what time she'll get here.

2 **THE COURT:** Well, why don't we have a short
3 adjournment and--

4 **MR. E** Oh, here she is.

5 **THE COURT:** Oh, she is present now, fine.
6 Then you are not represented by counsel, which is fine, and
7 for this proceeding that probably is not essential, but we
8 will see how the thing develops as we hear from the counsel
9 for the respondent.

10 Now you could just be seated, both of you, at the
11 counsel table.

12 **MR. E** We would also like to know what
13 formal address your honour or --

14 **THE COURT:** Well, although I am a judge, I am
15 sitting -- this is not a judicial proceeding, I am presiding
16 pursuant to the Law Enforcement Review Act, because the
17 matter must be referred to a provincial judge where the
18 Commissioner has declined to direct that a hearing be held.
19 So I can be addressed as your honour, but you know, that's -
20 - that's up to you, sir.

21 Just as I understand the matter before the court,
22 on October the 17th, of 1995, there was a complaint made
23 referring to an incident that occurred on October the 13th,
24 1995, and essentially the nature of the complaint was that
25 there was an arbitrary detention, and your complaint

1 indicated that other motor vehicles were not stopped, yours
2 was singled out, and you made a presumption that this was
3 based on discrimination. The question of the arbitrary
4 detention was really, in essence, the nature of the
5 complaint.

6 On November the 15th, the Commissioner, Mr. Norman
7 Ralph, requested a copy of any reports in relation to the
8 incident.

9 On November the 22nd the police replied that there
10 was no incident number, it hadn't been generated and there
11 was no mention of the incident by the constable involved,
12 who was Constable L. he was identified by his police
13 number.

14 On January the 22nd, 1996, the Commissioner wrote
15 to Constable L. and asked him to contact him within thirty
16 days to discuss the issues.

17 On May the 2nd, of 1996, both of the complainants
18 wrote about the six month delay which had occurred, and they
19 had heard nothing at that point.

20 On May the 22nd, of '96, the Commissioner, Mr.
21 Ralph, responded saying that he had a heavy case load, they
22 were doing their best and so on.

23 On August the 12th, of '96, some nine months
24 later, Mr. Ralph wrote to Constable L. again giving him
25 until September the 16th to respond, otherwise he would

1 refer the matter to a provincial judge for hearing.

2 On September the 12th Constable L. replied in
3 writing and, in essence, his explanation, he confirmed that
4 he asked for the driver's license and registration from the
5 female complainant and that she had mentioned the Charter of
6 Rights, and that it had been breached in her opinion, and
7 Constable L. claims that he told her he wanted to see her
8 driver's license and registration pursuant to the provisions
9 of the Highway Traffic Act, and he informed them also that
10 he could stop people and check for a driver's license and
11 registration, pursuant to that provision of the Highway
12 Traffic Act.

13 On September the 13th Mr. Norman Ralph, the
14 Commissioner, received a fax from the Winnipeg Police
15 Services indicating that Constable L. did, in fact, check
16 the complainant, M.F.E. through the system,
17 I assume this was the CPIC, but did not check the name of
18 the other complainant, H.E.

19 On December the 9th, of '96, the complainants both
20 wrote to the commissioner and complained about the delay,
21 that it was over a year and they had heard nothing.

22 On September the 9th, of '97, Mr. Ralph reported
23 to them that he perceived the complaint related to
24 discrimination and the legality of the officer stopping the
25 two complainants.

1 Subsequently, of course, he declined to refer the
2 matter to a provincial judge and declined to take any
3 further action on the complaint, he felt that there was no
4 justifiable complaint by the police.

5 Now is that a fairly accurate assessment of what
6 transpired from both of your viewpoints?

7 **MR. E.** No, your honour.

8 **THE COURT:** Pardon?

9 **MR. E.** I said no.

10 **THE COURT:** Go ahead.

11 **MR. E.** I don't know, like I said, I'm a
12 lay person to this proceedings, legal proceedings, we are
13 not lawyers. I would wonder if we could speak, we both
14 could speak interchangeably.

15 **THE COURT:** Yes, I have no difficulty with
16 that at all.

