

**IN THE MATTER OF:** *The Law Enforcement Review Act*, Complaint #5951

**AND IN THE MATTER OF:** A hearing pursuant to s. 17 of *The Law Enforcement Review Act* R.S.M. 1987, c.L75

B E T W E E N:

<b>F. D.,</b>	)	Self-represented
<b>Complainant</b>	)	
	)	
<b>- and -</b>	)	
	)	
<b>Constable E. D. and</b>	)	Rocky Pollack, Q.C., and
<b>Constable M. C.,</b>	)	Paul McKenna,
<b>Winnipeg Police Service, Respondents</b>	)	Counsel for the Respondents
	)	
	)	
	)	
<i>NOTE: These reasons are subject to a</i>	)	
<i>ban on publication of the respondents'</i>	)	December 12, 2005
<i>names pursuant to s. 25.</i>	)	

**Swail, P.J.**

**DECISION**

**THE COMPLAINT**

[1] Shortly after midnight on the morning of June 20<sup>th</sup>, 2002 the respondents stopped the complainant's truck on the Northgate Shopping Centre parking lot in the City of Winnipeg. The complainant says that during the course of the police stop of his vehicle the respondent officers abused their authority by:

1. failing to inform the complainant upon his arrest or detention of his right to be informed promptly of the reasons therefor, as required by section 10(a) of *The Charter of Rights and Freedoms*, contrary to section 29(a) of *The Law Enforcement Review Act*,

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

2. failing to inform the complainant, upon his arrest and detention, of his right to retain and instruct counsel without delay and to be informed of that right as required by section 10(b) of *The Charter of Rights and Freedoms*, contrary to section 29(a) of *The Law Enforcement Review Act*,
3. searching a vehicle being operated by the complainant without lawful authority or permission in contravention of section 29(a) of *The Law Enforcement Review Act*,
4. using oppressive or abusive conduct or language on the complainant, contrary to section 29(a)(iii) of *The Law Enforcement Review Act*.

[2] Pursuant to section 17(1)(a) of *The Law Enforcement Review Act*, the Commissioner has referred this complaint for a hearing on the merits. This section of the Act reads in part as follows:

17(1) The Commissioner shall refer a complaint to a provincial judge for a hearing on the merits of the complaint when

- (a) a provincial judge has under section 13 ordered the Commissioner to refer the complaint for a hearing;

[3] Mr. D.'s complaint in this matter was filed with the Commissioner of *The Law Enforcement Review Act* on June 21<sup>st</sup>, 2002. On March 27<sup>th</sup>, 2003, after the Commissioner completed his investigation of this complaint, he wrote a letter to Mr. D. advising him that the Commissioner's view was that there was insufficient evidence supporting his complaint to justify a public hearing. Mr. D. applied successfully to have this decision reviewed by a Provincial Judge under section 13(2) of *The Law Enforcement Review Act*.

[4] Section 29(a) of *The Law Enforcement Review Act*, which deals with abuse of authority by a member of a police department, reads as follows:

29 A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:

- (a) abuse of authority, including:
  - (i) making an arrest without reasonable or probable grounds.
  - (ii) using unnecessary violence or excessive force,

- (iii) using oppressive or abusive conduct or language,
- (iv) being discourteous or uncivil;
- (v) seeking improper pecuniary or personal advantage,
- (vi) without authorization, serving or executing documents in a civil process, and
- (vii) differential treatment without reasonable cause on the basis of any characteristic set out in subsection 9(2) of The Human Rights Code;

### **SPECIFICS OF THE COMPLAINT**

[5] The complainant's evidence at this hearing indicates that on June 19<sup>th</sup>, 2002, sometime around 11:30 p.m., he was stopped by the police. Mr. D. had just gassed up his 1994 Ford F150 blue pick-up truck at the Domo gas station located on the parking lot of the Northgate Shopping Centre at the corner of McPhillips and Inkster in the City of Winnipeg. He then pulled away from the gas pumps at the Domo station onto the shopping centre parking lot. As soon as he did this, a marked City of Winnipeg Police patrol car turned on its overhead lights and blew its horn to signal Mr. D. to stop. Mr. D. found out subsequently that the respondent Constable C. was driving the police car, and that the respondent Constable D. was a passenger in that vehicle.

[6] Mr. D. says that he stopped and got out of the driver's side door of his truck. With essentially what was a reflex motion he locked his truck door and closed it. He had no idea why he was being stopped. He acknowledges that both police officers got out of the patrol car and that one or both of them yelled at him to get back in his truck. Mr. D. said that he "froze". He says that because he was concerned that he did not want to put his hand into his pocket to get his keys to unlock his truck door (insofar as the police might interpret this as a threatening move) he put his hands on the railing at the top of the box of his truck and that he then walked to the back of his truck, keeping his hands on the railing on the box of the truck. Mr. D. says the police officers did not courteously ask him to get back in his truck but, rather, shouted at him: "We told you to get back in the truck."

[7] He said that one of the officers (apparently Constable D., who was the "jumper") went to the other side of the back of his truck and that Constable C., who was on the driver's side of his truck, ordered him to get down on the ground. He said that he did this, placing himself face down on the ground. He says that he was ordered to put his hands behind his back, and that he was then handcuffed by

Constable C. Mr. D. says that he was asking the police “What have I done? Didn’t I signal a turn? Do I have a flat tire?” because he was bewildered as to why the police would have stopped him.

[8] Mr. D. says that Constable C. asked him where his keys were and he told the officer that they were in his pocket. He says that Constable C. then reached into his pocket and took his keys out. He also apparently took Mr. D.’s wallet out of his pocket to get his driver’s licence. Constable C. then asked where his motor vehicle registration card was, and Mr. D. told him that it was in the glove box in his truck, and that he would get it. Instead, Constable C. went to Mr. D.’s truck, unlocked it, went in and searched his vehicle, including the glove box and some bags which Mr. D. had behind the driver’s seat of the truck.

