

WATERLOO REGIONAL POLICE SERVICE DISCIPLINARY HEARING

**IN THE MATTER OF ONTARIO REGULATION 268/10 MADE UNDER THE POLICE SERVICES ACT,
RSO 1990, AND AMENDMENTS THERETO.**

AND IN THE MATTER OF

POLICE CONSTABLE JESSE FOSTER #1299

AND THE WATERLOO REGIONAL POLICE SERVICE

CHARGES:

- 1. UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY—UNLAWFUL OR UNNECESSARY
ARREST**
- 2. UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY—EXCESSIVE USE OF FORCE**
- 3. DISCREDITABLE CONDUCT**

HEARING DECISION

BEFORE: SUPERINTENDENT (RETIRED) DEBRA PRESTON

APPEARANCES:

COUNSEL FOR THE PROSECUTION: MS. JESSICA BARROW

COUNSEL FOR THE DEFENCE: MR. BENJAMIN JEFFERIES

COUNSEL FOR THE PUBLIC COMPLAINANT: MR. DAVIN CHARNEY

HEARING DATES: May 19-21, 2021 & June 1, 2021

DECISION

CONSTABLE JESSE FOSTER #1299

DATE: August 3, 2021

Superintendent (Ret'd) Preston: Before rendering my decision in this matter, I would like to thank Mr. Ben Jeffries, counsel for Constable Foster, Mr. Davin Charney, counsel for Ms. Broomes, and Ms. Jessica Barrow, counsel, and the prosecutor in this case, for your submissions and exhibits tendered, all of which have assisted me in reaching my decision.

On May 19, 2021, Constable Jesse Foster (1299) pled not guilty to two counts of Unlawful or Unnecessary Exercise of Authority (Unlawful/Unnecessary Arrest and Excessive Use of Force) and one count of Discreditable Conduct, contrary to the *Police Services Act*.

Summary

The facts are summarized from the Notice of Hearing and Statement of Particulars (Exhibits 3 & 4) as follows:

Background for all allegations:

On July 29, 2017, Constable Jesse Foster was responding to a weapons call where the suspect was reported to be a black male with dreadlocks who left the scene in a red SUV (Sports Utility Vehicle). There was concern that there was a firearm in the vehicle.

Constable Foster was travelling eastbound on Concession Street in the direction of the call when he observed a motor vehicle travelling westbound at a high rate of speed. As the vehicle passed, he noticed that the vehicle was burgundy or red in colour. Constable Foster made a U-turn and caught up to the vehicle. He confirmed the vehicle was burgundy/red in colour but contends he could not identify the driver or the number of occupants inside.

Constable Foster followed the vehicle for approximately two to three minutes until the vehicle backed into a driveway on Crombie Street. He had run the plate on his MDT (Mobile Data Terminal) but indicated he had not looked through the information by that time. He further indicated that he had *reasonable suspicion* that the vehicle was the suspect vehicle.

Count #1:

Constable Foster is alleged to have committed an Unlawful or Unnecessary Exercise of Authority to wit: when advised by the Public Complainant that she did not have her driver's licence on her, he unlawfully arrested her for failing to identify, contrary to section 2(1)(g)(i) of the *Police Services Act* Code of Conduct contained in the Schedule to Ontario Regulation 268/10 of the Revised Regulations of Ontario, 1990 and therefore contrary to Section 80 of the *Police Services Act*.

Natasha Broomes was the driver of the vehicle stopped by Constable Foster and she had just arrived at home, parked her vehicle, and began to walk toward her front door. She noticed that there was a police cruiser stopped in front of her house. The flashlight from the vehicle was pointed directly at her. The officer, Constable Foster, exited his police cruiser and approached Ms. Broomes.

Constable Foster advised her that he was looking for an SUV (Sports Utility Vehicle) that was similar to hers and that there was a report of a gun inside of the vehicle. Ms. Broomes said that she giggled, (at the absurdity that there was a weapon in her vehicle) and continued to walk toward her front door. Constable Foster then asked Ms. Broomes to produce her driver's licence. She advised him she did not have it on her. Ms. Broomes proceeded to walk toward her house. At that point, Constable Foster made the decision to arrest her for '*Failing to Identify*' under the *HTA*.

Ms. Broomes was handcuffed and placed in the back of Constable Foster's police cruiser. Ms. Broomes was held for more than 30 minutes before being released with four *Highway Traffic Act* (HTA) tickets.

The power for a police officer to demand that a driver provide their driver's licence falls under Section 33(1) of the *HTA* which requires someone to surrender their license upon being requested to by an officer carrying out a purpose under the Act. Subsection 33(3) allowed Ms. Broomes who was unable, or refused to, surrender her licence when requested by the police officer for the purpose of carrying out a provision of the *HTA*, give reasonable identification of herself, and the correct name and address of the person shall be deemed to be reasonable identification.

In *R. v. Plummer*, a decision of the Court of Appeal, the Court found that a proper interpretation of s.33(3) requires that the officer must make a specific request for identification other than a driver's license. Until that request for alternative identification has been made, and the person has refused to comply, there is no contravention of the subsection.

Ms. Broomes was not requested or given the opportunity to give reasonable identification of herself, including but not limited to her correct name and address (the location where she had parked her vehicle and was walking towards) or to provide alternate documents to identify herself.

As well or in the alternative, at no time upon observing the possible *HTA* offence of speeding, to the time he engaged with Ms. Broomes, did Constable Foster advise her that she was being stopped for an *HTA* offence. As such, Ms. Broomes was not made aware of her obligation under the *HTA* to comply with his demand to provide her driver's licence; thus making the arrest unlawful or unnecessary.

The Courts have noted that where the section 10(a) information required by the Charter can be easily and quickly communicated without impediment, there is no reasonable excuse not to do so and failure to do so is not a trivial matter. After a detention or arrest, Constable Foster was obligated to inform Ms. Broomes of the reason for the arrest and/or investigative detention. As such or in the alternative, Constable Foster failed to do such, thus making the arrest unlawful or unnecessary.

Count #2:

Constable Foster is alleged to have committed an Unlawful or Unnecessary Exercise of Authority to wit: you grabbed the Public Complainant by the arm and/or slammed her against her vehicle and/or then swept her off of her feet and/or pinned her to the ground, contrary to section 2(1)(g)(ii) of the *Police Services Act* Code of Conduct contained in the Schedule to Ontario Regulation 268/10 of the Revised Regulations of Ontario, 1990 and therefore contrary to Section 80 of the *Police Services Act*.

As part of the arrest noted in count #1, Ms. Broomes alleged that Constable Foster grabbed her and slammed her against her vehicle. She yelled for help and told him that he was hurting her. Constable Foster advised her that she was under arrest for not complying with his demand to produce her driver's licence. Constable Foster then swept her off her feet and got on her back, pinning her to the ground.

Ms. Broomes stated that she was healing from a previous injury when she was physically arrested by Constable Foster. She sustained multiple bruising and attended a local hospital after the interaction.

For reasons set out in Allegation #1, the arrest of Ms. Broomes was unlawful, and as such, any force used was not justified and/or unlawful.