17 **MR. E.** Okay. Though we, we, we are
18 suspect, all right, or suspicious in the way we were
19 stopped, that is not the angle of our -- that is not where
20 we are going with this about the police having -- we saw --
21 we observed or privileged to the information where Mr.
22 McKenna and the lawyers, and the police is going with this,
23 that the police have under the Highway Traffic Act their
24 legal rights and authority to stop a vehicle, we have no
25 objection to that, that is not our case.

1 Our case are based on discriminatory and abusive
2 conduct by this police officer, all right, which happened
3 that night or which transpire that night. We went to the --
4 on that evening we went to theatre, Garrison Theatre I
5 believe it was. On our way home we stopped to play a little
6 VLT at the bar, that was on McPhillips, Concord Hotel.

7 **THE COURT:** Yes.

8 **MR. E.** The police officer in question,
9 Constable L. came into the bar, observing the patrons of
10 the bar. When we were about to leave, all right, we
11 observed the police officer leaving the same time. Within a
12 hundred, a couple of hundred yards, anyhow within a short
13 distance of our travelling to our residence we were stopped
14 by Constable L. all right. M. was driving the
15 vehicle at the time, I was a passenger and another passenger
16 were in the back seat of the car.

17 **THE COURT:** Yes.

18 **MR. E.** : M. can say what Constable
19 L. said at that time, being she was the driver of the
20 vehicle.

21 **THE COURT:** Fine.

22 **MS. F.E.** : That's, that's correct,
23 and the thing is, is that Constable L. did not ask for the
24 driver's and registration right away that normally officers
25 would ask when they stop you.

1 What he had said was there is nothing but thieves
2 and drug dealers that hang out in that bar, and he said it
3 in a very condescending way, and I got upset as a result of
4 it. So I said well, what are you stopping us for? I'm not
5 a thief, I'm not a drug dealer, and he says well, I'd like
6 to see the i.d.s, the i.d.s of all of the people present in
7 this vehicle, while at the same time asking for the
8 registration.

9 So to me it doesn't seem like something, a routine
10 check, because he is checking the passengers, and what we
11 were told by LERA is that this Constable had stated that he
12 was after the passenger in the back seat, but, in fact, did
13 not collect the i.d. from that person if that was the case.

14 The point was he collected the i.d.s from both my
15 husband myself, along with the registration. Now is that a
16 normal routine check? I don't think so. You would take the
17 driver's license and the registration, go back to the
18 vehicle, read it in. Well, sure, he read my license and the
19 registration in, but he did not put the other two
20 individuals' i.d.s through the computer also, and then he ---
21 he continued to carry on in a belligerent manner, trying to
22 provoke some kind of altercation, not only with myself, but
23 with my husband, and this is what infuriated me as a law-
24 abiding citizen because I couldn't get over the actions and
25 the conduct of this police officer.

1 **THE COURT:** All right.

2 **MS. F.E.** . All right, fine, I agree
3 that perhaps they are confronted with a number of criminals
4 out there, but I wasn't the criminal and he didn't have to
5 treat me the way he did, nor my husband, nor the other
6 passenger.

7 If it was the passenger that he was familiar with,
8 then why didn't he tell us, then there wouldn't be any
9 problem. That is what the issue is here.

10 **MR. E.** In fact, in fact I understand
11 Constable L. did not even check the other passenger at the
12 back, if so be the case that he was after the other
13 passenger in the back seat.

14 **THE COURT:** Well, in reading the file, which
15 is the only thing that I can go on, the file doesn't
16 indicate in the report from Constable L. that he had
17 stopped the vehicle for the purpose of identifying the
18 person in the back seat.

19 **MR. E.** That is in the LERA notes, that's
20 where we get that information from, that's what he told
21 LERA.

22 **THE COURT:** Is that correct, Mr. McKenna?

23 **MR. McKENNA:** That's right, your honour.
24 Constable L. never did get identification from the person
25 in the back seat. As I understand it,--

1 **THE COURT:** In his statement he never said
2 that that was the reason that he stopped the vehicle.

3 **MR. McKENNA:** No, he did not, your honour.

4 **THE COURT:** No, that's correct. All right,
5 as I say, I can, I can go on the basis this is a review for
6 me to determine whether or not there should be a hearing or
7 whether the complaint should be dismissed as the
8 Commissioner indicated.

