In the matter of: The Human Rights Act, R.S.N.S. 1989, c. 214, as amended 1991, c. 12

BETWEEN: KIRK JOHNSON

- Complainant -

and

MICHAEL SANFORD

- Respondent -

HALIFAX REGIONAL POLICE SERVICE

- Respondent -

and

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

DECISION

BEFORE: Philip Girard
Board of Inquiry

DATE OF DECISION: 22 December 2003

COUNSEL: Victor Goldberg and Rebecca Lamb
for Kirk Johnson

Michael Wood and Jennifer Ross
for the Nova Scotia Human Rights Commission

Michael Moreash and Patrick Duncan
for the Halifax Regional Police Service

The incident that resulted in Kirk Johnson laying a complaint against Constable Michael Sanford and the Halifax Regional Police Service can be succinctly described. On 12 April 1998 Earl Fraser and Kirk Johnson were pursued on Highway 111 by Constable Sanford and stopped at a shopping plaza just off Main Street in Dartmouth. Mr. Fraser was driving Mr. Johnson's Texas-registered 1993 black Ford Mustang. The constable asked for proof of insurance and vehicle registration and was not satisfied with the documents offered. He then ticketed the driver, and ordered the car towed. In fact Mr. Johnson's documentation was valid under Texas law. The next day an unidentified police official determined that the seizure had been erroneous and ordered the car released. Both Mr. Fraser and Mr. Johnson are black. The central issues in this case are whether any of Constable Sanford actions on the night of 12 April constituted an act of discrimination, and whether any actions or omissions of the Halifax Regional Police amounted to discrimination against Mr. Johnson.

Mr. Johnson first sought to lay a complaint against Constable Sanford for abuse of authority, using the complaints procedure provided under the authority of the *Police Act*, R.S.N.S. 1989, c. 348 as amended. An attempt at an informal resolution failed, after which Mr. Johnson filed a formal complaint. The officer responsible for adjudicating on such complaints decided on 2 June that while Constable Sanford had made a mistake, it was an error in judgment only and not an abuse of authority. Mr. Johnson did not appeal to the Police Review Board. On 14 December 1998 he laid a complaint under the Nova Scotia *Human Rights Act* alleging that Constable Sanford and the Halifax Regional Police had discriminated against him by wrongfully seizing his vehicle, contrary to section 5(1)(a)(i) and (j) of the *Act*. After the usual process of investigation and attempted mediation, it was determined that a settlement was not possible. I was appointed a board of inquiry on 2 May 2002. After a number of postponements requested by Mr. Johnson to accommodate his work schedule, and agreed to by the respondents, the hearing was held on 5-8 and 11-12 August, and 8, 15 and 19 September 2003. Closing arguments were to be heard on 29 September but Hurricane Juan intervened, and they were rescheduled for 29 October. Mr. Michael Wood, assisted by Ms. Jennifer Ross, represented the Human Rights Commission, Mr. Victor Goldberg, assisted by Ms. Rebecca Lamb, represented Mr. Johnson, and Mr. Michael Moreash, assisted by Mr. Patrick Duncan, represented the Halifax Regional Police and Constable Sanford. I wish to thank all counsel for their able assistance during this inquiry.

Kirk Johnson is one of Nova Scotia's best known athletes. He ranks among the top heavyweight boxers in the world and his career is followed with interest in both the local and national media. As a result, the hearing of his complaint was followed avidly by newspaper, radio and television reporters. It was often front page news in the local newspapers, and developments at the hearing were covered by a number of local radio and television stations; there was also some national media coverage. I think it is fair to say that the media coverage was

unprecedented for an inquiry under the Nova Scotia *Human Rights Act*. Aside from the complainant's identity, the allegations of racial profiling by the police also generated considerable interest. The treatment of racial minorities by the police in Canada has been a topic of controversy for the last decade at least, but especially within the last few years. It was inevitable that claims of racial profiling, made by a well-known complainant, would attract public attention.

I mention the atmosphere surrounding the hearing in order to clarify my role in two respects. First, I am not to be influenced by media coverage of the event, nor by Mr. Johnson's status as a star athlete. If an act of discrimination is established, his reputation, if harmed, would be relevant in an assessment of damages, but in other respects Mr. Johnson's status is not to affect my decision. He carries the same burden of proving an act of discrimination as would any other complainant in a similar situation.

Second, the inquiry into this complaint was not, and could not be, the appropriate vehicle for a full investigation of claims of racial profiling by the Halifax police. A board of inquiry under the Nova Scotia *Human Rights Act* is appointed to decide on a particular complaint, and is not to be confused with an inquiry under the *Public Inquiries Act* which usually has a more wide-ranging mandate. Mr. Johnson gave testimony to the effect that he had been stopped 28 times in the black Mustang while on visits to his parents over the years 1993-98, before the night in question. There was also some other evidence regarding black persons being stopped by police in the Halifax-Dartmouth area. Mr. Johnson's testimony on this point was not the basis for his complaint; rather, his and the other testimony was being offered in an attempt to show a pattern of behaviour by police actors that made it more likely than not that the incident under review here (the stopping, ticketing and towing of the Johnson vehicle) was the product of discriminatory attitudes and/or practices. It was argued that if I accept this evidence in whole or in part, it might be considered some evidence of racial profiling practices by the police, which might assist me in drawing inferences about the actions of police actors on the night of 12 April. I will address this argument in due course.

The complaint filed on 14 December 1998 stated "I feel that I was pulled over and harassed by Constable Sanford on the evening of April 12, 1998, because I am a black man." At the hearing counsel for the Commission and for Mr. Johnson broke down the incident into five distinct phases, all of which they alleged to be acts of discrimination, and a finding in their favour on any one of which would suffice to uphold the complaint. They are as follows:

1. the decision by Constable Sanford to pursue the vehicle
2. the failure to assess properly the documentation proffered by Mr. Fraser and Mr. Johnson
3. the decision to tow the vehicle
4. the level of the police response (i.e., an alleged over-reaction to the stopping)
5. the treatment by Constable Sanford of the two men as criminals or potential criminals

The last two allegations were not specifically made in the initial complaint but were not objected to by counsel for the respondents. I find there was no surprise or unfairness in presenting the case in this way as these allegations flowed predictably from the complaint and the events of the evening of 12 April. I prefer to collapse this scheme into three parts: the decision to pursue, the ticketing and towing, which are closely intertwined, and the level of police response. I do not find it necessary to isolate the alleged treatment of the complainant and Mr. Fraser as criminals or potential criminals as a distinct head of discrimination. I regard it as interwoven with the other matters.

The law

There is not much dispute about the law in this case. I did not understand the respondents to dispute that police services are "services" under s. 5 of the Nova Scotia *Human Rights Act* which the citizen is entitled to have provided in a non-discriminatory way; see *Fraser v. Victoria (City) Police (No. 2)* (1988), 9 C.H.R.R. D/5068 (B.C.C.H.R.); *Gomez v. Edmonton (City)* (1982), 3 C.H.R.R. D/882 (Alta. Q.B.); *Hum v. RCMP* (1986), 8 C.H.R.R. D/3748 (C.H.R.T.).

The burden of proof in such cases has been discussed many times. The complainant must establish a *prima facie* case of adverse treatment which, it can reasonably be inferred, arose because of race. The cases speak of race being an "operative" element in the conduct alleged to be discriminatory; it need not be the main or major cause of the adverse treatment; see *Fuller v. Candur Plastics* (1981), 2 C.H.R.R. D/419 (Ont. Bd. Inq.); *Basi v. CNR* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.). The burden then shifts to the respondent to demonstrate a rational and credible justification for their conduct. The complainant may then try to show that such justifications are mere pretexts or veils for conduct which is actually discriminatory. In most such cases, circumstantial evidence and inference are heavily relied upon as there is seldom direct evidence of discriminatory conduct. There was at one time some concern that developments in the Supreme Court of Canada jurisprudence on s. 15 of the *Charter* might alter this traditional understanding, but after a thorough review the B.C. Human Rights Tribunal recently concluded that the traditional tests remain unaffected: *Nixon v. Vancouver Rape Relief Society (No. 12)* (2002), 42 C.H.R.R. D/20.

A recent decision by the Ontario Court of Appeal which raised the issue of racial profiling by the police has made it clear that discriminatory acts by the police (or anyone) can arise from a process of subconscious stereotyping as well as from conscious decisions. Thus I must be alert at all stages of the inquiry for evidence from which such stereotyping might be inferred. In *R. v. Brown*, [2003] O.J. No. 1251, an African-American member of the Toronto Raptors basketball team was stopped by police and arrested for driving with a blood alcohol level above the legal limit. The arresting officer testified that Brown passed him going at least 30 km. above the speed limit. Brown denied passing the police vehicle and said he had been going less than 10 km. per hour above the speed limit. He argued that he had been arbitrarily detained because he was a young black man driving an expensive car, and that there was no articulable cause for the stop. A conviction at trial was overturned by the Summary Conviction Appeal

Court on the ground that the trial judge displayed a reasonable apprehension of bias in that he appeared to have closed his mind to defence arguments based on racial profiling. The Ontario Court of Appeal sustained the dismissal and ordered a new trial. There was considerable evidence of police misbehaviour, including alteration and suppression of police notes which, if believed, would have supported Brown's version of events. The Court of Appeal agreed with the definition of racial profiling advanced by counsel for the police (at para. 7): "racial profiling involves the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group." The Court added that "the attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping." *Brown* deals with the criminal law but these comments about racial stereotyping are equally applicable in proceedings before human rights tribunals such as this one.

The decision to pursue the vehicle

The allegation of the complainant is that Constable Sanford decided to pursue this vehicle at least in part because the occupants were black. The theory is not that Constable Sanford wished to harass black people as such, but rather that he used race as a proxy for a propensity to illegal behaviour, and that such decisions by police are unjustified and discriminatory. In order to prove this allegation the complainant has to show that Constable Sanford had some opportunity to observe the race of the driver of the car before it was stopped. Counsel for Mr. Johnson and the Commission tried to do this in two ways. The first was by direct testimony of the participants as to the events of that evening. The exact circumstances surrounding Constable Sanford's decision to pursue and stop the vehicle constitute the principal area of testimony before this inquiry where the facts are seriously in dispute, and they will have to be examined in some detail. The second way in which counsel sought to demonstrate that race played a role in Constable Sanford's decision was by introducing evidence as to racial differences in the styling of cars. The thrust of the argument was that there are obvious styling difference between cars, especially sports cars, owned by black males versus those owned by white males, that these are well known within police culture in general, and that I should infer Constable Sanford was aware of these differences and acted on this knowledge on the evening in question. Constable Sanford denies being aware of such differences, and denies knowing the race of the occupants of the vehicle before the stop was made.

The issues here are primarily factual. If I accept Constable Sanford's denials, then the complaint is not made out on this point. If I find Constable Sanford was aware of the race of the occupants before stopping the car, I must still go on to determine whether that knowledge led him to act in a discriminatory way.

Before embarking on a narrative of the events of that evening, let me dispose of the second argument first. With regard to the testimony on styling differences between vehicles owned by blacks and whites, I am not convinced that policemen in general are aware of these

differences, or that Constable Sanford was. I accept that there are some differences in styling with regard to a narrow range of sports cars, though these manifest themselves as tendencies rather than invariable practices. The differences involve types of wheel rims and paint, and the use or non-use of decals, and I accept the testimony of the witnesses O.J. and Jouan Johnson that they can perceive these differences. It is often the case that members of a minority group will be highly aware of certain small differences in behaviour that distinguish them from members of the majority, differences which may be much less visible to members of the majority. In distinguishing themselves from Americans, for example, Canadians often focus on fairly minor behavioural differences that might not be apparent to Americans. In the case of a given car within this category I expect that black youths could predict the race of the owner with a fair degree of accuracy, though clearly much less than 100% of the time. I find it significant that the only police officer who demonstrated even passing familiarity with this phenomenon was Constable Barry Warnell, who has had thirty years of patrol experience in the Dartmouth area. During that period Constable Warnell would have had opportunities to notice these fairly subtle differences, where other officers would not. Constable Sanford was raised in Fredericton, New Brunswick and had only been assigned to duties in Dartmouth for a few weeks before the evening in question. I do not believe he would have absorbed any local police knowledge among Dartmouth officers about black styling of vehicles in that short period, even if such knowledge existed.

Kirk Johnson was visiting with his cousin Earl Fraser and his family on the evening of 12 April 1998, at Mr. Fraser's home in North Preston. About 7:30 pm they decided to go for a drive so they could spend some time together before Mr. Johnson's imminent return to Texas. It had been a fine spring day, clear and with a high of 10 degrees C. The temperature at the airport had fallen to 7.3 degrees by 8:00 pm according to the Environment Canada Report (exhibit 14). Sunset was at 7:56 pm according to the National Research Council of Canada report for 12 April 1998 (exhibit 12). By 8:07 pm, when Constable Sanford first reported that he was following the Johnson vehicle, the sun had just set but the spring sky was still light.

The reason for noting the light and weather conditions will be apparent shortly but I must first flag a problem with exhibits 12 and 14 that was not raised at the inquiry. The National Research Council of Canada website shows the time of sunset at Halifax for 12 April 1998 as 6:56 pm. For some reason, no one at the inquiry noted the caveat immediately above the listing of sunrise and sunset times: "Add one hour to listed times when Daylight Saving Time is in effect." As a matter of record, Nova Scotia went on Daylight Saving Time on the previous Sunday, 5 April (see *Chronicle-Herald*, 4 April 1998). Thus sunset was at 19:56 or 7:56 pm on Sunday 12 April, not at 18:56 or 6:56 as listed on the face of exhibit 12, though the latter time was erroneously assumed to be correct at the inquiry. I also checked the *Chronicle-Herald* for 11 April 1998, which showed sunset at 7:55 pm. The same caveat goes for the temperature noted earlier, though it is not as crucial to this decision. The correct temperature at 8 pm was the 7.3 C I noted above, not the 6.2 noted on the face of the exhibit as the temperature at 8 pm.

