

5
ONTARIO COURT OF JUSTICE

10
HER MAJESTY THE QUEEN

v.

15
MICHAEL JACK

20
P R O C E E D I N G S A T T R I A L
C O N T I N U A T I O N

BEFORE HIS WORSHIP JUSTICE OF THE PEACE C. YOUNG
On MAY 27, 2010
at PETERBOROUGH, Ontario.

25
CHARGE: s. 136(1)(a) HTA - Fail to Yield to Traffic

A P P E A R A N C E S:

30
N. HENRY, Ms.,
P. SUTTON

Prosecutor for the Crown
Agent for the accused

ONTARIO COURT OF JUSTICE

WITNESS:	Exam. In-Ch.	Cr- Exam.	Re- Exam.
JACK, Michael	2	15	-
TAPP, Lloyd	21	29	-

Transcript Ordered. September 14, 2010.
Transcript Completed. October 06, 2010.
Ordering Party Notified. October 06, 2010.

May 27, 2010.

THE COURT: So, where are we at?

5 MS. HENRY: Well, for the record, last name Henry, first initial "N". I do appear as the prosecutor this afternoon. Your Worship, we are waiting your decision with respect to a motion by my friend to dismiss the case for -- a non-prima facie case was made by the prosecution.

10 THE COURT: Insofar as it relates to identification.

MR. SUTTON: Correct.

15 THE COURT: I'm going to dismiss your motion. I find that there is sufficient available evidence to verify the identity of the individual in question and we'll proceed from there. So have you -- you've rested your case?

MS. HENRY: Yes.

THE COURT: Now it's defence's turn.

20 MR. SUTTON: Certainly. And once again, for the record, Your Worship, surname Sutton, S-U-T-T-O-N, first initial "P" appearing on behalf of the defendant who is also present, and we're prepared to proceed.

25 Actually, on a preliminary matter, Your Worship, I'd ask my friend if she intends on recalling the investigating officer or Officer Payne at any point in time, dealing specifically with the exclusion of witnesses order.

30 MS. HENRY: No, Your Worship, I do not.

THE COURT: Thank you.

MR. SUTTON: I can indicate the defence does intend on calling two witnesses. I'll start first by calling Officer Jack to the stand. Sorry, Mr. Jack. My apologies.

THE COURT: That's all right.

MICHAEL JACK, affirmed:

EXAMINATION IN-CHIEF BY MR. SUTTON:

Q. Mr. Jack, if I can just first and foremost, when did you begin your duties with the Ontario Provincial Police?

A. Well, I started my training at the Ontario Provincial Police Academy on August 25th, 2008. I was sworn as a Provincial Constable on January 9, 2009 and I reported for duty at the Peterborough detachment on January 12th, 2009.

Q. And when you arrived at the Peterborough detachment, what was your principle duty at that point in time when you first started?

A. Well, I was a Probationary Constable, so I was assigned a coach officer, and we just started working together.

Q. And who was your coach officer initially?

A. It was Constable Shawn Filman.

Q. And how did that -- how did that work out with Constable Filman?

A. Well, from my perspective it didn't work out all that well. I did not feel that Constable Filman was interested in giving his best so to speak to coaching me. I felt that that was more of a nuisance to him at the time, so I was seated in the passenger's seat when we were driving. Of

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5 course, I was assigned to the coach and I was -- but I felt that even his tone of voice when addressing me was different than the tone of voice in relation to other people, so I felt that -- as I -- as I learned later, I felt that I was discriminated. That was my feeling. I like -- I like his very big personality so I didn't want to take any actions right away. I wanted to give it a few months to figure out what was going on. Maybe it was part of the training, so I didn't jump to conclusions right away.

10 Q. You indicated that you felt that you were discriminated, how did you come to that conclusion?

15 A. Well, when you feel that you're being kind of left out on occasion or just being subjected to differential treatment, but especially -- or the most significant one would be the tone of voice when it addresses you versus addressing others, and not being really kind of looked after so to speak.

Q. Did you ever voice your concerns?

20 A. Yes, I did sometime in mid-spring, probably towards the end of April I spoke with my supervisor, Sergeant Flindall about this and I said that I don't feel I'm being properly coached.

Q. And what was his response?

25 A. Well, he had knowledge of my concerns saying that, yes, it was the result of the mismanagement of human resources at the detachment and Constable Filman was not supposed to be my coach in the first place, and he said he was going to help me. He was going to speak with Constable Payne, who was on leave at the time because of some family issues, and when she gets back to the platoon she's going to be my coach.

30 Q. Okay. So when Officer Payne returned was she appointed as your coach officer?

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A. No, she was not appointed as my formal coach officer, but she was suppose to be my go-to person.

MS. HENRY: I don't see the relevance between the charge and the evidence being given by the defendant with respect to some type of feeling and discrimination within his unit.

THE COURT: Sir?

MR. SUTTON: With respect, if I'm permitted some leeway, I'm certain that will come out very quickly.

THE COURT: As long as it comes quickly.

MR. SUTTON: Q. When did Officer Payne become your coach officer, actually become active and actively involved?