9 Now just at this point, Mr. McKenna, could you
10 respond to the comments made by the complainants?

11 **MR. McKENNA:** Yes, your honour. First of
12 all, just if I may just correct one aspect, as you were
13 reading into the record the events, the chronology of the
14 events, you mentioned that on September 12th Constable L.
15 submitted a handwritten statement or something to that
16 effect, handwritten.

17 In fact, what happened on September 12th is there
18 was a meeting at the Law Enforcement Review Agency offices,
19 and so what you find on written form on the file are the
20 investigator's notes.

21 **THE COURT:** Oh, those are the investigator's
22 notes, not the handwritten statement of Constable L. ?

23 **MR. McKENNA:** That's right.

24 **THE COURT:** Thank you very much.

25 **MR. McKENNA:** The practice, the typical

1 practice at LERA is not to take statements from the
2 responding officers, and it is to have an interview with
3 them and the investigator takes notes, so just to correct
4 the record in that regard.

5 **THE COURT:** Okay.

6 **MR. McKENNA:** What I have heard so far from
7 the appellants in this matter, your honour, is what strikes
8 me as an attempt to have yourself placed in the shoes of
9 Commissioner Norm Ralph and for you, yourself, to rehear the
10 facts and see what you think of them and whether or not you
11 as a provincial judge presiding in this matter would
12 disagree and rule in a different fashion.

13 I believe you have my material on the file?

14 **THE COURT:** Yes.

15 **MR. McKENNA:** And I would just like to refer
16 to that material because I do not think that that is your
17 role in here. It has never been the role of any provincial
18 judge thusfar--

19 **THE COURT:** The rule is to review the
20 decision of the Commissioner.

21 **THE COURT:** That's right.

22 **THE COURT:** And the information which he had
23 available and determine whether he was correct in his
24 decision.

25 **MR. McKENNA:** That's right, yes. You follow

1 the typical sorts of direction of judicial review as opposed
2 to--

3 **THE COURT:** No, I don't agree with that.
4 This is not a judicial review.

5 **MR. MCKENNA:** Well, it is, I would submit to
6 you that it is and I submit that the judges that have heard
7 matters in the past have dealt with it -- I know that it
8 isn't in the classical sense, but there is a significant
9 body of case law that has developed as to how you analyze
10 the actions of the Commissioner, and if you bear with me I
11 am going to go through that with you.

12 **THE COURT:** Well, that's fine, except that,
13 as I say, the provisions of the Act are that under Section
14 13(2) the complainant may, within thirty days after the
15 sending of the notice to the complainant under subsection
16 1.1, apply to the Commissioner to have the decision reviewed
17 by a provincial judge, and that in subsection 3, on
18 receiving an application under subsection 2, the
19 Commissioner shall refer the complaint to a provincial
20 judge, who after hearing submissions from the parties in
21 support of or in opposition to the application, if satisfied
22 that the Commissioner erred in declining to take further
23 action on the complaint shall order the Commissioner, and so
24 on.

25 **MR. MCKENNA:** Yes.

1 **THE COURT:** Now that is to have the decision
2 reviewed by a provincial judge.

3 **MR. MCKENNA:** Yes.

4 **THE COURT:** Now that is not an appeal to the
5 Provincial Court, it is an appeal to a person designated.

6 **MR. MCKENNA:** Yes.

7 **THE COURT:** It could be to a lawyer, it could
8 be to a probation officer. It still is an administrative
9 proceeding, and it is not a judicial proceeding, it is not a
10 judicial review.

11 **MR. MCKENNA:** It, I believe, your honour,
12 that it has been treated as a matter where you are not to
13 substitute your decision for that of the Commissioner.

14 **THE COURT:** No, I agree with that.

15 **MR. MCKENNA:** Yes, yes.

16 **THE COURT:** I agree with that, but it is my
17 function to determine whether or not the commissioner acted
18 within the confines of his jurisdiction under the Act.

19 **MR. MCKENNA:** Yes, all right, I will address
20 that point directly.

21 **THE COURT:** Yes.

22 **MR. MCKENNA:** Let me, if it please your
23 honour, I will walk you through the brief that I have
24 provided to you. If you would go to page 2 of my brief,
25 your honour.

1 **THE COURT:** You see, I noticed under the
2 first point you referred to it as a judicial review, and
3 there is nothing in the Act that says that this is a
4 judicial review, that's the point I am making.

