

**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 **Kayla Borden**, Complainant, against **Cst. Scott Martin & Cst. Jason Meisner** of the Halifax Regional Police, requesting a review of a decision made by Inspector Derrick Boyd dated December 10, 2020.

**BEFORE:**

Jean McKenna, Vice-Chair  
John Withrow, Member  
Kim Ross, Member

**COUNSEL:**

Asif Rashid, Counsel for Kayla Borden  
Nasha Nijhawan, Counsel for Cst. Scott Martin &  
Cst. Jason Meisner  
Andrew Gough, Counsel for HRP

**LAST BRIEF RECEIVED:**

March 9, 2023

**DECISION DATE:**

May 12, 2023

## THE EVIDENCE

[1] Kayla Borden, the complainant in this matter, is 34 years old. She is a lifelong resident of Halifax Regional Municipality, and at the time of the events underlying this complaint, she was living with her parents in their home in the Woodside area of Dartmouth. She is well educated, hardworking, and active in her community. She graduated from Dartmouth High School and attended Dalhousie University for a year, followed by studies at the Centre for Arts and Technology and then Nova Scotia Community College where she completed Software and Information Studies and Financial Management. She is employed at the Nova Scotia Career Development Association, where she is a training administrator and works on diversity inclusive training, mental health initiatives, and black peer support. She is extensively involved in the music industry and has her own business, “Pineapple Express Media,” archiving urban culture and assisting artists with professional development. She is also active as a volunteer in the music community, and in senior homes.

[2] On July 28, 2020, leading up to her encounter with the police, which gave rise to this complaint, Kayla Borden was on her way home from visiting a relative in the Bedford area, near Charles P. Allen High School. She testified that she had travelled down Hammonds Plains Road to the Bedford Highway, then left along Bedford Highway to Dartmouth Road, over Magazine Hill, and along Windmill Road. Unbeknownst to her, she had become the subject vehicle in a pursuit/follow of a vehicle (we now know that the initial vehicle was not Ms. Borden's), which had first been observed by Cst. Stuart McCulley on the Bedford Highway, passing the entrance to Mount Saint Vincent University, at a high rate of speed, with no headlights or taillights on.

[3] Ms. Borden testified that, during the course of her trip home, she had not seen any vehicles behind her, and did not see any other vehicles on the road at all, other than a police vehicle on the Bedford Highway. It had pulled out of the HRP Bedford station, with overhead lights on. Ms. Borden says that that vehicle began travelling outbound (her direction); she pulled over, and the vehicle went by. She said this happened closer to the tattoo shop that “I knew was close by.”

[4] She testified that her driving speed was for the most part, “normal.”

[5] When she reached the intersection of Windmill and Seapoint Drive, the lights were just changing from red to green. A Halifax Regional Police van (we now know, operated by Cst. Nicholson with Cst. Martin as passenger) pulled in front of Ms. Borden, “nose to nose,” forcing her to stop as she began to

move forward when the traffic lights facing her changed from red to green. Ms. Borden said that she then unlocked her door and put her hands on the wheel at the request of Cst. Scott Martin, who then grabbed her arm and removed her from her car; she did not resist. She was immediately placed under arrest and handcuffed.

[6] As the arrest was taking place, an unmarked police vehicle (Cst. Jason Meisner) arrived behind her, followed shortly by a marked vehicle (Cst. Jeff Pulsifer). Two other police vehicles also arrived, almost simultaneously, although they left as soon as they saw that the situation was under control.

[7] Not surprisingly, she was shocked, not simply because of the stop, but because of the arrest and the multiple police vehicles on the scene. She testified that she asked why she was being arrested and says that she was told “you’ll find out in a minute.” Ms. Borden was then told that she had been driving without lights on, on the Bedford Highway, and that she did not pull over in response to their flashing lights. She denied driving without lights, and she said that she did pull over when she saw flashing lights, but that “they drove right by me”.

[8] Ms. Borden had not been advised of her right to counsel at this point.

[9] Within less than a minute of the stop, she was released when Cst. McCulley arrived and directed her release. Cst. McCulley had been following a short distance behind Csts. Meisner and Pulsifer. He said, “wrong vehicle.” He had immediately realized that this was not the vehicle that had been the subject of his earlier pursuit on the Bedford Highway, as it had a permanent license plate, while the one he had originally seen had a temporary permit. Ms. Borden was advised that hers was the wrong vehicle, that the vehicle being pursued had been initially travelling with its lights out and attempted to evade the police. She denied that her lights had been out at any point en route.

[10] Ms. Borden was asked to move her car to the roadside, which she did. Cst Meisner recorded her information and documents. He initially considered issuing a ticket for the “no lights” infraction, but decided not to do so, because of her understandable agitation and upset. She then left the scene.

## EVIDENCE OF THE HRM POLICE OFFICERS

[11] For the purposes of this hearing, we use the term “outbound” for vehicles traveling the Bedford Highway westward, towards Bedford, and “inbound” for vehicles travelling eastward, towards Halifax. The Board has heard the testimony of the subject officers, and others who had been tangentially involved. We have also heard radio communications from the outset to conclusion, and reviewed an agreed upon transcript of those communications, with a timeline.

[12] The patrol districts for HRP in the area are “West Division” which includes Bedford Highway, and “East Division”, which includes Magazine Hill.

[13] This “pursuit/follow” initially involved West Division and later, East Division. The divisions have separate dispatch, and in order for one division's transmissions to be heard by another, the particular vehicle must switch to include both.