Furthermore, or in the alternative, according to the Supreme Court of Canada, the right to be promptly advised of the reason for one's detention or arrest is embodied in section 10(a) of the Charter is founded most fundamentally on the notion that "one is not obliged to submit to an arrest if one does not know the reason for it"—Constable Foster failed to fulfill this obligation. When Constable Foster acted outside of his authority—statute (e.g., the Criminal Code) or the common law, and the Charter—Ms. Broomes was entitled to resist, by force, if necessary and the use of force against her was unlawful or unnecessary.

Count #3:

Constable Foster is alleged to have committed a Discreditable Conduct to wit: he failed to treat the Public Complainant equally without discrimination with respect to police

services because of race, ancestry, place of origin, colour, ethnic origin, citizenship, origin, creed, sex, sexual orientation, age, marital status, family status or disability, contrary to section 2(1)(a)(i) of the *Police Services Act* Code of Conduct contained in the Schedule to Ontario Regulation 268/10 of the Revised Regulations of Ontario, 1990 and therefore contrary to Section 80 of the *Police Services Act*.

Ms. Broomes alleges that her interaction with Constable Foster was a case of racial profiling arising out of the fact that she was a black woman.

The *Code of Conduct Schedule*, subsection 2(1) provides that a police officer commits misconduct if he engages in (a) discreditable conduct. “*Discreditable Conduct*” includes (i) a failure to “treat or protect persons equally without discrimination with respect to police services because of **race**, ancestry, place of origin, **colour**, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability”.

Constable Foster indicated that when he first observed Ms. Broomes, he noted that she had black skin colour—matching only one descriptor for the suspect but did not immediately observe her sex as female. However, when he did ascertain that Ms. Broomes was female, and not a black male (not matching the suspect’s description), he continued his investigation anyway. His actions, words and/or behaviour—including but not limited to the manner in how he spoke to and interacted with Ms. Broomes, the detention, the arrest, the use of force and issuing a series of tickets (as set out herein)—regarding Ms. Broomes indicates differential treatment and/or were governed by stereotypical assumptions or approach.

Constable Foster’s conduct is directly connected to the occupational requirements of a police officer to provide bias-free policing and to the reputation of the WRPS as a whole.

Evidence of Ms. Natasha Broomes

In 2017, Ms. Broomes drove a burgundy Pontiac Torrent (Exhibit 7, Tab 1). On July 29, 2017, she left home at approx. 5:00 a.m. to take her son to work and she described the route there and back. She wore pajama pants and a t-shirt. Her hair was similar to her current style. She believed the speed on Concession Street to be 50 km/hr and did not

believe she was speeding as there was no traffic, she was not rushing and there was no reason to speed. She did not suddenly press the brakes, nor did she observe a police car on her way home.

Ms. Broomes arrived home about 5:25 to 5:27 a.m. It was dark. She reversed into her driveway after pulling into another driveway. She did not see a police car. Her driver's door was by the front yard. She finished her cigarette, placed her wallet within the car, locked the doors and walked toward her house. Her registration and insurance were in her wallet. She did not see any police car/officer while completing these acts.

Ms. Broomes walked towards her front door as a light shone on her. She asked if there was something she could do to help and noticed he was a police officer. She was asked to come towards the officer but could not see due to the light. She was close to her front door, the officer was at the bottom of the driveway, and his vehicle on the road. She walked toward the officer, and they met at the back of her vehicle. She did not know what he wanted. She was told that she fit the description of someone he was looking for, ultimately a suspect with a gun. Ms. Broomes laughed as this was absurd/ridiculous, turned around and walked away. He did not talk about her driving or speeding, or that she was stopped pursuant to the *HTA*. He did not inform Ms. Broomes about her obligation to talk to him or that she was under investigative detention. She felt the reason for the stop was absurd as she was born in that city, no prior issues with the police and the allegation did not fit who she was as a person. The officer did not ask if she had a gun, which she has never had or used, or if she knew 'Joe'.

As she walked away, the officer asked for her driver's licence. She said she did not have it on her. He grabbed her right arm, slammed her on the back of her vehicle and arrested her for not complying with a police officer. She was not asked to find her licence but was asked her to identify herself verbally. She did not comply. She had shut down, was offended, aggravated, and upset, hurting, and afraid. The officer was very rude and physically excessive. He slammed her against her car by the time he asked her to identify herself. This was a storybook situation of a person with a gun, and she was the person they were looking for.

Before the officer put his hands on Ms. Broomes, she was compliant. She listened and was engaged. Once the situation turned, she lost respect. She felt the only reason she was being treated in that manner was because she was Black. The officer did not tell her she was obligated under the *HTA* to identify herself, produce other identification or what the consequences were. He did not tell her she could be arrested.

When Ms. Broomes was put up against the car, she was arrested for not complying with a police officer. The front of her body was against the rear driver's side of her vehicle. Her right arm was behind her, pushed towards the back of her neck. She yelled and told the officer she just had surgery on her right arm. She asked several times to let go of the arm and grab the other arm. He was hurting her due to a limited range of motion. He told her to 'shut up', she was under arrest, swept her feet underneath her, she landed face first on the ground and the officer was on top of her. She resisted and screamed for help. She continued to yell that he was hurting her. When she was moved to the ground, the pain was worse. The officer told her to 'shut up', she had to comply, and it was her fault. She was on her chest and his leg was on her back. He had one arm and her other arm was underneath her. She feared for her life. This was occurring simply because she was Black.

A video of part of the interaction was introduced (Exhibit 7, Tab 12). Ms. Broomes tried to call her brother but somehow pressed the video. She did hear the officer say she was arrested for failing to identify herself. She did not know she could be arrested for that. A 911 audio recording (Exhibit 7, Tab 13) was introduced. A neighbour called to report screaming and a woman yelling 'please get off me'.

The officer used his radio to call for backup and three officers arrived. She continued to yell 'get off me' and told one officer she was in pain, had just had surgery and the officer was hurting her. One of the officers told Constable Foster to get off her. He helped Ms. Broomes up, placed her under arrest, handcuffed her, and placed her in the rear of Constable Foster's vehicle. She did not resist as the second officer was not aggressive. The remaining officers looked around her car, the back and front yards, and they had a conversation with each other. While being handcuffed, escorted to/inside the police vehicle, she was not read her rights to counsel, or cautioned about not identifying

herself. Ms. Broomes was never told she was under investigative detention for the initial gun call. She was never asked for her vehicle insurance or registration. Constable Foster returned to the police vehicle, told her it was her fault, he knows she will blame him, and it could have been avoided if she listened from the beginning. She did not respond as there was nothing left to be said. He issued four tickets (Exhibit 7, Tab 3) which he left on her vehicle. There was no ticket for speeding and all tickets were thrown out of court.

A series of pictures taken August 7/8 showed bruising to Ms. Broomes' left side, right side, left thumb, calf, knee, and the front of her leg (Exhibit 7, Tab 5). She stated the bruising was the result of her interaction with Constable Foster. Following the incident, Ms. Broomes went to the hospital for treatment and follow-up with her doctor.

The interaction with Constable Foster made her feel powerless, inhumane, and belittled. Her feelings are still intense. She is anxious being in Cambridge and about police officers. The only reason she fit the description was because she is Black. She does not look like a male, has never owned a gun or associates with people from that world.

