

**DECISION**

File No. PC-19-0201

**NOVA SCOTIA POLICE REVIEW BOARD**

**IN THE MATTER OF:** The *Police Act*, Chapter 31 of the *Acts* of 2004 and the Regulations made pursuant thereto

- and -

**IN THE MATTER OF:** An appeal filed by **Cst. Nicole Green** of the Halifax Regional Police, subject officer in the public complaint filed by Clinton Fraser, is requesting a review of a decision made by Inspector Derrick Boyd dated November 5, 2020.

**BEFORE:** Jean McKenna, Chair  
John Withrow, Board Member  
Peter Mancini KC, Board Member

**COUNSEL:** Brian Bailey, Counsel for Cst. Nicole Green  
Andrew Gough, Counsel for HRP

**LAST BRIEF RECEIVED:** July 29, 2022

**DECISION DATE:** December 19, 2022

[1] This is the Complaint of Clinton Fraser against Cst. Nicole Green of the Halifax Regional Police (HRP). The matter relates to a traffic stop on Quinpool Road, on December 4, 2019, following an alleged collision between Mr. Fraser's vehicle, a GMC Sierra, a Toyota Yaris, and a construction truck. The event occurred in the course of an attempt by the operator of the Yaris, and Mr. Fraser, to merge into a single lane as a result of a lane closure.

[2] Cst. Green observed the interaction, spoke to all three operators, and ultimately determined that Mr. Fraser should be charged with an unsafe lane change, in violation of s. 111(b) of the *Motor Vehicle Act*, RSNS 1989, c. 293 (as amended). Throughout the time that the officers dealt with the situation, Mr. Fraser was angry, argumentative and agitated, and actually left his vehicle several times. After all interactions with Mr. Fraser and the others involved were apparently complete, including the issuing of a ticket to Mr. Fraser, Mr. Fraser was advised by Cst. Green that he could leave the scene. However, as the involved officers were returning to their vehicles, Mr. Fraser left his vehicle and angrily approached them. Cst. Green anticipated an imminent breach of the peace as well as a threat to the officers, and Mr. Fraser was arrested for breach of the peace, contrary to s.31(1), *Criminal Code of Canada*, RSC 1985 C-46. Mr. Fraser resisted the arrest, and force was used to restrain him, including the use of a Taser.

[3] The allegation, as framed and investigated by Halifax Regional Police, was for a violation of s. 24(7)(a), (b) and (c) of the *Police Act Regulations*:

(7) A member who abuses their authority in any of the following ways commits a disciplinary default:

- (a) making an arrest without good or sufficient cause;
- (b) using unnecessary force on or cruelly treating any prisoner or other person with whom the member may be brought into contact in the course of duty;
- (c) unlawfully exercising authority as a member.

[4] Inspector Derrick Boyd upheld all three charges and imposed a penalty of “de-escalation training and eight hours loss of pay.” Cst. Green appealed that decision.

**THE EVIDENCE:**

[5] The Board heard testimony from Mr. Fraser, Cst. Green, Cst. Desmond, Sgt. Burt, and Mr. Gerald Lonergan (owner/operator of the adjacent bakery). A number of documents, including HRP records, officers' notes, witness statements, and video footage from adjacent business premises, were admitted by consent.

[6] On December 4, 2019, at approximately 3:30 pm, due to construction work, the westbound curb lane on Quinpool Road was closed from the intersection of Monastery Lane westward. East of the lane closure, both the westbound curb and centre lane were open to traffic. A Toyota Yaris was traveling in the westbound curb lane. Mr. Fraser, in his GMC truck, was waiting on Monastery to enter traffic to turn right onto Quinpool and proceed westward. A construction related pickup truck was parked in the curb lane to his immediate right, directing traffic to the centre lane. Traffic cones closed the westbound curb lane beyond that. The setup would require the Yaris to merge into the centre lane, and Mr. Fraser's GMC to enter that lane at the same point. Traffic on Quinpool was heavy at the time.

[7] Mr. Fraser testified. He was a "reluctant" witness; he did not seem to want to be present, and he did not want to see or comment on the video taken that day, although he eventually did.