[9] He says that the police officers picked him up and sat him on the bumper at the back of his truck. He says that Constable C. asked him why he had been driving around the Public Safety Building. Mr. D. says that he told Constable C. that he had been in the area and asked “Have I done anything wrong?” He says that Constable C. asked him if he had a problem with police officers. Mr. D. says this question amazed him. He says at this point another set of officers in plain clothes arrived in a Malibu vehicle. He says that in answer to a question he put to these officers they said they were “just here to look after our brothers”.

[10] Mr. D. says that the police who stopped him did raise a couple of valid questions about:

1. the tint on the windows in his vehicle being too dark; and
2. the fact that he had no picture ID with his driver’s licence.

Apparently the police indicated he could be ticketed for both these offences. He says that he explained to the police about the tinted windows, that he had just bought the vehicle about five weeks before and that he was not aware the windows were too dark. He also told them that he had lost his driver’s licence somewhere and had been issued the “yellow slip” which he produced to them, and which he had received from the Motor Vehicles Branch as a temporary licence, with the advice that a permanent licence would be sent to him shortly.

[11] Mr. D. says that in response to his questions as to why he had been stopped, he was advised by Constable C. that he could stop anyone to check their licence and registration. He says that just before taking the handcuffs off and releasing him, Constable D. put his wallet and keys on the box of the truck and told him that he could now go.

[12] Mr. D. says that he had been stopped for a period of 45 minutes to an hour. He felt that his treatment by the police was deplorable, particularly in light of the fact that he had not done anything to warrant such treatment. He says that at one point he “didn’t know if they were just going to shoot at me”, and he wondered if he was being “set up” by the police as he felt his son had been when his son was arrested the night before.

### **CONTEST OF CREDIBILITY AND MAJOR ISSUE OF CONTENTION**

[13] Because the respondents’ version of what occurred on this police stop is quite different from that of the complainant, there is a serious contest of credibility in this matter between the complainant and the respondents.

[14] Further, the respective stories of the parties detailing the circumstances leading up to the complainant’s vehicle being stopped by the respondents are so totally inconsistent that it is not possible to reconcile them.

### **EVENTS PRIOR TO POLICE STOP**

#### **Complainant’s Version of His Being Parked Near the Winnipeg Police Vice Office**

[15] Mr. D. says that he was driving home in a westerly direction on Notre Dame Avenue between 11:00 p.m. and 11:30 p.m. on June 19<sup>th</sup>, 2002 when he decided that he was going to smoke a cigar. He says that he made a right turn off Notre Dame onto King Street, and proceeded in a northerly direction past a bus stop to a location where he felt he could park without blocking traffic on King Street. He had apparently turned onto King Street from Notre Dame Avenue because he wanted to find a location where he could legally stop his truck and locate his matches.

[16] Mr. D. says that he leaned over towards the glove box in his truck to locate his matches. He denies that he otherwise was slouched down in the cab of his truck to avoid being seen. He indicates that he was only parked in this location long enough to locate his matches, and that he then proceeded north on King Street to McDermot Avenue, made a right turn on McDermot to Arthur Street and made a right turn on Arthur to Notre Dame. He says that he then proceeded west on Notre Dame to Isabel Street and then went over the Salter Street Bridge. He specifically denies having driven in the very circuitous route described in the police version of events which follows in this decision. He also specifically denies having seen a beige car which he drove beside on the Salter Street Bridge, speeding up and

slowing down in concert with that vehicle as it apparently tried to avoid being beside him on the bridge.

[17] Mr. D. in his evidence then described how he got to the Domo gas station on the Northgate Shopping Centre lot at Inkster Boulevard and McPhillips Street. Nothing turns on what Mr. D. says happened during the course of his travels from the Salter Street Bridge to Inkster and McPhillips, or on the particular route that he says he took to get there.

### **Police Version of Mr. D. Being in the Vicinity of the Winnipeg Police Vice Office**

#### **Evidence of Constable L. C.**

[18] Constable C. has been employed by the Winnipeg Police Service for 18½ years. She says that on the night of June 19<sup>th</sup>, 2002 at about 11:45 p.m., on the completion of her shift as a Surveillance Officer, she was returning to the Vice Division Office at 55 Princess Street in Winnipeg. She says that she was driving through a lane from Arthur Street to King Street westbound and that she stopped at the entrance of the lane onto King Street. Apparently the lane in question is directly across King Street from the Vice Division parking lot. She says that when she got to King Street, because it is a one-way street, she looked to the south to see if it was clear to cross the street. At that point she observed a pick-up truck:

...parked right in line

to the rear door of the Winnipeg Police Vice Office. She says that because there is no business that would be open in that vicinity at that time of night, she:

...looked hard

at the truck and could see somebody sitting in the truck:

...kind of hunched down, they weren't sitting as if you were driving the truck properly, they were kind of hunched down.

Constable C. says that because of:

...different incidents that were happening, threats against police and being threats to following police home and that,

she became very concerned.

[19] Constable C. then crossed King Street and went into the Vice Division parking lot. She says that she then:

..right away

got on the radio in her vehicle to the other surveillance units from her shift and told them that she had a vehicle parked right outside the Vice Division in line with the rear door of the Vice Division and that she was going to go around the block to get the licence plate of the vehicle. She says that she made contact with Constable D. M. who told her that he was the last of the surveillance team from that shift in his vehicle.

[20] Constable C. was asked about the threats to police officers that she referred to. Her response was:

During, up to that point and even, I'm, I'm going to just approximate it was four to six months, we had a lot of incidents with different gang members and Hells Angels members that were intimidating police, trying to get plates at the time of police officers' vehicles, attempting to follow them home. We also, there was a -- two weeks prior to this date we had been informed by our supervisors that F. D. had spoken, some -- through conversation with a police officer, that he, he was making -- there were sort of indirect threats that how easy it would be to kill a police officer or shoot a police officer. So we were all informed of that two weeks earlier.