Cross-Examination—Mr. Jeffries

On July 29, 2017, Ms. Broomes drove her son to work shortly before 5:00 a.m. in her burgundy Pontiac Torrent. She wore pajama pants and a t-shirt. Her wallet was in the car, and she brought her phone with her. She took the same route out and back. On her return trip, she drove along Main Street which becomes Concession and heads toward the river. She agreed there is a significant hill at some point, but she was not speeding. Ms. Broomes estimated her speed about 50 km/hr and traffic was light. She did not recall driving down the hill, her vehicle picking up speed and braking to slow down but agreed this was a natural reaction given the light at the end. She was not driving 20 km over the posted speed, and she did not recall seeing a police vehicle while driving down the hill or hitting any red lights approaching the river. It was possible that she stopped but she did not recall, nor did she recall seeing any vehicles at identified intersections. She turned left onto Grand Ave and did not recall seeing any vehicles behind her at the Concession St. bridge. She turned right onto Crombie and reversed into her driveway.

A series of pictures (Exhibit 7, Tab 1) were confirmed as Ms. Broomes' vehicle. She reversed into her driveway and had a view onto Crombie. She spent 30-60 seconds in her vehicle finishing her cigarette and did not see any police vehicle. Ms. Broomes exited the vehicle and walked toward her front door when she noticed the light. She asked what she could do for the person holding light, which turned off or was directed elsewhere. She observed a police officer who asked her to come towards him. His vehicle was parked on the roadway but did not block her driveway. About one minute passed from closing her vehicle door to observing the officer. Ms. Broomes' phone was in her bra and her wallet was in the car. She had her cigarettes, lighter and keys in her hand. The officer said, 'come this way'. Ms. Broomes came down the stairs and met the officer at the rear panel of her vehicle.

Ms. Broomes asked the officer what the issue was. Constable Foster stated she fit the description of someone they were looking for. Ms. Broomes asserted that he was referring to her and not her vehicle, and the person had a gun. Ms. Broomes giggled and turned to go into the house as she found the fact that she might have a gun to be ridiculous. She did not have any information about the weapons call, the description of the other party or any vehicle associated with the call.

Constable Foster grabbed Ms. Broomes, slammed her into her car and asked for her driver's licence. She felt she was compliant and engaged as she left the front step to speak with the officer and offered him the time to explain what the issue was instead of just going into the house. Ms. Broomes estimated her interaction with Constable Foster was very brief, approximately 10-15 seconds. Ms. Broomes did not recall being asked about anyone else being in the vehicle. She was not asked if she dropped anyone off. Constable Foster did not ask for her driver's licence until after he placed his hands on her. Ms. Broomes disagreed that Constable Foster advised her that her vehicle matched one that police were looking for, asked if she dropped anyone off, if anyone was in the vehicle and to provide her drivers licence or other identification/verbally.

Constable Foster placed his arm on her right arm and pushed her into the vehicle with his hands. He swept her feet under her to the ground. It was just minutes between being pinned to the vehicle and brought to the ground. While at the vehicle, Constable Foster

stood behind her with her right arm up and her left arm dangling. Ms. Broomes offered her other arm which was not tucked under her body at this time. When Ms. Broomes was on the ground, her phone popped out of her bra. She struggled, screamed for help, and asked Constable Foster to release her as he was hurting her. Constable Foster told her to 'shut up', it was 'her fault' and he was not trying to hurt her. Ms. Broomes felt he was aggressive in his communication and sounded angry and authoritative. Constable Foster did not verbally threaten her. Constable Foster held her against the car while he called for backup. Constable Foster told her she was under arrest for not complying with a police officer. He did not say she was under arrest for failing to identify. He told her to stop resisting but did not ask her to surrender her arm. He did not punch/strike Ms. Broomes or use any use of force option.

When her phone slid out, Ms. Broomes picked it up to call her brother and somehow started the recording. She did not recall how long she was on the ground before the video started. Constable Foster's demeanour did not change when she was on the ground. He told her to stop resisting, shut up and it's your fault. She could not estimate how long she was on the ground before other officers arrived. Constable Foster had control of one arm and her other arm was free the whole time. One of the arriving officers handcuffed her.

Constable Foster scared Ms. Broomes by the way he physically reacted and spoke to her. His tone was aggressive, not professional or calm. She asked the officer who handcuffed her not to leave her alone with Constable Foster. She said this to all officers and re-iterated it to the Black officer prior to being lodged in Constable Foster's vehicle.

When Ms. Broomes was taken to the ground, she landed face-down on her chest with Constable Foster on top of her. His knee was on her back, and he controlled her right arm. She stated that they both tried to get the phone. She swiped it under a couch on the sidewalk on her right side. She did not recall how long she tried to call her brother. She described how her phone worked. When it came out from her shirt, the screen was open, she could push two buttons at that time, and it can open to video.

Ms. Broomes was referred to the video of her arrest (Exhibit 7, Tab 12). At the 12-second mark, Ms. Broomes confirmed that she was not trying to video the interaction; rather, she tried to call her brother. She did not believe Constable Foster was aware the video was being made. She became aware of the video a few days later. She sold the phone in May 2018 after she filed the OIPRD complaint. She was not read her rights to counsel or cautioned by any officer. She was not advised she was under investigative detention for the weapons call. The tickets were left on the hood of her car. Constable Foster did not ask for her insurance or vehicle registration.

Re-Direct—Ms. Barrow

Ms. Broomes did not know what speed she was going on Concession Street, but she was not driving over the speed limit. She did not see any police vehicles.

Evidence of Sergeant (retired) Ruel Green #684

Sgt. Green was the patrol supervisor for Constable Foster on July 29, 2017. The offensive weapons call was received at 0519 hrs. A male attended Elgin St. N. and threatened to 'blow someone's head off'. A firearm was assumed but not seen. The suspect description was a Black male with dreadlocks, driving a red SUV south on Elgin to Dundas. He sent officers to Elgin St. and continued to Constable Foster's location.

Sgt. Green reviewed the CAD details for the weapons call (Exhibit 7, Tab 9). At 05:19:41 hrs, a female advised that her husband "got into an altercation yesterday afternoon around 1600 hrs. Male is outside in a vehicle, said he had a gun and going to blow up husband's head". The vehicle was described as a red SUV and the reference to yesterday involved a Black male named Joe, with dreadlocks. He did not believe that all the information was voiced over the radio. At 05:25:23 hrs., he noted that Constable Foster made a licence plate query, but he did not know what was queried.

At 0525 hrs, Constable Foster queried Ms. Broomes with a date of birth and a licence plate query. Sgt. Green explained the information returned on a vehicle query (make/model/colour) and a person query (criminal record). The query would return a

person's address and a photo, if available. At 0526 hrs, the CAD noted that the husband had an altercation with the same male a year ago, identified as Jomo Smith 1987-02-23. Sgt. Green stated this was not necessarily the person involved in the weapons call and he did not know what information was voiced over the radio or input manually.

Sgt. Green was referred to the 911 recording of the call (Exhibit 7, Tab 14). He confirmed that the information broadcast noted the suspect was male, driving a red SUV, no mention of a firearm, possibly 'Joe' from an earlier call, Black male with dreadlocks. An officer recalled a male involved in an assault from a year ago named Jomo Smith. At 05:29:21, Constable Foster voiced over he was with a red SUV and a female refusing to identify. Sgt. Green believed Constable Foster asked for assistance.