[8] According to Mr. Fraser, a large delivery truck was traveling in the centre lane, and the driver had courteously stopped, just before the lane closure, to allow curb lane vehicles (and/or Mr. Fraser) to merge into the centre lane. Mr. Fraser considered this as a courtesy to himself, and he testified that as he attempted to enter the centre lane, the Yaris, which he says had been traveling westbound in the curb lane, came out to his left into the centre lane, also to merge into the gap created by the delivery truck. According to statements given by the driver and passenger of the Yaris, they were already in the centre lane when Mr. Fraser attempted to merge ahead of them, forcing them slightly over the centre line into the eastbound lane.

[9] The Yaris occupants did not testify, although statements given later were entered into evidence by consent. The Yaris occupants claimed that their passenger side mirror was struck and damaged through contact with the Fraser vehicle, damage which was later observed on inspection by Cst. Green, no

damage was visible on the Fraser vehicle. The female passenger of the Yaris admitted that as the vehicles attempted to merge, she got up on her seat, opened her window, and proceeded to pound on the hood of Mr. Fraser's vehicle.

[10] According to the construction workers in the truck at the intersection, (the workers did not testify) as Mr. Fraser was attempting to access the centre lane, his truck also contacted theirs, although on subsequent inspection by officers at the scene, it was not possible to determine whether there was any fresh damage.

[11] At the time of the alleged collisions, Cst Nicole Green and Cst. Josh Desmond were traveling westbound, a few cars back; Cst Desmond was driving. Cst. Green was the senior officer and was Cst. Desmond's training officer. Cst. Desmond testified that he observed the Yaris moving across the centre line, he observed contact between the vehicles, and he saw the passenger of the Yaris lean out of the window and strike the hood of Mr. Fraser's vehicle.

[12] Cst. Green testified that she observed the Yaris passenger reach out of the window and hit the hood of the Fraser vehicle; in her testimony she said the Fraser vehicle was trying to merge, and the Yaris was "inching ahead", trying to prevent Fraser from merging (unfortunately neither the Yaris driver nor Mr. Fraser displayed the same courtesy to each other that the driver of the large truck had shown them). Cst. Desmond activated the siren and lights; they wanted" to figure out what was going on" as Cst. Green put it in her testimony at the hearing. Cst. Desmond told her that he thought the Fraser vehicle struck the Yaris. She said that she did see his mirror nick the mirror of the construction truck.

[13] Cst Green called dispatch, describing the call as a "road rage" incident. In response to that call, Constables Porter and Arsenault came to the scene. Porter and Arsenault's initial involvement was to speak to the construction workers from the construction truck.

[14] In response to the siren, both the Yaris and the Fraser truck pulled over in the coned off area, just in front of East Coast Bakery. The passenger and driver of the Yaris both got out, and headed towards Mr. Fraser's vehicle, yelling. At the same time, Mr. Fraser got out of his vehicle and began to yell as well. However, Cst. Green and Desmond immediately directed the individuals to get back in their vehicles and

remain there. The purpose was to separate the parties to prevent an escalating confrontation, and as well, was done out of concern for safety, given the heavy traffic on Quinpool. All parties complied. Cst. Desmond dealt with the Yaris people, and Cst. Green dealt with Mr. Fraser.

[15] Shortly after Mr. Fraser got back in his truck, two men from the construction truck came down the sidewalk and reported to Cst. Green that Mr. Fraser had also struck their vehicle. Those men then returned to their truck, without speaking to Mr. Fraser. The officers advised Mr. Fraser of the allegation, and he got out of his truck, (contrary to the direction of the officers,) and went back towards the construction truck where he began to confront the workers, who responded in kind. Again, Csts. Green and Desmond approached, and all officers successfully managed to de-escalate an inflammatory situation, by keeping the parties separate through officer presence and voice commands. All returned to their vehicles as directed.

[16] Cst. Green spent the next several minutes discussing the situation with the other officers. She also began to review the various drivers' documents, and enter the information in the system, as well as to determine what, if any, charges should be laid. After approximately 20 minutes, contrary to police direction, Mr. Fraser again got out of his truck, took pictures of his own vehicle, and again went back toward the construction truck, ostensibly to take photos. Again, the officers followed him back and directed him back to his truck, where Mr. Fraser angrily pointed out to Cst. Green that there was no damage to his truck. She appears on the Ash Bakery video to be calmly listening to him and examines his passenger side mirror.