[21] Constable C. advised Constable M. what she was going to do, then pulled out of the Vice Division parking lot onto King Street, and then circled around north to Bannatyne, west on Bannatyne to Princess, south on Princess, east on Notre Dame and then back on Smith Street to King. When she got close enough to the parked truck to read the licence plate, she realized that this was the licence plate of F. D.'s truck. She says as she drove past the truck she recognized F. D. as the driver of the vehicle. Constable C. says that she radioed this information to Constable M. and:

-- and then when I tell him, at the end of everything I say, I am going around the block again and I'm going to try to keep an eye on the truck from the south.

[22] Constable C. says that at the start of her shift that day she and her fellow officers had been briefed on an arrest of the complainant's son, S. D., the day before for very serious weapons and explosives charges. Her level of concern at recognizing Mr. D. in the truck parked near the Vice Office was elevated by this circumstance.

[23] Constable C. says that by the time she got back to where the truck had been parked on King Street it was no longer there. She again proceeded north on King Street, west on Bannatyne and south on Princess:

... and at this time I see the truck in the far east lane. I think there's three lanes on Princess and he's in the far east lane closest to the vice building. He's got his brakes on and he's just sort of crawling and he's looking at the front door of the vice division.

[24] Constable C. says that as she passed Mr. D. in his truck she was in the far west lane of Princess and that "all of a sudden" Mr. D. accelerated up behind her:

...right to my bumper as I'm making the turn onto Notre Dame. So he's cut over his two lane, like his lane and the other two lanes and he's right on my bumper.

[25] Constable C. says she was quite concerned at the aggressive manner in which Mr. D. drove up behind her. In addition to conveying information to Constable M. on the radio, she made telephone contact with her boss, Sergeant M. H., and told him what the situation was. She says that as she conveyed this information to Constable M. and Sergeant H. she was "making numerous turns now in the exchange district". She describes the situation in these words:

A I'm making a turn, I'm going a straightaway, make another turn, make another turn, and he was keeping right with me on my bumper and then we would, like I said I would speed --

Q Okay.

A -- try and keep some distance from us.

[26] Constable C. says that she was deliberately staying in the Exchange District because she wanted to get more surveillance units involved. She said:

You can't do a one-man surveillance, you can't follow 'cause he could make a turn and lose Constable M. I wanted more units to get on so that we securely had him.

[27] Constable C. says that every turn she made Mr. D. was coming right up on her bumper and in her opinion Mr. D. was:

...letting me know he was right on my bumper. He was, he was not trying to follow me and see where I'm going, he was letting me know he's right on me by his aggressiveness.



[28] Constable C. says that after making numerous turns in the Exchange District area, Constable M. let her know that there were other units with him so:

I now know there's approximately maybe three or four more units.

[29] Constable C. says that she then made a turn onto Isabel to go northbound over the Salter Street Bridge. She says:

I remember going up Pacific to Isabel and telling them that, which my route was going to be.

[30] Constable C. says that she was in the west lane of the Salter Street Bridge as she went north over the bridge:

And as I'm going over the bridge, F. D. now comes up beside me on the bridge and I didn't, I didn't know what his intentions were. I didn't want, at that point, to stay in line with him in any way so I would either brake or speed up. Each time I sped up, he sped up and was keeping what I call neck and neck with me.

[31] Constable C. says that she broke her contact with Mr. D. and his vehicle as follows:

And as we came to the foot of the bridge, I wanted to get out of his line of sight at that point so I braked hard at the foot of the bridge at Dufferin. He was forced to go through the intersection and I made a right turn onto Dufferin and I just took off. And at that point, he just continued.

[32] From the point that Constable C. broke contact with Mr. D., one or more of the other three or four surveillance units continued to follow Mr. D. in his truck to the Domo service station at Inkster and McPhillips. By this time, Sergeant H. had arranged for Constables D. and C. to stop Mr. D. in their marked police car and find out what he was doing.

[33] Mr. D.'s position is that Constable C.'s version of Mr. D. having followed her vehicle, effectively harassing her, is a fabrication. This despite the fact that Constable C.'s evidence is supported in detail by the evidence of Constable M. and Sergeant H.

### **Undercover Officers Having Testified Behind a Screen**

[34] It should be noted parenthetically that Constables C. and M., as well as Sergeant H., all of whom are members of an undercover surveillance unit with the City of Winnipeg, were permitted to testify behind a screen so that their faces could not be identified by either Mr. D. or any individuals who might have come

into the courtroom during the course of their testimony. My reasoning for permitting these officers to testify in this manner was the subject of a separate ruling which will not be repeated in detail at this point. Suffice it to say that my conclusion was that I did, in fact, have the jurisdiction as a provincial judge conducting a L.E.R.A. hearing as a "*persona designata*" to make such a ruling, and that in the circumstances this was an order which should be made.

### **Evidence of Sergeant W. N.**

[35] Sergeant N. has been a member of the Winnipeg Police Service for 13½ years. At this hearing she testified to an incident which occurred in May of 2002 during the course of a Queen's Bench trial at which she was a witness. Apparently the accused was one L. W. who, according to Sergeant N., was associated with:

...the Zigzag group who (sic) was a puppet club of the Hells Angels.

She says that she was sitting on a bench in the Law Courts hallway when Mr. D. came out of the courtroom and sat beside her. He was attending the W. trial with his son, S. D., who apparently was a friend of the accused.

[36] Lest this indirect association of Mr. D. with someone who might be looked on as an associate of a criminal organization might be interpreted as pejorative to Mr. D., I should hasten to add that Sergeant N. acknowledged in cross-examination that Mr. W. was not convicted of the charge he faced at this trial. In any event, Sergeant N. says that the complainant F. D. was someone with whom she was familiar because of some youth dealing she had had with Mr. D.'s son, R.