The evidence of Mr. Fraser before the inquiry was that he spotted Constable Sanford's vehicle behind them at a point east of the Micmac Mall as they were heading west, and noticed that it was travelling at a high rate of speed, much higher than the estimated 40 m.p.h. (60 km/hr) Mr. Fraser was travelling. Constable Sanford's vehicle passed them at high speed, braked quickly so that the rear end of the car lifted up, then proceeded more slowly, so that the Johnson vehicle in turn passed him. Mr. Fraser says at this point he had eye contact with Constable Sanford, and that his (Fraser's) window was part way down so that there was nothing to impede the officer's view of him. Mr. Fraser's account of the incident when interviewed by Mr. William Grant of the Commission on 25 October 2001 was similar though not identical. He stated then that Sanford passed them at a high rate of speed, "glanced over at them as he passed," then braked. Mr. Fraser was less categorical on whether his window was up or down, stating, as recorded by Mr. Grant, "the windows of the car had to be down, because the air conditioning was not working," but that he (Fraser) "was sure that Sanford saw who was in the car." On both occasions Mr. Fraser stated that after the police car passed him, he said to his cousin, "we're going to be stopped." He stated that there were no other vehicles on that stretch of highway at the time.

Mr. Johnson's testimony at the inquiry agreed with Mr. Fraser's as to Constable Sanford's vehicle passing his, braking suddenly so that the rear end of the car lifted up noticeably, then proceeding more slowly so that the Johnson vehicle passed him. He recalled Mr. Fraser predicting that they would be stopped, and stated there was no traffic on the highway at the time. He was not asked about any eye contact with Constable Sanford, either in direct or cross-examination, nor did he volunteer anything on this point in his testimony regarding the pursuit of his vehicle. In cross-examination he said he could see that Constable Sanford was white when the police vehicle passed his car, so he assumed Constable Sanford could see his race. All parties agree that once the Sanford vehicle was clearly following the Johnson vehicle on Highway 111, Mr. Fraser changed direction. Highway 111 at the point in question is four or five lanes wide in both directions with a concrete barrier in the middle. The four westbound lanes divide into two lanes going towards the Macdonald Bridge to Halifax, on the left, and two other lanes plus an exit lane on the right, with the exit lane providing access to Woodland Avenue. Mr. Fraser had been proceeding towards Halifax in the left hand lanes, signalled, and moved over two or three lanes to exit at Woodland. He followed the cloverleaf around to the eastbound lanes of the highway, with Constable Sanford still following, then after a short stretch on the highway turned into the Westphal Plaza parking lot. The plaza is located at the point where Highway 111 becomes Main Street and is no longer a controlled access highway. Everyone agrees that once the Johnson vehicle was stopped, Constable Sanford put on his lights.

Constable Sanford's evidence in direct examination was that he was travelling in the opposite direction to the Johnson vehicle when he first encountered it, and that it was the combination of "nice sports car with tinted windows" that attracted his attention. He passed by quickly and then noticed the Texas licence plate either by turning around or in his rearview mirror. The Johnson vehicle had no licence plate on the front, so he could not have seen it as he approached the vehicle, if in fact he approached it from the opposite direction. The additional

factor of the Texas licence caused him to take an interest in the car, and he turned around and followed it. He could see the silhouettes of two persons in the car, but could not and did not make out their race. When it seemed to be taking evasive action he decided to stop it. He denied having overtaken the car in the manner described by Messrs. Fraser and Johnson, and in particular denied having eye contact with Mr. Fraser. On cross examination his recollection of the circumstances leading up to the decision to stop was less distinct. In response to a question from Mr. Goldberg his testimony was:

> The only thing I can say for certainty is the Mustang was going what I refer to as inbound [i.e., towards Halifax] on the 111 or Main Street and that I was either coming directly at it or I could have been even pulling out of one of these side streets. I can't recall specifically where I was at the time.

And in response to a question from Mr. Wood, he said "I can recall specifically that I was not behind that vehicle at the time I first observed it. I remember seeing it coming. I was either coming straight at it or coming out from the side street."

The testimony at the inquiry is not the only source of evidence about what happened that evening. There is testimony from Mr. Johnson which is much closer to the event. When he was making his complaint against Constable Sanford, about which I will have more to say later, Mr. Johnson gave a statement to Sergeant Michael Bell. Sergeant Bell was the officer responsible for dealing with complaints against the police. This statement was given on18 May 1998, after Mr. Johnson had returned from Texas. The statement was not audio-taped, and was in effect dictated by Mr. Johnson to Sergeant Bell, who typed it as Mr. Johnson spoke. Sergeant Bell could not locate a signed copy of the statement, but said his normal practice was that he would have the deponent sign the statement and give him a copy. The content of the statement was re-typed, or probably cut and pasted from the word-processed original, into the "Investigative Report - Kirk Johnson (HRPS File #46-98)," a copy of which is found at tab 1 of volume 3 the Joint Exhibit Book. In response to an invitation to describe the circumstances of the traffic stop, Sergeant Bell recorded Kirk Johnson as saying:

> Off the highway of Main Street, pass Mic Mac Mill. We were driving. Me and my cousin Earl Fraser. The cop car zoomed past us. Looks back and slows down so we can pass him. We drive and cut off at the Woodlawn [Woodland] Blvd. He slows down and follows us around the ramp ....

This version of the stop, if accurately recorded by Sergeant Bell, is of significant probative value because of the circumstances under which it was given and its closeness in time to the event. It is essentially the same version of the stop that was given by the complainant and Mr. Fraser at the inquiry – that Constable Sanford was behind them, passed them at high speed ("zoomed past us"), then slowed down so as to let them pass.

This statement was not given in the context of a human rights complaint but as part of a complaint against the police pursuant to their internal processes. It is possible that Mr. Johnson mis-remembered the circumstances of the stop, though I find that unlikely so close to the event, especially given the distressing event in question. I must caution myself that he may not have been telling the truth about the manner of the stop, so as to magnify his complaint against Constable Sanford. This too I find unlikely. The focus of the complaint was the mistaken seizure of the car and virtually all of the two-page single-spaced document relates to that and not to the circumstances leading to the stop. The seizure is what was uppermost in Mr. Johnson's mind in making this complaint. While there are occasional references later in the document to Mr. Johnson's belief that he was singled out constantly by the police for routine stops, the lead-up to the stop in question is described almost incidentally, and for that reason I find it convincing.

The absence of traffic on the Highway 111 at the time in question provides some circumstantial evidence in support of the Johnson-Fraser version of the nature of the pursuit of the car. Both of them testified there was no traffic on the highway at the moment in question, so that Constable Sanford could have executed the manoeuvre he did without danger to other motorists. The sun had only just set, it was not dark, and visibility was very good, again factors indicating a lack of danger in this manoeuvre. Constable Sanford's recollection of the events leading up to the stop was generally weak, and his testimony about the amount of traffic not of assistance on this point. In 1998 there was no Sunday shopping in Nova Scotia, and I think I can take notice of the fact that major highways are often very quiet on Sundays before the tourist season begins in late May. Given that this was Easter Sunday, the roads were likely to be even quieter than usual at 8:00 pm. It is quite plausible that for the 2 or 3 minutes (maximum) this pursuit lasted there were no other vehicles at all on that particular stretch of the Highway 111. The police transcript notes Constable Sanford saying at 20:07:29 "I'm gonna be trying to get caught up to [the Johnson vehicle]" while only two minutes later at 20:09:30 he reports "I'm in the parking lot of Tim Horton's."

Mr. Moreash suggested that it was highly implausible that a police officer would behave in the manner I have found, mainly because of the danger involved in executing it in near darkness on a busy highway. He was honestly mistaken about the degree of darkness, as we all were during the inquiry because of the failure to take Daylight Savings Time into account, and while Highway 111 is normally a busy highway, I have found it was not busy at all at the relevant time on the evening in question. I accept that the manner of Constable Sanford's overtaking of the vehicle was unusual even under perfect conditions, but not that it was implausible. I caution myself that Mr. Fraser and Mr. Johnson would have had ample opportunity over the years to agree on a story about the events of the pursuit by the police vehicle, but in largely accepting their version of the events I reject this possibility. I find their evidence credible.

I find as a fact that Constable Sanford overtook the Johnson vehicle and then let it pass him, in the manner described initially in Mr. Johnson's May 1998 statement to Sergeant Bell, and in the testimony of the complainant and Mr. Fraser before the inquiry. As to where Constable

Sanford was when he initially saw the vehicle, I accept his testimony that he was either heading in the opposite direction from the Johnson vehicle and turned around to follow, or had been entering the highway from a side street. Either way, he saw a dark coloured sports car which he decided to follow. As to what sparked the constable's initial interest in the car, his testimony at the inquiry was "a nice sports car with tinted windows." This does not quite match with how he described his interest in his response to Mr. Johnson's complaint in May 1998. Constable Sanford filed a response to Mr. Johnson's formal complaint on 28 May in which he reported that he "had occasion to observe a dark colored Ford Mustang with Texas licence plates." There is nothing about tinted windows in that statement only six weeks after the event. In spite of this discrepancy, I am not convinced that he knew or surmised the race of the vehicle's occupants at the time he decided to follow it.

Whether Constable Sanford became aware of the race of the occupants during his pursuit of the vehicle, and whether that had an impact on his decision making is harder to ascertain. We know that he was aware of two occupants, as he mentioned that in his very first communication with the dispatcher Suzanne Killen at 8:07. I have found that Constable Sanford passed the Johnson car and then let it catch up and pass him at a fairly slow rate of speed. Thus he had two opportunities to see into the vehicle, first when he passed at high speed, and secondly when the Johnson vehicle in turn passed him at a slower rate of speed. If the window was down, then Constable Sanford must have seen the race of the occupants as he passed. Even if it was up, given the amount of light remaining in the sky, it is possible that he saw the race of the occupants, though this depends too on the amount of tint in the windows. Testimony on these matters took up a considerable amount of time at the inquiry.

There are several pieces of evidence to be considered as to the state of the window: Mr. Fraser's testimony at the inquiry and during his interview with Mr. Grant of the Human Rights Commission on 25 October 2001; Mr. Johnson's testimony at the inquiry and in his statement to Sergeant Bell; and Constable Sanford's testimony. As recorded by Mr. Grant, Mr. Fraser stated

> Sanford glanced over at them as he passed and Fraser said to Johnson that 'he's going to stop us.' He said that all Sanford saw was two black people. He said that Sanford braked after he passed them. Fraser said that the windows of the car had to be down, because the air conditioning was not working. He said that he is unsure of the time, but it was not dark. Fraser said that he is sure that Sanford saw who was in the car.

I should note that Mr. Fraser did not sign this statement when a draft was sent to him, but his explanation at the inquiry was that he "didn't think it [i.e., the complaint] would get this far," not that he found errors in the transcription. I am prepared to accept that Mr. Grant recorded the essentials of the interview correctly.

At the inquiry Mr. Fraser's testimony was as follows:

Q. And, tell me, when you say you slowed down and you looked at him and he looked at you, was your window open when you looked at him?

A. Yeah.

Q. So did you see him at that point?

A. Oh, yeah. I seen him.

Q. And did he see you, do you think?

A. Yeah, he seen me.

Q. Did he see Kirk? Or you don't know?

A. I'm not sure if he was paying attention to Kirk. Maybe he was just paying attention to me, the driver.

Q. Do you know if he saw you previously?

A. When he went by me?

A. Yeah. He caught a glance of my colour. My hand stands out on the steering wheel. And if you look back, you'll see a black guy driving a sports car.

Q. Okay.

A. The window wasn't up. Kirk's black Mustang do have tinted windows in the front and back.

Q. So what do you mean by that?

A. Well, Kirk's driver's side is tinted and the passenger side is tinted. But my window was down.

Q. And your hand was on the driving wheel.

A. Yeah.

Q. So you're saying that the – in your opinion, the driver would have caught a glance at least of your hand?

A. Well, he glanced at my face, too. He had to see me.

Q. This is when he first went by.

A. Yeah.

Mr. Johnson was not asked about the eye contact between his cousin and Constable Sanford in his direct examination. In cross-examination, Mr. Johnson said he had seen Constable Sanford was white when he passed his car the first time, by seeing him through the window. He then said, "so I'm pretty sure if I can see what colour he is, I'm pretty sure he can see me." When Mr. Moreash observed that the car windows were tinted, Mr. Johnson replied "very light." Mr. Moreash continued that "The side windows and the rear window were tinted" and again Mr. Johnson replied, "very light." When Mr. Johnson was making his complaint against Constable Sanford in May 1998, however, Sergeant Bell recorded Mr. Johnson as saying "We parked and then he [Sanford] put his lights on. He comes to the car. My cousin rolled down the window." Constable Sanford testified that his recollection was that the windows of the vehicle were up, but given his rather hazy recall of the events leading up to the stop, I do not find his evidence reliable on this point.

If I believe Mr. Fraser's testimony at the inquiry about the windows being down and the ensuing eye contact between him and Constable Sanford, then I must find as a fact that the latter knew the race of the vehicle's occupants at that point. In general I found Mr. Fraser an honest and credible witness, but there are some inconsistencies about this particular piece of evidence that trouble me and cause me to reject it. First, Mr. Fraser's testimony at the inquiry was more definite than that he gave to Mr. Grant in 2001. In 2001 he said the windows "had to be down" because the air conditioning was broken. That is not a statement of actual recollection, "the windows were down," but a deduction based on a related fact. And it is rather dubious that the occupants of the vehicle would have felt the need for air conditioning or wide-open windows when the ambient air temperature was around 7 degrees C., especially when Mr. Fraser was dressed, according to his testimony, in cut-off jeans and a t-shirt. I realize that this statement arises from a document prepared by Mr. Grant, and may or not be Mr. Fraser's actual words at that interview. Nonetheless, I am prepared to believe that Mr. Grant, who as a matter of record is an investigator of some seniority with the Commission, is very aware of the importance of capturing the nuances of differing states of recall about past events, and captured it correctly in this instance. I am thus left with a conjectural statement by Mr. Fraser that the windows had to be down in October 2001 and an affirmative statement that they were down in August 2003.