A. Well, it never really happened formally because the -- we had -- so in the summertime there was a spike in the workload so they had an increase in the workload coupled with -- so there was no time. We never even doubled up. We sat and spoke with her a few times, maybe half an hour, 40 minutes in total say, and give me some directions -- so I continued working on my own soliciting help from officers who were willing to help me, usually come in early or leaving late, or coming in on my days off to study and to do the work.

Q. Did you ever have any incidents with Constable Payne?

A. Yes, I did. It's not something I wish to talk about, but on July 1st in the morning Constable Payne reprimanded me for certain deficiencies in front of other officers in the constable office, officer from our shift and officers from the morning shift as well. I don't remember exactly the contents of the conversation, the one-side

5 conversation, because I was in shock, but she said something along the line that Constable Filman tried very hard and that basically wasn't comfortable. I don't remember, honestly. I was just in shock -- and anger in her voice. And then on July 18th also she called me aside in the morning and accused me of winking at her and looking at her inappropriately.

THE COURT: Pardon me?

10 A. Accusing me of winking at her, that I winked at her and looked at her inappropriately.

THE COURT: I'm sorry, I didn't hear. I'm not understanding you.

A. Constable Payne accused me of winking, that I was winking at her.

THE COURT: Winking?

15 A. Winking, yes. Like, looking at her inappropriately or it wasn't professional, and...

THE COURT: One moment.

A. Yeah.

THE COURT: Carry on.

20 A. Well, I had nothing -- I had done nothing of the kind and the only thing that came to my mind at the time was I had at sometime involuntary winking in my left eye, so I was just very, very -- I felt I was harassed.

THE COURT: One moment.

MS. HENRY: Again, Your Worship, I cannot see where this....

THE COURT: One moment.

MS. HENRY: Yes.

30 THE COURT: I'm writing. Ma'am?

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MS. HENRY: Again, I don't see where this information has any relevance with respect to the charges before the court today.

THE COURT: Sir?

MR. SUTTON: Again, I would suggest very respectfully, sir, that there is relevance and it will come to light very quickly.

THE COURT: Well, I told you once before -- I find it interesting, I truly do, but that's not -- I'm not here to find it interesting. You said once before it was going to become clearer than it already is, and when can I expect that?

MR. SUTTON: I would suggest within five minutes.

THE COURT: You've got half that time.

MR. SUTTON: Okay. Thank you.

Q. So, this relationship with your coach officer, did it progress into something worse or better?

A. Worse.

Q. How would you describe that?

A. I was constantly in a defensive position. I was -- and I had to always justify my actions. I was scrutinized and....

THE COURT: You were what?

A. Scrutinized. I was like under a microscope. I mean, I was inefficient because I was new, I was a rookie and I wasn't local to the area. These officers had tens of years of experience combined and they were born and raised in this area, which I wasn't, so, of course, I was inefficient and took -- steps and I needed help, not harassment.

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MR. SUTTON: Q. Were any formal complaints ever lodged against you?

5 A. Well, yes. On August 3rd Sergeant Flindall reprimanded me in his office for mishandling a certain case, and then I said, "Well, you know what, I've done my best. At this point I cannot give any better output," so otherwise I was going to contact the Ontario Provincial Police Association, which I did and an investigation was conducted, which I was advised later that I was being targeted. And then a series of
10 reprisals....

THE COURT: Hold on. Hold on. Hold on. I want to hear again what you said.

A. Okay.

THE COURT: It's just -- excuse me.

15 A. It's my accent. Yeah, I know.

THE COURT: I want to hear again what you said.

A. Yes.

THE COURT: On August the 3rd...

A. On August the 3rd...

20 THE COURT: ...your Sergeant reprimanded you?

A. Yes.

THE COURT: For?

A. For mishandling a work-related....

25 THE COURT: Hold on. Words are an amazing thing. Carry on.

A. And advised me that he was considering charging me with this neglect of duty and insubordination as well.

30 THE COURT: One moment, please. Do you know if those charges would have been laid under the *Police*

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something along the lines, "He's going to kill me. He's going to kill me," so all of us jump in our cruisers and just drove there like crazy, scaring the public along the way.

Q. And what happened when you got there?

A. Nothing. It was investigated. After about 20 minutes it was determined -- approximately 20 minutes, half an hour, that it was a bogus call, and unsubstantiated call.

Q. So you determined that the call was unsubstantiated, correct?

A. Yeah.

Q. What did you do next?

A. Well, we started leaving the scene. I think there were five cruisers at the time, so two cruisers was Constable D'Amico and Constable Morin, they headed east and Sergeant Flindall, Constable Payne and myself headed west on County Road 29.

Q. Okay. And was that the order of the vehicles as they left; Sergeant Flindall and....

A. I'm not sure. I don't remember. I know I -- I believe I left last.

Q. Okay.

A. Because that's -- heading in separate directions.

Q. Okay. So you went which direction on the 14th Line?

A. I went -- I was westbound.

Q. And did you approach a stop sign?

A. Yes, I did.

Q. What did you do when you got to that stop sign?

A. See, that's where I start being vague, but

normally I would have stopped, so I believe I stopped.