[37] Sergeant N. says that Mr. D. came and sat beside her on the bench in the Law Courts hallway. Apparently Mr. D. started talking to Sergeant N. about the evidence of Constable L. who was an undercover officer testifying at the W. trial and how that officer (a female) was testifying about making a drug purchase. Sergeant N. testified:

And Mr. D. went on to say, like he had been reading some gang book or gangs about LA and been on the internet and he talked about, you know, if that was a copy in LA and our gangs were like theirs or we were like them that that cop would be dead. And he went on to say that, that we and we know where you live, and if we were smart we'd go out and get you out jogging and pop you one out at the perimeter.

[38] Sergeant N. said that Mr. D. then told her:

-- that we know where you parked your cars, that, you know, we can put a bomb, like a bomb under it. And, and then in the -- then I -- then he said, you know, you guys should know what it's, or you guys should know what it's like to be one of us. It's like being in a jail with you police continually surveilling you or following you around, it's like being in prison. And I asked him if this was a threat and he goes, oh, no, it wasn't a threat, and I asked if this could happen, and yeah, it could happen.

[39] Sergeant N. says that she took these comments from Mr. D. quite seriously and that she advised her superiors of what Mr. D. had said to her.

[40] In cross-examination, the following exchange occurred between Mr. D. and Sergeant N.:

Q Oh, I mean, you mean -- because I can -- I'm willing to stand here and tell you I can guarantee a hundred million times that I never threatened you in any way.

A It was an indirect threat. It was an intimidation factor.

## **POLICE VERSION OF MR. D.'S STOP BY THE RESPONDENTS**

### **Evidence of Constable M. C.**

[41] Both of the respondents testified at the hearing. Their evidence was entirely consistent one with the other. Because Constable C. seemed to have more direct contact with Mr. D. than Constable D. (indeed, Mr. D.'s evidence seems to confirm this), I will set out Constable C.'s evidence about Mr. D.'s stop in detail hereunder.

[42] Constable C. testified that he and Constable E. D. were assigned to a marked City of Winnipeg police car, Unit No. N103, at 10:00 p.m. on June 19<sup>th</sup>, 2002. Constable C. was the driver, and Constable D. was the passenger or "jumper". Both officers were in uniform.

[43] Constable C. says that they were assigned to general patrol duties in District 11 in the City of Winnipeg. However, at 11:54 p.m. (according to the unit history for Unit N103 filed as Exhibit 3 in this hearing), Constables C. and D. were pre-empted from their duties in District 11 to conduct a stop of Mr. D.'s vehicle.

[44] That it was unusual for the respondents to be pre-empted from their normal duties in this manner is reflected in Constable C.'s evidence that he could only recall having been pre-empted in this way once before in the five years that he had been on the Winnipeg police force to the date of this incident.

[45] The urgency and unusual nature of this situation was also indicated by the fact that the instructions to the respondents were provided on their computer rather than over the police radio which was the usual manner in which they received instructions. This was so that a police radio communication requesting this stop could not be intercepted by someone using a police radio scanner.

[46] Constable C. says that the information which he and his partner received was that:

...Mr. D. had been following surveillance vehicles in the area of the Public Safety Building, 55 Princess, and that we were required or asked to stop him, to formally identify him, and question him with respect to that.

[47] Constables C. and D. were provided with the licence plate number for the vehicle that they were to stop, and Constable C. says that Constable D. checked his licence plate number on CPIC, "and it came back being registered to Mr. D."

[48] Constable C. was asked whether he had any information about Mr. D. or his family prior to making the stop that was proposed. He said that he did and then the following exchange took place:

Q And what sort of information did you have?

A Well, I didn't have any personal dealings with Mr. D. prior to this date.

Q Yes.

A However, I knew of him. There had been numerous -- I'll make it simple to explain -- there had been numerous intelligence reports and, and briefing intelligence reports that we had received with respect to comments he had made as was referred to earlier in the -- to another officer at court to his obviously his -- the involvement of his sons as being members or associates of organized crime. You know, all these things were, were made aware to us. We knew that -- there'd also been reports that he had been following police vehicles before.

[49] Constable C. was also asked whether at the beginning of his shift that night he received any other information that would have caused concern about having to stop Mr. D. His response was:

Yeah. In addition to the previous information that I had, what we were told specifically in the shift briefing was again -- and I'll explain this a little further. It's -- the arrests are made the day before are all read out to the officers at the shift briefing, and that arrest of, of S.(phonetic) D., Mr. D.'s son, was on the dailies, we call it the dailies, for that day. It was read to us and it was explained

that S. D. who we know is an associate of organized crime, a member of organized crime, was caught in possession of a large cache of explosives, automatic, or semi-automatic shotguns, assault rifles and ammunition.

[50] Constable C. also testified to having been advised of other comments made by Mr. D. He said:

The comment the previous intelligence we'd received was that Mr. D., as we referred to earlier, had been in court some time prior to this date, I don't remember the exact date, it was several weeks prior, spoke to an officer, and made comment specifically relating to how easily an undercover officer could be uncovered and, and murdered if necessary if they -- criminal organization of the Hells Angels so wished it.

[51] The following exchange then occurred between counsel for the respondents and Constable C.:

Q And did that impact in any way on you as far as you would have concern about him now following an undercover officer?

A No question.

[52] Constable C. says that when Mr. D. stopped his truck on the Northgate Shopping Centre parking lot in response to the police having turned on their overhead lights and honked their horn at him, Mr. D. immediately got out of his vehicle. Constable C. says that he then stepped out of the police vehicle, and while standing behind the police car door told Mr. D. "in a clear voice" to stop and get back in his truck. Constable C. says that he was only about 20 feet away from Mr. D. when he said this to him and that he felt that Mr. D. had heard him.

[53] Constable C. said that rather than getting back into his truck, Mr. D. locked the truck door and closed it behind himself.