At 05:30:16, Constable Foster stated he had an uncooperative female on the ground which may be related to the weapons call. At 05:33:50, Sgt. Green was on scene and confirmed the female was on her stomach, uncooperative and struggling. This occurred on the front lawn of the residence. The female was identified as Ms. Broomes, and it appeared that Constable Foster tried to handcuff her. Constable Foster stated that he observed Ms. Broomes travelling west on Main Street from the direction of the weapons call., and her SUV was red. Sgt. Green was told that she drove 'poorly' which alerted Constable Foster to her vehicle.

Sgt. Green received an update on the suspect vehicle, which was an older model SUV, tinted windows, possible Ford, poor paint job, faded which did not match Ms. Broomes' vehicle. The driver was a Black male with a thick Jamaican accent, no female seen. He had a private conversation with the units on Elgin to ensure the vehicle on Crombie was not involved and the suspect was a male. The same information was received. There was a passenger, but the complainant did not see/hear a female.

Until this point, Sgt. Green thought it was possible that Ms. Broomes' vehicle was involved. Once he received this information, he concluded her vehicle was not involved in the offensive weapons call and a decision was made to release her.

Sgt. Green described Ms. Broomes as a Black female with dreadlocks. He had no difficulty deciding she was female. Sgt. Green knew she failed to identify herself under

the HTA and Constable Foster arrested her. Sgt. Green was not present during the initial traffic stop or the 'failures' but was present when the tickets were issued.

Cross-Examination—Mr. Charney

Sgt. Green was aware that Ms. Broomes was under arrest for fail to identify under the HTA and under investigative detention pursuant to the weapons call. Ms. Broomes was not going to be released until he confirmed the vehicle and Ms. Broomes were not involved in the weapons call.

Cross Examination—Mr. Jeffries

An offensive weapons call is serious and one that a road supervisor must attend. Until he had a conversation with Constable Burgess, the only description of the vehicle was a red SUV. The additional information that confirmed this was not the suspect's vehicle became available when he was on Crombie St.

When Sgt. Green arrived on Crombie, Constables Foster and Hanby were trying to handcuff Ms. Broomes. He did not observe any strikes or use of force options used beside handcuffs. Ms. Broomes was uncooperative, struggling with the officers and mentioned having surgery. Sgt. Green was not concerned that Constable Foster was being too aggressive and described him as calm and professional. He did not raise his voice or say, 'shut up'. Sgt Green did not recall Ms. Broomes asking not to be left alone with Constable Foster. Sgt. Green was not present when/if Constable Foster advised Ms. Broomes of the arrest for failing to identify herself and the investigative detention.

Until Sgt. Green received the vehicle/suspect information while on Crombie St., he felt there were grounds to detain Ms. Broomes. His grounds for the investigative detention of the vehicle included: red vehicle, dynamic call for service, and direction of travel west from Elgin Street. He needed further information before he released the vehicle.

Sgt. Green was referred to a 'google maps' image which had 154 Elgin Street N. and 7 Crombie Street added (Exhibit 7, Tab 2). In the weapons call, the dispatcher described the direction of travel for the SUV as south on Elgin to Dundas. When Sgt. Green was satisfied that Ms. Broomes was not involved in the weapons call, he believed he had a

conversation with Constable Foster who would have overheard the same information. Ms. Broomes was issued with tickets and released. Sgt. Green remained on scene.

Re-direct-- Ms. Barrow

Sgt. Green agreed there was no notation in his notes or his OIPRD statement about having a conversation with Constable Foster. He assumed they had such a conversation but had no specific recollection of the conversation and this was ultimately an assumption.

Evidence of Constable Dean Hanby #1326

On July 29, 2017, at 0529 hrs, Constable Hanby heard the offensive weapons call but he was detailed to another event. Shortly after, he heard Constable Foster's transmission for assistance on Crombie St. He observed Constable Foster struggling with a female on the front lawn. His initial view was obstructed due to the couch and the red SUV on the road. He helped Constable Foster. Constable Hanby believed Ms. Broomes was face down on the ground and her left arm was tense under her abdomen. Constable Foster had control of her right arm. Ms. Broomes was angry, upset, screamed obscenities, and demanded to be let go. She claimed an injury to her right arm. Constable Hanby took control of Ms. Broomes' left arm and moved it to her lower back. He assisted Ms. Broomes to her feet once Constable Foster handcuffed her. He did not recall who put Ms. Broomes in the police vehicle. His general practice if someone complained of an injury would be to loosen the handcuffs or take them off. Constable Hanby did not recall Ms. Broomes being given her rights to counsel or that she was under investigative detention. He was not on scene when she was released or given the tickets.

Cross Examination –Mr. Charney

Constable Hanby did not recall the type of vehicle driven by Constable Foster.

Cross Examination—Mr. Jeffries

Constable Hanby's initial view was obstructed by a red SUV, but he did not know if it was on the road or in the driveway. He left the scene within minutes after the handcuffs

were applied. He did not recall how long it took to get Ms. Broomes under control. She struggled while being handcuffed. She was actively resistant while he was on scene. He did not recall Ms. Broomes asking not to be placed in Constable Foster's vehicle.

Re-direct—Ms. Barrow

Constable Hanby did not have an independent memory of where the red SUV was parked. He noted in his statement the vehicle was stopped on the road in front of the residence, but he was not sure if 'the' vehicle was the SUV or the police cruiser.

Evidence of Constable Worswick #1444

On July 29, 2017, Constable Worswick was in uniform and drove a marked police vehicle. The dispatcher broadcast the weapons call and said that the husband was threatened by a male he had issues with. The male was described as a Black man with dreadlocks, driving a red SUV. He drove toward the call when he heard Constable Foster who sounded like he was involved in a struggle. Constable Foster stated he was with a female he believed was related to the weapons call.

Constable Worswick arrived at Crombie St at 0533 hrs and observed Constables Foster, Hanby, Sgt. Green and a female on the lawn. The female yelled and screamed as the officers tried to handcuff her. She may have yelled, "get off, you're hurting me" but he had no notation of this. Constable Worswick described Ms. Broomes as a Black female with black dreadlocks, slim build. Constable Worswick was told to relieve Constable Foster who was out of breath. Constable Worswick took control of Ms. Broomes left arm and brought her to Foster's police vehicle. He was not present when her rights to counsel were read, or she was told about the investigative detention. Constable Foster stated he believed she was involved in the weapons call as she was driving the SUV from the area. When Constable Foster tried to stop Ms. Broomes, she tried to run into the house. Constable Foster was investigating a weapons offence and he felt Ms. Broomes was involved. Constable Worswick did not know the reason for the arrest and was not involved in Ms. Broomes release. Constable Worswick left shortly after Ms. Broomes was secured in the police vehicle. Constable Worswick stated if someone refused to identify under the *HTA*, he would reiterate why they were required

to do so, that they could be arrested, and he would want to avoid going that route so please identify yourself.

Cross Examination—Mr. Charney:

Constable Worswick did not recall what type of vehicle Constable Foster was driving.

Cross Examination—Mr. Jeffries:

The roads were not busy at that time of day. Other officers assisted in the call due to the potential for a firearm involved. He recalled that the suspect for the weapons call left in a red SUV and there was a red Pontiac Torrent parked in the driveway. He felt the vehicle fit the description of a red SUV. On arrival, Constables Foster and Hanby were trying to handcuff Ms. Broomes, who was resistant. Constable Worswick did not see Constable Foster strike Ms. Broomes or deploy any use of force options. He described Constable Foster as calm, professional and not aggressive. He had no knowledge that Ms. Broomes did not want to be lodged in Constable Foster's vehicle. Constable Worswick tries to avoid arresting someone for failing to identify under the *HTA*. He would explain their obligation under the *HTA*, time permitting, and why it was in their best interest. He agreed that circumstances dictate that best practice is not always possible.