Q. I'm sorry, I didn't hear you.

A. I believe I stopped. Yeah, I stopped.

Q. You came to a stop. What did you do next?

A. And next I turned left onto County Road 29.

Q. Did you make any observations either during your turn or prior to your turn?

A. Well, the....

THE COURT: Is that County Road 29?

A. Yes.

THE COURT: Thank you.

MR. SUTTON: I'm not familiar with the area, sir.

A. Yeah. Well, when I looked to the south in a southbound direction -- sorry, when I looked to the south there were no northbound vehicles coming my way and -- Sergeant Flindall, followed by Constable Payne.

THE COURT: Now I've just lost a whole sentence.

A. Okay.

THE COURT: You looked south and there were no northbound motor vehicles.

A. Exactly.

THE COURT: What did you say after that?

A. And then there were only two vehicles heading southbound -- south of Smith 14th Line.

THE COURT: Yes.

A. There were vehicles approaching...

THE COURT: So there were no vehicles northbound?

A. No.

THE COURT: And there were two motor vehicle southbound?

5
A. The -- southbound south of the line, and there were also vehicles approaching from the north, so we had two cruisers southbound.

THE COURT: Those two vehicles that were southbound were cruisers; is that right?

A. Yes. And then....

THE COURT: And what else?

10
A. And then there were vehicles north of line which were heading southbound, which I allegedly....

THE COURT: One moment. One moment. Thank you.

A. Okay.

MR. SUTTON: Q. So these southbound vehicles, how far back from the intersection were they; do you recall?

15
A. No, I can't say for sure. I can only guess.

Q. In your best estimation, how far back?

A. I don't know. Fifty metres, hundred metres at the most. Fifty metres maybe. They were slowing down.

Q. So what did you do next?

20
A. Well, I turn onto County Road 29, but I did not turn into the southbound -- I didn't turn into the southbound lane, I turned into the northbound lane, because it was clear and I accelerated, and then merged into the southbound lane behind Constable Payne's vehicle.

25
Q. Did you make any observations of whether any vehicle had to take evasive action or anything similar?

A. No, I did not.

Q. Did you hear any brakes squealing?

THE COURT: One moment.

30
MR. SUTTON: Sorry.

Q. You didn't hear any brakes squealing?

A. No, I did not.

Q. How far in front of you would you estimate were Officer Payne and Sergeant Flindall; do you recall?

A. No. I mean, I can't say. I'd be lying if I did. I don't know. Just using common sense, I don't know, maybe 50 to 100 metres ahead of me. In the range, probably. I can't be sure. Some distance far away.

Q. Let me just clarify this. When you made your turn onto the county road from the 14th Line, you turn into the northbound lane, correct?

A. Yes. Yes, I did.

Q. And what happened after that? What did you do next?

A. I just continue heading over to the detachment. We took different routes, and when I arrived at the detachment Sergeant Flindall advised me in his office that I was getting charged and he was writing the traffic ticket with a smile on his face. Then I took more calls and again this sort of stuff and I went different route. I had to stop a couple of times. My nose was bleeding. I continued working.

Q. Were you ever made aware of -- prior to arriving back at the detachment were you ever made aware of your alleged violation?

A. No. It was a big surprise to me. I was in shock.

Q. What was the end result of your involvement with the OPP?

A. Well, eventually I was forced to resign. I was dismissed from employment for not meeting basic requirements for

my status to be changed from a probationary to permanent, but after I was charged I was disallowed to work on my own. I was sent for an assessment, so, my driving skills did not meet the requirements, so....

5 Q. Sorry, what was that?

A. My driving skills were deemed not to meet the requirement so I was disallowed to drive the cruiser on my own. That was one of the things I guess that was a factor.

10 Q. And who made that determination?

A. Well, the commanding staff.

Q. And what was required after that?

A. After that I was reassigned to a different platoon, a different coach officer and we just drove together, but I was consistently not meeting the standards anymore.

15 Q. So, I'm going to ask you directly, did you fail to yield the right-of-way to oncoming traffic that day?

A. I don't think so. I wasn't made aware of anything until I was advised that I was charged. I didn't even know what the charge was about. I mean, there was no accident, there was no evasive manoeuvres taken by the -- no screeching tires like you asked me. I mean, I lay the charge before myself for fail to yield, but that was as a result of an accident, actually, in two instances.

25 Q. I believe you indicated you had to take a re-evaluation course with respect to your driving; is that correct?

A. Yes, I was sent to Kingston. Yes.

Q. What was the outcome of that?

A. Well, my driving skills were above the average but below the OPP standards they say, so it was like five and -- six and a half, five and a half. I'm not sure. So I was--

missed the -- so to speak, and then....

THE COURT: You were what?

A. My driving....

THE COURT: Your last comment, you were something or else so to speak?

A. So to speak? It's like let's say that the OPP standards are six and I scored five and a half. Five would be the average. Five would be the average driver, five and a half is what I got on the evaluation and assessment and six was their requirements, so I was sent for remedial driving assessments and it was good. The driving instructor said I was a good driver. I never got the report. I don't have it on file, so -- that's what they told me verbally.