[54] Constable C. says that requiring people in a motor vehicle to stay in the vehicle is a matter of officer safety and a strategy that is taught to Winnipeg police officers at their training academy. He says that when Mr. D. locked and shut his truck door, he then repeated his instructions to Mr. D. to get back into the vehicle. He says again Mr. D. did not obey his direction. He says at this point Mr. D. started to walk slowly towards the police officers. Constable C. says that he then repeated his command a third time, telling Mr. D. to stop and get back in his truck. Again Mr. D. disobeyed the instruction and continued to walk slowly toward the police and the back of his vehicle.

[55] Constable C. then repeated his instruction to Mr. D. to get back in his truck and in response Mr. D. put his hands on the box of his truck. Constable C. thought it was the tailgate of the truck, “but it was the rear of the vehicle”. The following exchange then occurred between Mr. McKenna and Constable C.:

Q Is there anything different about this fourth command?

A It was the same exact command. It was even the same tone of voice, same -- you now, it wasn't escalating any. It was just simply, get back into truck.

[56] Constable C. says that at this point Mr. D. was approximately ten feet away from him, and that when he put his hands on the tailgate of the truck that he again (for a fifth time) told Mr. D. to get back in his truck. The following exchange then occurred between Mr. McKenna and Constable C.:

Q Okay. What was his response to that?

A He disobeyed my instruction. What he did was he laid down on the ground.

Q Yes.

A In a prone position, what we call prone, it's, you know, face down with your, your arms I guess at your sides and your legs outstretched.

Q Okay. And was there anything different about this command that caused him to get on the ground?

A No. My command was to get back into the truck.

Q Same as the other four?

A Same.

Q And by the time you're telling him to get back in the truck the fifth time and he's lying down, is there anything now happening exterior to this incident that would cause him to have a hard time hearing you?

A Not that I was aware of.

[57] Constable C. says that after Mr. D. lay down on the ground, he ordered Mr. D. to not move. The following exchange then occurred between Constable C. and Mr. McKenna:

Q Yeah. Okay. What did you think he was doing now when he was lying there on the ground putting his hands behind his back? What was going on in your mind?

A To be honest with you, I didn't really understand what was going on. I -- it certainly -- my gut feeling was there was something -- it was not in the ordinary for someone to do that, to disobey my instruction that many times, and then to lay down on the ground when instructed to get back into the vehicle, there was no question in my mind that there was something in the vehicle he didn't want us to see. That's the gut feeling that I had.

[58] Constable C. says that when he told Mr. D. not to move, that Mr. D. had put his hands up behind his back. He says that:

I walked over to him, put the handcuffs on him.

He says he and Constable D. then immediately picked Mr. D. up and sat him on the back of his truck. He says that during this period of time Mr. D. was not asking any questions at all. He says that:

In fact, after I handcuffed him, I explained to Mr. D. fairly clearly why he was being handcuffed, that we had, you know, felt that his behaviour was, as creating even more of a heightened officer safety concern for us, and we wanted to maintain as much control over him as we possibly could, so...

[59] Constable C. says that Mr. D.:

...never asked at any point prior to being handcuffed why he was being stopped...

[60] Constable C. was then asked by Mr. McKenna whether he thought that Mr. D. knew why he was being stopped. His response to this question was:

Absolutely.

The following exchange then occurred between Mr. McKenna and Constable C.:

Q Now, we've heard that the driver's licence was retrieved. Can you tell us how that happened?

A Yes, when I put him up to his feet, M. (phonetic) and I, Constable D. I call him M. so it's a little bit easier, we, we got him up. I asked him if he in fact was Mr. D., F. D., he said he was. I asked him for his driver's licence. He said he had it in his wallet, which was in his pocket. I don't remember which pocket it was, but I took it out.

[61] Constable C. says that Mr. D.'s driver's licence turned out to be a yellow temporary permit. He says he asked Mr. D. where the photo portion of his driver's licence was, and Mr. D. explained to him that he had lost it and that he had received a temporary permit from the Motor Vehicle Branch. Constable C. says:

And I told him that basically that under The Highway Traffic Act we could cite him --

...-- for not producing his driver's licence, his photo part of his driver's licence, but that the explanation he had given me --

...-- was reasonable.

[62] Constable C. says he asked Mr. D. where the registration for his vehicle was. Mr. D. told him that it was in the glove box of the vehicle. Constable C. went over to the truck to confirm that the doors were locked. He then came back and asked Mr. D. where the keys were. Mr. D. told him that the keys were in his pocket and Constable C. reached in and got the keys out of his pocket. He then went over to the truck, unlocked it and went into the glove box and got the registration out of it.

[63] Constable C. says that while he was in Mr. D.'s truck, he did a visual inspection of the interior of the vehicle. He also says:

...when I say that, I mean I took a quick look on the front seat, in behind the rear seat.

...And in the glove box where the registration was, obviously.

[64] Constable C. was asked why he did this and he responded:

Again, we went over this earlier. There was obviously concerns with respect to Mr. D. that -- concerns for my own safety and that of my partner. So it's basically was to, to ensure he had no offensive weapons or anything that could harm in any way at the time.

[65] Constable C. says that while he went over to get the motor vehicle registration, Constable D. stayed with Mr. D. He says that on his return from the vehicle he went back to the police car and:

...I ran the plate again on the system to confirm the information we had previously a third time, I guess.

He says that he confirmed the status of the driver's licence, that it was active and that it was of the appropriate class. After he confirmed all this on CPIC, he says that:



I came back out. I told Mr. D. that there was something very important that I had to ask him. I had told him I'll just say also that everything had checked out and his paperwork was all in order as far as we could see. And then I asked him specifically what he had been doing in the area of the Public Safety Building or 55 Princess in that specific area earlier in the evening.

Constable C. went on to say:

His response to that was that he was just driving around, and that he had been in the, in the area visiting a friend, or something to that effect.

Constable C. said that Mr. D. did not provide any information about stopping near the Vice building and rummaging around to find matches to light a cigar or a cigarette.