[14] In the early morning hours of July 28, 2020, Cst. Stuart McCulley was parked in the vicinity of Mount St. Vincent University, adjacent the Bedford Highway. He observed a dark-coloured vehicle (initially described by him in radio communication as “black”), without headlights, travelling outbound, at a speed of 80-90 kph. He immediately began to pursue, engaging his lights and siren. At seven seconds into the pursuit, he described it as follows: “Its a, uh black, black Pontiac, one occupant.” Very quickly, he was able to overtake and pull up alongside, still at high speed. He had a one-two second opportunity to observe the driver, but then, the driver, rather than stopping, accelerated away. At 21 seconds into the pursuit, it turned up a residential street. Cst. McCulley pursued, with his overhead lights and siren; the vehicle attempted to evade, travelling at high speed throughout this residential district, and at one minute and two seconds from origin, returned to the Bedford Highway, continuing outbound.

[15] Sgt. Lawlor, watch commander for the shift, had been following Cst. McCulley's radio transmissions. At 47 seconds into the pursuit, he asked Cst McCulley of the reason for the pursuit; he was advised “no lights on, possible impaired.” At 1:09, Sgt. Lawlor ordered him to terminate the pursuit (the risk to the public outweighed the ability to apprehend, and the pursuit would tend to contribute to the dangerous speed). Cst McCulley turned off his lights and siren but attempted to keep the vehicle in sight. At 1 minute, 26 seconds, he saw it turn off the Bedford Highway onto Kearney Lake Road using a

one-way lane designated for vehicle right turn onto Bedford Highway. At that point, he lost sight of the subject vehicle; he continued up Kearney Lake Road toward Highway 102 looking for it. He communicated that as it was originally heading outbound, it probably would continue in that direction.

[16] Other West Division officers on the watch were hearing the radio calls and watching for a vehicle matching the description. They proceeded to join the search for the fleeing, probably dangerous driver/vehicle to assist when and if possible.

[17] At one minute, 45 seconds, Cst. Anil Rana radioed that “..he..... just pulled over.” He advised that he was at 741 Bedford Highway, which would have placed him some distance away from Cst. McCulley's last sighting, going onto Kearney Lake Road, 21 seconds earlier. In Cst. McCulley's opinion, it would have been impossible for the vehicle to reach Cst. Rana's location in the seconds since it was seen heading up Kearney Lake Road, and he advised Cst. Rana that it could not be it. Cst. Rana then went up Larry Uteck Drive to continue the search.

[18] At that point, dispatch requested a description of the vehicle; Cst. McCulley radioed the description as follows: “It was a dark-coloured Pontiac, probably like a Pursuit or something like that. Uh, he had no lights on, single driver and he had a baseball hat on, is all I could tell, with a temp permit.”

[19] Throughout the pursuit, Cst McCulley had been communicating with West Division. Another officer advised on the radio that a similar vehicle, “a dark blue Pontiac,” had been stopped the week prior for impaired driving and he thought this might be the same driver.

[20] Cst. McCulley decided to continue along Highway 102, towards Bedford, looking for the vehicle.

[21] Cst. Jason Meisner was in the parking lot of the Bedford HRP office adjacent to the Bedford Highway (west of the Kearney Lake Road and the Hammonds Plains Road), when he heard the radio transmissions; he got into his own vehicle (an unmarked white SUV) and headed inbound on the Bedford Highway to possibly intercept. Before he reached Hammonds Plains Road, he saw a vehicle travelling towards him, with running lights only, and no taillights. He braked and turned to follow. At 4:24 (time from the original sighting by Cst McCulley) he reported his sighting: “He just passed the west office, I think. I'm trying to turn around. Not pursuing him but I'm pretty sure that car just went past the west office. That'd be outbound on the Bedford highway. Looked like a Pontiac. Daytime runners are on, but his, uh, taillights certainly are out.” He suspected that this was the subject vehicle. The lights were not

on, it was travelling in the expected direction, it matched the description of “possible Pontiac” and there was very little traffic on the Bedford Highway at that time of night. He testified that it appeared dark coloured in the lighting conditions. He was unable to make any observation of the driver, either gender or racial characteristics.

[22] He briefly had lost sight of the vehicle when he turned around; he radioed “...any of the units at the West office see him take a side road there? Cause he certainly saw me put my brakes on.” At 5:43 he reported: “I can see him in front of me now, he just uh didn’t have his lights on so I couldn’t see him. Just passed Shore Drive, still outbound on the Bedford Highway. He testified that he was surprised at how quickly he came up to it, due to the absence of taillights. He followed, staying back to avoid detection, without flashing lights, but keeping it in sight. From the distance that he followed, and the fact that there was no illumination of the license plate area, he was unable to see if it had a temporary permit or a permanent plate.

[23] Cst. Meisner continued to follow, staying far enough back that the driver would not notice him. At 6:13, he radioed that it was going up Dartmouth Road. At 6:40, he said “we just passed Wardour, doing 60, I don’t know if – I don’t think he’s aware that we uh...well that I’m behind him. And it looks like he just clicked his lights on, because his taillights are on again.”

[24] Cst. Pulsifer, on lunch break in the Bedford office, was also listening to the radio communication, and he left to follow Cst. Meisner at a short distance. Cst. Dewer joined the search and proceeded to the 102. The intention of these officers, and others that become involved, was to provide backup and assistance in the event Cst. Meisner or any other officer, travelling alone in their patrol car, managed to stop the fleeing vehicle. There was an obvious risk associated with a lone officer stopping and dealing with a driver who had earlier been speeding and attempting to evade police.