There is also the discrepancy between Mr. Johnson's statement to Sergeant Bell in May 1998 and Mr. Fraser's testimony. Mr. Goldberg pointed out, quite correctly, that when Mr. Johnson was reported to have said, "My cousin rolled down the window," there was no indication of the starting point of the window. It could already have been half-way down. Or the window could have been down on the highway, then put up as Mr. Fraser was exiting, so that it had to be rolled down when Constable Sanford approached. I reject the latter as mere conjecture. If the window had already been half-way down, it seems odd that Mr. Johnson would have mentioned the fact at all that it was rolled down further. It was not relevant to anything in

the complaint, whereas rolling down a closed window when Constable Sanford approached would be relevant to show that Mr. Fraser was polite and cooperative with the officer. It is also the case that Mr. Johnson did not mention anything about eye contact in his own testimony, as I have noted. His testimony was to the effect that Constable Sanford had to have seen the race of the occupants, and that the tinted windows would not have been an impediment to that. It is notable that in cross-examination, Mr. Johnson's testimony was that the tint would not have been an impediment to Constable Sanford's observation of the occupants, not that the windows were open. I would think that if the windows had been open and Mr. Fraser and Constable Sanford had had eye contact, Mr. Johnson would have noticed this, or even had eye contact himself with Constable Sanford. In spite of rejecting Mr. Fraser's testimony on this point, I am not prepared to say he was not trying to mislead the inquiry. It is not unusual for people to convince themselves over time of the existence of a certain state of affairs. I think Mr. Fraser believes that Constable Sanford had to have the opportunity to observe his race, and did not sufficiently distinguish between that hypothesis and his actual recollection on this point.

If the window was up, could Constable Sanford still have seen the race of the occupants through the tinted glass? With sunset only 11 or 12 minutes before Constable Sanford passed the vehicle, and under clear conditions, I find the sky was still light enough for him to observe the race of the occupants. Mr. Johnson testified that the tinting of his windows was light, and that appears to be borne out by the photos adduced in testimony. There is unfortunately no photo of the vehicle in side view, but I am prepared to assume from the photos showing the state of tinting in the front and rear windows that the side windows were similar. Mr. Johnson testified that tinting is done in Texas because of the heat. This is unlike the tinted windows one usually encounters in Canada, such as those in some diplomatic and military vehicles, which are heavily tinted expressly to hide the identity of the occupants. I find on a balance of probabilities that Constable Sanford observed the race of the occupants as he passed the vehicle–not that he necessarily had actual eye contact, but that he observed them. I do not accept his denial on this point.

Constable Sanford's awareness of the occupants' race does not on its own prove he discriminated against the complainant. It must still be shown that the race of the vehicle's occupants caused them to be treated differently (in a negative sense) from other citizens. The complainant bears the burden to show that race was an "operative" element, as I stated earlier, in Constable Sanford's decision to stop the Johnson vehicle and check out the driver's documentation. If so, the burden then shifts to the respondent to establish justification. I find the complainant has established a prima facie case of discrimination, based on the unusual conduct of Constable Sanford's vehicle in pursuing the Johnson vehicle and his denials of the same. From this action, one could infer that Constable Sanford took the action he did in order to discern more about the occupants o the vehicle, and once having discerned their race, acted on an inadmissible stereotype of black criminality in deciding to stop the vehicle. I believe it is much less likely that Constable Sanford would have decided to continue his pursuit had he discerned two well-dressed white men in the car. I now turn to look at the shifting nature of Constable

Sanford's interest in this vehicle from initial contact to the actual stop in order to decide whether any apparent racial differentiation is justified.

During his first spotting of the Johnson vehicle, the tinted windows would have been enough to arouse his interest because they are not permitted in Nova Scotia, with certain exceptions. Meeting the car head on, he would not have seen the out of province licence plate, as there was one only on the back of the car. Only once he passed the car and looked in his rear view mirror, or physically turned back to catch a glimpse of the licence, as he testified, would he have seen the Texas licence plate. At that point, one might have expected his interest to decrease. In general it is not an offence for an out of province vehicle to have tinted windows. During the actual stop, Constable Sanford did not ask any questions about the tinted windows, nor did he issue a ticket for any offence related to tinted windows. So once tinted windows were taken off the table, so to speak, what was left for Constable Sanford to take an interest in? Why did he retain an interest in an out of province black Mustang?

One reason Constable Sanford gave in his testimony was that, based on his experience, out of province sports cars driven by young males are suspicious. On his own evidence he would not have known these were young males since he admitted to seeing only silhouettes, but it could probably be inferred that sports cars are usually driven by young males. Constable Sanford had been commended for stopping a U.S. vehicle a few months earlier which turned out to have occupants for whom there were outstanding warrants. In addition, Constable Cainen stated over the police radio system at 8:08 pm that the "car comes up here every summer from the States, it lives on Faulkner Street, just below ... Frenchy's there, across from the Liquor Commission. I queried it last week and it came up NOF [not on file]." He then stated "didn't get a R/O [registered owner] from NCIC on it last week." This intervention might be interpreted in two ways. One is that Constable Sanford shouldn't worry about this vehicle, as its history was known to Constable Cainen in a general way. The reference to no registered owner and "not on file" might create an aura of mystery around the car, however, depending on what one understands the NCIC check to do.

The NCIC is the National Crime Information Center in Clarksburg, West Virginia, which maintains a computerized index of criminal justice information available to Canadian as well as U.S. law enforcement officials. From the description provided on its website (exhibit 19), it contains only records on stolen vehicles and persons with criminal records or warrants. If a vehicle comes back NOF or "no R/O" that is a purely neutral event in policing terms; it simply means there is no record of the vehicle being stolen. It does not mean there is no registered owner at all, or that there is anything untoward about the vehicle. It is like looking at the polar bear cage at the zoo and noting there is no tiger in it. The absence of the tiger does not mean it has escaped. However, it became apparent during the course of the inquiry that some police officers and some of the dispatchers believe that NCIC contains a record of all state vehicle identification numbers, so that a "no R/O" report would create suspicion. It seems that Constable Sanford's understanding of a "no R/O" report was to that effect. His testimony in direct was as follows:

> Q. So what is the significance of that transmission to you? What does that tell you?
>
> A. Well, it means that he tried to inquire on the vehicle and got no information back.
>
> Q. So that doesn't necessarily mean that it's not registered.
>
> A. No, if anything, that just raises a flag for me that, you know, he should have gotten something back on the vehicle.
>
> Q. Okay.
>
> A. ... Police, the other unit, says, "Didn't get an R/O from NCIC on it last week."
>
> Q. R/O meaning registered owner.
>
> A. Yes, and again, that's not really very helpful, other than telling me there's another - - just these are just additional things that are adding to my interest in this vehicle.

While this testimony is not totally free of ambiguity, I take it as meaning that the report by Constable Cainen confirmed Constable Sanford's initial suspicions about the vehicle. He also stated elsewhere in direct that had "queried many vehicles, U.S. plates, on NCIC and received back registered owner information, as well as on CPIC, I believe all the motor vehicle branches are all tied together through CPIC." [CPIC is the Canadian Police Information Centre, which plays a similar role in Canada to NCIC in the U.S.] Some additional evidence of his understanding of the meaning of an NCIC report is found in his notation on the vehicle custody report, "checked attached plate on NCIC. R.O. not found." If he thought this was purely neutral information there was no reason to note it on a form which asks why the vehicle was taken into custody.

Soon after the Sanford vehicle had passed the Johnson vehicle and then slowed down to let it pass, Mr. Fraser decided to exit from the highway because he did not wish to be followed by a police vehicle. His testimony was

> And I said, Ah, gee, I can't take this, Kirk. So I dove – I crossed over – because we were the only car on the road. Crossed over maybe two or three lanes and I said, Kirk, Let's go back to Main Street. So I went down Woodlawn [Woodland] and I came back up around on Main Street.

There was nothing wrong with Mr. Fraser's decision to leave the highway. The police vehicle had obviously indicated an interest in him through its action, but it had not put on its lights, or signalled in any way that he should pull over. Constable Sanford's testimony is in agreement on this point. Mr. Fraser was perfectly entitled to do as he did, even though his action was likely to, and I find did, create the impression in Constable Sanford's mind that he was trying to "evade"

the police. Mr. Fraser himself admitted that he was trying to get away from the police vehicle so that he and Mr. Johnson could continue their conversation in peace. It was Constable Sanford's own aggressive behaviour with his vehicle that resulted in Mr. Fraser trying to "shake" him. Constable Sanford's impression of evasion was advanced as a justification for continuing to follow the vehicle and deciding to stop it. I accept that, in general, a perception of evasion by a police officer is good justification for stopping a vehicle, but I must still consider all the surrounding circumstances, and *R. v. Brown* directs me to be alive to the possibility of subconscious stereotyping.

I have found as a fact that Constable Sanford was able to, and did, observe the race of the occupants of the vehicle as he passed it. I am troubled both by his unusual manner of pursuing the vehicle, and by his denial that he knew the race of the occupants before stopping the vehicle. He admitted that in general his recollection of the lead-up to the stop was hazy, but he was adamant about this particular fact and about the fact that he had not passed the vehicle as described in the testimony of Mr. Johnson and Mr. Fraser. Later in the inquiry, when it was clear beyond a shadow of a doubt that Constable Sanford had misread the dates of Mr. Johnson's insurance letter and wrongfully concluded his insurance was expired, he still would not admit under questioning from Mr. Wood that he had made any mistake. His testimony led me to conclude that he was very resentful of this complaint and more concerned about not admitting to anything that might lead to any inference of racism than in being perfectly candid.

I conclude that some of the factors advanced as justifications for Constable Sanford's conduct in pursuing and deciding to stop the vehicle were things he should have been taking into account. An officer can follow a car that appears to be eluding him. One of Constable Sanford's grounds for suspicion–his interpretation of the NCIC report–I have found to be erroneous, but that error was one he would have made with any vehicle regardless of the race of its driver. Nonetheless, my finding that Constable Sanford's testimony on some key points was less than candid leads me to conclude that he has not succeeded in rebutting the *prima facie* case established by the complainant. I infer that once Constable Sanford was aware of the race of the occupants of the vehicle, this fact confirmed his suspicions that something was amiss. It was an operative element in his decision-making, though mixed in with other legitimate factors. I am not required to find whether this resulted from a conscious decision on his part or resulted from a subconscious stereotype. Either way it was still a violation of the Nova Scotia *Human Rights Act*.

There is one further piece of evidence that I should consider before concluding on this point. Mr. Johnson testified at the inquiry that he had been stopped by police in the black Mustang a total of 28 times before 12 April 1998, during the cumulative three-month period he had visited his family in Nova Scotia since acquiring the car in 1993. That is to say, the three months was made up of visits of a week or two at a time spread out over the five years. Mr. Johnson had made reference to this same figure in the course of his police complaint in May 1998, as noted by Sergeant Bell in his report. A CPIC report was made available at the inquiry which showed a total of 21 inquiries on his vehicle during a search period from May 1993 to 11

April 1998, the first one being on 1 August 1997. Some inquiries were by the RCMP, others were by the Halifax Regional Police Service, and a number were multiple queries arising out of the same incident. Without going into all the details, this document provided some confirmation of a pattern of multiple stops of Mr. Johnson's vehicle, though considerably fewer than 28.

I do not believe it would be appropriate or fair for me to use this evidence when adjudicating on a complaint against an individual officer. This evidence does not assist in deciding whether it is more likely than not that a given police officer on a particular day discriminated against a black driver in singling him out for a stop.

The vehicle stop

There is little dispute about what happened next. The concern here is what meaning is to be attributed to Constable Sanford's actions – did they constitute discrimination?

When the Johnson vehicle came to a stop, the police vehicle stopped near it and put on its flashing lights. Constable Sanford approached the vehicle and asked Mr. Fraser for his driver's licence. He said he did not have it on him, and the constable then asked for his name and date of birth. Mr. Fraser gave his name as Earl J. Fraser and his age as 36. Constable Sanford apparently did not believe him because he asked again for his age. According to Mr. Johnson Constable Sanford asked him several times, his voice becoming louder and more annoyed each time, but on cross-examination by Mr. Wood, Mr. Fraser denied that the constable raised his voice during this interchange. In any case Constable Sanford's reaction did not surprise Mr. Fraser because people often think he is much younger than he is. (He was in fact 36 at the time.) Constable Sanford then asked for Mr. Fraser's address and he gave it. Mr. Fraser says Constable Sanford then asked if he had any warrants against him and he said no. (Constable Sanford does not admit that he did so, and Mr. Moreash suggested he would not have done so because it would have been an improper question to ask. It is not necessary for me to make a finding on this point for my decision, and I do not do so.) By this point Mr. Johnson's cousins Jouan and Oliver (O.J.) Johnson, aged 17 and 19 respectively, had arrived in their own vehicle. They had been driving by on Highway 111 and noticed Kirk's car and the police vehicle with the flashing light, and drove over to see what was going on. Constable Sanford asked them if they knew who Mr. Fraser was, as he had no identification on him, and they confirmed his identity. A little later Constable Sanford used this information to ask the dispatcher to run a check on Mr. Fraser on the Provincial Motor Vehicle Registry; he was confirmed to have a valid Nova Scotia driver's licence.

Constable Sanford then asked for proof of insurance and vehicle registration. Mr. Johnson passed to Mr. Fraser a letter from his insurance company in Texas, a copy of which I attach as appendix 1 to this decision. Constable Sanford looked at this document quickly and said it was not the right document, or was not acceptable, or words to that effect. There was

some brief verbal sparring between Constable Sanford and Mr. Johnson over the insurance. The dates of the policy are written as follows:

EFFECTIVE DATE: 03/26/98 EXPIRATION DATE: 10/04/98

Constable Sanford read the date of expiry as April 10, 1998, and told Mr. Johnson that the policy was expired. The latter tried to correct this reading of the dates but Constable Sanford replied that it wasn't valid because anyone could print up such a document. Mr. Johnson tried to explain what the requirements were in Texas and asked Constable Sanford to telephone the 1-800 number on the letter from Allstate Insurance, but Constable Sanford did not appear to be interested. He cut him off and returned the letter to Mr. Fraser. He then asked Mr. Fraser for the vehicle registration. Mr. Johnson replied that it was in the window, and pointed to a sticker on the passenger side. Constable Sanford said, "I'm not talking to you," so Mr. Fraser asked his cousin where the registration was and he replied again that it was in the window. Mr. Fraser pointed to the sticker on the passenger side of the windshield. Constable Sanford said that was not acceptable registration, that in Nova Scotia registration had to be in a certain form. Mr. Johnson replied that the car was registered in Texas, not Nova Scotia. He testified that he said "This car is registered in Texas, so if you got a problem, you got to talk with the Texas people, but this is what Texas gave me and that is all I got." Constable Sanford again said it was not acceptable. Mr. Johnson said he then asked, "if I was some white people from New York or anybody else, would you say that this is not legit?"