[66] Constable C. says that after this discussion he asked Constable D. to remove the handcuffs. He says that Constable D. did remove the handcuffs and that he (Constable C.) then gave Mr. D. his driver's licence and his keys to his vehicle and told him that he was free to leave.

[67] Constable C. says that he then offered Mr. D. "a friendly piece of advice":

Which was that if he was in fact in the area of the Public Safety Building with bad intent that he should seriously rethink his motive --

...--because he could be subject to arrest for that.

Constable C. says that Mr. D. did not respond to this advice.

### **ASSESSMENT OF COMPLAINANT'S CREDIBILITY**

[68] I have already indicated, of course, that there is a serious contest of credibility between the police officers and Mr. D. with regard to what happened when the respondents stopped the complainant's vehicle and with regard to Mr. D. having been around the Public Safety Building and 55 Princess Street just before the police stop of his vehicle. In assessing the relative credibility of the parties, I must say at the outset that the police evidence about Mr. D. having been parked in the vicinity of the Winnipeg Police Vice Office at 55 Princess Street, and what happened when he and his vehicle were recognized by Constable C., is overwhelmingly persuasive and convincing.

[69] This police evidence is very detailed and consistent among the three undercover police officers who testified to Mr. D.'s suspicious conduct around the

Winnipeg Police Vice Office, and his following Constable C.'s vehicle and effectively harassing her.

[70] The fact that Sergeant H. called for a marked Winnipeg Police patrol car with uniformed officers to stop Mr. D. and try to ascertain just exactly what he was up to around the Winnipeg Police Vice Office was not surprising. In fact, it would appear that this would be the least that the police could do in light of the bizarre documented previous conversation Mr. D. had had with Sergeant W. N. approximately one month earlier.

[71] With regard to that latter incident, Mr. D.'s cross-examination of Sergeant N. can only be interpreted as a total denial of his having threatened her on the occasion in question, but her evidence as to his bizarre, if not threatening, comments to her on that occasion was not shaken by that cross-examination.

[72] Mr. D.'s evidence, on the other hand, indicates that it was simply a coincidence that he happened to park on King Street, apparently exactly where Constable C. says she saw him; that is, immediately opposite the Vice Division parking lot. Again, Mr. D. seems to indicate in his evidence that the fact that Constable C. saw him in a rather odd or "slouched down" position in his truck was not because he was trying to hide, but it was because he was leaning over to locate matches in the glove compartment of his truck. At best, this again can only be described as another very odd coincidence.

[73] Further concern arises from Mr. D.'s evidence with regard to the following:

- The time at which Mr. D. says various events occurred. In particular, he says that he pulled onto King Street off Notre Dame Avenue between 11:00 and 11:30 p.m. on June 19<sup>th</sup>, 2002. He says that his subsequent stop by the police on the Northgate Shopping Centre parking lot occurred at sometime around 11:30 p.m. Although the first of these two times (i.e., the time at which he turned off Notre Dame onto King Street being between 11:00 and 11:30 p.m.) may very well be correct, his evidence as to the time at which he was stopped by the police on the Northgate Shopping Centre parking lot (i.e., around 11:30 p.m.) has to be wrong insofar as Exhibit 3 at this hearing, the unit history for Unit N103, indicates that the respondents were not pre-empted to attend and stop Mr. D.'s vehicle until 11:54 p.m.

Further, there is no reason to doubt Constable C.'s evidence that it was 11:45 p.m. when she drove through the lane from Arthur Street to King Street westbound and arrived at the entrance of the lane onto King Street. It

was at that point that she first noted Mr. D.'s vehicle. If Mr. D. had simply stopped at a convenient location to locate his matches as he said he did, why would it be that he was still parked in that same location "slouched down" 15 minutes to three-quarters of an hour after he says he first turned off Notre Dame onto King Street?

It is possible, of course, that Mr. D.'s timing with regard to all of these events is at odds with the times recorded by the Winnipeg Police, but it seems unlikely that all of Mr. D.'s estimated times would be off by a possible 45 minutes in each instance.

- Mr. D.'s estimate was that he was detained on the Northgate Shopping Centre lot by the respondents for a period of 45 minutes to an hour. The police evidence is to the effect that the entire incident relating to Mr. D.'s stop on that occasion was approximately 17 minutes. The police evidence in this regard is supported by Exhibit 3, the Unit N103 history, and there is otherwise no reason to disbelieve that evidence. It appears clear then that Mr. D.'s evidence as to the time involved in his stop by the respondents is a significant exaggeration.
- Mr. D.'s evidence as to how he came to be face down on the ground at the scene of his stop by the respondents is that he assumed this position because he was ordered by the respondents to get down. The police officers, on the other hand, say that Mr. D. placed himself face down on the ground in response to a command from the police to get back in his truck. Of significance in this regard is Exhibit 1 at this hearing, the transcript of Mr. D.'s original complaint to the L.E.R.A Commissioner. In that document, Mr. D. says in part:

I got out of my truck to proceed to the back. The police car was positioned from the back of my truck about 50 to 70 feet. While I was exiting my vehicle I unintentionally locked my door. My passenger door was locked as well. The two officers began shouting at me, something like get back in the truck (I was stopped & standing) at the back of my truck. I was sort of frozen there. I put my hands on the back tailgate. The officer wearing badge No. X came to look in the box of my truck. The other officer was shouting for me to get back in my truck. At this point with my hands on the back tailgate, I thought I heard him say -- get down! So I lay down on my stomach -- hands behind my back -- spread legs -- face down. At this point I was handcuffed!

(Emphasis added.)

My conclusion is that Mr. D.'s unequivocal evidence at this hearing that he was ordered to the ground by the police officer is an instance of reconstructive recollection which he was not quite bold enough to allege in his original complaint and which, in fact, is not true.