5 **MR. MCKENNA:** Yes, I understand that. That
6 is my interpretation based on, and you will look at
7 paragraph 1(a) where I have underlined the word reviewed.

8 **THE COURT:** Yes.

9 **MR. MCKENNA:** And I believe that that was the
10 intention of the legislators.

11 **THE COURT:** Well, that isn't what it says,
12 and it says reviewed. It doesn't say by the Provincial
13 Court, it says by a Provincial Judge.

14 **MR. MCKENNA:** Yes.

15 **THE COURT:** That is a fairly substantial
16 difference.

17 **MR. MCKENNA:** It may be a difference in the
18 sense of, you know, the entity that is hearing the matter,
19 but when you think about it and when you think that the --
20 you would be placing yourself in a very difficult situation
21 if you strayed from the types of rulings that have come down
22 thusfar from, and I have provided some in my material from
23 Judge Cohan and Judge Rusen, and the difficult position you
24 place yourself in, your honour, is that you would be asked
25 to rehear only parts of the information that Commissioner

1 Ralph heard. . You don't have the benefit, and nor did Judge
2 Rusen nor did Judge Cohan, of listening to the entire story
3 from the complainant, listening to the entire story from the
4 respondent officer, speaking to sergeants, supervisors,
5 independent witnesses, you don't have that, so it would be--

6 **THE COURT:** I have what the complainants
7 received.

8 **MR. MCKENNA:** I'm sorry?

9 **THE COURT:** I have everything that the
10 complainants received, all of the material that they
11 received.

12 **MR. MCKENNA:** Yes, absolutely, but you don't
13 have the benefit of interviewing all of the various people,
14 like the Commissioner does.

15 **THE COURT:** No. If a hearing were ordered
16 by me, then the presiding judge at that time would have the
17 benefit of all of that information.

18 **MR. MCKENNA:** Yes.

19 **THE COURT:** That isn't my function.

20 **MR. MCKENNA:** I understand that. My point
21 is, when I am saying is you don't have all of the
22 information in front of you is that you really are placed in
23 a very compromising situation to be able to say whether or
24 not the judgment call of the Commissioner is right or wrong.

25 **THE COURT:** Well--

1 **MR. MCKENNA:** You won't during these
2 proceedings listen to the police officer, nor will you for
3 that matter listen to all of the details and perhaps any new
4 details that the complainants or appellants may be tempted
5 to add in in this sort of a forum.

6 **THE COURT:** Well--

7 **MR. MCKENNA:** It has never been intended to
8 be a new hearing.

9 **THE COURT:** No, I am not suggesting it is
10 intended to be a new hearing. It's a review--

11 **MR. MCKENNA:** Yes.

12 **THE COURT:** --of the decision of the
13 Commissioner, that's what it is, and he has parameters under
14 which he is entitled to proceed, and it is up to him, up to
15 me to determine on a review whether he acted within those
16 parameters, that's all that I am saying.

17 **MR. MCKENNA:** At page 3 of my material, your
18 honour, I have quoted from Judge Rusen at the bottom of the
19 page. Do you have that in front of you, your honour?

20 **THE COURT:** Yes, I do.

21 **MR. MCKENNA:** Yes.

22 On my review of the Commissioner's
23 decision, I must be satisfied that the
24 Commissioner did not exceed his
25 jurisdiction, that he followed the rules

1 of natural and procedural fairness, that
2 he acted within the limits of the
3 statute or that the decision reached by
4 the Commissioner was not patently
5 unreasonable or irrational.

6 That is how Judge Rusen handled it, and Judge
7 Cohan reiterated what is probably the old expression six of
8 one and half a dozen of the other. I think in different
9 words he said the same thing and it is at the top of page 4.

10 In order to order a review I have to be
11 satisfied that the Commissioner erred in
12 his decision. He has a discretion under
13 the Act to rule as he did, there is
14 nothing to indicate that he acted in bad
15 faith. Even if I disagree with his
16 conclusion in that regard, there is
17 nothing to indicate bad faith. Delay
18 does not establish bad faith. The
19 Commissioner, I think, complied with all
20 of the rules of natural justice, he
21 caused an extensive investigation to be
22 made and there is nothing in his report
23 and nothing that I have heard today that
24 will convince me that he acted other
25 than in a judicious manner in declining

1 to proceed further with this
2 investigation. In the result, I find
3 that the Commissioner did not err in
4 declining to take further action with
5 respect to Mr. W. 's complaint.