[17] Mr. Fraser continued to loudly argue with Cst. Green, however, she was able to obtain his documents, and tried to explain to him that he struck the mirror on the Yaris in his attempt to merge into traffic. He denied contact with the Yaris, and the construction truck, and continued to do so in his testimony at the hearing.

[18] Cst. Green then provided documents to the driver of the Yaris and the construction workers. The driver of the Yaris asked to leave the scene before Mr. Fraser, as they claimed that they felt threatened by Mr. Fraser's conduct, ("aggressive" and "swearing") and they said that they were concerned that he might follow them. They were allowed to leave.

[19] Cst Green continued to prepare the necessary documents, which were provided to the operator of the construction truck, as well as a summary offence ticket charging Mr. Fraser with a Motor Vehicle Act ticket

for “unsafe lane change. The video shows her calmly standing at the passenger side of his vehicle while providing him with the ticket, as well as documentation on the other vehicles and parties involved. At that point, the construction workers also left the scene. She testified that she was attempting to explain to him why he was being ticketed, and that he continued to angrily deny any contact with the other vehicles. She spent approximately two minutes speaking to him. She then told him he could leave the scene. As well, it was after 4:00 p.m. and with the construction stoppage finished for the day, the westbound curb lane should be open to traffic, with parking prohibited.

[20] As the officers then began to return to their respective vehicles, Mr. Fraser again got out of his vehicle, and began to move towards the officers, in what appears on video to be an aggressive manner. Cst. Desmond was the first to notice, and he moved quickly forward to intercept him, directing him back to his truck. Cst Green follows immediately (within a second, as can be seen on the video) followed by Cst. Arsenault. She testified that she saw a pen in Mr. Fraser's right hand, and that he raised his hand; she perceived at that point that he was going to assault the officers. However, she testified that prior to seeing the pen, she didn't think he intended to assault the officers, but had already made the decision to arrest him. When she saw the pen, that became “part of the reason” for arrest. She had expected that if they simply left the scene, there would be further confrontation; she testified that “if he wasn't arrested, we would be called back”. She said there were a number of factors at play, which included his angry, aggressive demeanor, throughout, his refusal to readily comply with officer direction, the presence of traffic, etc. The video does not show his hand being raised until Cst. Desmond places his hand on Mr. Fraser's left arm, half turning him back towards the door of the truck. As he turns, his right arm raises, in a gesture that Ct. Green interpreted as aggression, and a threat to the officers. It could also be interpreted as pointing out that the Yaris driver had left the scene. Mr. Fraser did not, in his testimony, explain the gesture. He did say that he was angry about the ticket and wanted to “confront” the officers.

[21] Cst. Green testified that, prior to the arrest, she had told him at some point in the interactions, that if he got out of his truck again, he could be arrested. Cst. Arsenault testified that he also warned him earlier that he could be arrested if he got out of his truck again, and that when he directed him to get back in his truck, he responded “get back in your own car, I'm not a child.”

[22] Video evidence from East Coast Bakery was entered into evidence. As well, Mr. Gerry Lonergan, the proprietor of East Coast Bakery testified as to his observations at the time. The video captures the

entirety of the incident. The audio mainly captures the voices of Mr. Lonergan and his customers within the store, and demonstrates the heavy traffic on Quinpool Road, as well as numerous pedestrians going by on the sidewalk. For the most part, it does not capture the voices of anyone outside of the premises. Periodically, however, Mr. Fraser can be heard speaking in a loud and angry manner, both from outside and inside his own vehicle. Cst. Desmond can be heard on two occasions telling Mr. Fraser to get back in his vehicle. Mr. Fraser is heard telling Cst. Desmond to “get back in his own car,” and at one point saying that he did not want to leave. The video also well demonstrates the body language of all involved. Throughout the encounter, Cst. Green and the other officers display a calm, non-threatening demeanor in the face of an ongoing, angry, verbal confrontation by Mr. Fraser. This includes the final moments when Cst. Green delivered the ticket and information documents to Mr. Fraser. She testified that she was attempting to explain to Mr. Fraser why he was getting a ticket, while he continued to angrily deny any contact with the Yaris. He stated that if police say they saw it, they were lying.