MR. SUTTON: Q. Is there anything else you'd like to add to your evidence today?

A. Well, just some of my experiences at the Peterborough detachment. This kind of treatment surpassed everything I ever experienced in my life, negative-wise. I've never got so harassed and belittled and humiliated like that at this detachment before. My accent was brought up a number of times. It was a negative experience.

MR. SUTTON: I have nothing further.

THE COURT: One moment, please.

MS. HENRY: Okay.

THE COURT: One moment, please. I'll be right with you.

CROSS-EXAMINATION BY MS. HENRY:

5 Q. Mr. Jack, would you agree that there does not have to be an accident in order for this specific charge to be laid?

A. I don't know.

Q. You don't know? You don't know the charge that you were charged with?

10 A. I know the charge I'm charged with, but I don't know if the....

Q. Well, under the definition of that charge does it say that there needs to be an accident in order for this charge to be laid?

A. I don't know.

15 Q. You indicated that there were vehicles at both southbound and northbound, and I believe that this was County Road 29 (sic); is that correct?

A. Yeah, that's correct.

Q. Thank you. I'm sorry, County Road 23.

A. 23?

20 Q. Yes.

A. Yes, it was County Road 23, you're right.

County Road 23 eventually turns into County Road -- no, it was County Road 23, you're right.

25 Q. And you indicated that there was both vehicles that were ahead of you in a southbound direction as well as vehicles heading in the northbound direction; is that correct?

A. There were no vehicles heading in a northbound direction.

30 Q. Well, I believe that you stated that there were two vehicles approximately 50 to 100 metres heading in a

southbound direction, correct?

A. Yes, that's correct, southbound direction.

Q. Okay. And you indicated they were 50 to 100 metres approximately?

A. Well, at this point I can only guess.

Q. Okay. So for you to -- was there any way that you could pull into the southbound lane and do so in a safe manner?

A. I don't know. I can't tell you right now.

Q. Well, typically when you're heading southbound, do you typically turn into the southbound lane?

A. Well typically, yes, and -- had to -- to make the -- if there insufficient room and you don't know....

Q. Okay. So was there sufficient room for you to turn into the southbound lane on this day?

A. I can't tell.

Q. You were heading southbound though, correct?

A. Yes.

Q. So....

A. Well, at the time it was a high intensity call, I was trying to stay on my team's tail, and that's why I tried to make it faster to....

Q. Were you heading to another call?

A. Not anymore.

Q. In fact, what was -- where were you heading?

A. Heading back to the detachment.

Q. So why was it necessary to stay on your team's tail?

A. How long does it take for the adrenaline to get out of the blood?

Q. Did you not indicate that it was a bogus call that you'd been at?

A. Yes, but we went like racing.

Q. Okay. And there were five vehicles approximately, cruisers that were there at that time?

A. Yes.

Q. And how long were you on scene at that previous call?

A. Probably 20 minutes.

Q. Probably 20 minutes. And how long did it take you to determine that, in fact, it was a bogus call?

A. All of us were involved in the investigation, so....

Q. I'm sorry?

A. All of us were involved in the investigation. We interviewed them separately, so -- we interviewed them then pulled our results together and determined that their stories matched and that there was no substance to this call.

Q. Okay. And so can you explain to me what the adrenaline would have been at that point if this was -- and correct me if I'm wrong, this was a domestic call?

A. Well, I guess it was more of a family dispute

Q. A family dispute. Can you explain to me then how you're in such a high adrenaline rush at that point?

A. After the call or before the call?

Q. After the call.

A. I was just trying to stay with my team. We came together, we leave together.

Q. At the detriment of other vehicles on the road?

A. There was no detriment to other vehicles.

Q. But there was vehicles in the southbound lane, correct?

A. Yes.

Q. And you were travelling southbound, correct?

A. Yes.

Q. Do you not think that when you pulled out to head southbound that you would affect this other traffic?

A. Affect them in which way; that they had to slow down?

Q. Well, if you were -- well certainly slow down, but if you were travelling in a southbound direction and you seen a vehicle pulling out into the southbound -- turning left to turn southbound, what would you -- what would you....

A. They were approaching an intersection. There was sufficient distance for me to turn.

Q. No, but there wasn't because you ended up having to turn into the northbound lane; isn't that correct?

MR. SUTTON: Objection. Is my friend giving evidence?

MS. HENRY: I apologize.

THE COURT: When you ask a question...

MS. HENRY: Yes.

THE COURT: ...just wait for the answer.

MS. HENRY: Q. You, in fact, had to turn into the northbound lane, correct?

A. Yes, I did.

Q. So would that not indicate that there was no -- it wasn't safe for you turn into the southbound lane?

A. I can't tell you right now. I don't remember.

Q. Then why didn't you turn into the southbound

lane?

A. Well, like, again, as I said, I was trying to catch up and that was just faster. I was trying to catch up -- I already made the turn.

Q. Did you not indicate earlier that you had to turn into the northbound lane in order to overcome vehicles in the southbound lane?