[25] East and West Divisions of HRP are on separate channels, and are normally unable to hear each other’s radio transmissions, however, they can switch over if desired. Dispatch advised East to switch, as at this point the suspect was approaching that sector. Csts. Scott Martin and Andrew Nicholson were working together in “the wagon,” with Cst. Nicholson driving. They heard the transmissions, including a query from Cst. Meisner as to whether anyone had a “spike belt” to stop the vehicle. They heard Cst.

Meisner's radio transmission: "Dispatch, you want to confirm if anybody has a safe way to stop this vehicle? There's no traffic at all. I'm not going to light him up cause he's probably just gonna take off again, but unless we can stop him then, uh, I'm not going to light him up. We're heading onto magazine now."

[26] Csts. Nicholson and Martin were dispatched to assist; they decided to proceed to Seapoint Road, which intersects with Windmill. They parked on Seapoint, facing Windmill, and reported this at 10:04. They had a good vantage point to observe any traffic coming from Magazine, which transitions into Windmill Road. From this location, they could possibly safely intercept the vehicle being followed by Cst. Meisner. Shortly after their arrival, they could see what they now knew was the suspect vehicle coming down Magazine, onto Windmill, followed by what they knew be Cst. Meisner. As it slowed to a near stop the traffic lights turned green; this created a safe opportunity to stop the vehicle. Cst. Nicholson pulled the wagon into the intersection, with overhead lights activated, effectively blocking the suspect vehicle. In their testimony, they described the car as a dark-coloured sedan, possibly a Pontiac.

[27] Both officers exited the wagon and approached the suspect vehicle. The front hood identifying emblem was missing but, in their experience, it did resemble a Pontiac. Cst. Nicholson approached from the front on the passenger side, and Cst. Martin on the driver's side. When they reached Ms. Borden's vehicle, they could see a single occupant, as per the initial descriptions. Cst. Martin then observed that the driver was a woman of colour (who we now know was Ms. Borden) in the driver's seat; she was not wearing a ball cap. Cst. Martin instructed her to put her hands on the wheel and then to get out of the vehicle. He placed his hand on her arm as she got out; he then turned her and placed her in handcuffs. Cst. Martin testified that he told her that she was being arrested for flight from police. He says that she disputed this but was fully compliant.

[28] In short, he had reasonable grounds to believe that this was a driver who had fled, at high speed, to escape police. Although the lights were on at that point, Cst. Meisner was a short distance back. This confirmed for Cst. Martin that this was the vehicle that Cst. Meisner had followed from Bedford. There was a lone occupant. The car appeared dark in the existing lighting and resembled a Pontiac of some sort. He did not see a license plate because, out of necessity, he had approached from the front, and immediately dealt with the driver. When he actually got to the car, and saw the driver, the only additional (not different) information was that the driver was a black female. He had intended, from the moment of the stop, to arrest the driver.

[29] Ms. Borden describes the stop quite differently:

She told the Board that she didn't see Cst. Martin or Cst. Nicholson stop and exit the East wagon and approach her car. She believed that the person who arrested her approached her vehicle from behind, rather than in front. Instead, she explained it this way:

“And they...like, yeah, they're slowly driving in front of me. The light turned green so I thought that they were just going to keep on passing me and I was going to continue to go, but all I hear from behind me is “put your hands on the steering wheel” and I didn't know what was going on. And I still only seen that paddy wagon in front of me.”

[30] That is not at all the scenario described by the officers at the scene, and through radio transmission. Clearly, Cst. Martin, the arresting officer, did not approach her from behind.

[31] Cst. Martin, and other officers, testified as to why an arrest would be necessary in the circumstances. The purpose of the arrest is to quickly control the driver. No one knew why the driver had fled from Cst. McCulley, but it was reasonable to assume that meant that the driver had been involved in some sort of illegal activity. There was a possibility that the driver was impaired or had some other motive to escape police. The possibility existed of a weapon in the car, or a hidden passenger. The situation was sufficiently serious that Cst. Meisner had, at one point, queried the availability of a spike belt; he wanted a safe way to stop this car. The fact that the driver was a woman changed nothing. The fact that Ms. Borden was co-operative had no impact. As Cst. Dewar put it, “cooperativeness can change fast, depending on the dynamics of the situation.”

[32] While Cst. McCulley was expected to arrive and be able to identify the car, no one would know when he would arrive.

[33] The transcript of transmissions shows that at 10:36, 32 seconds from the time Csts. Martin and Nicholson arrived at Seapoint, Ms. Borden had been arrested and handcuffed.

[34] At 10:44, within 8 seconds of her arrest, Cst. McCulley arrived at the scene. Within 17 seconds, he had exited his own vehicle, noted that there was a license plate on Ms. Borden's car, and announced to the others that it was not the subject/intended vehicle. Ms. Borden was immediately released but was asked to remain in order to obtain her driving documents.



[35] There are some inconsistencies between Ms. Borden's version of events throughout, and those of the officers involved. In this case, however, we have not only the testimony of Ms. Borden and the officers involved to assist us, we have the timeline transcript of the West zone and the East zone, as well as the audio and timeline transcript of the radio transmissions as the events unfolded.

[36] Ms. Borden testified (noted above) that she had seen a police car with overhead lights, but it had gone by when she pulled over. She testified that she had seen this on the Bedford Highway, when it came out of the Bedford west police station, and which passed her near "a tattoo place." There is such a facility shown on the Exhibit 3 map. However, the evidence, including the radio transmissions, is clear that there was no police vehicle with flashing lights in that area. The police did not want to alert the fleeing driver triggering further high-speed flight; the object was to possibly locate, follow and stop, when safe.

[37] The only radio transmission reference to a police stop with flashing lights was Cst. Rana's (abandoned) that had taken place East (inbound) of the Hammonds Plains Road where Kayla Borden entered the Bedford Highway. That could not have been Kayla Borden; she had come onto the Bedford Highway from the Hammonds Plains Road and headed west (outbound).