[23] He was unhappy that the Yaris driver was allowed to leave the scene. He suggested to the officers that they were racist in their conduct. towards him, although racism did not form part of this complaint against the officers.

[24] Mr. Lonergan also described in general terms what he could overhear of the conversations of Mr. Fraser and the officers. In the video, Mr. Lonergan can be heard discussing the situation with a customer who had arrived in his shop at some point and describes Mr. Fraser to her as angry and aggressive and “yelling in the cops' faces.”

[25] Mr. Fraser is a large man; 6 feet 3 inches, and 220 pounds. When he testified, he initially appeared to be reluctant to be present at the hearing. He said that he did not want to view the video. He maintained, despite video evidence to the contrary, that he only got out of his truck twice. He said that he was not angry; his voice was naturally loud.

[26] In his testimony, Cst. Desmond described Fraser's demeanor throughout the incident as “hot headed...loud...swearing...worked up....” Cst. Green described him as “worked up...yelling...agitated. He wasn't listening”.



[27] The video displays the arrest efforts.

[28] It can be seen from the video that having issued the ticket, and spoken to Mr. Fraser through his passenger window, (for approximately two minutes) Csts. Green, Desmond and Arseneau began to walk back towards their own vehicle. Almost immediately, Mr. Fraser gets out of his vehicle, onto the street, and begins to approach the officers. In reaction, Cst. Desmond and Cst. Green step off the curb, with Cst. Desmond slightly ahead towards Mr. Fraser. Cst. Desmond points back towards Mr. Fraser's truck; Mr. Fraser continues to move forward, and Cst. Desmond places his hand on Mr. Fraser's left arm. Mr. Fraser turns slightly back. He does not appear on the video to be returning to his truck, and he raises his right hand and arm – possibly pointing back towards the west. Cst. Green immediately grabs his raised right wrist and brings it down on / towards the side of the truck bed. She testified that she was arresting him (as noted above, she had already made the decision to arrest him when she stepped off the curb) and attempts to bring his hand behind his back, in order to handcuff him. Mr. Fraser struggles and strongly resists physical control. Cst. Desmond, who is much smaller than Mr. Fraser, jumps on Mr. Fraser's back in what he testified was an effort to apply a neck restraint. That had no effect. Finally, all three officers take Mr. Fraser down to the ground. The struggle continues, as they attempt to handcuff him. Ultimately, the taser is used, by Cst. Green, and at some point Cst. Porter who had just come back from another store where she had been interviewing a potential witness) and he is finally handcuffed.

[29] Cst. Green testified that Mr. Fraser had a pen in his raised right hand, and her perception was that when he raised his right arm, he was going to use it as a weapon. She testified that it broke in the struggle. Cst. Desmond said that he did not notice the pen but did testify that he saw ink on Cst. Green's hand. Mr. Fraser testified that he didn't have a pen, "why would I have a pen?". However, when the ticket was being issued to him, he had asked for the officers' names and badge numbers, and Cst. Green testified that he wrote them down.

[30] The pen was not recovered or seized as evidence, but the Board accepts that he did have the pen in his hand. Even if he didn't, Cst. Green testified that when she moved off the curb towards Mr. Fraser, she had already made the decision to arrest him; as she testified, "if I did not arrest him, we would be called back later."



[31] Although Mr. Lonergan did not overhear everything said throughout the traffic stop, he was continuing to observe, even after he discussed other matters with a customer. It is telling to note that when he observed an angry Mr. Fraser get out of his truck the final moment before arrest, he is heard saying to a customer on the tape “oh my god, this is when it's going down....they told him three times, I told you this was going to go bad.” He perceived that they were going to arrest him.

[32] The entire incident took place over some 40 minutes. From the point when Cst. Green and Cst. Desmond move off the curb in reaction to Mr. Fraser exiting his vehicle and approach the officers, to the point at which she placed a hold on his right wrist, to effect the arrest, took six seconds (the actual time is displayed on the video).