#### **CONCLUSION ON CREDIBILITY AND COMPLAINT NO. 4**

[74] In the final analysis, principally because I find the three undercover officers' evidence to be so compelling, I simply cannot accept Mr. D.'s evidence that what the undercover officers had testified to is a fabrication. Rather, I conclude that Mr. D. is not a credible witness, and in every instance where there is a conflict of evidence between Mr. D. and, respectively, the respondents, Sergeant W. N.; and the three undercover surveillance officers, I reject the evidence of Mr. D. and accept the evidence called on behalf of the respondents.

[75] I might comment parenthetically that the *W.(D.)* case has no application to these proceedings, and in fact the onus is on the complainant pursuant to section 27(2) of *The Law Enforcement Review Act* to satisfy the Court "on clear and convincing evidence" that the respondents have committed the alleged disciplinary defaults.

[76] The conclusion to reject Mr. D.'s evidence and accept the evidence of the respondents and their witnesses effectively disposes of Mr. D.'s allegation of the respondents having used oppressive or abusive conduct or language on the complainant contrary to section 29(a)(iii) of *The Law Enforcement Review Act*. This leaves for consideration, however, the first three complaints of abuse of authority by the respondents set out in paragraph 1 of this decision.

#### **ASSESSMENT OF COMPLAINTS 1, 2 AND 3**

[77] Mr. D.'s remaining complaints in this matter must be assessed then on the basis of the evidence of the respondents as to exactly what happened when he was stopped by the police. It is clear from that evidence that Constables D. and C. had been specifically assigned to stop (and, by implication, detain) Mr. D. to determine what he had been "up to" around the Winnipeg Police Vice Division Office at 11:45 p.m. on June 19<sup>th</sup>, 2002 and thereafter. It is also clear that the respondents were well aware of:

1. Mr. D.'s background of association through his children with the Hell's Angels motorcycle gang;

2. his having effectively threatened a female police sergeant at the Winnipeg Law Courts Building approximately a month previous to this incident; and
3. the arrest of Mr. D.'s son on serious weapons and explosives charges the night before.

In these circumstances, the respondents obviously had to have serious concerns about officer safety in making a stop of Mr. D.'s vehicle, and their conduct in effecting this stop must be considered in this light. This is so regardless of the factual correctness of Mr. D.'s children's associates within the Hell's Angels; his having threatened Sergeant N.; and the validity of the charges on which his son was arrested. All of these matters formed a part of the background to Mr. D.'s stop by the police and clearly were legitimately in the minds of the respondents when they effected this stop of Mr. D.'s truck.

[78] Mr. D.'s conduct in deliberately locking the door to his truck and closing it when he was clearly told by Constable C. to get back in his truck, and then on four further occasions refusing to follow these instructions and instead first walking towards the police and then lying face down on the ground, is obviously conduct which raised the concerns of the respondents making this stop. In my view, it well justified Constable C.'s conduct in accepting Mr. D.'s effective invitation (by bringing his arms up behind himself while lying on the ground) to be handcuffed.

[79] It has been noted in any event that virtually immediately after handcuffing Mr. D., the respondents lifted him up and sat him on the back bumper of his truck.

[80] It is further to be noted from Mr. D.'s conduct when he was detained by the police that:

- Mr. D. obviously knew why he was being stopped, insofar as he never asked about that (despite his protestations to the contrary at the hearing of this complaint).
- Mr. D. never suggested to the police when he was asked about what he was doing around the Public Safety Building that he had stopped on King Street opposite the Vice Division Office simply to locate matches (which was the story that he told at the hearing of this matter).

[81] It is in this context that it must be determined whether or not the respondents abused their authority by failing to comply with subsections (a) and (b) of section 10 of the *Charter of Rights and Freedoms* as alleged in allegations nos. 1 and 2 and

in failing to comply with section 8 of the *Charter of Rights and Freedoms* on searching Mr. D.'s vehicle as is effectively alleged in allegation no. 3. The respondents do not allege that upon detaining Mr. D. they complied with the requirements of both subsections (a) and (b) of section 10 of the *Charter of Rights and Freedoms*. In all of the circumstances, however, such failure to comply with the requirements of this section can at most be considered to be technical breaches and it would remain a question of doubt as to whether either of those breaches would have resulted in any sort of remedy whatsoever under the *Canadian Charter of Rights and Freedoms*.

[82] It is also clear in my view that such technical breaches of the *Canadian Charter of Rights and Freedoms* made in the unusual circumstances resulting from Mr. D.'s own conduct in this matter cannot in any realistic manner be viewed as acts or omissions amounting to an abuse of authority by the respondents in this matter.

### **BREACHES OF CHARTER RIGHTS CONSTITUTING DISCIPLINARY DEFAULTS**

[83] Counsel for the respondents have referred to the decision in *Rampersaud v. Ford*, Board of Inquiry (Ontario *Police Services Act*) decision January 26<sup>th</sup>, 1994.

[84] The Board's decision in this matter under the heading "Is Every Charter Breach by a Police Officer a Disciplinary Offence?" reads as follows:

Anyone who attends at criminal court on a regular basis will be aware of the fact that charges against accused persons are regularly dismissed because of both serious and technical breaches of the accused's *Charter* rights by investigating officers. If police officers were subjected to disciplinary proceedings every time a judge made such a finding, police work would be impossible, and police officers would operate under a form of "disciplinary chill". Police officers are not lawyers and cannot be expected to know every nuance of *Charter*-related law. Further, the rights of accused with regard to arbitrary detention, arbitrary arrest, and unreasonable search and seizure are constantly being refined by our higher courts. The common-law regarding such rights may well change between the time of an individual's arrest and his or her trial. Police officers, acting in good faith, should not be held to a retroactive standard of conduct.

I agree with these comments.

### **Highway Traffic Act Stop vs. Stop for Investigative Detention**

[85] In cross-examination, Mr. D. pressed Constable C. about the Constable having told him that as a police officer he could stop anyone to check their licence and registration. Although Constable C. at first could not recall Mr. D. having asked him anything, the following exchange then occurred:

Q You don't recall specifically telling me in a loud manner, I can stop anybody I want to check their licence and registration? This is what I'm asking you.