[38] Cst. Meisner had come out of the Bedford office, but had first travelled inbound from the Bedford office, towards the Hammonds Plains Road. He had seen a vehicle without lights; he turned, proceeded outbound to follow, and caught up. That had placed him behind what almost certainly Ms. Borden's vehicle, with no vehicle in between, and he was not operating flashing lights. As he put it in his radio transmission, he was not going to "light him up cause he's probably just going to take off again."

[39] The transcript of the police radio conversations for West zone, from the time of the initial observation by Cst. McCulley, to and including the radio communication from East, do not show any police stop, or police vehicle, with flashing lights other than Cst. Rana's. We accept Ms. Borden's evidence of her route, which would not have taken her east off Hammonds Plains Road to where Cst. Rana saw a vehicle. As noted above, Cst. Meisner had come out of the police station, travelled inbound on the Bedford Highway and observed a vehicle with only running lights coming towards him, outbound. As noted, he turned, caught up to a vehicle, and stayed behind what we now know and understand was Ms. Borden's car, with no cars between them.

[40] We also accept that the vehicle lights were off at that point and remained off until some ways up Dartmouth Road. His testimony on this is supported by the radio transmissions.

[41] The only other vehicles to exit the Bedford station were Cst. Sim Dewar and Cst. Jeff Pulsifer. Cst. Pulsifer had turned right out of the Bedford station and caught up with Cst. Meisner, with no vehicles between himself and Cst. Meisner; this places both Cst. Meisner and Cst. Pulsifer behind, not ahead, of Ms. Borden. Cst. Dewar had turned inbound and went up the Kearney Lake Road to the 102. He eventually exited at Bedford and followed Csts. Meisner and Pulsifer up the Dartmouth Road. It could not have been his vehicle that she says she saw coming out of the West Office.

[42] Ms. Borden also has maintained from the outset in her complaint, her interview in the HRP complaint investigation and in her testimony, that she had turned her lights on when she left her cousin's home. Her car at the time was a 2010 Dodge Avenger. In cross examination she said that the headlights had to be switched on manually, using a lever adjacent to the steering wheel. She testified that she remembered turning them on when she left her cousin's home. On August 8, 2020, she was interviewed by Sgt. Jonathan Jeffries, in his HRP investigator role. She was asked how she knew she had turned her lights on, she responded "because it's night-time." When prompted, she added that her dash was lit up when her lights were on; that would certainly imply that her lights were on, in most vehicle makes and models. In redirect, she stated that if her headlights were not on, her dash would be dark.

[43] Cst. Meisner's evidence was clear that only the running lights were on on the car that he followed from the Bedford Highway to the stop on Seaview. His radio transmission reflects that the taillights, and presumably the headlights, came on shortly after the vehicles had passed Wardour Drive. According to the radio transmissions, Csts. Pulsifer and Dewar were following Cst. Meisner, about 100 metres back. Cst. Pulsifer testified that he saw the taillights come on when they were getting close to the lane merger approaching Magazine Hill. Cst. Dewar confirmed, in his testimony, that he too saw the vehicle travelling on the Dartmouth Road with no taillights. He testified that when the suspect vehicle passed Ridgevale (a short distance past Wardour), the lights were off. The Bedford bypass merger is a short distance past Ridgevale.

[44] The evidence, noted above, make it clear that Cst. Meisner was following her vehicle continuously from the Bedford Highway and her lights were out, until they came on at some point on the Dartmouth Road before it merged with the Bedford Highway.

[45] Ms. Borden offers no explanation for this discrepancy. This is not a case of police officers testifying one set of facts, and a witness/complainant another. In this case, the radio transmissions, generated in the course of the event, provide clear evidence that until Ms. Borden approached the Bedford bypass, her headlights and taillights were off. The Board is satisfied that Ms. Borden's taillights and headlights only came on as she was headed up Dartmouth Road towards Magazine Hill. Yet, even in the face of this evidence, Ms. Borden continued to maintain her position.

[46] Another inconsistency is Ms. Borden's evidence regarding information that she says she heard at the scene of the arrest. She testified that an officer at the scene told her that "they were looking for a white male in a Toyota." None of the radio transmissions mention any such description of the vehicle and none of the officers involved made any such statement. The suspect vehicle was consistently described as a "black" or "dark coloured" Pontiac. A photo of her car was entered; it certainly isn't black, but rather a somewhat pale, blue grey. At night, it could be perceived as dark. It lacked a hood emblem on the front but certainly could easily be mistaken for a Pontiac but never was there any description of a Toyota or a white male.

[47] Ms. Borden's evidence of the arrest is also inconsistent with the evidence of Csts. Martin and Nicholson, and the undisputed evidence of the location of their wagon. According to Ms. Borden, the arresting officer approached her from the rear. Both officers describe approaching from the front, which is consistent with the position of their vehicle. As it was, that approach exposed them and put them at risk, but passing the side of her vehicle, and then returning from the rear, would have put them in greater danger.

## **DECISION**

[48] The issues, as identified on Ms. Borden's behalf, are as follows:

- 1) Did the subject officers unlawfully detain and arrest Ms. Borden?
- 2) Did the subject officers implement her right to be informed of the reason for her arrest and to counsel?
- 3) Was racial profiling a factor in either the initiation or continuation of her detention or arrest by the actions of the subject officers?

- 4) Does the event in which the subject officers detained or arrested Ms. Borden, if racial profiling was at play, pose a systemic problem, due shortfalls in training about racial profiling?
- 5) If the above is answered in the affirmative, what are the appropriate remedies?