A. I'm sorry. Can you repeat that question?

Q. Did you not indicate earlier that you turned into this northbound lane in order to overcome vehicles that were in the southbound lane?

A. They're not -- they were still north of me. The vehicle were still north of me.

Q. But did you not say that you had to merge in in front of vehicles travelling in the southbound lane....

A. Not in the -- they were always behind me.

THE COURT: You know, I'm getting awfully tired of listening to the both of you.

A. They were always in front.

THE COURT: Listen to me. One will speak, one will answer. The first one that doesn't do it right, okay? Here we go.

MS. HENRY: Q. Did you indicate to the court that when you turned into the northbound lane that you overcame vehicles and merged in behind your fellow officers?

A. I did not overcame them. They were always behind me.

Q. Then why was there a need to turn into the northbound lane?

MR. SUTTON: Objection, Your Worship. Asked and

answered.

THE COURT: Sir.

MS. HENRY: I have no further questions. Oh, no, I do have one other question.

5 Q. You indicated that there had been a prior time that Sergeant Flindall had had an opportunity to lay a charge against you, correct, with respect, I believe, to you failed to -- something to do with -- you were -- you failed to do your job properly, as if there was something wrong with your performance?

10 A. He said he was considering that.

Q. I'm sorry?

A. He said he was considering that.

Q. And did he file that charge?

A. No.

15 Q. He did not. Okay. And also you indicated to the court that -- I believe that he was considering charging you with insubordination; is that correct?

A. Yes.

Q. And did he file that charge?

20 A. No.

Q. And at any time was Officer Payne, was she your -- your coach on the....

A. She wasn't my coach. She was my go-to person.

Q. Okay.

25 MS. HENRY: I have no further questions. Thank you.

THE COURT: Re-direct?

MR. SUTTON: No re-direct, subject to any questions the court may have.

30 THE COURT: You may step down. Any other witness?

A. I was with the Toronto Police Service for 15 years.

Q. What did you do with the Toronto Police Service?

A. I spent six years as a general patrol officer, and nine years in an investigative capacity in various units.

Q. Over the course of your career, Officer, if I can ask, roughly how many traffic incidents have you investigated?

A. Well, for about six months I was with the East Traffic Unit with the Toronto Police and you have a lot of accidents over there simply by the higher volume of vehicular traffic on the roadways. Within those six months I would estimate, just those six months alone I had in the area of close to about 500 accidents investigated. Many of them would have been minor in detail; many of them serious, and not to mention the numerous other collisions through the course of a general constable's duties on the road, then one takes into account the traffic incidents, traffic enforcement and accident investigations upon being a member of the Ontario Provincial Police, so it would be numerous. Numerous.

MR. SUTTON: Your Worship, at this time I'm seeking to qualify Officer Tapp for the purposes of giving opinion evidence with respect to disclosure that was provided by Officer Payne and Sergeant Flindall. I'm seeking the leave of the court for that opinion.

THE COURT: Any comment?

MS. HENRY: I have no knowledge whatsoever of the gentleman's qualifications and expertise.

5
THE COURT: You have no problem with accepting him as an expert in this limited area?

MS. HENRY: In this limited area.

THE COURT: Fair enough. One moment, please.

MR. SUTTON: Certainly.

THE COURT: Let's say what the area of expertise is.

MR. SUTTON: Sorry, sir, I didn't hear that?

THE COURT: What's the area of expertise?

10
MR. SUTTON: Dealing specifically with the incident before the court as it relates to the investigation, the charge before the court and the allegations before the court.

15
THE COURT: Well, I think we have to be a little more specific. What is he being qualified as an expert in?

MR. SUTTON: To provide his opinion of....

THE COURT: On what?

20
MR. SUTTON: The *Highway Traffic Act* charge under s. 136(1)(b), fail to yield to traffic on a through highway.

THE COURT: So he's being asked to be qualified as an expert on s. 136(1)(b)?

25
MR. SUTTON: Specifically with the charge before the court, but more specifically....

THE COURT: 136(1)(b)?

MR. SUTTON: Specifically with....

THE COURT: Elements of the offence?

MR. SUTTON: That's correct.

30
THE COURT: That's fine with you?

MS. HENRY: That's fine.

THE COURT: Thank you. Carry on.

MR. SUTTON: Q. Officer Tapp, have you had an opportunity to review the disclosure provided by both Sergeant Flindall and Officer Payne?