6 So, in other words, both of these judges who have
7 travelled this road before you have addressed the issue of
8 whether or not they felt the commissioner erred, but in
9 doing so their analysis proceeds along the basis of whether
10 or not there was any unfairness being shown in the file,
11 there is anything that is clearly irrational or patently
12 unreasonable, and whether or not there is anything in the
13 file that is irrelevant.

14 For instance, if there was an indication in the
15 file that the Commissioner received some evidence and placed
16 weight on certain evidence that should not have been placed
17 before him and should not have been considered, and if you
18 find all of that then it is open to you to find that the
19 Commissioner has erred, and it makes good sense from a
20 practical pragmatic point of view, because you will not
21 during the course of this forum hear out both sides as to
22 what they did or did not do, and so from a pragmatic and
23 practical point of view it makes perfectly good sense.

24 **THE COURT:** Well, I agree generally with the
25 comments made by my colleagues.

1 **MR. MCKENNA:** yes.

2 **THE COURT:** Both Judges Rusen and Cohan, but,
3 again, you go back to the Act, section 13(1).

4 **MR. MCKENNA:** Yes.

5 **THE COURT:** It indicates that the
6 Commissioner must be satisfied (a) that the subject matter
7 of the complaint is not frivolous or vexatious.

8 **MR. MCKENNA:** Yes.

9 **THE COURT:** That there is justifiable
10 evidence supporting the complaint to justify a public
11 hearing.

12 **MR. MCKENNA:** Yes.

13 **THE COURT:** And before he can decline to take
14 action on the complaint.

15 Now dealing with the sufficiency of evidence
16 supporting the complaint--

17 **MR. MCKENNA:** Yes.

18 **THE COURT:** --if he makes an error in his
19 assessment then that would be sufficient grounds, would it
20 not, for me to order a review?

21 **MR. MCKENNA:** Yes, it certainly would. I
22 mean those are his parameters and if you find error in any
23 of his parameters, certainly.

24 **THE COURT:** Yes. All right, well then let's
25 cut to the chase, because in reviewing the material I am not

1 satisfied from the law that he was justified in making that
2 arbitrary stop and detention, and the case law certainly
3 indicates that the provisions of the Highway Traffic Act,
4 which permit a police officer to stop a person and require
5 that they identify themselves and provide their driver's
6 license, registration and so on, that this is permissible in
7 connection with, well, there have been various cases with
8 the Ride program, the Alert, the Alberta Stop Check program,
9 and probably also various things where they uniformly stop
10 all vehicles to make sure that they have their seat belts
11 done up for purposes of public safety, but LeDain, I
12 remember in the Supreme Court, I don't recall the citation,
13 but he decided that an arbitrary stop by a police officer of
14 an individual was an arbitrary detention and wasn't
15 justified.

16 Now Mr. Ralph, in his reasons, said that he had
17 received a legal opinion that the detention was quite proper
18 because the Highway Traffic Act permitted it. Now I
19 question that. And if the stop was arbitrary then the
20 complainants were on pretty solid ground in asking why they
21 were being stopped, and he didn't say well they made an
22 improper turn. In fact, they said well, there was another
23 vehicle that left and made an illegal turn and it wasn't
24 followed, the Constable followed them.

25 **MR. McKENNA:** You have no evidence before you

1 that the stop was arbitrary; quite the contrary. The
2 Officer attended and gave articulable cause for the stop.

3 **THE COURT:** What was his cause that he
4 articulated; pursuant to the Highway Traffic Act?

5 **MR. MCKENNA:** Pursuant to the Highway Traffic
6 Act, that they were leaving this bar and that he was going
7 to check them for alcohol.

8 **THE COURT:** No, he never said that, that
9 wasn't in any of the information provided before Mr. Ralph.

10 **MR. MCKENNA:** Well, I don't mean check for
11 alcohol in the sense that he had intentions of a
12 breathalyser. As you know, you can't form that opinion
13 until such time as you have them at a roadside and you are
14 within enough proximity to look at the various signs.

15 **THE COURT:** Well, --

16 **MR. MCKENNA:** I am placed in a very difficult
17 situation here. I mean, I can't -- I can't add facts to
18 your honour.