Re-direct—Ms. Barrow

Constable Worswick believed Constable Foster behaved professionally. The officers struggled to get her arms into position to be handcuffed.

Evidence of Constable Foster #1299

On July 29, 2017, Constable Foster worked from 2230 hrs to 0700 hrs. He was assigned as south 71E. He was in uniform, operated a marked police SUV and was equipped with all his use of force options.

At 0519hrs, an offensive weapons call was broadcast. The initial information was a Black male with dreadlocks named Joe arrived at Elgin St. N. and threatened to 'pop off

the head' of the complainant's husband. Constable Foster believed this meant shoot him with a firearm. He made his way into the city and provided the route.

Constable Foster referred to the CAD details (Exhibit 7, Tab 9). He confirmed that, at 05:10:41 hrs, a male outside the house on Elgin St. N. stated he had a gun and was going to 'blow up the husband's head'. The suspect vehicle was a red SUV which left Elgin St. N. heading towards Dundas. At 05:24:16 hrs, Constable Foster was aware there was a call the day before where the suspect was a Black male named Joe with dreadlocks. Constable Foster felt this was one of the most serious calls.

Constable Foster was referred to the GPS monitoring system map for his vehicle (Exhibit 7, Tab 4). His vehicle was stationary on Blenheim Rd. at 05:20:18 when he received the weapons call. He travelled down Blenheim Rd into Cambridge, along Grand and turned eastbound on Cedar to Harris Street. His vehicle changed directions at/around Harris and came to a stop at 0527 hrs on Crombie Street.

Constable Foster proceeded east on Concession towards Elgin. He passed Ainslie. He observed a red/burgundy vehicle travelling westbound away from the weapons call at a high rate of speed, estimated to be 70 km/hr in a 50km/hr zone. The SUV braked suddenly as it passed him. This vehicle stood out due to the speed, sudden braking, it slowed down, the description of a red SUV, the time of day with light traffic, the time delay of approx. two mins which coincided with the time the vehicle left Elgin St. N., and he did not observe any other red SUV's. Constable Foster was referred to a google map (Exhibit 7, Tab 2). To arrive at the point where he initially noticed the red SUV, the suspect vehicle could have travelled southbound on Elgin N. and turned right on Main Street.

Constable Foster believed this was the vehicle involved in the weapons call. He did a U-turn to confirm the colour of the vehicle. Constable Foster confirmed the vehicle parked on Crombie Street was the same vehicle that passed him on Concession Street (Exhibit 7, Tab 1). He caught up to the vehicle at Water and Concession. The red SUV was in lane one and he was in lane two angled to the vehicle. He noted it was red. He did not

see the licence plate due to a vehicle behind it. He did not see any occupants, the driver, the gender, or the skin colour of the driver. He did not initiate a stop.

As the red SUV moved forward, Constable Foster positioned himself behind it, obtained the licence plate and entered it into his MDT. He confirmed he made the vehicle query at 05:25:23 (Exhibit 7, Tab 9). He ran one search which was also run through the Ministry of Transportation (MTO) where received the registered owner's information. He did not search Ms. Broomes by name. He was not able to review the information as vehicles were moving. He positioned his vehicle behind the red SUV and did not know where it was headed. The red SUV turned left onto Grand, then right onto Crombie, pulled completely into a residence then reversed into 7 Crombie. Constable Foster's vehicle was parked in the middle of the road about ten feet away. He pulled his vehicle into the bottom of the driveway to stop the vehicle as he did not know if this was the final location. In Constable Foster's mind, this was a traffic stop.

Prior to shining his flashlight, Constable Foster did not see the driver or occupants. Crombie Street is a residential area with artificial lighting, dimly lit and it was dark outside.

Constable Foster had a strong suspicion that this was the vehicle involved in the weapons call. He activated his flashlight and saw the driver duck down. He noted the driver had Black skin and dreadlocks. He was certain this was the vehicle and the driver. When he saw the driver's door open, he exited his vehicle to intercept the driver. His intention was to place the driver under arrest based on reasonable and probable grounds for uttering threats. He did not call for backup as he exited the vehicle quickly and admitted this was a poor decision regarding officer safety. He exited his vehicle, illuminated the driver and this was the first time he identified the driver as a woman.

Constable Foster described the situation as dynamic and complex. He had to assess, plan and act. He noted the driving evidence, the vehicle description, had formed reasonable suspicion and once he pulled up to the vehicle, had reasonable grounds to arrest the driver. He constantly reassessed the situation. The fact that the driver was

female did not change the speed, time delay, red SUV, and direction of travel and he believed this was the same vehicle from the weapons call.

The driver stood near the driver's side rear passenger door. He positioned himself to the right of his vehicle to observe the entire scene, including the vehicle, the driver, and the house. The driver kept her head down and Constable Foster asked if she was okay to judge her reaction. He lowered his flashlight as the driver stated he was blinding her. Constable Foster told the driver that the police were investigating a weapon's call and her vehicle matched the description. He did not recall her response as he looked in the vehicle for other occupants. He told her he needed to see her drivers' licence (she did not have it) and asked if there was anyone else in the vehicle or if she dropped anyone off. She replied, "what does it look like". Constable Foster asked her to come towards him, but the driver did not respond. He walked towards the driver and asked for her licence. He asked Ms. Broomes to identify herself verbally and she replied, 'No'.

Constable Foster was faced with a decision. He was investigating a weapons offense and had grounds for investigative detention based on the vehicle colour, the speed, direction of travel, time delay and vehicles on the road. He also had a parallel *HTA* investigation and the need to identify the driver to speak to her about her speed, confirm her documents and ensure she was sober. The driver turned to make her way towards the front door of the residence. He had no other choice but to arrest her.

He did not advise Ms. Broomes he was conducting an *HTA* investigation as he had 10-15 seconds from when he first spoke to Ms. Broomes to when she turned towards the door which was 10-12 feet away. His main concern was the weapons call. After saying 'no' to his request, she turned her body to the left. Constable Foster grabbed her right arm and said she was under arrest for fail to identify. She pulled away and screamed, 'no, stop'. He attempted to reason with her, saying 'you are under arrest, you are not going anywhere and stop'. She continued to pull away. Constable Foster tried to grab her left arm to no avail. Constable Foster did not tell her she was under investigative detention. As he took control of her arm, Constable Foster wanted to be as clear as possible that Ms. Broomes was under arrest and could not leave. It was his intention to detain her pursuant to the weapons call and the *HTA*.

Constable Foster tried to reason with Ms. Broomes who continued to struggle. He referred to Ms. Broomes as actively resistant. After 5-7 seconds of struggling, he brought Ms. Broomes down to the grass. He did not slam Ms. Broomes into her vehicle. He pushed her towards her vehicle so she could not escape. In reasoning with her, he stated, 'you're under arrest, you're not free to go, you're not going anywhere and stop'. His tone was authoritative. He did not yell but made sure she could hear him.