A. Yes, I have.

Q. And what is your determination based on that review of the disclosure?

A. Well, quite frankly, based on my experience and the units I've been involved with, I was quite surprised that a particular charge as that was initiated, because one would have -- in order to establish the elements or the facts in issue for that particular charge, would have a sole window of view and a restricted, a rather restricted window of view, that being the rear view mirror and a side view mirror. Many people, it's common knowledge, when anyone operates a motor vehicle, many vehicles, in fact, most vehicles, you have the caption on the side view mirror, "Objects in this mirror appear closer than they are." For that reason alone, coming sort of one being tangent or adjacent to an intersection that will give you a broad view of the unfolding events, one has to be very leery of laying such a charge based on the evidence of -- that is afforded from a rear view mirror and a side view mirror. In this particular case what I'm led to believe based on the disclosure that I reviewed, you literally have a mini convoy of police vehicles. The average citizen normally is apprehensive and concerned when they see a police vehicle approaching from a side road or even in front of them. Here you have two vehicles that turn. This third one turns immediately behind, feels that there's safe enough distance to turn, but accelerates in the

5 oncoming lane and gradually moves over or moves into the
intended direction of travel. Then looking at the disclosure I
see from the disclosure provided that one alleges that there was
braking involved. Well, you're a police officer. You're
travelling in tandem. There's more than enough time and it's
incumbent upon you, otherwise it would be a neglect of duty
under the *Police Services Act* to at least pull over on the side,
wait until the traffic moves and get the ideal source of view,
that being this alleged vehicle that would have been affected.
10 In this particular case nothing was done, so what are we left
with? My opinion, you're left with the observations of an
individual that's driving straight ahead, not with her body
turned around looking at the direction behind them through the
rear window, but driving straight ahead, but paying attention
15 while concentrating on their driving ahead, looking at a side
view mirror and a rear view mirror, albeit all of that, not for
a concentrated period of time, glimpses, and that leaves the
integrity of such a charge, in my opinion, questionable.

20 Q. What are the elements of the offence of s.
136(1)(b)?

25 A. Well, motorists travelling in one direction or
travelling when upon entering from an intersection roadway shall
yield to traffic on the through -- on the highway, on the lane
that it's intending to turning into, any failure to do so, okay,
would constitute a breach of that other motorist's right of
travel. That charge in my career so far, 24 years, and I've
laid that numerous times, but always as a result of an accident,
because no one is able to afford accurate evidence, because an
officer's never there when an accident occurs, hence, the
30 derivatives of those observations are always from the second

motorist, the impacted motorist or the other person involved. In this particular case we're devoid, we're bereft of that evidence.

5 Q. Based on your review of the disclosure, do you believe Mr. Jack committed the offence before the court?

10 A. Absolutely not. I don't believe so. It can be an opinion, but I don't believe so, and I stress that based on the following comments. A motorist travelling from one roadway to another will see traffic coming. When the motorist feels it's safe to do so, will turn. If a traffic's travelling -- a vehicle's travelling at a particular speed, and the motorist that's making the turn feels there's enough room, there's no traffic coming in the oncoming lane, in the opposing lane, the motorist might turn into the opposing lane, accelerate for the sake of not wanting to impede the regular speed of the other vehicle. Now, having said that, it's much different with a police vehicle because it's a police vehicle, and not just one vehicle. You've got two vehicles that turn ahead, traffic coming. Let's say this is going east, the vehicle is going north intending to make a left turn to go east, you've got the lead vehicle, okay, sees two police vehicles making a left turn and -- he not sees the third police vehicle right behind, naturally that vehicle is going to slow down.

15 20 25 Q. Very briefly, Officer Tapp, what's your definition of the word "yield?"

30 A. Yield involves and implies that there was an accident that was -- that had occurred or a collision, a mere -- an immediate impact. It implies an immediate impact, whether it occurred or not. I wasn't there when it happened, but I specifically question my ex-colleague, "Okay. Well, was there

an accident? Could there have been an accident? Did this vehicle have to slam on their brakes, swerve out of the way to avoid?" All that would denote, yes, the proximity of this vehicle to the vehicle making the turn and hence -- and hence establish a prima facie case. Yes, you failed to yield to the right-of-way of that impeded motorist.

Q. We've heard today that you've had some history with the Ontario Provincial Police?

A. Absolutely. With respect my ex-colleague over here. I am a visible minority. I've never been -- since I've come to the OPP....

MS. HENRY: If I may object, Your Worship?

THE COURT: What are you objecting to?

MS. HENRY: It's my understanding that this is simply to be an opinion on the exact elements of the charge. He's now getting into a discrimination....

THE COURT: Are we by field of expertise?

MR. SUTTON: That's correct?

THE COURT: Okay. Qualify, testify as an expert on 136(1)(b)?

MR. SUTTON: Correct.

THE COURT: Where do you wish to go now, with respect?

MR. SUTTON: I'm seeking to have the witness provide his -- basically his history with the Ontario Provincial Police with respect to any potential prejudice that may be involved there.

MS. HENRY: I don't know what relevance that has on this case, the charge before the court.

THE COURT: Good question.

MR. SUTTON: We've heard the evidence very candidly of former Officer Jack. There was an allegation of some prejudice and mistreatment. I submit to the court very respectfully that the potential evidence, possible evidence of Officer Tapp would further reinforce that.

MS. HENRY: I would note that it is just that, an allegation, Your Worship. There's nothing that is factual before the court. And needless to say, like I stated, it is not before the court today. Today is simply a *Highway Traffic Act*....

THE COURT: There's so many things before the court in this trial that it boggles my mind. I have a few questions. You make a connection or -- have a seat, Madam Prosecutor.

MS. HENRY: I'm sorry?

THE COURT: Have a seat. We're not going somewhere where there's nothing to go to. You either make a connection or you don't.