[33] The video demonstrates throughout that 40 minutes that Cst. Green and the other officers seen on the video (primarily Csts. Desmond and Arseneau), made efforts to de-escalate a potentially volatile situation. They used officer presence and voice direction. Cst. Green appears to listen when Mr. Fraser points out that there was no damage to the passenger side mirror of his vehicle. She didn't simply hand him the ticket and leave with a “see you in court” attitude; she spent some considerable time speaking to him through his passenger side window, and her body language, and that of Csts. Desmond and Arseneau, displays a calm, non-aggressive stance. She told him he could leave.

[34] They had every reason to believe the incident was at an end as they walked back to their vehicles. There was certainly nothing more to be discussed. Yet contrary to their expectations, Mr. Fraser once again got out of his car and started towards them, in what appears on the video to be an angry, aggressive manner. What his intention was at that point, we do not know, but he did testify that he was angry when he was issued the ticket, and that he got out to confront the officers. Cst. Green's perception at that moment was that there would imminently be a breach of the peace of some kind, whether with other workers at the construction site (the two associated with the truck had left, but there were still traffic cones by the curb), or confrontation with other people in the area. As well, he had been warned by Cst. Green and Cst. Desmond earlier that he could be arrested.

[35] According to Cst. Desmond, at one point when arrest was mentioned, his response was: “try me.”

[36] In **Fleming v. Ontario**, 2019 SCC 45 (HRP BoA Tab 2), the Supreme Court of Canada considered arrest for breach of the peace. **Fleming** involved an action for damages brought against officers of the Ontario Provincial Police by a protester who was arrested for breaching the peace at a rally. The claim was for false arrest and battery. Police injured the plaintiff's arm in effecting the arrest. The court held that police do not have the power to arrest someone who is acting lawfully in order to prevent apprehended breaches of peace and that the arrest of the accused was unlawful. The court stated that a breach of the peace will occur only if an act involves "some level of violence and a risk of harm. It is only in the face of such a serious danger that the state's ability to lawfully interfere with individual liberty comes into play. Behaviour that is merely disruptive, annoying, or unruly is not a breach of the peace."

[37] The Board considers that the cumulative conduct of Mr. Fraser, including the final confrontation, went well beyond "disruptive, annoying or unruly".

[38] In **R v. MacInnis**, 2014 NSSC 262, the Court confirmed that there is indeed a common law police power to arrest for **anticipated** breach of the peace.

[39] HRP argues that in the present case, "...the grounds for arrest for breach of peace simply are not made out. They argue Mr. Fraser did not behave in a threatening or violent manner towards the officers at any point throughout the interaction. *Fleming*, *supra* clearly states that merely being disruptive or unruly does not rise to the level of behavior necessary to justify an arrest for breaching the peace. However, the accused in **Fleming**, *supra* was a protestor, who up until the time of his arrest, had not been angry or threatening; he had simply arrived as a potential participant in a protest, and was approached by other individuals who were perhaps potentially threatening.

[40] It is argued, on behalf of HRP, that there was no imminent risk of harm and that the conduct of Mr. Fraser was described by Cst. Green as merely "disruptive, argumentative, unruly, and upset." However, Cst. Green and Cst. Desmond also described him as angry, confrontational, swearing, etc. The video evidence shows body language and actions of an angry, aggressive individual. The people in the Yaris found his manner frightening. It must be noted that he was not arrested for being angry, loud, swearing or being confrontational; rather these were background factors that led Cst. Green to conclude that his conduct in

getting out of his truck AFTER the ticket had been issued, called for an arrest, as it was her perception that real harm was imminent; she testified that if they did not arrest him at that point, she felt that they would be called back shortly. She also testified that she had experienced hundreds of traffic stops throughout her career, and that it was highly unusual for an individual to get out of a vehicle after a ticket had been issued.

[41] Cst. Green anticipated that when Mr. Fraser got out of his truck for the fourth time, after the ticket had been issued and explained, there was a risk that Mr. Fraser would initiate a confrontation with the remaining construction workers and so she felt that it was necessary to prevent that. His conduct at that point was perceived as escalating; Cst. Green testified that in her opinion, the arrest actually de-escalated the situation.