[49] Ms. Borden's theory is that the pursuit and arrest were unwarranted, and were unlawful, and were the result of actual or systemic racial bias on the part of those involved, and in particular Csts. Meisner and Martin. In fact, even as of the hearing, she firmly maintained that position. It was put to her in cross examination that she now knew why the officers had stopped her. She maintained that "...there is multiple times that indicate that I wasn't the person they were looking for." She did not specify what those "multiple times" were.

[50] It was put to her in cross examination that:

Q. "Okay, and if the evidence was that they had made the decision to stop you before they knew you were black, would that change your view of whether or not it was a racially motivated stop?"

A. "No"

Q. "So even if the officers had no idea they were stopping a black person, you would still think that they stopped you because you were a black person?"

A. "Yes, that's correct."

Q. "Can you help me understand why?"

A. "Because we continue to get stopped every day from officers. Even just riding a bike. I...I had a cousin that drove his bike home from work and he didn't have a helmet on and got beat up by the police just because he was driving home without a helmet. So I do believe that I did get pulled over because I was black."

Q. "...If I'm able to convince the Board that these officers made a mistake, that it was an honest mistake and it didn't have anything to do with your race, your position will still be that it was racially motivated. I guess that's my question?"

A. "That's correct"

## LEGALITY OF ARREST AND DETENTION

[51] It is common ground, and oft repeated law, that a warrantless arrest requires subjective and objective grounds to arrest. “The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint (**R. v. Storrey**, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, at pp. 250-51; **R. v. Latimer**, 1997 CanLII 405 (SCC), [1997] 1 S.C.R. 217, at para. 26; **R. v. Tim**, 2022 SCC 12, at para. 24).”

2. In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence (**R. v. Shepherd**, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 17). Subjective grounds for arrest are often established through the police officer’s testimony (see, for example, *Storrey*, at p. 251; *Latimer*, at para. 27; *Tim*, at para. 38). This requires the trial judge to evaluate the officer’s credibility, a finding that attracts particular deference on appeal (**R. v. G.F.**, 2021 SCC 20, at para. 81; **R. v. Beaudry**, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 4).
3. The arresting officer’s subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer (*Storrey*, at pp. 250-51).

[52] At the time that he arrested Ms. Borden, Cst. Martin had information to indicate to him that Ms. Borden was driving a vehicle that had fled from police. He knew that the vehicle that had initially been observed by Cst. McCulley had been operating without headlights or taillights and fled at high speed. He knew that Cst. Meisner was following a vehicle that had shortly before been observed on the Bedford Highway, without headlights or taillights, travelling in the same direction as the suspect vehicle. He knew that two other police vehicles were following Cst. Meisner, one unmarked and one marked, and he was in radio contact with those vehicles. He saw them approach the intersection and he knew that there was little or no traffic on the highway. He also knew that the suspect vehicle had been described as black or dark, he knew it appeared to be a Pontiac. He saw the vehicle coming down Magazine, and then stopping at Seaview, followed by the police vehicles. He viewed it as dark, in the lighting conditions. He could see that the subject vehicle resembled an older model Pontiac sedan He had heard radio transmissions

regarding the availability of a spike belt, which suggested that this was a serious situation. He knew at some point the vehicle had to be stopped and the driver arrested but, in the circumstances, it would not pull over in response to flashing lights. This had every indication that this was a high risk stop. He was in a position to safely stop the vehicle.

[53] Cst. Martin approached the vehicle from the front, where the wagon was parked. The preferred, trained approach, where possible, is to approach from the rear, for safety reasons: the officer can see the driver, and initially remain slightly behind, but the driver does not have a direct view of the officer. It avoids the possibility of the officer being struck by the subject vehicle.

[54] Approach from the rear was not an option in this case, as the wagon was directly in front of Ms. Borden's car. As soon as Csts. Martin and Nicholson got out and approached, they would have been in direct line of sight of this (then) unknown driver. It would have been pointless to pass in front, go to the rear, and then again approach the car. As a result, they did not have an opportunity to observe any temporary permit, or alternatively, a license plate.

[55] Cst. Martin did not know the gender of the suspect driver, other than the generic description "he", but that was not considered a gender identifier. Indeed, in her direct testimony even Ms. Borden used the generic. In describing the alleged earlier encounter with a police vehicle on the Bedford Highway, she said: "...and as soon as I passed the police station on the Bedford Highway, there is a cop car that was coming behind me and I seen **his** lights on, so I pulled over."

[56] It is common in current vernacular to ascribe the male gender to an unknown driver, such as 'did you see what that guy did?'

[57] Cst. McCulley testified that he was 90% sure that the driver was male, however he did not mention this in his radio transmission. He could have said "probably male," but that still would not rule out a female. Cst. Martin could only rely on the information that he had. That information was as accurate as possible, given the lighting conditions and high speed at the time of his observations, confirmed by his radio transmissions.

[58] The testimony, supported entirely by the radio transmissions, clearly establish that neither the race or gender of the driver was known, and it was not until Cst. Martin arrived at Ms. Borden's door that he could see that she was black, and a female. That information certainly did not rule her out as the suspect driver. The only factor that could possibly have eliminated her was the absence of a temporary permit, and that had not been seen by Cst. Martin in his very brief initial encounter.

[59] Given what Cst. Martin reasonably believed to be past conduct of the unknown driver, there was an urgent need to control that driver, whoever he or she might be. His role at that point was to control the situation by stopping the car and arresting the driver. The goal in so doing was officer safety and protection of the public. One can well imagine ensuing public outrage had this been the initial fleeing driver, who then fled once again and eventually caused injury or property damage elsewhere.