MR. SUTTON: Q. Officer Tapp, did you have a history of prejudice with the OPP?

A. To answer that question, in all fairness, Your Worship, the answer is yes, and when I reviewed the material just the -- on the prima facie, just the disclosure of the material alone, I asked myself and what stuck out in my mind is, "Why lay this charge when even on its own there's such a prima facie case to not even substantiate such an allegation?" But then again, I am a visible minority and I understand the dynamics behind this. I have been targeted by the Ontario

5 Provincial Police. I have five complaints filed with the Human
Rights Commission since the time I came to the OPP. I've never
been subjected to this type of treatment in all my years, 15
years with the Toronto Police. Five complaints filed with the
Human Rights Commission against the OPP. The Ontario Human
Rights Commission slated it for a five-day hearing and on day
three of the five-day hearing the OPP approached my counsel and
negotiated a settlement, so, yes, and since I've been
transferred out. Since hearing of this allegation I would love
10 to have used my former colleague as a witness in my complaints
for the Human Rights Tribunal, however, I've since known these
two other officers -- anyways....

THE COURT: I've heard all I need to hear.

MR. SUTTON: Thank you.

15 THE COURT: And let it be clear, that it will go to
whatever weight I choose to give it.

MR. SUTTON: Understood.

THE COURT: Not to any degree of admissibility.

20 MR. SUTTON: Understood. Thank you. I have
nothing further. Perhaps my friend does.

THE COURT: Cross?

MS. HENRY: I just have one question.

25 CROSS-EXAMINATION BY MS. HENRY:

Q. Can you please just indicate and just to
collaborate, were you, in fact, present on the day that this
occurred?

A. Absolutely not.

30 Q. So you have no firsthand knowledge with respect
to this occurrence?

A. No, absolutely not.

Q. So you don't know what was seen and what was not seen through the rear view mirror?

A. No. Other than just what I'm gleaning from the disclosure.

Q. Thank you.

MS. HENRY: I have no further questions.

THE COURT: Re-direct?

MR. SUTTON: Nothing in re-direct, thank you.

THE COURT: You may step down, Officer, thank you.

A. Thank you, Your Honour.

THE COURT: So, where are we now everyone? Are there anymore witnesses?

MR. SUTTON: That's all the witnesses, Your Worship.

THE COURT: Submissions. Are we ready for submissions? Defence?

MR. SUTTON: Certainly.

THE COURT: You're ready?

MR. SUTTON: Certainly. Before I start speaking, Your Worship, I just wish to refer to my notes.

THE COURT: Okay. Take your time. Take your time.

MR. SUTTON: Unfortunately I don't have the pleasure of a transcript, despite the fact that I believe the court ordered one, but I might be mistaken.

THE COURT: You're not the only one that didn't get one.

MR. SUTTON: Oh, thank you. The charge before the court, Your Worship, very candidly, 136(1)(b),

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failing to yield to traffic on a through highway, what does that require? It requires a defendant, number one, turning onto a highway; number two, failing to yield to that traffic. What does the word "yield" mean? That very candidly is very clear, that's the crux of the whole argument. That's the crux of the whole prosecution's case, and the case of the defence.

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You've heard the evidence of Sergeant Flindall. He's been with the OPP for quite some time. He indicates that he's made his turn, he's driving down the highway and he observes in the rear view mirror Officer Payne leave and turn. He estimates the vehicles to be travelling at approximately 200 meters away from the intersection at that time and he sees Officer Jack make the turn. He says the vehicles travelling in that direction had to stop, they had to slam on their brakes. How did he know that? Well, he saw the nose slam down, all the while while he's looking through this, driving down the highway at 80 to 100 kilometres per hour. Not through one, but through two vehicles. Through all the equipment and everything.

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Then we heard the evidence of Officer Payne. Almost verbatim to Sergeant Flindall's. Almost directly verbatim. She indicates that she makes the turn, she watches in her rear view mirror. Officer Jack makes the turn. She estimates the

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vehicle to be travelling at approximately 200 metres....

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Officer Jack -- sorry, Michael Jack takes the stand, he gives evidence. He can't really remember. It's quite some time ago, but what he is sure on is that he comes to a stop, makes a turn after looking in both directions. He sees two police vehicles travelling southbound that way; he sees two vehicles or three vehicles travelling southbound coming towards him, in terms that there's enough room to make the turn safely, however, not to impede traffic he turns into the northbound lane, he travels down the highway, accelerates and pulls into the southbound lane.

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From the charge before the court, Your Worship, very candidly, the defendant yielded to traffic. I respectfully submit the distance isn't that important. The distance is -- the issue before the court very clearly, did he interfere with traffic? Did he affect the flow of traffic? No he didn't. We can't be certain of that.

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I'm going to submit to you very candidly, the proper charge to be before the court is fail to drive in marked lane. He didn't do that when he made that turn. That's now what we're faced with.

But what really has me today and had me on the

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initial trial date is the comment that Officer
Payne gave on the stand with respect to --
essentially indicating that she was above the law.
She didn't have to obey the law in the performance
or in the execution of her duties. So if that's
the case, Officer Jack was in the performance of
his duties, so was Sergeant Flindall.