The two men were obviously becoming somewhat confrontational by this point and the conversation was becoming more heated. Mr. Johnson was talking in an agitated manner but did not at any time make any threatening moves either inside the vehicle or outside it. In direct testimony, Constable Sanford described Mr. Johnson's manner as confrontational right from the beginning of the stop, and "fairly belligerent" as it progressed. I find that Mr. Johnson did not behave any differently than anyone might who believed their vehicle was about to be towed unjustly. Even without the racial element that Mr. Johnson perceived as contributing to Constable Sanford's actions, a person in Mr. Johnson's position would find the experience upsetting and might well react in an angry and verbally aggressive manner. Deputy Chief McNeil testifed that the police are trained to expect such behaviour and how to deal with it. I find that Mr. Johnson was verbally belligerent with Constable Sanford but I do not find his reaction unreasonable given the circumstances. A citizen who honestly and reasonably believes he is being treated unjustly by the police is not obliged to sit meekly by to let matters take their course. He or she is entitled to remonstrate vigorously with the authority who is believed to be acting in error, as long as there is no resort to threatening gestures to accompany the words.

By this point the dispatcher had reported back the results of her NCIC search request, which was that there was no registered owner found for the vehicle. Mr. Johnson then provided a registration receipt. This document, called a "Tax Collector's Receipt for Texas Title Application/Registration/Motor Vehicle Tax" showed Kirk Johson as the owner of a 1993 Ford Mustang, but none of the details on it matched the information Constable Sanford had before

him. The licence plate number shown on it was different, as was the validation sticker number, though it does not appear that Constable Sanford actually compared this number with that on the windshield sticker. The document also showed it as expiring on 30 June 1994.

It is not clear whether he was asked for it or not, but Mr. Johnson provided his (valid) Texas driver's licence to Constable Sanford. When his name and date of birth were relayed to the dispatcher, she reported that Mr. Johnson had last had a Nova Scotia driver's licence in 1994. No suspensions were showing, but the dispatcher reported that when such a long time had elapsed, it was difficult to say for sure. Constable Sanford looked at the vehicle registration sticker on the windshield, and also looked at the licence plate on the back of the vehicle. It was showing as expired in 1994.

Having rejected the evidence of insurance and vehicle registration proffered by Mr. Johnson via Mr. Fraser, Constable Sanford told Mr. Fraser that he was going to issue some tickets and asked him to accompany him to his police vehicle. Mr. Fraser did so, and Constable Sanford made out two tickets, one for driving without proof of insurance, in the amount of $912.50, and one for driving without proof of vehicle registration, in the amount of $107.50. He told Mr. Fraser that he was going to order the vehicle to be towed, and Mr. Fraser asked if he could break the news to Mr. Johnson, anticipating that he might be upset. Mr. Fraser did so, but according to him Mr. Johnson took the news calmly.

When Mr. Fraser and Constable Sanford went over to the police vehicle, Mr. Johnson decided to seek some assistance from the other police officers who were now on the scene. In the next section I will describe in more detail how many police officers arrived at the scene and under what circumstances, but for now it is sufficient to note that other officers had arrived. Mr. Johnson spoke to two of them. One said "he's the man on the job [Sanford] . . . I can't interfere." Constable Christopher Regan recalls having a brief conversation with Mr. Johnson but does not recall what was said. According to Mr. Johnson, one of the officers asked him about his boxing career. Mr. Johnson then asked one of these officers who the man in charge was, and was directed to Sergeant Eric Bowes. (Sergeant Bowes retired in 2000 but I will refer to him by the title he had at the relevant time.) By this point Mr. Fraser had informed Mr. Johnson that his car was to be towed. Sergeant Bowes was in charge of the evening shift for Delta Zone in Dartmouth on 12-13 April, and was also filling in for the supervisor of Echo Zone (where these events occured) that evening. His unit history shows he was put on to the call at 8:50 pm. Constable Publicover, who had arrived early on as backup, had requested an NCO (supervisor) to attend at the scene, and the dispatcher Suzanne Killen asked Sergeant Bowes to go. He arrived on scene at 8:57. Mr. Johnson testified that when he showed Sergeant Bowes the insurance letter and asked him about the dates, the sergeant read the dates correctly and said it was not expired. When Mr. Johnson then invited him to intervene and stop Constable Sanford from acting on erroneous information, Sergeant Bowes declined to do so.

Constable Sanford also had a brief conversation with Sergeant Bowes. If the unit history is correct as to Sergeant Bowes's arrival at 8:57, the conversation could only have occurred after the tickets were issued and the tow truck called, which occurred at 8:54. Whether this

conversation was before or after Sergeant Bowes' conversation with Mr. Johnson is not clear. Sergeant Bowes remembered Constable Sanford showing him an insurance document and also looking together at the expired Texas plate, but did not recall any discussion with him about the effective dates of the insurance. He did not seek to dissuade Constable Sanford from acting on the views he had formed.

At the inquiry Sergeant Bowes testified in chief that he had no recollection of speaking with Mr. Johnson on the evening in question, but when interviewed by Mr. Grant of the Human Rights Commission on 28 August 2001 he stated that he had discussed the validity of the papers with Mr. Johnson and in particular had assured him that no charges would be proceeded with if his documentation turned out to be valid. Sergeant Bowes signed this statement. On cross-examination by Mr. Goldberg, Sergeant Bowes admitted that his recollection in August 2001 was better than in August 2003, and he must have had a conversation with Mr. Johnson though he no longer had any independent recollection of it. I accept Mr. Johnson's testimony as to the content of that conversation, that is, that Sergeant Bowes read the dates on the insurance letter correctly.

The tow truck arrived and took the Mustang. Constable Sanford left the scene at 10:18. Mr. Johnson and Mr. Fraser left the scene around that time with O.J. and Jouan Johnson.

Did Constable Sanford's actions at the vehicle stop constitute discrimination?

The complainant is obliged to make out a *prima facie* case of differential treatment based on the alleged ground of discrimination, here, race. Here, the complainant must first show that Constable Sanford's decision to issue the tickets to Mr. Fraser and to tow the vehicle was motivated to an impermissible extent by race; i.e., that on a balance of probabilities he would not have behaved the same way with a white driver.

I note, in order to dismiss, a preliminary problem. The tickets were issued to Mr. Fraser but he is not a complainant in these proceedings. I find that I am entitled to consider Constable Sanford's behaviour surrounding the ticketing as part of Mr. Johnson's complaint. (Counsel for the police did not suggest otherwise.) It was Constable Sanford's reaction to the Johnson vehicle and the state of its documentation that caused him to issue the tickets. Had the tickets not been cancelled, Mr. Johnson would have been legally obliged to pay the fine under s. 259 of the *Motor Vehicle Act*. Mr. Johnson was "in jeopardy" with regard to the tickets as well as Mr. Fraser. In addition, the tickets are of course inseparable from the towing itself, which is the main focus of Mr. Johnson's complaint.

In order to consider if differential treatment has occurred, the board must necessarily hypothesize about how events would have unfolded if the driver and passenger of the vehicle had been white rather than black. It will help to focus on what exactly the officer's duty is in such a situation. S. 18 of the *Motor Vehicle Act* of Nova Scotia requires an unexpired vehicle permit to be carried in the vehicle at all times when on a highway, to be "subject to inspection by any peace officer." S. 230(2) imposes a similar requirement with regard to proof of insurance coverage. I

will assume for the purposes of this decision that these sections authorize a police officer to stop a vehicle to inspect the documents in question. As Constable Sanford said at the hearing, the onus is then on the driver to produce documentation that satisfies the officer conducting the stop of its validity. That is correct, but I would add that once the driver produces documentation, a correlative duty arises on the officer to give it a fair assessment. The standard is not perfection; the officer must assess it reasonably and fairly, and is entitled to make a mistake after such an assessment without engaging his or her liability. Where a Nova Scotia registered vehicle is concerned, the officer will be able to do this very quickly because the officer knows exactly what is acceptable proof. There were two complicating factors in this case. One is that this was a Texas registered vehicle, and the second is that the passenger and not the driver had all the information that needed to be conveyed to the officer.

Where an out-of-province vehicle is stopped, a reasonable and fair assessment of the documentation offered will inevitably require some kind of dialogue with the driver. Officers cannot be expected to memorize the different requirements for the 60 separate jurisdictions that exist in North America outside Nova Scotia. The officer will examine the documentation for any apparent inconsistencies on its face, and for any evidence of forgery or tampering. If the documentation is in a form with which the officer is not familiar, he or she will have to engage in a dialogue with the driver to ascertain what the requirements are in that jurisdiction. The officer will have to make an on-the-spot assessment of whether the driver's evidence is trustworthy. If it is, and the documentation appears to comply, that will be the end of the matter. If the officer is not convinced, he or she has three choices: to let the driver go with or without a warning, if the officer's suspicions are not such as to raise any serious concern; to issue tickets without more investigation; or to seek further assistance from other sources before making a final determination: from the dispatchers, from the sergeant in charge on that shift, from other officers either by radio or in person, or even from the home jurisdiction if practicable.

Normal police practice on vehicle stops is to converse only with the driver, partly to avoid confusion and partly to avoid the officer's becoming distracted in a multi-party conversation. It is clear that some exceptions need to be made to this rule, however. Where, as here, the driver cannot answer any of the officer's questions, the officer must engage in some kind of dialogue with the occupant of the car who has the required information. Otherwise, key information may not be communicated.

That is what happened here. The documentation offered to Constable Sanford did not appear to "check out" in some respects. The vehicle registration receipt was difficult to read and appeared to be expired. The licence plate was clearly expired. On a quick read of the letter outlining insurance coverage, Constable Sanford misread the dates and thought it was expired too. He also was not familiar with this kind of document and doubted whether it was valid proof of insurance in any case. All these features of the situation (even aside from Constable Sanford's own mistake in reading the dates) would cause an officer to be suspicious, especially the expired licence plate, but Constable Sanford had to give the driver a fair chance to address those suspicions. In particular, he was not entitled to assume that Texas requirements were the same as Nova Scotia's. His duty was to make a reasonable and fair assessment of the

documentation offered, in light of what he could reasonably ascertain about the requirements for insurance and vehicle registration in Texas. That required further dialogue with Mr. Johnson, or, failing that, consultation with some third party who could provide assistance. Neither dialogue nor consultation happened. Constable Sanford refused to talk to Mr. Johnson, and would only talk to Mr. Fraser, who could tell him nothing about the matters he needed to find out about.

In fact, all Mr. Johnson's documents were in order. The insurance had not expired and a letter from an insurance company is valid proof of coverage in Texas. Texas does not use licence plates at all as proof of vehicle registration; the windshield stickers are the form of proof required. The vehicle tax registration receipt provided by Mr. Johnson is not something that needs to be shown in Texas; Mr. Johnson only provided it to Constable Sanford because he had rejected everything else. These facts first came to the attention of the Halifax Regional Police when Sergeant Bell was investigating the complaint that Mr. Johnson made on 14 April. He telephoned his father-in-law, a Texas resident, to inquire about vehicle registration and insurance requirements and was told the information I have related above. A letter from the State Department of Public Highways and Public Transportation was introduced to prove that vehicle registration was via windshield sticker. No formal evidence of the insurance requirements was provided but the police seem to have accepted Sergeant Bell's father-in-law's statement as authoritative.

Sergeant Bell took notes of his discussion with Constable Sanford about this incident on 15 April, after he had been put on notice by Mr. Johnson that he intended to make a complaint. These notes confirm that "Sanford's conversation mostly directed towards Fraser, Johnson to Sgt. Bowes." They then go on to record "Johnson did not mention anything about registration to Sanford. Nothing mentioned to him about insurance. Believes this was mentioned to Bowes." I have found this not to be the case, and indeed it is beyond belief that Mr. Johnson would sit in his vehicle and not try to communicate with an officer who was about to mistakenly tow his vehicle. I find he did become frustrated and cease communicating at a certain point, but only after he had tried to convey information to Constable Sanford that the latter either misinterpreted or showed no interest in hearing. The account of this meeting with Sergeant Bell suggests Constable Sanford was already trying to portray the incident in a way that was most favourable to him.

Did this failure to engage with Mr. Johnson, which led to a failure to assess properly the documentation offered, amount to differential treatment based on race? In deciding whether there has been a *prima facie* case of differential treatment, a board of inquiry must try to establish how events normally unfold in a given situation. Deviations from normal practice and evidence of discourtesy or intransigence are grounds for finding differential treatment. I find it difficult to imagine that these events would have unfolded the same way if a white driver from Texas had been involved in this stop. The lack of courtesy towards Mr. Johnson, and the failure to make any attempt at all to investigate what the legal requirements were in an unfamiliar jurisdiction, whether through conversation with Mr. Johnson or otherwise, are examples of unprofessional behaviour from which I am entitled to infer differential treatment, and I find that this differential treatment was based principally on Mr. Johnson's race.

Counsel for the respondent focussed on several factors as explaining any apparently differential treatment. The first was Mr. Johnson's alleged belligerency from the outset, and arising from this the need to keep officer safety in mind as a key factor in judging an officer's conduct at a stop. I realize that traffic stops can be dangerous, and that any standard for behaviour on such stops must take officer safety into account. I have found as a fact that Mr. Johnson became verbally aggressive with Constable Sanford as soon as he saw the way things were heading, and I accept that the latter interpreted his language as abusive and manner as confrontational. I do not accept that there was anything in Mr. Johnson's response to the situation to cause Constable Sanford to feel threatened. Two cars with Mr. Johnson's cousins pulled up quickly but Constable Sanford spoke to them and confirmed Mr. Fraser's identity with them; his testimony at the inquiry was that they did not behave in a threatening way. Within a short period of time there were numerous officers and police vehicles on the scene. I accept that Constable Sanford did not at first know who Kirk Johnson was, but quickly became aware from his fellow officers that the passenger in the vehicle was a well-known local figure and not some fugitive miscreant from Texas. The parking lot where the stop occurred was on the edge of a well-travelled roadway, well lit, and in full view of a donut shop with people coming and going. It was not in the least remote or sheltered from view. Constable Sanford felt comfortable enough with the situation that he went to his vehicle with Mr. Fraser for some period of time to write out the tickets and engage in radio communications, while Mr. Johnson exited from his vehicle and spoke to several other officers.