[42] Mr. Fraser denied being angry before the ticket, but admitted that he was angry after he received the ticket. The evidence clearly shows that he was angry throughout.

[43] Cst. Green's subjective perception at the time, if objectively is supported by the evidence, must be carefully considered.

[129] In **R. v. Golub** 1997 CanLII 6316 (ON CA), [1997] O.J. No. 3097 (Ont. C.A.), the Court noted:

Often, the officer's decision must be made quickly, in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same sort of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.

[130] In **Wiles v. Police Complaint Commissioner** [1997] O.J. No. 6274 (Ont Div. Ct.) the Court concluded that "A constable has no obligation to weigh and determine the validity of various versions of events and render judgement before effecting an arrest."

[131] While Inspector Hernden, or some other hypothetical officer, might have dealt with things differently, those hypothetical approaches may or may not have produced a happier outcome for all concerned; indeed, matters might well have been worse. We do not find that Cst. MacGillivray's conduct was in any way contrary to a reasonable response; as noted above, in the Tactical Communication materials reflected in Inspector Hernden's report:

This rightfully cannot be done from a position of calm and detached reflection gained from hindsight but instead from considering the officer's point of view 'in the moment'. An officer's perception is influenced by a variety of personal characteristics that they bring to the situation. Some of these factors include size, strength, or fitness, their experience, skill/ ability / training and importantly, their level of confidence to handle the situation. The officer's perception of the incident will heavily influence the officer's tactical considerations and intervention response. **It is important to note that how any given officer perceives and responds to a situation will be based on the previously mentioned factors and that these factors may be unique to that officer and may legitimately differ from another officer facing the same circumstances”.**

[44] Cst. Green's subjective perception at the point of arrest was reasonable, considering all that had occurred in the previous 40 minutes. It is objectively supported by the undisputed evidence of his conduct throughout and up to the point of arrest. She and the other officers had attempted de-escalation several times. While certainly one option was to once again attempt to calm him down, and convince him to leave, she had exercised such efforts throughout her contact with Mr. Fraser, and in fact had completed such an effort seconds before. Her perception of an imminent breach of the peace as she articulated it in her evidence, was subjectively and objectively reasonable. We therefore conclude that she had the lawful authority to arrest him for imminent breach of the peace, which became further supported by her belief that he was about to assault an officer. The arrest cannot be considered as being “without good or sufficient cause”, or an “unlawful exercise of authority”

#### **USE OF FORCE:**

[45] It would appear to be common ground with the parties, that use of force is justifiable if the arrest is lawful, although if the use of force is excessive, it will be in breach of the disciplinary authority. Use of force that is required to effect an arrest is justifiable.

[46] There is no argument that Mr. Fraser was physically highly non-compliant with efforts to handcuff him; it took three officers to bring him down and handcuff him, even with the application of a Taser; he is very big and appears to be very powerful. The video demonstrates resistance continuing to and through the use of a CEW. The force used cannot be described as excessive in the circumstances.

[47] No doubt Mr. Fraser's perception was that the ticketing, and the ultimate arrest was unreasonable. In fact, he continued to hold that belief throughout the hearing.


[48] Mr. Fraser is a person of colour. His perception, at least in part, was and is, that his treatment was racially motivated. However, there is nothing in the evidence that shows any consideration of race by the officers involved. He was unwilling to accept that his truck had contacted the Yaris and the construction truck, at the time of his interactions at the scene, and even in the course of the hearing, It was the totality of that conduct, that triggered the eventual confrontation and arrest.

[49] The actions of the Yaris driver and passenger was discourteous. Simply recognizing the need of Mr. Fraser to merge into the lane, and yielding the few seconds of delay / inconvenience this might have. caused them, would have prevented the later confrontation. However, their conduct did not rise to the level of criminality, or a breach of the Motor Vehicle Act. Their behaviour did not continue beyond the initial encounter.

[50] But discourteous conduct is not a violation of any law, and no ticket could be issued to condemn such behaviour.


[51] The appeal of Cst. Green is allowed. There is no disciplinary default.

Dated at Halifax, Nova Scotia this 19<sup>th</sup> day of December, 2022.



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Jean McKenna, Chair



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Peter Mancini KC, Board Member



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John Withrow, Board Member

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