Ms. Broomes struggled while on the ground. Constable Foster was aware of Ms. Broomes, the vehicle, and the front door as he did not know if someone else was there. While on the ground, she was face down and he was on top with control of her right arm. Constable Foster saw the cell phone on the ground, but he was unaware it was recording. He tried to reach underneath Ms. Broomes to get control of her left arm. He continually told Ms. Broomes she was under arrest. She stated he was hurting her, and he responded that he was not trying to do so. He did not use physical strikes or his use of force options. He did not intend to harm Ms. Broomes. Constable Foster told Ms. Broomes she was not going anywhere; he was a police officer and that she was under arrest. He made several attempts to take control of her left arm. He called for backup. Constable Foster felt that, in trying to grab the cell phone, Ms. Broomes was trying to have someone stop a lawful arrest, so he swiped the phone away. He did not recall telling Ms. Broomes to 'shut up' and did not tell her that the situation was her fault.

The time on the ground was about 2-3 minutes. He listened to the video recording (Exhibit 7, Tab 12). He noticed the cell phone when it was face up. Constable Foster told Ms. Broomes to put her hands behind her back several times. He was unable to gain control of her left arm. His tone was consistent throughout the interaction.

Constable Hanby arrived first. Ms. Broomes screamed and struggled. Constable Foster was able to focus more on Ms. Broomes instead of the vehicle or front of the home. Constable Hanby pulled her left arm behind her back and Constable Foster applied the handcuffs. Ms. Broomes' demeanour did not change when Constable Hanby arrived.

Constable Worswick arrived and took control of Ms. Broomes. Sgt. Green arrived. Ms. Broomes was brought up and walked to the police vehicle. He did not know who

conducted the search. She was placed in the rear of his vehicle. Constable Foster told Sgt. Green the reasons for the stop, why he felt the vehicle was involved, that Ms. Broomes was under arrest pursuant to the *HTA* and under investigative detention.

Ms. Broomes was given her rights to counsel and cautioned three times while in the rear of the police vehicle. Shortly after she was placed in his vehicle, he told Ms. Broomes she was detained for the criminal investigation and under arrest for failing to identify herself under the *HTA*. The investigative detention ended once Constable Foster heard the radio broadcast between the units on Elgin St. N. and Sgt. Green. He told Ms. Broomes she was no longer being detained for the weapons call, but was under arrest for failing to identify. Constable Foster asked Ms. Broomes to identify herself, but she did not reply.

Constable Foster issued four tickets to Ms. Broomes for 'driver fail to give identification, her insurance card, permit and licence. He gave Ms. Broomes a chance to identify herself and provide her insurance card and permit but she stayed silent. He did not recall asking for her licence after the arrest. Ms. Broomes stated, "let me go or take me to jail". Once in the vehicle, Ms. Broomes initially continued to scream. He explained the reason she was in handcuffs and in a police vehicle was due to her actions. She stopped talking.

Constable Foster opened the rear door, removed the handcuffs, and handed Ms. Broomes the tickets. She left them on the back seat. Constable Foster placed them on the hood of her car. He had no further interaction with Ms. Broomes. The allegation that the arrest was based on the colour of Ms. Broomes skin is false. Constable Foster stated that anyone who got out of the vehicle would have been arrested.

Cross Examination—Ms. Barrow

Constable Foster clarified that whoever exited the vehicle would have been detained. Their arrest was dependant on their behaviour at that point. If the driver was White, he/she would have been detained as he was interested in the vehicle. Ms. Broomes happened to be driving it. The appearance of the suspect at that point had no bearing on his decision to detain that person.

When Constable Foster observed Ms. Broomes vehicle, he knew the suspect was Black, involved in an altercation the day before, his name was Joe and he drove a red SUV southbound Elgin towards Dundas. He could have taken any side street.

Constable Foster had no formal way to judge Ms. Broomes high rate of speed. He used his experience/observation to estimate her speed as 70 km/hr. He was looking for the suspect vehicle, most likely a speeder. He had grounds to stop Ms. Broomes for speeding and to discuss her speed, but not to give her a ticket as there was no reasonable prospect of conviction given it was an estimate.

Ms. Broomes pressed her brake as she passed him. He believed this was due to her speed and observation of the police vehicle. He agreed most people would slow down if they noticed a police vehicle and there was nothing unusual about braking to slow down on a hill. At this point, Constable Foster formed reasonable suspicion that this was the suspect vehicle with the suspect and a gun. He did not have an answer for why he did not contact the dispatcher given this was a serious call. He did not stop the vehicle as he wanted to get behind it, read the plate return and any other information from the dispatcher and decide where to stop the vehicle. Constable Foster confirmed he entered the plate query into the MDT and the steps required to receive the return. He did not view the return as he wanted to position himself behind the SUV and there were two quick turns. It took three minutes from entering the query until he reached Crombie. He did not have the time/ability to review the return during that time.

Constable Foster stopped at the end of Ms. Broomes' driveway. The CPIC return would have told him it was Ms. Broomes' address. He immediately interacted with the driver as he saw her exit the red SUV. This was a dynamic situation and he had to act quickly. Prior to looking into the vehicle, he formed reasonable suspicion that this was the vehicle. He shone the flashlight into the vehicle and noted the driver was Black with dreadlocks. He formed reasonable and probable grounds to arrest in relation to the gun call and believed with certainty this was the suspect. His grounds were the person in the red SUV was Black with dreadlocks. Before he exited his vehicle, he held reasonable and probable grounds. Once he noted the driver was female, he had reasonable suspicion. He could not arrest her, but he could detain her for investigation. He had a

parallel *HTA* investigation for speeding so he could discuss her speed, ensure she was licenced and sober and had her vehicle documents. Constable Foster did not discuss her speeding as he was not able to. The car matched the description of the red SUV for the weapons call which was the more pressing issue and wanted to discuss first.

Constable Foster asked for her driver's licence but did not ask if she had a gun, or if she knew Joe. He wanted to identify her (for the weapons call), and he made inquiries if there was someone else in the vehicle or if she had dropped somebody off. This took 10-15 seconds. He did not have the chance to advise Ms. Broomes she was stopped in relation to the *HTA* prior to her arrest. The weapons incident took precedence.

Constable Foster was referred to his memo book, e-ticket notes, and occurrence report (Exhibit 7, Tabs 7, 8 & 11). He confirmed these documents were produced shortly after the incident, but he has had a lot of time to consider the events.

Constable Foster defined investigative detention as the belief that the person is probably involved in a criminal offence. You can detain them for the purpose of identification and figuring out if they were involved in an offence. At that point, you continue the arrest, or release them. Constable Foster agreed that he detained Ms. Broomes to identify her, and he had an obligation to inform her she was being detained. He stated that a police officer has the grounds to stop a driver under the *HTA* if they observed an offence that would give grounds to stop the vehicle. It was the officer's decision whether to lay a charge. He stated that a police officer has the grounds to ask a driver to identify themselves under the *HTA* if they were observed committing an *HTA* offence and operated a motor vehicle. If the vehicle stopped driving and the officer was in fresh pursuit/departure, the officer can stop the person and demand identification. Constable Foster agreed that, if possible, prior to arresting someone for failing to identify themselves under the *HTA*, they should be advised of their obligation to identify themselves. Constable Foster agreed that if he did not have the grounds to stop Ms. Broomes under the *HTA*, and he did not have the grounds for investigative detention, that Ms. Broomes would not have any legal obligation to speak to Constable Foster, provide any information, and she was free to walk away. Constable Foster asserted that he did have the grounds for the *HTA* stop.