When a person exits from a vehicle during a stop it is called a "threat cue" and officers are expected to treat such behaviour as potentially threatening, according to an officer safety training manual entitled "High Risk Responses - Vehicle Stops" that was produced in evidence. The operative word here is "cue," however, meaning "indication." Constable Sanford did not appear concerned by this behaviour at all. If he had felt at all threatened he would surely have asked one of his fellow officers to ensure that Mr. Johnson stayed in his vehicle. I do not accept that Mr. Johnson's language was sufficient reason for Constable Sanford to cut off discussion with him. If he had been less abrupt in his dealings with Mr. Johnson and shown himself amenable to reason, it is reasonable to think that Mr. Johnson would have responded accordingly.

The duty of a police officer when confronted with abusive language is discussed in *R. v. Zwicker*, [1938] 1 D.L.R. 461 (N.S. Co.Ct.). In that case a well known business man in Mahone Bay was stopped by the chief of police on the main street of the town for having an expired licence plate. Mr. Zwicker used abusive language to the police chief in front of a small crowd that had gathered and was charged with using "insulting or abusive language, calculated to provoke a breach of the peace" under a town by-law. The County Court Judge reversed a conviction by the local magistrate on the basis that the words, though abusive, were not calculated to provoke a breach of the peace. He went on to describe the duty of a police officer and of all public officials in such situations:

> They must expect more or less so-called abuse. It is an incident of democratic government and free speech; and they should bear it, if not in good humour, at least with reasonable tolerance and that tact which is a very necessary part of the equipment of a

> servant of the public. In this country a policeman is a peace officer, and his duty is not only to the public generally but to every individual citizen, and to protect that citizen, and to protect him, as far as possible, even against his own weakness....

I find Constable Sanford did not display the reasonable tolerance and tact required of someone in his position and I infer that race was a major factor in this professional failing.

Some justification for Constable Sanford's error in misreading the dates on the insurance letter was sought to be advanced. It was alleged that the Halifax Regional Police invariably record dates in the day/month/year form, and that is why Constable Sanford misread them. I would not even raise this if so much time had not been spent on trying to establish it. Even if this could be proved, which it was not–a variety of means of recording dates was evident on different police documents–why anyone would expect a letter from a U.S. insurance company to conform to a practice of the Halifax police eludes me. Dates in purely numeric form are always ambiguous and it is an elementary precaution in any situation to make sure one has got it right. This case was easy because the effective date read "03/26/98," and it is clear there is no 26th month. When a $912 ticket is hanging in the balance, there is a particular obligation on a police officer to read the dates correctly. I do not accept that there was anything urgent or dangerous in the situation that justified Constable Sanford's misreading. He was totally in control of the situation, and had ample backup to assist and protect him should any incident arise. The number of officers at the stop also ensured that Constable Sanford could have sought more information about the unfamiliar documentation he had been presented with. He was under no particular time pressures, and neither, apparently, were the numerous other officers who showed up. There was time to ask the dispatcher to call the 1-800 number (which I accept Mr. Johnson had mentioned to Constable Sanford) to check out the insurance. I do not say that an officer would always be required to follow up with a phone call of this nature; it would depend on whether he or she had backup present, whether there were any plausible threat cues, and so on. In this case the stop went on for quite some time and there was plenty of backup.

Constable Sanford was unfamiliar with a letter from an insurance company instead of a pink card as is used in Nova Scotia, and it was suggested that, even aside from the question of expiry, it was reasonable for him to reject this item as proof of insurance. There is no doubt a letter is not usual, but as I said earlier, Constable Sanford was not entitled to assume that Texas requirements are the same as Nova Scotia's. Even in his report of 28 May, responding to Mr. Johnson's formal complaint, Constable Sanford observed, "Fraser was unable to produce Cst. Sanford with a pink insurance liability card." That was true but totally beside the point. There was no way that the driver of a Texas registered vehicle was going to be able to produce identical proof of insurance to that common in Nova Scotia. Constable Sanford showed a similar stubbornness on the evening in question to even conceive that something other than a paper vehicle permit similar to the Nova Scotian type could be acceptable proof of registration.

I find that Constable Sanford initially had reason to be suspicious about the nature of the documentation offered and the expired licence plate. However, the whole tenor of his interaction with the occupants of the vehicle, especially with Mr. Johnson, shows that he did not allow them

a fair chance to respond to his concerns. His assessment of unfamiliar documentation was unacceptably cursory and he quickly decided he did not wish to speak to the only person who could have enlightened him. A police officer is not required invariably to make the right decision on a judgment call, but he or she does have to follow a proper process before arriving at the wrong one if the decision is to be accepted as a simple error in judgment. There is some flexibility in assessing what is "proper" in a given situation, and due weight will be accorded to factors such as officer safety, time pressures, the feasibility of obtaining more information, and so on, but here I find almost no evidence of fair process. Constable Sanford's mind appeared closed virtually from the outset and remained that way for the rest of the evening and thereafter. I infer that the tragic lack of communication which caused Constable Sanford to fall into error was the result of the police officer's use of a racial stereotype of black male criminality. I do not find any of the justifications advanced persuasive and the *prima facie* case is not rebutted.

I assume that the liability of the Halifax Regional Police would be engaged by the act of its employee pursuant to the doctrine of vicarious liability, but I also find it engaged by the failure of Sergeant Bowes to act after obtaining information that a possibly discriminatory act by one of his officers was in progress. I have found as a fact that Mr. Johnson showed Sergeant Bowes the insurance letter and that the latter read the dates correctly. From that he should have realized that Constable Sanford was possibly in error. Once he had that knowledge, and knowledge of the race of the parties in question, he was faced with a situation with some apparent indicators of discrimination. Under these circumstances I believe he had a duty to investigate further, and to assure himself that no discriminatory act was taking place. I refrain from saying what exactly he should have done, because it is clear he did not take up the matter at all with Constable Sanford. The validity of the insurance was a key aspect of this traffic stop. If Sergeant Bowes had raised the matter with Constable Sanford after the discussion with Mr. Johnson, it is possible that the issue could have been cleared up. I presume Sergeant Bowes had authority either to cancel the tow truck or to send it away when it arrived, and to cancel the tickets which had been issued.

I wish to be clear here. I am not saying that every time a police supervisor discovers that an officer is dealing with a member of a racial minority, he or she is to suspect discrimination and comes under a special duty to scrutinize the officer's conduct. What distinguishes this case is that the sergeant had *prima facie* evidence of a constable's error in dealing with a black person. That is what triggers the duty to intervene. Sergeant Bowes could have provided the sober second look that was sorely needed, but did not.

I also wish to address an understandable concern of officers reading this decision. If we are to be held liable for violating the *Human Rights Act* on the basis of unconscious stereotypes, some might say, how can we ever be sure we are acting correctly? How can we guard against something that is not conscious? Isn't it unfair to hold us to such a high standard? I think the answer to this question was given by Constable Christopher Regan at the inquiry. In response to a question about how to deal with racial stereotypes, he replied that you have to work at it. That simple answer is the essence of it. Recognizing the problem and developing techniques to deal with it, both at the personal and institutional level, are the key. Police pride themselves on being

professionals and part of that professionalism involves rigorous training on a wide variety of matters. Learning to recognize and deal with racism is another form of training that the police must add to their repertoire in order to continue to provide quality policing services, just as learning about domestic violence became a larger part of police training in recent years. Here I think Constable Sanford was not well served by his employer, as I will detail further on.

Problems with the Motor Vehicle Act: drivers of out-of-province vehicles

I am going to open a large parenthesis here. It is a tangent to the main issues in this case but I feel compelled to address it. Mr. Moreash urged me to keep in mind the words of s. 18 of the *Motor Vehicle Act*, which states that, subject to an exception not relevant here,

> an unexpired permit for a vehicle shall at all times while the vehicle is being operated upon a highway within this Province be in the possession of the driver thereof or carried in the vehicle and subject to inspection by any peace officer.

The definition of permit in s. 2(ap) of the Act was not raised during the inquiry, but it reads "'permit' means a permit issued under this Act." Clearly an out-of-province vehicle could not have a permit "issued under this Act." Such vehicles are only required to be registered if their owners become residents of the province, which Mr. Johnson was not. I do not believe a peace officer in Nova Scotia has the authority to ask the driver of an out-of-province vehicle for proof of registration in the course of a routine check. S. 18 of the *Motor Vehicle Act* does not provide it, and I was referred to no other statutory source for such a power. It is possible that there are constitutional constraints imposed by federalism on the province's power to impose such an obligation on the driver of an out–of-province vehicle. A peace officer presumably has a common law power to ask for proof of registration if he or she has reasonable grounds to believe the vehicle in question was stolen, but that was not the case here. Even though Constable Sanford, in my view, had no legal authority to ask Mr. Fraser for proof of registration of the vehicle, this was not in itself discriminatory since Constable Sanford was acting on a widely held belief that officers had such power.

A similar point could be made about the duty to carry what is now referred to in the *Motor Vehicle Act* as a motor vehicle liability insurance card. S. 230(1) of the Act, which was the basis for the ticket issued to Mr. Fraser, states that

> No person shall drive a motor vehicle registered or required to be registered under this Act unless there is in force in respect of the motor vehicle or in respect of the driver of the motor vehicle a motor vehicle liability policy.

Section 230(2) in turn states that

> violation of subsection (1), where the court is satisfied that the defendant failed to produce forthwith upon the request of a peace officer a motor vehicle liability insurance card issued pursuant to Section 204 for a policy as required by subsection (1) that was

> valid and subsisting at the time of driving, such failure is proof, in the absence of evidence to the contrary, that there was not in force at the time of driving a motor vehicle liability policy as required by subsection (1).

However, the duty to carry proof of insurance which is somewhat obliquely imposed by s. 230(2) only applies to drivers of a "motor vehicle registered or required to be registered under this Act," which Mr. Johnson's vehicle clearly was not. I do not believe peace officers had in 1998 or now have legal authority to ask the drivers of out-of-province vehicles for proof of insurance under these sections. Once again this is not germane to the issue of discrimination because the belief was widely shared among police officers that they had such power.

I note the legislative provisions on these matters in Ontario legislation are phrased quite differently: the *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 7(1)(a) states that no person shall drive a motor vehicle on a highway unless they carry a currently validated permit, but does not contain the restrictive definitions of "motor vehicle" and "permit" found in the Nova Scotia *Motor Vehicle Act*. The *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25, requires a liability insurance card to be carried (s. 3) but includes in the definition of card "such evidence of insurance as is prescribed by the regulations."

I accept that police officers were acting in good faith and in the interests of public safety and security in asking drivers of out-of-province vehicles for proof of insurance and registration, and I do not fault them for it, but I feel constrained to bring this apparent gap in legal authority to public attention. I would recommend that the Halifax Regional Police Service procure an opinion as soon as possible from the Department of Justice as to the statutory and constitutional authority of peace officers to ask drivers of out-of-province vehicles for proof of registration and insurance on a routine basis, and to seek legislative amendments if necessary.

The Police Response

The position of counsel for the complainant and the Commission was that the police response to this traffic stop was excessive and discriminatory. The allegation is that more police officers and vehicles were present on the scene than needed to be, largely because of the race of the occupants of the vehicle and not because of the objective requirements of the situation. It is further alleged that this excessive response caused undue embarrassment and humiliation to Mr. Johnson and that it constitutes a separate act of discrimination by Halifax Regional Police Services, independent of the actions of Constable Sanford.

Any dispute here is not primarily factual, though there is some disagreement about the actual numbers. The position of the police is that the size, nature and duration of the police presence was justified by the situation as it was reasonably perceived to be developing, and not connected in any way to the race of the participants.

First, it is necessary to try and reconstruct the number and identity of the police officers on the scene, and the circumstances of their arrival. As soon as Constable Sanford reported at 8:08 pm over the Primary East radio channel that the vehicle he was following was trying to avoid him, the dispatcher Ms. Suzanne Killen requested backup on her own. Constable Bruce Publicover responded to her request and began to head to the area indicated. Constable Sanford arrived alone in his vehicle at the Tim Horton's parking lot at 8:09 pm. Within five minutes O.J. and Jouan Johnson arrived in their vehicle, and Constable Sanford requested backup at 8:14. This is normal procedure when an officer is working alone, for obvious reasons. Constable Publicover had not arrived yet and it is not clear whether Constable Sanford knew he was already on his way. Constable Bruce Publicover's unit history shows him arriving by 8:20, and leaving at 9:22. Constable Publicover has since retired and could not be located to be served with a subpoena, so the inquiry did not hear from him. At some point another cousin of Mr. Johnson, known as Rocky II, arrived in his vehicle, but it does not appear that his arrival changed the situation in any way.

Constable Chris Regan's unit history shows him as being preempted at 8:26, arriving on scene soon after, and remaining until 9:27. Preemption means either that the dispatcher asks an officer to stop what they are doing and go to a particular site, or that the officer personally makes that decision after hearing what is being broadcast on the police radio. Unsurprisingly neither the dispatcher nor the officers in question could remember which of these had happened on the night in question. About 8:30 Earl Fraser's address was broadcast over the CPIC channel as North Preston, which would indicate the likely race of the driver of the stopped vehicle to anyone listening on that channel. Constable Regan made the only comments that evening, recorded on the police transcript, that suggest there was anything out of the ordinary about this traffic stop. At 8:36 he said "we've got a few people milling around here. The situation's a little tense, ..." And at about 8:38 he said "Alright, I'm gonna let you know, arrest a party here now, but I'm not sure if we're going to or not, if so, it's probably going to be a confrontation." Yet at 8:41 someone in Unit 43 stated "We're just here with them at Sobey's," and in response to a question from the dispatcher as to whether everything was in order, replied "Yeah, so far, yeah." According to their unit histories, Constable Barry Warnell and Darrel Gaudet are shown as preempted at 8:45 and arrived on the scene at 8:46. At 9:17 they were pre-empted to another call. The police wagon was there for some period of time, but it was not made clear who was driving it. Sergeant Eric Bowes arrived in a four by four at 8:57 and stayed until 9:21.