[60] Cst. Meisner explained the rationale for arresting immediately, rather than waiting for Cst. McCulley to arrive:

“...well to start with, I believe, and we all believed, that this vehicle is possibly and likely the suspect vehicle that had been previously attempted to be stopped by Stuart McCulley. And in doing so, it’s already fled once. So during the actual traffic stop that occurred, in the interest of safety of the police officers, the public, and the driver, it would be standard practice for us to take control of the vehicle right away and not wait for the officer to arrive at the scene to make an identification “

[61] The Board is satisfied that Cst. Meisner had the subjective grounds to see the Borden car as the subject, fleeing vehicle. On the facts of this case, those grounds are easily objectively verifiable, and the circumstances leading up to the arrest support the legality of the arrest. This was not simply a routine traffic stop, to remind (and possibly ticket) a driver for driving without lights, which would be a *Motor Vehicle Act* infraction. Subjectively, and objectively, Cst. Martin had reasonable grounds to believe that this driver had committed a criminal offence. As Cst Martin testified: “there was urgency there to remove that person from the vehicle to avoid further risk to the public, ourselves, and the driver should that flight continue.” His decision to arrest had been made even before he saw Ms. Borden.

**REASON FOR ARREST AND RIGHT TO COUNSEL**

[62] Ms. Borden complains that she was not immediately advised of the reason for arrest, nor advised at all of her right to counsel. She says that she asked Cst. Martin why she was being arrested, and his initial response was “you'll see in a minute.” But when she said, “this is discrimination,” she was immediately told “because you didn't have your lights on.” She testified that he then said, “you didn't pull over.” Cst. Martin disputes this; he says that he immediately told her the reason for arrest, and that he didn't say “you'll see in a minute.” Nothing turns on this issue; Ms. Borden, as noted above, was told, within seconds, the reason.

[63] It is undisputed that she was not advised of her right to counsel. Cst. Nicholson testified that there simply was not time, as she was released almost immediately. She was never searched or placed in a police vehicle; within seconds of her arrest, she was released. She then was asked to move her car to one side, and was asked for drivers license, registration, etc. This had become a *Motor Vehicle Act* infraction.

[64] The request for her to move her car to a safe position, and provide her drivers documents, etc. is characterized by counsel for Ms. Borden as a further 'detention', it was a detention, but for a different purpose than the original detention.

[65] Ms. Nijhawan argues that the detention, in relation to a possible *Motor Vehicle Act* ticket, does not generate a requirement of right to counsel:

“When Cst. Meisner detained Ms. Borden following her arrest to conduct a traffic stop under the *Motor Vehicle Act*, he also informed her of the reason that she was being stopped. Ms. Borden's own evidence acknowledges that it was explained to her that she was alleged to have been driving without headlights on, and that she engaged in a debate with Cst. Meisner over this fact. A police officer is not required to provide charter rights and caution during a simple traffic stop without investigative detention or arrest.”



[66] She relies on **R. v. Harris**, 2007 ONCA 574 at para 45-47; **R. v. MacLennan**, 1995 NSCA 5

[47] As Mr. Dawe acknowledges in his factum, it was accepted at trial that the police are not required to give a detained person his s. 10(b) rights during a brief lawful Highway Traffic Act roadside stop. That concession was not qualified on appeal. I think the concession is consistent with those cases that hold that the exercise of the rights guaranteed by s. 10(b) is incompatible with the brief roadside detention contemplated by a stop made for road safety purposes: see **R. v. Orbanski**, 2005 SCC 37 (CanLII), [2005] 2 S.C.R. 3, [2005] S.C.J. No. 37, 196 C.C.C. (3d) 481; **R. v. Smith** (1996), 1996 CanLII 1074 (ON CA), 28 O.R. (3d) 75, [1996] O.J. No. 372, 105 C.C.C. (3d) 58 (C.A.); **R. v. Saunders**, 1988 CanLII 197 (ON CA), [1988] O.J. No. 397, 41 C.C.C. (3d) 532 (C.A.).

[48] I am satisfied that Harris was lawfully detained as part of a Highway Traffic Act brief roadside detention. It flows from counsel's concession, which I accept as well founded, that this detention did not trigger the rights set out in s. 10(b) of the Charter. Lipkus did not offend against s. 10(b) when he did not advise Harris of his right to counsel before asking him for identification.

[67] In Lewis, MacDonald, J. summarized:

“The driver is not entitled to the right to counsel guaranteed by s. 10(b) of the **Charter** during the period, which must be as brief as possible, between detention which begins when the vehicle is stopped and the conclusion of the inspection of documents, when the driver must be released if no demand has been given.”

[68] In this complaint, we are satisfied that there was no right to counsel in the course of the brief detention to gather Ms. Borden's information. Indeed, pursuing right to counsel would have unnecessarily extended the period of 'detention.' The detention to gather information was lawful and, further, was not a violation of the disciplinary code of conduct.

[69] Counsel for Ms. Borden says the reasons are “dubious.” He argues that this later request for documents, etc. constitutes a “street check.” He references the “Ministers Directive – Street Check bans” of Dec. 2, 2021:

1. No police officer shall:

- a. interact with a person for the purpose of collecting and recording identifying information; or,
- b. collect and record identifying information as the result of an interaction with a person; unless, at the time of the interaction, the police officer reasonably suspects that:
- c. the person has recently engaged in, is engaged in, or will engage in unlawful activity; or
- d. the person has information relevant to the investigation or prevention of unlawful activity or the enforcement of the law.

[70] However the directive would not in this case negative the collection of information.