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I'm going to respectfully submit, Your Worship, the
evidence before the court, it's not a prima facie
case. There is no evidence before the court. The
best evidence -- the best evidence of any
interference with traffic, of any interference with
the flow of traffic wasn't stopped. It was let go.
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Drove away down the highway, and when asked Officer
Payne indicated, "Well, I'm a police officer. My
evidence is the best anyways."

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The best evidence is the evidence of the defendant
before the court who indicated that, yes, he did
look -- yes, he did make the turn, a turn into
oncoming traffic in that lane. He yielded to the
traffic. The traffic was in the distance. He
indicated that on a conservative guess,
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approximately 50 metres, 150 feet, but he felt
probably more. A minimum of a hundred metres. He
did yield to the traffic. And again, it's the
wrong charge before the court. It's that simple.
Those are my submissions.

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THE COURT: Madam....

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MS. HENRY: Your Worship, the evidence of Officer Flindall, he specifically said that he observed the defendant's vehicle go into the southbound lane and then had to turn hard left back into the northbound lane in order to avoid the collision, and I believe he specifically said that had he not turned hard left back into the northbound lane or to the northbound lane, not back into, but into the northbound lane, that there would have been a collision. He visually observed this. He gave the eyewitness evidence that this, in fact, was the case and was the scenario of events.

When asked -- Mr. Jack, asked him, you know, "How many vehicles were coming in the other direction?" he indicated that he wasn't sure. When asked if he -- if -- excuse me. Let me just look at my notes. When he asked if -- if, in fact, he did commit the offence, he said, "I don't think so." He didn't say no. He didn't say, "No, because I turned hard into the -- or I turned into the northbound lane initially." He just said, "I don't think so." I believe that the evidence of Officer Flindall, that he visually observed him pull into the north -- or southbound lane and then pulled hard back to the northbound lane in order not to -- to cause the collision was, in fact, the scenario of events that day.

Officer Payne has given evidence that she never

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observed him leaving from the stop sign. When her observations were made, Mr. Jack was already in the northbound lane. The observation of Officer Flindall was that the vehicles that were coming in the southbound lane had to hit their brakes and he visually observed the front end of their vehicles take a nosedive, which indicated to him that they had to hit their brakes. They seem to say that it's due to the fact that it was a police vehicle pulling out. There had already been two police vehicles that had pulled out before that, so, chances are if you're to assume that the reason they're hitting the brakes is because they've seen a police vehicle, I would suggest to the court that that had already been done when the first two police cruisers had pulled out.

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When asked, Officer Jack, was he in a hurry, was he on his way to another call and he said no, that he simply was trying to catch up to his fellow officers, and when asked if he was catching up to go somewhere specific, it was simply back to their station, so it's not like they were in a race where he decided he was going to pull out, take the northbound lane and pull in as he seems to be giving as his scenario of events.

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Both officers indicated, and specifically Officer Flindall indicated in his evidence that he had no obstructions between his observation of Officer

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Jack's vehicle and his position. That he observed this. Mr. Jack seems to try to give the impression that there was some type of racist pursuit here, but I would suggest to the court, even under the evidence of Mr. Jack, that there were two previous opportunities for Mr....

THE COURT: What race? I don't even know what race he is?

MS. HENRY: I don't know either, Your Worship.

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THE COURT: Oh, forget it then.

MS. HENRY: I'm just stating that there were two previous occasions that....

THE COURT: Move on.

MS. HENRY: Very well.

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THE COURT: I don't see any race.

MS. HENRY: I don't either. I would state, Your Worship, that we believe that we have a prima facie case, that the officer gave clear, concise evidence of his observation. Part of that evidence was corroborated by another officer who was on scene. My friend seems to indicate that Officer Payne thinks that she's above the law and I believe that stems back to the conversation with respect to her using her telephone rather than using her radio that was in the car, and I believe that she simply said that as an officer that she was exempt from the rules with respect to being able to use her phone while in a motor vehicle. I don't believe that at any point that she states that she was above the law, and I don't believe that the

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evidence would see it that way either.

Your Worship, I believe that we have a prima facie case. I believe that -- just that. Thank you.

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THE COURT: Okay. Obviously, we're going to have a transcript, and -- we're going to all have a copy of it this time, and -- pardon me. When is an appropriate time for all of us to come together again? I guess my schedule may be the worst of all. When would we normally, Madam Clerk, come back?
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THE COURT: August 12, defence?

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MR. SUTTON: Yes, I'm available.

THE COURT: August 12 it is. Courtroom 4, August 12, 2010, 9:00 a.m. Thank you.

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--- ADJOURNED.

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FORM 2

Certificate of Transcript
Evidence Act, subsection 5(2)

I, Patricia Anne Elizabeth Pimblott, certify
that this document is a true and accurate
transcript of the record of R. v. Jack
in the Ontario Court of Justice held at 70 Simcoe
Street, Peterborough, Ontario taken from DRD recordings.

Oct 5/10

Date

P. Pimblott

Patricia Anne Elizabeth Pimblott, C.C.R.