It is clear that the recollections of Mr. Johnson, Mr. Fraser and the Johnson cousins are faulty on this point. They remembered the number of vehicles as between eight and ten, with as many as three police wagons there at one time. It is clear from Sergeant Bowes's comments on the police transcript that only one wagon was available that evening. I do not suggest that they were misleading the inquiry. It would have been dark or close to dark by the time the number of police vehicles started to mount up, and the excitement around the event could easily cause one's memory of the numbers to be exaggerated.

Even so, five cars plus the police wagon at a traffic stop of this nature may appear excessive and I am certain that it created an impression in Mr. Johnson's mind that the police

were "out to get him" in full force. The complainant has the burden of proof to show not that the police response was excessive in an absolute sense, but rather that it was excessive compared to how the police would have responded had the occupants of a vehicle stopped under similar circumstances not been black. Since statistics on such matters are not kept (at least, none were produced), the only way this comparison can be made is by trying to establish what the ordinary policies and practices of the department are. I have already referred to the officer safety training manual on traffic stops, and the issue was addressed principally by Deputy Chief McNeil. A number of the policemen and dispatchers involved were also asked about their practices and understandings of how many backup vehicles should assist at a traffic stop under varying conditions. The primary consideration from a police point of view in all such stops is officer safety. The guidelines refer to two kinds of stops, those involving "known risks" and those involving "unknown risks." The former are considered more dangerous and police officers are expected to exercise more caution. Known risks involve occupants who are known to be carrying weapons, have warrants out for their arrest, and the like. The vast majority of stops, then, involve unknown risks where the officer has no reason to suspect that the occupant is a threat. That was the case here, but officers and dispatchers still have a lot of discretion in such situations to assess whether extra help is needed. Any decision that an unacceptable element of racism crept into the exercise of that discretion so as to render it discriminatory is necessarily based on inference. It must take into account known facts from which one might infer racism, as well as alternative explanations for what happened.

The only facts from which one might infer a discriminatorily excessive response are the broadcasting of Mr. Johnson's name and Texas address over the CPIC channel at about 8:24 pm and Mr. Fraser's North Preston address over the same channel at 8:30 and the subsequent arrival of three more vehicles in addition to the three already there. Officers who knew of Kirk Johnson, and several on site did, would know his race if they heard that information over their police radios; they would also infer Mr. Fraser's race from a North Preston address. The evidence of the CPIC operator Victoria Newman-Jones, which I accept, was to the effect that police do not normally listen in on the CPIC channel. Even if the North Preston address and the name of Kirk Johnson had been broadcast on the Primary East channel for some legitimate reason and heard more widely, I rather doubt whether the simple arrival of a number of vehicles after the broadcasting of such information is sufficient to create a *prima facie* case of discrimination. If the subsequent arrival of more than one vehicle in such a situation is interpreted as discriminatory and consequently discouraged, the safety of the police and the public at large may be put at risk. There is always a risk of over-response provoking a reaction by those detained, but the risks involved in under-response are, it seems to me, much greater.

I am unable to say that the police response was the result of any discriminatory behaviour, attitudes or policies on their part. I believe that the response was unusually strong, but not that it was related to the race of the occupants of the vehicle. Given the number of occupants in the Johnson vehicle and the fact that two other vehicles containing persons known to the occupants had arrived on the scene, the presence of two additional police vehicles to provide backup was part of normal practice and entirely reasonable in the interests of officer safety. Those vehicles had arrived in any case before the name Kirk Johnson or the address of Earl Fraser were

broadcast. Part of the reason that more cars arrived, I find, was simply opportunity. This stop went on for rather longer than usual as Constable Sanford requested a number of checks on both Mr. Fraser and Mr. Johnson, waited for the results, and then waited for the tow truck to arrive. As officers on duty heard on their radios that the matter was still going on, this news created a kind of snowballing effect. Deputy Chief McNeil testified that opportunity is a major factor in the response to all traffic stops. If an officer is not otherwise occupied and is in the area, it is considered good practice to drop by just in case, even if backup is not requested. Everyone admitted it was a slow night for police work in Dartmouth, as one would hope and expect on Easter Sunday. It strikes me as part of human nature that officers with time on their hands would feel more useful attending a traffic stop where their presence might conceivably be needed as backup, than cruising around the empty streets of Dartmouth. Mr. Moreash did not put the matter in this way, but I will also take judicial notice of the existence of a strong culture of police solidarity. Police officers try to support each other at all times and given the risks they face, over-response rather than under- response is to be expected. Some of these factors may not stand out as particularly compelling justifications for the police to respond as they did, but that is irrelevant as long as they are not discriminatory. They are rational and credible. The major factor in the response, I conclude, was simply opportunity to check out an unusually long traffic stop on a slow night.

To conclude on this point, I find the police response undoubtedly appeared excessive to Mr. Johnson. I find that there was little objective justification for the presence of more than three vehicles, but that a variety of reasons aside from the race of the complainant explain the nature of the police response. I would advise, however, that some discussion on the problems inherent in over-response, both practical (escalating the situation) and perceptual (creating a negative public impression), be incorporated in the training on traffic stops currently provided; and that police officers and dispatchers be made aware of the possibility that an excessive response might be considered discriminatory under certain circumstances.

Had I found otherwise on this branch of the complaint, I would have awarded no more than an additional $1000. Mr. Johnson did feel humiliated at the level of police response, which seemed more appropriate to criminal behaviour than a *Motor Vehicle Act* offence. All this took place in front of younger members of his family to whom he was something of an icon, and was apparent to any casual observer using the coffee shop or passing by on Main Street. A low curb was the only barrier separating the Johnson vehicle and police cars from the street and thus from public view. Mr. Johnson's distress was acute, but regarding this particular matter it was transient, and I find any harm to his reputation as a public figure was equally transient. There was no evidence of media coverage. Mr. Johnson did not mention the nature of the police response as part of his complaint to the police in May, nor did he lay a separate complaint against the police force as a whole, as the regulations entitle him to do. Mr. Johnson's main focus has always been Constable Sanford's actions rather than the police response, and that is why my award would have been on the low side.

I pause before proceeding to observe that matters might well have taken a very different turn on Easter Sunday 1998. I accept Constable Regan's testimony that he had some discussion

with Constable Sanford about possibly arresting Mr. Johnson on the basis of suspected auto theft, which I find to be the basis for his remarks recorded at 8:38. Fortunately for everyone, that idea was not proceeded with. If the police had tried to arrest Kirk Johnson that evening for stealing his own vehicle there is no doubt in my mind that a "race riot" of some kind would have ensued. Mr. Johnson testified that while the stop was proceeding he thought about calling for help from his community, and had he or his cousins done so in response to a threatened arrest, given the number of police officers present, matters could have turned violent very quickly. In the end I infer Constable Sanford did not proceed with his hunch because Mr. Johnson was known to a number of the officers, and this reassured him that theft was unlikely. In this regard, then, the presence of other officers was ultimately beneficial to Mr. Johnson.

This alternate scenario is a sobering reminder of how even one mistake by the police can lead to serious trouble. What I have found to be Constable Sanford's misunderstanding of the significance of a Not on File report from NCIC, one that I found was widespread among police actors who testified before the inquiry, led him to suspect auto theft in this case. I blame not him but his training for this error. The level of confusion within the Halifax Regional Police that exists about what information NCIC collects, and what inferences can and cannot be drawn from their reports, is unacceptable. This is not an issue of racism but of basic police practice. My own understanding of NCIC reports may be incorrect, but the point is that there is no common understanding of the meaning of these reports on the part of Halifax Regional Police officers. I do not make this a part of my order, but I urge that a senior member of the police administration go on a personal tour of the NCIC facility in West Virginia to learn at first hand exactly what the Centre does, and that all employees in the dispatch system and all police officers be re-educated on a priority basis about the true nature of NCIC reports.

The evidence of Dr. Wanda Thomas Bernard

A number of issues came up with regard to the evidence of Dr. Wanda Thomas Bernard, whom Mr. Goldberg wished to qualify as an expert witness with regard to racism in Nova Scotia, the impact of racism on individuals and communities, anti-racism training, and racial profiling by police. Dr. Bernard holds a master's degree in social work from Dalhousie and a doctorate in sociological studies from the University of Sheffield, England. She has been a professor in the Maritime School of Social Work at Dalhousie since 1990, and was appointed director of the school in 2001. Dr Bernard has conducted research and published widely on the experiences of black people in Nova Scotia and elsewhere, their encounters with racism, their success stories, and their coping mechanisms, and on anti-racist education and diversity training. Her work on racism, violence and health has attracted major grant funding from the Canadian Institutes of Health Research, which is another clear indication of her high stature in the scholarly community.

At the outset Mr. Duncan raised the issue of a possible appearance of bias on the part of the chair, given that Dr. Bernard and I are both professors at Dalhousie University. Mr. Duncan indicated that he did not have any evidence of bias apart from the bare fact of our being faculty

members at the same university and belonging to the same union, but he quite properly urged me to reflect on this issue. I put before the parties my previous contacts with Dr. Bernard and ruled that there were no reasonable grounds for supposing that I would suffer from any disqualifying bias in hearing her testimony. I will elaborate on that ruling here. Dr. Bernard and I have never to my knowledge sat together on a university committee or a union committee of any kind, and we have never been involved in a research project of any kind together. Our academic work is in quite distinct fields and I have never served as a reviewer of Dr. Bernard's work for a granting agency, scholarly journal or in any other capacity, nor she of mine. My one, and for all intents and purposes only, contact with Dr. Bernard was in 1991 or 1992 when she was invited to organize a segment of a Professional Development Day program at Dalhousie Law School that focused on anti-racist education. I was a participant in the session, which I recall as lasting for three or four hours. Since that time I have met Dr. Bernard casually at university functions no more than once or twice, and exchanged a few words with her on those occasions. It was and remains my view that these very limited contacts should not give rise to any appearance of bias, but I thank Mr. Duncan for raising the issue so that it could be thoroughly aired.

Mr. Duncan was prepared to accept Dr. Bernard's expert qualifications on racism in Nova Scotia, the impact of racism, and anti-racist training, though he argued that her evidence on the first two points was not necessary or relevant to the inquiry. He referred to an Ontario Board of Inquiry decision, commendably made available by opposing counsel, Mr. Goldberg, in which the proposed expert testimony of Dr. Bernard on anti-black racism in Canada was rejected on the ground of lack of necessity. The board observed that it was "statutorily charged with and presumed to have the expertise to determine whether discrimination, including systemic discrimination exists." (*Omoruyi-Odin v. Toronto District School Board*, [2002] O.H.R.B.I.D. No. 21 at para. 55) With all due respect to the board, expertise in racism and expertise in discrimination are two different things. Racism is a social phenomenon, discrimination a legally prohibited act. Boards are presumed to possess a certain expertise in the law of discrimination and human rights, but do not necessarily possess expert knowledge in the practices and impact of racism beyond a basic understanding of their dynamics (though obviously a range of knowledge on these topics exists on the part of boards of inquiry). Racism takes many guises, exists in many different environments and it is studied by a great variety of social scientists using various methodologies. A given board of inquiry is unlikely to be up to date on all this literature, and I would not wish to see *Omoruyi-Odin* cited as a way of cutting off recourse to expert evidence in discrimination cases. One method of providing this evidence to a board is of course simply to submit published works on the relevant matters, but works cannot be cross-examined.

Mr. Duncan pointed out that according to the Supreme Court of Canada in *R. v. Mohan* (1994), 114 D.L.R. (4th) 419, the test for expert evidence is that it must be more than merely "helpful," but must actually be relevant and necessary to the forensic process. I realize that people may have differing views on whether expert evidence on racism and the impact of racism is relevant and necessary in a case of alleged discrimination, particularly a case of individual discrimination. I did not accept Mr. Duncan's objections to the admissibility of the evidence on these topics, but took them into account in assessing the weight to be attributed to it. In my view, the actual context of the *Mohan* decision must be kept in mind in understanding where to draw

the line between "helpful" and "necessary" evidence. *Mohan* was a criminal case where the rules of evidence are highly structured, partly because of a historic concern to ensure that unduly prejudicial evidence does not go before a jury. I note that with only one exception all the case authorities cited in *Mohan* are criminal cases, suggesting that the concerns relating to criminal trials were uppermost in the Court's mind. In any case, immediately after noting that the descriptor "helpful" sets too low a standard, Justice Sopinka went on to say at 429, "I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information 'which is likely to be outside the experience and knowledge of a judge or jury.'" I have found that it satisfies this test for the reasons stated above. Expert evidence in discrimination cases can be statistically based, with an air of scientific validity, but often it is highly qualitative and uses the "softer" methodologies of the social sciences. This is clearly appropriate when we are dealing with the elusive but nonetheless powerful concept of human dignity that underlies human rights law. The often subtle nature of discrimination puts a high burden on complainants, and I would urge future boards not to be too quick to characterize proffered expert evidence as merely "helpful" and thus excluded.

Dr. Bernard's testimony on the powerful impact of negative media stereotypes of black males, both on white people and on black men themselves, was especially pertinent. She noted the strong tendencies in popular culture and film to focus on black men as criminals, pimps, uneducated persons, and uninvolved as fathers of their children. Her research has examined the "cool pose" that young black males sometimes adopt in response to these media portrayals, which in turn unintentionally helps to reinforce the stereotypes. The net effect of her testimony was that these negative stereotypes are widely diffused in our culture, so much so that they operate at a subconscious level, and that it requires a considerable amount of training to counteract them. The issue of possible subconscious stereotyping by police officers was a major focus of this inquiry, and I found Dr. Bernard's evidence relevant and necessary to that issue, in the sense described in *Mohan*.