19 **THE COURT:** No, I know, neither can I. All
20 that I can go by is the information that was before the
21 Commissioner at the time that he had made the decision and,
22 as I say, the first thing that I noticed was that there was
23 an arbitrary detention and that such an arbitrary detention
24 has been held as being justifiable if it is part of a
25 program to get dangerous drivers off the road, but if one

1 person is singled out then this isn't part of any program.
2 and he never said well, I observed the vehicle driving
3 erratically, I saw them drinking alcohol in the bar and I
4 suspected they were impaired, there was nothing like that;
5 he just stopped them, and I don't know why he decided to
6 check them, and the statement that he made through the
7 investigator, the handwritten statement that I had on file
8 didn't indicate anything, except his contention that he
9 stopped them pursuant to the Highway Traffic Act.

10 MR. MCKENNA: Well, the problem I suppose
11 with that, your honour, is that this is not a handwritten
12 statement, they are not verbatim notes either.

13 THE COURT: Well, that is the information
14 that the Commissioner had.

15 MR. MCKENNA: Yes.

16 THE COURT: He got that.

17 MR. MCKENNA: They are not verbatim notes.

18 THE COURT: The complainants got it.

19 MR. MCKENNA: Yes.

20 THE COURT: And that's what I get. So I am
21 saying he made the decision on the basis of what we all
22 read.

23 Now if there is some other information then
24 Constable L. over the past two years could have produced
25 something, because I am certainly concerned about the

1 incredible delay that went on. I mean this is now two years
2 ago and there is no explanation for the police not providing
3 this information, and Constable L. in particular not
4 responding.

5 **MR. MCKENNA:** Well--

6 **THE COURT:** And I also have a concern that
7 although no report was generated--

8 **MR. MCKENNA:** Yes.

9 **THE COURT:** --suddenly we find out some time,
10 about a year later, that he actually checked out the
11 operator on CPIC.

12 **MR. MCKENNA:** Yes.

13 **THE COURT:** You know, why wasn't that
14 disclosed? The whole thing, it just, it leaves a bit of a
15 sour taste.

16 **MR. MCKENNA:** Well, whether something is
17 disclosed or not is not within the control of the constable.
18 The request for information is made to Internal, and
19 Internal handles that. In a case like this you don't
20 generate reports, so what you have to go through is what is
21 called the unit history.

22 Now why the Winnipeg Police Service doesn't
23 provide a unit history to the Law Enforcement Review Agency,
24 I don't know. There was never a demand made of Constable
25 L. to go and get it and provide it. In fact, these are

1 typically confidential documents and it is not for an
2 individual constable to take a document such as that and go
3 and give it to any agency.

4 You know, they are all stamped, I believe if you
5 look through the records, you always see the confidential
6 stamp on many of the documents and I believe you will find
7 the unit history on the file. You know that is not
8 something--

9 THE COURT: Well, all right. The issue isn't
10 before me.

11 MR. MCKENNA: Yes.

12 THE COURT: But it certainly causes me some
13 considerable concern that this matter takes a couple of
14 years because in many ways it isn't a serious complaint in
15 the sense that there was severe harm done to these
16 complainants, but it is serious to the extent that there was
17 an arbitrary detention. They draw conclusions that it was
18 discriminatory for whatever reasons. There isn't any
19 concrete evidence of that, but they are concerned, and there
20 is no explanation as to why they were arbitrarily detained.
21 That is, I guess, really the basis of it.

22 MR. MCKENNA: Well, with the greatest of
23 respect, you are going by notes that are not verbatim.
24 Likewise, there would have been any number of conversations,
25 I suppose.

1 **THE COURT:** Well, then certainly as counsel,
2 Mr. McKenna, you could have provided a formal statement by,
3 you know, on behalf of your client if it was significant to
4 the proceedings. If it varied from what the handwritten
5 notes said, you received a copy, the same as the
6 complainants.

7 **MR. MCKENNA:** Of?

8 **THE COURT:** Of the investigator's handwritten
9 notes.

10 **MR. MCKENNA:** No.

11 **THE COURT:** Attributed to Constable L.

12 **MR. MCKENNA:** Oh, yes, I don't receive a
13 copy. I get to go and have a look at them once a hearing
14 date is set.