[71] Mr. Rashad argues that “Ms. Borden did not engage in any unlawful activity and there was no basis that she was going to engage in unlawful activity.” He argues that based on the Directive, Cst. Meisner fell afoul of the ban. Ms. Borden’s detention after she was released from arrest was an unlawful street check.

[72] The undisputable fact is, however, that Cst. Meisner did “reasonably suspect” at the time, that she had recently engaged in “unlawful activity” by driving without lights. She was not issued a ticket, out of sympathy for her, in the circumstance. Cst. Meisner testified:

“I apologized because it was clear that the stop had shocked her, and despite the circumstances I could empathize with how she might feel. Although we had been acting in good faith...I understood why that would shock her. So I apologized for her feeling that way and sent her on her way.”

[73] The collection of information also falls within the second exception to the ban; her information, and ability therefore to contact her, could assist in any further investigation into the identity of the correct subject vehicle (That individual was never located).

[74] Counsel for the officers points out that the Minister's Directive came over a year after this incident. She also argues:

“In addition to the fact that Ms. Borden was investigated for a *Motor Vehicle Act* offence by Cst. Meisner, the Board also heard evidence that it was necessary for officers to collect her personal identifying information in order to properly document her mistaken arrest. As explained by Cst. Dewar: “...You need to document; you need to record the incident to reflect the police had arrested someone and released them. You would be not doing your job if you didn’t in the sense that there’s no record of what you did. And that you have to accurately report the arrest”.

[75] Even Ms. Borden would have expected there to be a documented record of the event when she contacted HRP later that day.

[76] It would be astonishing if the officers had not created a complete record of an event involving such a pursuit and arrest, involving multiple officers and vehicles. A failure to do so would almost certainly create a suspicion of police “cover up” of an incident.

**[77] Was racial profiling a factor in either the initiation or continuation of her detention or arrest by the actions of the subject officers?**

[78] On behalf of Ms. Borden, counsel for Ms. Borden asks us to apply the analysis of racial profiling in *R v Le*, 2019, at paras 76 and 77. In *Le* the Supreme Court of Canada discussed and defined racial profiling:

[76] In contrast, the concept of racial profiling is primarily concerned with the motivation of the police. It occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment (Ottawa Police Service, Racial Profiling (June 27, 2011), Policy No. 5.39 (online), at p. 2).

[77] This Court adopted the following definition of racial profiling in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789: Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential

treatment or scrutiny. Racial profiling [also] includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed.

[79] He refers the Board to the decision in **R. v Sparks** 2022 NSPC 51, where “identification evidence against the accused was excluded, and breach of probation and release conditions charges were dismissed. An officer had collected identification evidence from a driver (who was black) (the accused) without a driving infraction to justify the stop. The officer had perceived him to be the particular individual who was subject to the conditions. The driver information confirmed that he was in fact the person in breach, but it was the only identification evidence.”

[80] The Court concluded that:

“Moreover, prior to approaching the vehicle, he could have used his inhouse police databank system to acquire a Department of Motor Vehicle photo of Mr. Sparks. Simply put, other options existed other than approaching the Black male driver on a hunch that it might be Mr. Sparks. In these circumstances, more was required.”

[81] In this case, however, Csts. Martin and Meisner were not acting on a “hunch;” they had a reasonable suspicion that Ms. Borden was the driver of the subject vehicle, and that when the decision to follow, and ultimately arrest, arrest was made, no one was aware of her colour, nor did her colour contradict the known information. They did not have a plate number, and had not seen any temporary registration, and would have no means to access any database that might have existed.

[82] As noted in the above review, race could not have been and was not a factor at any point in the Borden incident. No officer involved had any knowledge of her racial origins until Cst. Martin became aware that she was black, when he arrived at the side of her car. He had already made the decision to arrest and in fact, had a duty to do so in the circumstances. Cst. McCulley had two seconds, travelling at a dangerously high speed, on a dark night, to observe the driver of the actual fleeing vehicle; he did not discern race; at best, he thought that that driver might be male.

[83] Mr. Rashad argues that Cst. McCulley was 90 percent certain that the driver was male, but that was only in the course of his testimony; it was not conveyed in any radio transmission. He made no observation of race.

[84] Cst. Martin had already made the decision to arrest when Ms. Borden stopped, and it was his duty to control what he reasonably perceived to be a dangerous situation. The discovery that Ms. Borden was a black female neither added to or diminished the risk.

[85] The concluding determination that police had the wrong vehicle was the presence of the license plate.

[86] Her subsequent 'detention' to gather her particulars was not done as a result of her colour; it was an officer's duty, in the circumstances, justifiable, both for the purpose of issuing a ticket but also for properly completing a full occurrence report of an incident that was far from routine. Surely, in the circumstance, that information would have been needed regardless of race or gender.

**[87] Does the event in which the subject officers detained or arrested Ms. Borden, if racial profiling was at play, pose a systemic problem, due shortfalls in training about racial profiling?**

[88] We have determined that racial profiling was not a factor at any point in the events. However, HRP Chief Dan Kinsella was subpoenaed by Ms. Borden, and spoke extensively regarding HRP training programs created in an effort to counter conscious or unconscious racial bias. At the outset of his testimony, Chief Kinsella offered an unsolicited apology to Ms. Borden, and expressed empathy for what she had experienced. The Board is satisfied that this was completely sincere. He also acknowledged the existence of racial bias in policing as with any other field of endeavor. He detailed steps that HRP is taking to train its officer, to recognize, and avoid, the intrusion of bias in its work. Anti racism courses are a mandatory part of ongoing officer training. The latest program, "Journey to Change", has been facilitated by members of the black community. It is currently voluntary but will become mandatory for all officers.