The evidence of Dr. Bernard on anti-racism training was both necessary and relevant to the inquiry and it informs my discussion of remedies later in this decision.

Mr. Duncan did not accept Dr. Bernard's qualifications on the issue of racial profiling practices by the Halifax Regional Police and a qualification hearing was held to determine whether I should accept them. At the close of Mr. Goldberg's submissions I decided that the attempt to qualify Dr. Bernard on this point failed at a threshold level, without calling on Mr. Duncan. The main indicia of expertise in such hearings are relevant publications in peer-reviewed journals and successful peer-reviewed grant applications. Dr. Bernard's main research regarding such practices occurred in the context of a recent pilot study on black men and the criminal justice system, in which a research assistant interviewed nine black men from the Halifax-Dartmouth area who had had experiences with the criminal justice system. (Dr. Bernard employed a male research assistant to overcome perceived problems involved with a female interviewer in such a context.) These men talked about their perceptions and experiences of racial profiling by the police, among other matters. This report has not been published, and its main conclusion on this point was that more research needs to be done. Publication in a peer-

reviewed journal ensures that the research in question has at least a threshold level of legitimacy in the discipline in question, and without that it is not possible to establish expert credentials on the precise topic in question. It seems to me that to be qualified as an expert on racial profiling practices, the candidate would also have to include some evidence from police actors in their studies, either in the form of interviews or of statistical data showing the incidence of stopping vehicles according to race. See for example Scott Wortley, "A Northern Taboo: Research on Race, Crime and Criminal Justice in Canada" (1999), 41 Canadian Journal of Criminology 261-74; and Wortley and Julian Tanner, "Data, Denials and Confusion: The Racial Profiling Debate in Toronto" (2003), 43 Canadian Journal of Criminology 367-90.

Remedies

(i) individual

I have found that Constable Sanford discriminated against Kirk Johnson in the course of the ticketing and towing of his vehicle. I have also found that the Halifax Regional Police Service are liable for this act through the failure of their employee Sergeant Bowes to properly supervise Constable Sanford during the course of the stop. Mr. Johnson is entitled to general and special damages for this violation of his rights, to be awarded against both respondents jointly and severally. I have also considered institutional remedies against the Halifax Regional Police Service and will address this matter below.

With regard to special damages, Mr. Johnson's testimony was that he was obliged to return to Halifax 20 to 25 times from Texas either to discuss the progress of his complaint with his lawyer or to participate in the Commission's investigative process. He estimated the return fare at about $630 U.S. for each trip, or $820 Canadian using 1.3 as an exchange rate. This amount sounds right for a return trip to Texas, but Mr. Johnson was not able to provide any written evidence to substantiate the number of times he was obliged to return to Halifax in connection with this case. Mr. Moreash chose not to cross-examine Mr. Johnson on this point but he did raise in his closing submissions the possibility that Mr. Johnson would have been returning to Halifax to visit his family in any case on some of these visits. I accept that Mr. Johnson visited Halifax 20 times or more between 12 April 1998 and August 2003 and that he may have discussed his complaint with his counsel on all or most of these occasions. I doubt that he would have made 20 separate visits purely for this purpose, had he not also had family reasons for visiting the Halifax-Dartmouth area. Mr. Johnson filed the complaint on 14 December 1998 but it appears that it did not enter the investigative phase until the summer and fall of 2001. I was appointed as a board of inquiry on 2 May 2002 and from that point until August 2003 the hearing was adjourned on at least two occasions because Mr. Johnson could not be available. I find that Mr. Johnson made six trips to Halifax that he would not otherwise have made in order to discuss the progress of his complaint, for a total of $4920. I do not award pre-judgment interest on this amount.

With regard to the amount of general damages, Mr. Goldberg suggested $25,000 during closing submissions, plus exemplary damages. He is well aware that the usual range of awards in this province, and indeed across Canada, is between $1,000 and $10,000, but argued that an amount within this range would trivialize and diminish respect for human rights. Mr. Wood acknowledged the usual range but did not recommend any particular amount. I do not find any reason to exceed the usual range of damage awards. Mr. Johnson's status as a public figure can be taken into account in assessing any harm to reputation and should not be used as a vehicle to award damages on a different order of magnitude than is customary. I do not find this to be a case for exemplary damages.

I find that the events of 12 April were very humiliating, stressful and painful for Mr. Johnson, and that this injury continued long after the night in question. Dr. Bernard testified as to the sense of violation that members of minorities experience when subjected to acts of racism; she analogized it to an assault. We understand that a person who has been physically assaulted will continue to experience psychic after-effects for some period of time long after any physical injury has healed. A similar reaction can occur after a direct encounter with racism. When the act occurs at the hands of the police, contact with whom one has no control over, it is bound to create an ongoing sense of vulnerability.

The harm to be compensated has two aspects: harm to Mr. Johnson's self-esteem, and to his reputation. The latter element has a unique aspect in this case. In addition to the humiliation suffered on the evening in question, Mr. Johnson felt betrayed by the police. He had followed his parents' teachings that he was to cooperate with the police and was not to blame racism for any problems he might have. Mr. Johnson often spoke in schools where he tried to pass on the same message, which is not always a popular one in the black community. It required some courage to do this. Yet this incident seemed to reveal that his message was flawed, that a law-abiding black citizen could still get in trouble with the police even though minding his own business. Some in the black community may have thought less of Mr. Johnson because of this, and there was some evidence to this effect.

In considering any harm to Mr. Johnson's reputation I also have to consider any counter-balancing factors. I find that any harm to Mr. Johnson's reputation was transient and was offset to a large extent by his rise in stature in the black community, and to some extent outside it, in deciding to pursue a human rights complaint against the police to its final conclusion. Many of Mr. Johnson's supporters attended the hearings, and while I did not follow the newspaper coverage in detail, even a cursory reading shows that Mr. Johnson was cast in a quasi-heroic light. My award under the heading of loss to self-esteem and injury to personal dignity includes, however, an element for the sense of embarrassment Mr. Johnson suffered as a result of feeling undermined in the community by his encounter with the police. Keeping in mind the precedents for this kind of award in Nova Scotia and across Canada, I award $10,000 in general damages with pre-judgment interest at the rate of 2.5% from 12 April 1998. I recognize this is on the high end but I feel it is appropriate both because a public authority is involved and because the injurious effect on Mr. Johnson's self-esteem continued for some time after the night in question.

Mr. Goldberg requested an award of costs against the respondents on a solicitor-client basis. I find that it was reasonable for Mr. Johnson to have separate counsel, and that Mr. Goldberg's participation in the inquiry was very valuable. There was little repetition as between Commission counsel and Mr. Goldberg, and I find his presence did not unreasonably lengthen the inquiry. Some preliminary research on this question revealed that it was more complex than I had anticipated, however. I believe I have, in general, jurisdiction to award costs on this basis but there seems to be some conflict in the authorities as to what principles govern the award. See for example *Nkwazi v. Correctional Service of Canada* (2001), 41 C.H.R.R. D/109 (C.H.R.T.), where the law is reviewed. If the parties cannot agree on the costs award within 30 days of the deadline for appealing this decision, they are to contact me and I will ask for written submissions and a hearing on this issue; I retain jurisdiction over the complaint for this purpose.

Mr. Wood reminded me that I have authority under the Act to make an award to a person who is not a complainant. I award $1000 to Earl Fraser payable jointly and severally by both respondents. Mr. Fraser went out for a quiet Sunday drive and found his life quite altered through no fault of his own. Constable Sanford was civil to Mr. Fraser throughout the night in question but his action still had the effect of dragging him into a long proceeding over which he had no control. He for some time thought he might have to pay over $1000 in fines, and getting the tickets cancelled turned out not to be a straightforward matter. I accept his evidence that the tickets were only cancelled because a police officer who had heard of his difficulties approached him off duty and took it upon himself to help. I find Mr. Fraser experienced the effects of this discriminatory act, albeit to a much lesser extent than Mr. Johnson, and is entitled to an award on this basis.

(ii) institutional

Turning to institutional remedies, it is common for decisions of this kind to include provisions about educational measures to be taken by the respondent, particularly where it is a business or large organization. I agree with the general philosophy of the Commission's observations on this point. Mr. Wood urged that any remedies "must clearly not be seen as punitive and should be intended to foster respect and support for HRPS. They should enhance and improve the objectivity, integrity and neutrality of HRPS in the eyes of the public." His suggestions were as follows:

1. That a scholarship should be established by the Halifax Regional Police Service in the name of Kirk Johnson (or such other name as is appropriate) to be given annually to a resident of North Preston pursuing studies in criminal justice.

2. the Halifax Regional Police Service should be directed to begin collecting and maintaining statistics on the race of all drivers of motor vehicles which are stopped by police officers, the mechanics to be determined following a proposal to be prepared by the police and submitted to the board of inquiry, for which purpose I would retain jurisdiction.

3. racial sensitivity training should be made mandatory for all civilian and police employees and should be completed within two years.

I disagree with the first and third of these suggestions. With regard to the first suggestion, I see no reason to memorialize this incident in this way. Any remedies I order must be proportional to the findings of discrimination in the decision. I think that an order for immediate mandatory sensitivity training for all 500 or so employees of the Police Service would be an excessive response to the finding in this case. It would be seen as punitive and might cause a form of backlash. This is not to say, however, that I regard the discriminatory ticketing and towing of Mr. Johnson's vehicle to be a one-off event which could never happen again. I have heard a lot of evidence about the development of anti-racism policies by the Halifax Police in the period 1991-97, and by the (amalgamated) Halifax Regional Police Service after 1997. Mr. Moreash rightly anticipated that the adequacy of the anti-racism and diversity management policies of the police service would be on trial to some extent in this proceeding, and provided both documentary and oral evidence of these policies through Deputy Chief Christopher McNeil.

I have some concerns about the thrust of these policies but even more about the extent to which they are taken "on board" by the whole organization from the police officer on the beat to the higher echelons of the administration. There was a common theme in the answers when officers testifying before the inquiry were asked about their awareness of institutional anti-racism policies and their experience of diversity training. Most replied that they had some sessions in their training at the Atlantic Police Academy but none thereafter and they were not familiar with the policies adopted by their employer. This is in direct contradiction to the commitment promised in the 1995 Halifax Police Department (as it then was) Diversity Management Policy, which Deputy Chief McNeil said was the cornerstone of Halifax Regional Police policy in this area. That policy promised that all current employees would participate in a race relations course, and that new employees would do so within twelve months of their commencement of employment. The discriminatory acts in this case might well have been avoided had existing anti-racism policies and educational opportunities been more vigorously diffused and promoted throughout the organization. There are elements of both individual and organizational responsibility involved in this case, and in that context I think it is appropriate for me to include in my order some provisions about how the Halifax Regional Police Service can improve its educational efforts. The plan I outline below is not meant as a punitive measure, but as a process which I hope the Police Service will embrace in a cooperative rather than adversarial manner. It is meant to be an adjunct to existing management techniques for assuring quality service, but with an additional emphasis on public transparency.

I am not prepared to say that the Halifax Regional Police Service is an organization rife with racism. Like many large organizations in the 1990s, it was forced to deal with race relations issues in the context of a crisis; in this case, the events of July 1991 which resulted in a so-called "race riot" in Halifax. The crisis arose out of allegations that the police over-reacted to a spontaneous protest by black people over difficulties in access to some downtown bars in Halifax. Crises are often a necessary spur to action in the short term. The downside of crisis-driven policies is that they fade away when the crisis passes, and old patterns of behaviour

reassert themselves. According to the evidence of Deputy Chief McNeil, much of the efforts of police administrators in the early to mid-1990s focused on hiring minority officers to ensure more diversity in the police force itself. Ten new officers were hired in 1993, nine black and one Asian. Another ten or so minority officers were hired around 2000, but as Deputy Chief McNeil testified, there are always retirements and resignations, so that it is a struggle to keep up the numbers. These measures were a step forward but with black officers still comprising at most 5 or 6% of the police force there was clearly work to do vis-a-vis the other 95%. Another focus was on eliminating discrimination and harassment within the police organization itself, which is a laudable goal but has little impact on police-community relations.

The policies discussed by Deputy Chief McNeil have surprisingly little to say beyond vague generalities about police interactions with non-white members of the community. I realize that in 1997 the Halifax Regional Police Service emerged as a result of municipal amalgamation and that there were many complex problems resulting from that action. No organization can do everything at once and it is understandable that for a time management's attention was taken up with pressing priorities resulting from the merger. Presumably that time has now passed and the police can devote more attention to improving relations with minority communities and individuals. It is a matter of record that it has already begun to do so in the form of community meetings, including some in the north end of Halifax, that were reported in the local newspapers in September. Even though the Halifax Regional Police Service does not provide policing service to the black communities of North Preston, East Preston or Cherry Brook (the RCMP provides such services to those communities), I would suggest that some outreach effort by the respondent police service to these communities is advisable, given the frequency with which their residents encounter members of the Halifax Regional Police Service in the Halifax-Dartmouth area.

Anti-racism education, or as it now sometimes called, diversity training, requires a substantial commitment in terms of money, time and energy by the organization undertaking it. It is clear that the Halifax Regional Police Service has made some progress in defining its goals and educating its workforce in this regard over the last dozen years, but it is equally clear to me that a kind of progress report or reality check is needed. There is no point in reinventing the wheel at great expense in those areas where the Police Service is doing a good job. But there are clearly areas where existing practices and policies need to be reviewed either for content or with a view to their being more fully embraced by staff; there may be other areas which have not been addressed at all. Dr. Bernard spoke of a "needs assessment" as a necessary preliminary step to adopting a program of diversity training, and I order that one be undertaken according to the time-line below. I will retain jurisdiction over the complaint for the limited purpose of ensuring that these steps are completed, and my jurisdiction will end when the final police report referred to in number 7 below is published. In creating this plan, I have tried to balance two main things: the needs of all citizens to know that their police force is making its best efforts to provide services in a non-discriminatory fashion to the public; and the needs of the police management to be able to plan for the deployment of its budgetary and human resources in an efficient fashion. That is why I have left modes of implementation largely to the police while trying to ensure that

the public is kept informed about measures that are underway, and can comment, critically if need be, on the direction of policy in this area.