15 **THE COURT:** Yes, okay.

16 **MR. MCKENNA:** So the hearing date is set by
17 then.

18 **THE COURT:** Yes.

19 **MR. MCKENNA:** And I have no idea, you know,
20 what conversations go on between the investigator and the
21 Commissioner. I know that the notes are not verbatim, they
22 are not a statement. The officer is told ahead of time that
23 I am not going to be writing down, you know, the
24 investigator says we won't be writing down anything that you
25 say and we will be taking notes and referring the matter

1 back to the Commissioner. I don't know what kind of
2 conversations go back and forth between the investigator and
3 the Commissioner.

4 **THE COURT:** Well, are you suggesting that he
5 had another reason for stopping them that wasn't divulged?

6 **MR. MCKENNA:** I don't feel that it is proper
7 for me to add facts, your honour, my client is not here.

8 **THE COURT:** Well, that's the bottom line.
9 All that I can do is review what the Commissioner had, and
10 the Commissioner indicated in the report to the Complaints,
11 is that not correct, that he, did Commissioner Ralph not
12 indicate that he had a legal opinion that the stop was quite
13 proper pursuant to the Highway Traffic Act.

14 **MR. ELLIS:** Yes, your honour.

15 **THE COURT:** Yes, that was my recollection of
16 reading the circumstances.

17 **MR. MCKENNA:** But I don't believe that he is
18 saying that it was arbitrary.

19 **THE COURT:** Pardon me?

20 **MR. MCKENNA:** I don't believe he is saying it
21 was arbitrary.

22 **THE COURT:** No, the Supreme Court said that.

23 **MR. MCKENNA:** Yes. What I am saying is--

24 **THE COURT:** LeDain.

25 **MR. MCKENNA:** --that I don't think the

1 Commissioner found it to be an arbitrary stop based on
2 everything that he heard.

3 **THE COURT:** No, he didn't. He said that they
4 were, they were permitted under the Highway Traffic Act
5 period.

6 Now, the Supreme Court has said yes, it can be
7 permitted, but it is still an arbitrary stop, but it is
8 justifiable, it isn't a contravention of Section 9 of the
9 Charter of Rights because in the interests of getting
10 dangerous drivers off the road they can run Ride and Check
11 Stop and Alert programs and probably any type of other form
12 of detention where they set up a road block and they stop
13 all vehicles, but to single out one vehicle and stop that
14 vehicle and say I'm stopping you because I'm empowered to do
15 this, I can do it any time I want under the Highway Traffic
16 Act, and I can demand your identification and so on.

17 The Supreme Court says you can't, that's an
18 arbitrary detention and it is not justified. Do you
19 disagree with that?

20 **MR. MCKENNA:** I didn't come prepared to argue
21 that point, I didn't understand that to be the nature of
22 this proceeding.

23 **THE COURT:** Well, as I say, in reading the
24 complaint, the complaint indicated that they were stopped
25 and the driver asked why they were being stopped, and the

1 complaint that was articulated in writing referred to it
2 being not having any basis being stopped, and then the
3 attitude of the Constable, you know, created obviously a
4 situation where they were rebelling against this arbitrary
5 detention and that is what this matter is all about, I would
6 suggest. Is that a fair assessment?

7 MR. E. Yes, your honour.

8 MR. MCKENNA: Your honour, you know, if you
9 want me to address the case law that has developed on police
10 powers to stop I will be happy to do so, but I am obviously
11 not in a position to do that right now.

12 THE COURT: Well, as I say,--

13 MR. MCKENNA: I have read the case law in,
14 you know, various times, and it is very complex and there is
15 a lot of it. You know, I don't feel comfortable on shooting
16 from the hip on something as complex as that.

17 THE COURT: Well, I just -- there was--

18 MS. F.E. I just want to mention
19 there, your honour, that we did want to resolve this
20 informally with Constable L. and he refused.

21 THE COURT: You did?

22 MS. F.E. Yes, through the
23 investigating officer, and that was mentioned by the
24 investigating officer to Constable L. and he refused to
25 do so.

1 **THE COURT:** Well, there is always that right.

2 **MR. McKENNA:** I don't--

3 **THE COURT:** Was this not pursued to your
4 knowledge, Mr. McKenna?