A If that's how you remember I said it to you, I did tell you that we could stop any vehicle at any time to check the driver status of their --

Q Well, that's how I remember you telling it to me.

[86] Constable C. then went on to confirm his position that he had not treated Mr. D. disrespectfully and, rather, had been at pains to explain to him:

...why were (sic) stopping you and what authority we had to do that...

[87] Unfortunately, it may be that Constable C.'s explanation to Mr. D. of his authority as a police officer to stop a vehicle on the highway to check the operator's licence and registration under section 76.1 of *The Highway Traffic Act* may have run afoul of the caution of the Supreme Court of Canada in *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 that:

Officers can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those relating to driving offences. Any further, more intrusive procedures could only be undertaken based upon reasonable and probable grounds. Where a stop is found to be unlawful, the evidence from the stop could well be excluded under s. 24(2) of the *Charter*.

[88] During his examination-in-chief Constable C. made it quite clear in the course of the following exchange why Mr. D. was stopped:

Q Okay.

A And that was the, at the end of the day, the scope of my stop was to positively identify him.

Q Yes.

A And determine why he was in the area of the PSB. That was the scope of my stop.

[89] In these circumstances a question arises as to why Constable C. would not have told Mr. D. precisely why he was being stopped, rather than making any reference to police powers to stop vehicles under *The Highway Traffic Act*. The answer to this question seems to be related to this exchange between Mr. McKenna and Constable C. during his examination-in-chief:

Q In, in your experience, constable, and including the experience in the undercover area, why is it that you don't want to tell Mr. D. detail about the undercover officers?

A It's like the best way I can describe it is like poker. You don't show your hand unless you have to, or when you're forced to. The more we tell him or disclose to any suspect that we're actively investigating, the more likely they will, they'll change their behaviour, change their, their criminal activity to try to make it more difficult for us to, to investigate it. So we don't want to disclose more information than we absolutely have to. That's part of what these kinds of investigations are. Like I said, they're very cloak and dagger, they're very secretive. They need to be, by their very nature.

[90] The explanation arising from this answer (a concern not to reveal any information about undercover police activities) cannot, of course, override Constable C.'s obligations in this instance pursuant to sections 10(a) and (b) of the *Canadian Charter of Rights and Freedoms*. I do, however, accept the bona fides of Constable C. in advancing this explanation and, as previously indicated, any breaches of Mr. D.'s rights in this situation in contravention of section 10 of the *Canadian Charter of Rights and Freedoms* were technical breaches only.

[91] In my view, although Constable C. may have indicated to Mr. D. that the police authority to stop Mr. D.'s vehicle flowed from the Manitoba *Highway Traffic Act*, in fact this was a stop for the purposes of an investigative detention in relation to an allegation which could well be viewed as a persistent following of a justice system participant contrary to section 423.1 of the *Criminal Code of Canada*. Constables C. and D. were provided with "reasonable grounds to detain" Mr. D. by virtue of the information and instructions provided to them on their computer by Sergeant H. In turn, all of the circumstances of this stop and the other information Constables C. and D. had about Mr. D. provided reasonable grounds for them to believe that their personal safety might be at risk and made the visual search of Mr. D.'s truck by Constable C. entirely justified on the grounds of officer safety.

[92] His Honour Judge Sandhu's reference in his decision in *R. v. Lee Shawn Elyk* given November 25<sup>th</sup>, 2005 to the *Ferris* and *Mann* cases is pertinent to the situation here:

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



[23] Cited by the Crown, *R. v. Ferris*, [1998] B.C.J. No. 1415 (C.A.) has withstood the test of time and remains as the most instructive of precedential law in this area. In that regard the comments of Ryan, J.A. are particularly instructive, at paras. 49 and 50 (in part):

49. *We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties....*

*.....We cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.*

[24] *Mann* permitted a limited search for officer safety, verifying the concerns enunciated in *Ferris*. *Mann* thus balances the opposing tension between officer safety and public liberty, within the confines of the particular facts of that case.

[25] Courts have consistently endorsed the proposition that if there exists a constellation of objective and subjective facts that warrant a concern for officer safety, then a limited detention and search are permissible to overcome that concern. How limited depends, again, upon the particular facts.

## **CONCLUSION**

[93] I accept as being entirely accurate, and justified, the expressions by the respondents in this matter of their concern for their own safety during the course of effecting the stop of Mr. D.'s vehicle. In these circumstances, the respondents would have been foolish not to have searched Mr. D.'s truck for weapons.

[94] It is clear from the authorities that upon effecting an arrest police officers have the right to search the arrested person and his immediate surroundings. It also appears clear from the authorities that upon a detention such as occurred here, a search of the accused and his surroundings for the purposes of assuring officer safety, and for weapons, can be appropriate. In the circumstances of Mr. D.'s

bizarre behaviour when he was stopped by the respondents in this matter, such a search was eminently advisable if not absolutely necessary.

[95] Finally, with regard to allegation no. 4 in Mr. D.'s complaint, that is, the allegation that the respondents used oppressive or abusive conduct or language on a complainant, it is clear that that was not the case and that the respondents, in fact, treated Mr. D. reasonably and courteously in the circumstances. In particular, the respondents were neither verbally abusive to Mr. D. nor was the conduct of Constable C. in placing handcuffs (at Mr. D.'s invitation) on him excessive in light of Mr. D.'s behaviour in disregarding police instructions to stay in the truck and then proceeding towards the police officers while ignoring further requests to get back in his truck.

[96] My conclusion, then, is that neither of the respondents in this matter have committed a disciplinary default in any respect as alleged by the complainant. Accordingly, Mr. D.'s complaint in this matter is dismissed.

[97] It is further ordered that the ban on publication of the respondents' names shall continue.

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Wesley H. Swail, P.J.