Constable Foster agreed that the decision to detain Ms. Broomes was his alone and he was the only person who could judge whether he had the authority to continue the detention. He believed that Ms. Broomes' vehicle was somehow involved in the weapons call and by extension, she was involved as the driver. He used his discretion to detain Ms. Broomes, arrest her and he is the only officer with direct knowledge of the basis for the discretion used. If he decided that Ms. Broomes was no longer involved in the weapons call, it was within his authority to release her. It was his responsibility to continually assess whether the detention was warranted.

Constable Foster agreed that he heard the radio transmissions that the suspect was a Black male named Joe with dreadlocks, the vehicle was a red SUV and the direction of travel. This was known to Constable Foster before he encountered Ms. Broomes. The information about Jomo Smith with a date of birth was broadcast and available to him.

When Ms. Broomes exited her vehicle, Constable Foster asked her to speak with him. She stood still but was compliant and did not walk away at this point. Constable Foster noted that she was female, quickly looked in the vehicle but did not notice other occupants. The first thing Constable Foster asked about was in relation to the weapons call. He did not say that he observed her speeding, and he approached her pursuant to the *HTA*. He was not able to advise her that she was under investigative detention and that she had no legal obligation to speak with him.

Prior to arresting Ms. Broomes, Constable Foster did not use any force. He disagreed that Ms. Broomes walked away before he asked for her driver's licence, which she had no legal obligation to have on her person as she was no longer driving. He did not have time to ask her to find her licence and he did not advise her she was stopped pursuant to the *HTA*, even though she was standing in front of him. She was not advised that if she failed to properly identify herself, she could be arrested. He did not advise her that she was under investigative detention, ask whether she knew Joe or had a gun.

Constable Foster told Ms. Broomes she could identify verbally. She started to walk away. In the 10-15 seconds he had initially with Ms. Broomes, he was unable to discuss her legal requirements. If he let her walk away, he would have lost the *HTA*

investigation and was negligent. He would have let evidence and its continuity disappear with respect to the weapons call and would have been neglectful in his duties. Constable Foster agreed that he could not have given Ms. Broomes a speeding ticket based on good faith. He preserved the need to identify Ms. Broomes as once you commit an *HTA* offence, you are not able to walk away. He needed to identify her, ensure she was licenced, sober and had all her documents. He needed to identify Ms. Broomes for the investigative detention and the *HTA* infraction.

When asked about the sense of urgency, Constable Foster stated that, barring exigent circumstances, he did not want a situation where he had to force his way into her home or write a search warrant. He had to make an urgent decision before she walked away based on his belief that Ms. Broomes was still involved in the weapons call and he was concerned for his safety. Constable Foster grabbed her right arm with a moderate amount of force to stop her from leaving. Ms. Broomes mentioned many times that he was hurting her, but Constable Foster did not recall mention of a surgery, although this is contained in his OIPRD interview (Exhibit 7, Tab 6). He did not opt to switch arms as he may have lost control.

Constable Foster stopped at Ms. Broomes' house at approximately 0528 hrs. Sgt. Green arrived at 05:34:50 hrs. His struggle with Ms. Broomes was two to three minutes. He had his shin across her lower back at the top of her hips which is how he was taught to deal with a struggling person. He had her right arm held up her back and Ms. Broomes stated he was hurting her. He did not include her complaint of pain in his reports. While struggling, Constable Foster contacted the dispatcher for backup. He still believed she was connected to the weapons call. He did not ask the dispatcher for an updated description of the suspect or vehicle as he was struggling with Ms. Broomes.

At 0541 hrs., Constable Foster read Ms. Broomes her rights to counsel and caution. She was in the rear seat of his police vehicle, and he was in the front seat. Ms. Broomes was advised that she was under investigative detention in relation to the gun call as Constable Foster still believed she was connected. He asked Ms. Broomes for her identification, insurance & vehicle registration. She remained silent and Constable Foster took her silence as a refusal. Due to the handcuffs, he agreed it was impossible

at that moment to provide the documents. He agreed that after he read Ms. Broomes her rights to counsel and cautioned her, it was her right to remain silent.

Constable Foster agreed that after Ms. Broomes was placed in the police vehicle, further investigative steps were taken to confirm whether she was involved in the gun call. He agreed that, if he had pulled up the query return, he would have known who the registered owner was, her address and that she was female. After he read the rights to counsel and cautioned Ms. Broomes, Constable Foster did not recall if he looked at the CPIC return. He agreed that, at 05:38:51 hrs., Constable Burnham provided a vehicle description of an older model red SUV, possibly a Ford Explorer, tinted windows, poor paint job, faded. At 0549 hrs., Constable Foster was able to confirm Ms. Broomes' identity through MTO ISS. Ms. Broomes had been detained for approximately 20 minutes at that point. The ultimate description of the vehicle did not match Ms. Broomes vehicle, other than the colour and it was an SUV. He also learned that the suspect was a Black male with a thick Jamaican accent and no female was seen. Constable Foster and Sgt. Green wanted to confirm that Ms. Broomes was not connected to the gun call before she was released. After garnering all this information, Constable Foster still had suspicion that Ms. Broomes was involved as her behaviour was not typical of a traffic stop. Even when he released Ms. Broomes from investigative detention, Constable Foster was suspicious of the entire situation but had no legal grounds to hold her. When he released Ms. Broomes, he told her that the investigation was ongoing, that she may be charged in the future, but she was no longer being detained. In his training, when you strongly believe that someone may be involved in a situation, but you no longer have the grounds to hold them, you release them but let them know the investigation is ongoing. He found her behaviour odd, but he could not say that he believed she was involved. She was released with four tickets, none of which were for speeding. Constable Foster agreed that no evidence was discovered that Ms. Broomes was connected to the gun call.

Cross Examination—Mr. Charney

A red SUV is not an uncommon vehicle/colour. He first noticed the brake lights of the red SUV through his driver's side window and mirror. The brake lights came on as the vehicles met and the vehicle dipped forward as he looked at his driver's side mirror. As the vehicle passed, he looked at the side mirror at the back of the vehicle and saw the back of the vehicle come up and the front of the vehicle go down.

Constable Foster stated he had a lot of time to consider this incident, so his memory was fresh. In his OIPRD statement (Exhibit 7, Tab 6) he stated, "I believe that the vehicle was travelling more than 50km/hr. I'd be guessing". Constable Foster told the Tribunal that he estimated the speed was 70 km/hr. He was unable to point to any record or notation that indicated the speed of the red SUV.

In his e-ticket notes (Exhibit 7, Tab 8), Constable Foster agreed he travelled eastbound, and he noticed the red SUV when he passed Ainslie. He was referred to the GPS data log (Exhibit 7, Tab 4). He agreed that GPS marker 35 noted his location was east on Cedar on one side of the river with Concession on the other side. At GPS marker 40, Constable Foster was east of Ainslie which is where he noticed the red SUV. At GPS marker 40, his speed was 62 kms/hr and at GPS marker 41, his speed was 12 kms/hr. This was the location where he made a U-turn. He agreed that his speed fluctuated between 51, 62 and 11 kms/hr. Constable Foster agreed that he turned his vehicle around, sped up before Ainslie where he slowed down as the red SUV slowed down. He did not recall catching up with the red SUV at the light at Ainslie. He agreed that traffic was light, there were few vehicles on the road, he was in lane two and the red SUV was in lane one. Constable Foster had no recollection of a red light or seeing other vehicles at the Ainslie intersection.