1. Within two months of the expiry of the deadline for appeal of this decision, the Halifax Regional Police Service shall engage the services of two consultants to conduct a needs assessment of its current policies and practices on anti-racism education and diversity training. One of these consultants must come from Nova Scotia and the other must come from outside the Maritimes. These consultants may be individuals, partnerships, or corporations, but the intent is that one person or group be local and one be from outside the Maritimes. Knowledge of the local black, other minority and First Nations communities is essential in this process, but the fresh insight that outside eyes can provide is also desirable. The Police Service shall advertise in appropriate media for these positions, and the advertisements may differ as between the Nova Scotia/non-Nova Scotia consultants, given that a somewhat different background is sought in each case. The Nova Scotia Human Rights Commission must approve the content of the advertisements and must reply expeditiously with any concerns about the content of the first drafts.

2. Ideally the two consultants will work together to produce a single report, and the Police Service should in its search for consultants try to find persons who are willing to work together to this end. If a single report proves to be unattainable, however, each may submit an individual report.

3. The Nova Scotia Human Rights Commission shall provide to the Police Service on a confidential basis a list of names of persons or entities regarded as suitable to conduct the work within one week of the deadline mentioned in point 1. The Police Service shall consider these names but is not restricted to them and has the final responsibility for choosing the two consultants; provided, that before concluding any contract, the Police Service shall submit the name or names of consultants proposed to be hired who are not on the Commission's list, to the Nova Scotia Human Rights Commission which shall have one week to make such confidential comments on their suitability as it sees fit.

4. It shall be a term of the consultants' contracts that the report(s) will be submitted to the Police Service within six months of the date of contracting. If the consultants think it advisable, the report(s) may include a report card showing by letter grade (A, B, C, D, F) the effectiveness of various aspects of the content and implementation of the Police Service's current anti-racism and diversity training policies. The reports shall be written in plain language and shall be made public at the expense of the Police Service. Before the reports are made public the Police Service shall have the opportunity to comment on any factual or interpretive errors and request correction by the consultants. If a dispute about such matters cannot be resolved to the satisfaction of the Police Service, the consultants have the last say and the report must be published as per their final draft. The Police Service will be entitled to comment publicly on the reports when published. If in their interviews with members of the Police Service the consultants encounter evidence of racist attitudes or discriminatory behaviour, their public reports are not to identify by

name or description the persons associated with such attitudes or behaviour, but they may convey a separate confidential report with such names to the chief of police if they think it advisable. The existence of any such confidential report is not to be mentioned in the principal report.

5. The Nova Scotia Human Rights Commission shall be entitled to comment publicly on the consultants' report(s) but the final decision as to what action is required rests with the Police Services.

6. The Halifax Regional Police Service shall appoint one of their senior managers to have overall responsibility for complying with this process, and that person shall be identified publicly as soon as possible after the deadline for appeal of this decision has passed.

7. Three months after the publication of the consultants' report(s), the Halifax Regional Police shall make public its response to the needs assessment, and shall indicate what steps it has taken and is planning to take in light of it.

With regard to the matter of excessive police stops of vehicles driven by black males, and whether there should be a separate remedial provision on that matter, I will have to state my findings of fact. I have found that race was a factor in stopping of the Johnson vehicle. That alone would justify some order to the Halifax Regional Police to at least review their policies on vehicle stops and provide some retraining. There was the CPIC record of queries of the Johnson vehicle plate, which tended to confirm Mr. Johnson's testimony of multiple stops, though at a frequency less than he asserted. I must bear in mind, however, that the query reports started in 1997. Given that Mr. Johnson had the car from 1993, I infer that there may have been stops earlier than the earliest date shown on that record. The testimony on the state of computer equipment in police vehicles at various points in time was not entirely clear, but I suspect that an earlier state of technology made such queries more difficult, such that they would not necessarily be conducted if an officer was immediately satisfied that Mr. Johnson's papers were in order. I accept the testimony of Mr. Johnson's cousins O.J. and Jouan Johnson who both stated they were with Mr. Johnson on several occasions, O.J. Johnson said on seven or eight occasions, when he was stopped by the police. O.J. Johnson was not asked where the stops occurred but Jouan Johnson said some were in Halifax and some were in Dartmouth, which suggests some Halifax Regional Police involvement. Mr. Johnson's father Gary Johnson testified to local knowledge that black men get stopped all the time leaving Preston, but the RCMP is the more likely body to be conducting such stops.

The CPIC record alone could not confirm the reason for the queries on Mr. Johnson's vehicle. As Mr. Moreash pointed out, driving with an expired Texas plate might explain a good deal of this police interest in the vehicle, apart from any question of race. There is also the complicating factor of two police forces, the RCMP, which provides police services to North Preston but is not a party to this proceeding, and the Halifax Regional Police. I also accept from the testimony of other witnesses that there is a serious problem of perceptions in the black community about the prevalence of apparently arbitrary stops by the police. The problem in crafting an appropriate remedy is the absence of information on this topic. I am reluctant to

accept Mr. Wood's suggestion of directing that statistics on traffic stops be kept on a racial basis, but there may be no other way to secure the necessary information upon which to base a sound policy. I conclude that there will have to be further submissions on this matter. I would ask that counsel for the Police Service submit one or more proposals to me within thirty days of the passage of the deadline for appeal of this decision. To be more precise, what I would like is a proposal for how information could be provided on the role of race in traffic stops by the Halifax Regional Police. This may be a proposal for a study to be conducted by an academic and funded by the police, for example. Counsel for the Commission may submit a different or a more detailed proposal if he wishes, but is not required to do so.

Let me be clear that I do not want this to turn into a perpetual inquiry. My role at this future hearing would be limited to approving one of the proposals and ensuring it is completed in a timely fashion. I envisage that the study would be made public and the results would be given to the consultants conducting the needs assessment. I will play no role in assessing the information revealed by the study.

The Police Complaints Process

I wish to address as a separate matter the issue of the police complaints process invoked by Mr. Johnson in May 1998. The process is governed by ss. 6 to 28C of the regulations passed under the *Police Act*, R.S.N.S. 1989, c. 348 as amended. This was the first place where Mr. Johnson tried to get some redress for the embarrassment and inconvenience he had suffered. This was the most appropriate place for his concerns to be addressed, and had this process worked more effectively, I believe Mr. Johnson could have achieved a satisfactory response to his concerns and everyone would have been spared this long, expensive and difficult proceeding. Once a complaint is made, the complaints officer (in this case, Sergeant Michael Bell) is required by s. 11 of the regulations to "consider whether the complaint can be resolved informally" and must attempt to do so with the consent of the member concerned and the complainant. According to the regulations, an informal resolution consists of a proposal which is committed to writing on a document called Form 7 and signed by both parties. After consulting with the officer to hear her or his side of the story, the practice of the complaints officer is to present a proposed resolution to the complainant first. If the complainant does not agree, the informal resolution fails and the complaints officer investigates the matter as a formal complaint.

The proposed resolution put to Mr. Johnson on Form 7 is reproduced as Appendix B to these reasons. The regulations regarding complaints against the police are a model of Weberian rationality but the informal resolution provisions, including Form 7, disclose a woefully inadequate understanding of human psychology. Mr. Johnson came in fuming about what he labelled racist treatment at the hands of a police officer, treatment which the police department itself immediately admitted was based on an error (though it did not admit any racist overtones), and what kind of resolution was offered? A bland apology, a signature on a form and a cheque for the $69 towing fee. No face to face meeting, no real acknowledgment of the gravity with which Mr. Johnson obviously regarded the incident, simply a neat bureaucratic way of closing a

file. It is worth reproducing Mr. Johnson's account of what he says he requested at his first interview with Sergeant Bell on 14 April:

> I tell you what, this is not going to rest, not until I get an apology. I said to the guy, What I want, Earl, his wife and his kids to be here in this room and my mother and father and my lady and my brother to be in this here room to hear Sanford say with his mouth, Kirk Johnson, I apologize. I'm wrong. I said that to him [Bell]. And I said, Once he does that, this is over. I'm not going to court. I'm not trying to make no formal complaint. That will rectify the whole problem.
>
> The guy looks at me, No, we can't do that for everybody. He said, We would be apologizing to everybody. I said, Listen, it's better that you guys do that rather than try to bring the whole police department down. The guy says, No. I said, Well, you know, you know what I do for a living, so it's going to get publicity. Well, you know, [Bell replied] the police department, we're used to publicity. It don't matter to us. I said, Look, I'm trying to talk to you guys. If this is the way you guys want to roll. Thank you for talking to you. I'll see you guys in court.

I realize that this account could be regarded as self-interested on Mr. Johnson's part, as showing that he was reasonable and the police weren't. Sergeant Bell admitted having no independent recollection of the events relating to the Johnson complaint, and testified with the aid of his notes and documents relating to the investigation of the complaint, though not his "working file" which could not be found. He denied that Mr. Johnson made the request for a personal apology because there was no mention of it in his notes. I observe that Sergeant Bell's notes for the days in question are very brief and to the point, really more of an activity log. It seems to me quite consistent with his demonstrated practice that he would not mention something like the request for a personal apology that he thought was outside the realm of the complaint process.

In any case, Sergeant Bell did make two notations on 18 May 1998 at or shortly after the meeting at which he recorded the detailed statement from Mr. Johnson referred to earlier. The first was "Mr. Johnson does not wish to sign this document [the draft Form 7]." The second was "obvious that an informal resolution cannot be reached," which was noted after Kirk Johnson signed the note pad to indicate he had received the cheque for the towing fee. Sergeant Bell's first note was sufficient to establish that an informal resolution was not going to be reached. Why would he mention again that it was "obvious" that an informal resolution was not going to be reached? I infer that he made the second notation because there was a continuing conversation about what Mr. Johnson wanted out of the complaint process, something he "obviously" couldn't have in Sergeant Bell's opinion. Having observed both Mr. Johnson's and Sergeant Bell's demeanour I accept Mr. Johnson's testimony that he requested a face to face apology. Mr. Johnson's memory was not clear on the sequence of meetings he had with Sergeant Bell, but I find he made the request for a personal apology in April and reiterated it in May. By referring to Sergeant Bell's demeanour I do not mean to suggest he was not telling the truth or seeking to mislead the inquiry. I am referring to my impressions of him as a "by the book" sort of person who is very concerned to follow established procedures (as indeed police officers are

trained to be). It strikes me as entirely plausible that he would have regarded Mr. Johnson's request as outside the scope of the informal resolution process, as Mr. Johnson stated in his testimony. I do not blame Sergeant Bell for the derailing of the informal resolution process. He was working within the system as it had been set up. It is a system governed mainly by bureaucratic imperatives and by the laudable goal of protecting the employment rights of unionized police officers, but it does not display any creativity in its attempts to respond to the concerns of complainants.

The real question is why a request for a personal apology should be seen as so outlandish. It is ironic that this complaint occurred in May 1998, and in June 1998 the provincial Department of Justice released a glossy brochure entitled *Restorative Justice: A Program for Nova Scotia.* Restorative justice is an ancient concept that has been revived in recent years. It is now being employed extensively in the field of criminal justice, where one of its main features is that the offender, the victim and the community are active and participate in the resolution process. Nova Scotia has developed one of the most reputable and comprehensive restorative justice programs in the world, and the police in Nova Scotia participate in it regularly in their law enforcement capacity. There is no reason that the police complaints process could not be infused with restorative justice principles, which would focus in a much more responsive and empowering way on the complainant's real concerns. In particular there is a large and sophisticated literature on the role of apology in a variety of contexts which could be considered in redesigning the police complaints process.

I am not suggesting that the police complaints process was in itself discriminatory or that it operated in a discriminatory way with regard to Mr. Johnson's complaint. For that reason I do not include any mandatory provisions in my order relating to it. I do strongly suggest, however, that the Halifax Regional Police Service engage an outside consultant with some expertise in restorative justice theory and methods to review their complaints process with a view to redesigning it. Policing in an increasingly multi-cultural society poses major challenges, and police-community relations can be a flashpoint of tension. A truly responsive complaints process should help to defuse the tensions that can arise from the mistakes and misunderstandings that will inevitably occur in the policing context. Certainly it would be better for complaints alleging racially discriminatory behaviour by the police to be dealt with if at all possible through the police process rather than through the human rights process, which can be much longer and more adversarial.

The reason that I have gone on at such length about the complaints process is that it represented a tragic lost opportunity. The result of this decision will probably be seen as a victory for Mr. Johnson and a loss for the police and Constable Sanford. Consider, however, that Mr. Johnson leaves this process with some monetary compensation and some sense of satisfaction at having his view of the incident confirmed in the main by the board, but without the one thing he really wanted, which was an apology from Constable Sanford. He does not really have closure. Constable Sanford leaves this inquiry probably feeling upset and diminished. The one thing that might make him feel whole again is forgiveness from Mr. Johnson. Without that he will not have closure.

I know that boards of inquiry have sometimes ordered apologies by respondents. In my view this is a mistake. A forced apology may be worse than no apology at all, and I will not order Constable Sanford or the Halifax Regional Police Service to make one. As noted earlier, the Halifax Regional Police Services apologized during the course of the inquiry for the error in seizing the car, without however admitting any discriminatory aspect to that error. I suggest that a sincere apology acknowledging the discriminatory aspects of this incident, in a form acceptable to the complainant, might go some way towards putting relations between the police as a whole and the black community on a better footing. I suggest that the parties think about whether they are willing to offer forgiveness and an apology, respectively, in order to close the circle on this matter. I appreciate that the possibility of an apology may have been canvassed during any negotiations that may have gone on before my appointment; such information is privileged and I have no knowledge of it. Whatever may have gone on then, matters may appear in a different light now that my decision is known. Probably it would be best if any initiatives in this direction happened through a skilled mediator or facilitator, the costs to be paid by the Halifax Regional Police. I ask Mr. Wood as Commission counsel to offer his good offices in putting the parties in touch with such a person. If Mr. Johnson, Constable Sanford or the Halifax Regional Police Service wishes to explore my suggestion further I suggest they contact Mr. Wood on a confidential basis.

_____

Philip Girard
Board of Inquiry

Dated at Halifax, Nova Scotia this 22nd day of December, 2003