5 **MR. McKENNA:** No, your honour, I don't recall
6 that.

7 **MR. E.** Investigating officer told
8 Constable L. the information we got from the
9 investigating officer that they offered Constable L. to
10 resolve this informally. As a matter of fact, not the
11 investigating officer, but Mr. Ralph himself told us that,
12 he offered Constable L. to resolve it informally, but
13 Constable L. refused to do that.

14 **MR. McKENNA:** I don't recall ever being
15 approached on the subject. We, there is an entire provision
16 for informal resolution and we prefer it to the rigid
17 structures of hearings far -- much rather prefer it.

18 **THE COURT:** Well, of course. I mean I would
19 always encourage that.

20 **MR. McKENNA:** Particularly, as you say, the
21 nature of this complaint, it is not, you know, such that we
22 are not alleging that somebody had an arm broken or
23 something like that. These types of complaints are very
24 good for settlement, I would think, and I always found that
25 the Commission is very good at it and they act as very good

1 mediators. I can honestly tell you I don't recall such a
2 conversation.

3 Now I am pretty good with notes, I don't like to
4 rely on my memory and my file has no notes of a request for
5 something like that.

6 **THE COURT:** Well, there isn't anything on the
7 file indicating that there was.

8 **MR. MCKENNA:** Yes, I absolutely don't rely on
9 memory, so when somebody says would your client like to
10 informally resolve I would write that down, write the date,
11 who asked me and then I would follow it up with a phone call
12 and I will write the answer to the phone call. You know, at
13 any given time I probably have a hundred of these on the go
14 and if I didn't do that--

15 **THE COURT:** Well, I should just advise the
16 complainants, there is a whole procedure dealing with the
17 matter of determining this type of complaint informally, and
18 arrangements can be made.

19 Now did Mr. Ralph indicate that Constable L.
20 refused to participate in this type of--

21 **MR. E.** Yes, he did and I think we have
22 Mr. Wright right at the back of us who substantiate that by
23 saying that the officer had that right to refuse.

24 **MS. F.E.** : Yeah, that's correct,
25 your honour.

1 **MR. McKENNA:** No, your honour, I have no
2 notes whatsoever of such a request.

3 **THE COURT:** Well, at this point my
4 inclination, of course, as I indicated, is to refer the
5 matter for a hearing, but if the complainants wished to have
6 the matter resolved informally perhaps this could be
7 adjourned and you might contact Constable L. I mean,
8 this would certainly be preferable to having a formal
9 hearing.

10 **MR. McKENNA:** Sure.

11 **THE COURT:** Would you still be prepared to
12 resolve the matter informally or would you--

13 **MR. E.** Well, your honour, after two
14 years, right, and knowing what we know now about Constable
15 L.'s position or disposition, we feel that it should go
16 for a hearing.

17 **THE COURT:** Fine. Well, that is perhaps
18 unfortunate from everybody's viewpoint, but I can understand
19 the concern of the complainants, it has taken over two
20 years, and so I will formally direct that the complaint be
21 referred for a hearing, and I assume you would like to have
22 a ban on publication of the respondent's name until the
23 complaint has been disposed of? This is usually granted,
24 but only until it is disposed of.

25 **MR. McKENNA:** That's right, your honour, I

1 would like that order made.

2 THE COURT: Would you wish to have some
3 formal written reasons or is that necessary?

4 MR. MCKENNA: I don't know that it is.

5 THE COURT: You have the transcript if you
6 wish.

7 MR. MCKENNA: I don't know that it is
8 necessary. I don't contemplate any appeal in this.

9 THE COURT: Fine. Could you close the
10 proceedings.

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12 (Matter concluded 10:55 a.m.)

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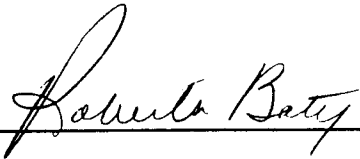
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SPECIAL EXAMINER'S CERTIFICATE

I, ROBERTA BATY, A DULY APPOINTED SPECIAL EXAMINER in and for the Province of Manitoba, do hereby CERTIFY the foregoing pages are a true and correct transcript of the proceedings taken by me on the stenomask at the time and place hereinbefore stated.



ROBERTA BATY

SPECIAL EXAMINER, Q.B.

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