## SUMMARY

[89] We are satisfied that there was no disciplinary default by either Cst. Meisner or Cst. Martin, and their actions on the night of July 28<sup>th</sup>, 2020, were reasonable, both subjectively and objectively. The evidence was clear that even a simple traffic stop poses a risk of danger, and this was not a simple traffic stop. It was an ongoing, dynamic situation.

[90] While the evidence of whether her headlights 'taillights were operating is conflicting, the Board, as noted above, is convinced that when Cst. Meisner first began to follow her, the lights were not operating. There would be no other reason for Cst. Meisner to be following her. We are satisfied that as she approached Magazine Hill, the lights came on. This evidence emerges from the actual transcript of the radio communication, as well as the testimony of Csts. Meisner and Pulsifer. Ms. Borden denies that she turned them on; she maintains they were on all the time but offers no possible explanation of why they might have been off.

[91] Counsel for Ms. Borden argues that as a result of multiple reports of abuse of Black civilians by police, both in the USA and in Canada, Black persons have a legitimate fear when stopped by police. We agree. He states:

“In the cross examinations of the subject officers, Constable Sym Dewar and Chief Kinsella, among others, questions were asked about what *could* happen at a traffic stop, in terms of worst-case scenarios for officers. This resulted in testimony about officers being killed, run over/into, and other acts of violence, positing any traffic stop as being potentially dangerous or deadly. This point will be returned in the submissions below. Only Ms. Borden could convey her fears of what *could* have happened as a Black person being stopped by police, and she noted her thoughts were on George Floyd and other Black people stopped by police over the years, and the often dire consequences they faced. This is the impact of a Black person being stopped by police, a fear of being the next victim, which emphasizes the damage caused by wrongful stops, particularly when alone, late at night, and surrounded by many officers. This point will be returned to in the submissions to follow.”

[92] There can be no doubt that the history of treatment of Black persons by police has contributed to a legitimate, ingrained fear of police, in many cases. But counsel also acknowledge a known risk and resultant trained response by police to a history of violent, and sometimes lethal risk to a 'simple' traffic

stop, or roadside presence at, for example, an accident scene, or a disabled motorist to assist member of the public regardless of gender or race. Police are highly trained to realize that even the most innocuous scenario can become deadly.

[93] The Board fully understands Ms. Borden's fear, distress, and anger, on July 28<sup>th</sup>, 2020. She was stopped, and briefly surrounded by multiple police vehicle, with flashing emergency lighting. Most citizens have a level of discomfort even when stopped by a single officer. The number of vehicles alone would magnify Ms. Borden's emotional response, as would her awareness of negative interactions between the police and members of the black community. It is not surprising that she filed a *Police Act* complaint. However, she should now understand the basis for that stop.

[94] Unfortunately, however, with her strong conviction of police racism, she refuses to accept the rationale behind the events of that night, even with full and clear tested evidence. This was demonstrated by her evidence in cross examination noted above:

Q. "Okay, and if the evidence was that they had made the decision to stop you before they knew you were black would that change your view of whether or not it was a racially motivated stop?"

A. "No"

Q. "So even if the officers had no idea they were stopping a black person you would still think that they stopped you because you were a black person?"

A. "Yes, that's correct."

Q. "Can you help me understand why?"

A. "Because we continue to get stopped every day from officers. Even just riding a bike. I...I had a cousin that drove his bike home from work, and he didn't have a helmet on and got beat up by the police just because he was driving home without a helmet. So I do believe that I did get pulled over because I was black."

Q. "...If I'm able to convince the Board that these officers made a mistake, that it was an honest mistake and it didn't have anything to do with your race, your position will still be that it was racially motivated. I guess that's my question."

A. "That's correct"

[95] This position is untenable, particularly in the face of not only officer testimony, but the radio transmissions throughout. This is not a case of their word against hers. There is not an iota of evidence that conscious or unconscious racial bias/systemic racism had anything to do with the pursuit and arrest of July 28, 2020.

[96] Her complaint is dismissed. At the request of counsel for the officers, we will hear argument on costs to follow.

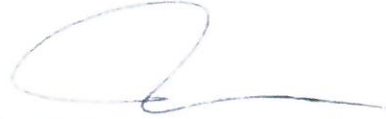
[97] The incident was properly reported in a General Occurrence Report, by Cst. McCulley. This incident began with a pursuit, and it was mandatory to generate such a report. At the outset of the pursuit, an incident number was assigned by dispatch. Csts. Meisner and Martin filed supplementary reports at the request of a supervising officer. Cst. Meisner agreed on cross-examination that it was necessary to record Ms. Borden's identification information because she had been part of a criminal investigation into the flight from police and dangerous driving offences of the unidentified driver. Ms. Borden's evidence is that police officers explained to her that they asked for her identification "to use it to put in the incident."

[98] Even Ms. Borden, as a lay person, would have expected that a report be generated for an incident such as this. When Ms. Borden attended HRP to file her complaint, she was concerned that, initially, neither Halifax or Dartmouth could locate a file. Eventually it was located in the system.

[99] The Board is satisfied that the requirement for Ms. Borden to remain and provide her details to Cst. Meisner was an expected and required procedure; that information was entered as part of the required pursuit report. This could not be characterized as a street check. Did it necessitate advising of right to counsel?



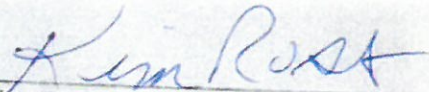
Dated at Halifax, Nova Scotia this 12<sup>th</sup> day of May 2023.



Jean McKenna



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