Concession Ave has a bridge across the Grand River and the majority is a four-lane, well-travelled highway. When the red SUV stopped at Concession Street/Water St., Constable Foster did not try to see in the vehicle or use his flashlight as he wanted to identify the plate and get behind the vehicle to stop it if needed. He could not pull beside the red SUV. Constable Foster disagreed that he tried to look and see who the driver

was at that intersection, that he noted the driver was a woman and considered she may have dropped someone off. Constable Foster disagreed that he was trying to make sense that he had a red SUV with a Black female with dreadlocks and the complainant was mistaken. He stated that he had no idea who was driving the red SUV.

Constable Foster's usual practice was to pull the vehicle over, but most drivers are not that close to home. Despite pulling into the driveway, the person drove a vehicle and was speeding, and he had the right to ask for their licence. Most of the time he stops a vehicle when the offence occurs. He followed the red SUV through two intersections and made two turns. He did not activate his lights as he had not made the decision to stop the vehicle when it pulled into the driveway. He had no idea it was the driver's residence. Constable Foster could not remember an event unfolding like this before. He noted that the driver's behaviour was not consistent with a typical traffic stop. His behaviour was the same regardless of who he was stopping.

As he followed the red SUV, Constable Foster entered the licence plate into his MDT and the results were instant. He walked the Tribunal through how he entered a plate. The fact that he was driving prevented him from viewing the results. The GPS records showed that he never completely stopped after doing the U-turn until he arrived on Crombie, although he believed he stopped at Concession/Water.

Constable Foster disagreed that he saw the name Natasha Broomes and 'female' in the search results or that he looked in the vehicle at the intersection and noticed a female driver. He disagreed that, after viewing the results, he considered that the driver dropped someone off. He agreed that it crossed his mind that the complainant was mistaken, and that the driver was a Black female and not a male. This thought did not influence him. He disagreed that these considerations crossed his mind when he reviewed the CPIC results prior to his arrival on Crombie.

Constable Foster felt it was suspicious that the driver pulled into the neighbour's driveway and backed into her own as he thought that the driver was trying to hide or force him to conduct a multi-point turn. This manoeuvre added to his suspicion, but it did not influence his actions and he would not use it to articulate his suspicion.

Constable Foster confirmed the driver was a Black person with dreadlocks and he believed this was the vehicle and person involved in the weapons call. He was going to arrest the driver. It was an oversight and an officer safety issue for not calling it in. In his OIPRD statement he stated that he did not call it in due to confidence on his part and his ability to handle himself. He also wanted to investigate further (Exhibit 7, Tab 6). He was questioned that if he made the decision to arrest the SUV driver, what did he want to investigate further? He disagreed that he was not confident in the information, or that he had the right vehicle and suspect, which was why he waited.

Constable Foster confirmed that he would have detained any one who got out of the vehicle. He was focused on the driver, and he wanted to speak with them. He was suspicious that the vehicle was involved in a criminal offence and the driver, and any occupants, would be detained. He agreed that no matter who got out of the vehicle, young or old, Black or White, male or female, they were going to be detained. When he noted the person in the vehicle was a woman, that did not change his view on detention.

He realized Ms. Broomes was a woman before he arrested her. In his OIPRD interview Constable Foster stated that he had a strong suspicion that she was involved in the call, either she recently dropped somebody off or the complainant's information was off. A Black male with dreadlocks could end up being a Black female with dreadlocks. The fact that Ms. Broomes was female did not influence his actions.

To engage in lawful detention he needed reasonable suspicion. The vehicle was the main reason why he made/continued the detention. He agreed there was no evidence that Ms. Broomes had dropped somebody off or that a female was involved in the weapons call. It crossed his mind that the suspect was a Black male with dreads, and he was confronted with a Black female with dreads. The main reason he followed Ms. Broomes vehicle was because it was a red SUV. It did not cross his mind that the complainant could be mistaken on the vehicle/colour. When he realized Ms. Broomes was a woman, he wanted to talk to her, identify, investigate, and detain her. Constable Foster agreed that in his training, when you arrest or detain a person, you tell them about the arrest/detention. He asserted that he did not have time and the fact that she started to walk away forced him to make the arrest/detention. In the twenty minutes

from his initial approach to her release, Constable Foster did not mention that she was speeding. There was nothing put over the radio or in the video recording about speeding.

Constable Foster did not recall receiving anti-racism training prior to this incident. He received implicit bias awareness in the last 1-2 years.

Re-direct: Mr. Jeffries

Constable Foster did not ask Ms. Broomes where her licence was, tell her that if she did not identify she could be arrested, tell her she was under investigative detention or ask if she had a gun or knew Joe as it was a 5-10 second interaction before the arrest. He wanted to ask if she was okay to judge who he was dealing with and then ask for her licence to identify her prior to continuing his conversation. It was a quick and dynamic situation. It did not cross his mind to ask if she had a gun or if she knew Joe.

Constable Foster asked if she was okay. She had her head down and was covering her eyes. He did not want to escalate the situation. He could not let her walk away as the HTA investigation would have been lost and he would lose evidence and witnesses with respect to the weapons call. He felt he would have been neglectful in his duties.

When Constable Foster and Ms. Broomes started their interaction, the suspect 'Joe' or his weapon had not been located. He believed that Ms. Broomes drove the vehicle seen leaving the weapons call. He believed Ms. Broomes, as the driver of that vehicle, could have had knowledge about Joe's location or the firearm allegedly in Joe's possession.

Submissions

Prosecution: Ms. Barrows

Credibility

The credibility of witnesses must be assessed based on the O'Halloran test which has been applied by the Commission. In Faryna and Chorny (1952) BCCA, Justice O'Halloran noted,

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions” (Exhibit 9, Tab 7).

The cases of Krug and Buckle OCPC, (2003 & 2005) confirm that the O’Halloran test is typically applied by the Commission (Exhibit 9, Tabs 10 & 2).

In Pacitto and Toronto Police Service, OCCPS, 2004 (Exhibit 9, Tab 17), the Commission acknowledged that a witness’ testimony and/or its congruence with that of other witnesses does not need to be perfect, and the witness may be credible overall. The standard of perfection is not what is expected. In O’Reilly and Ottawa Police Service, OCPC, 2004 (Exhibit 9, Tab 16), the Commission supplemented the O’Halloran Test with a list of factors that should be considered when assessing credibility.

In Deviney and Toronto Police Service, OCPC, 1999 (Exhibit 9, Tab 6), the Commission held that a complainant/witness’ version of events is more credible than that of a subject officer where their version is more logical and where the complainant/witness had a greater independent recollection of events. In Talha and Culleton, Board of Inquiry, 1993 (Exhibit 10, Tab 37), the Board held that where the complainant’s memory of the events was likely to be heightened due to the unique impact of the events on his/her life that may render their version of events more believable. Ms. Broomes experienced a traumatic event. Her memory of the events is vivid. Constable Foster testified that he acted appropriately so it is unlikely that he remembered the events in the same way.

Ms. Broomes evidence was genuine, forthright, credible, and believable. Her evidence was not perfect, but it does not have to be. She was cross-examined at length and her version, answers and demeanour remained consistent.

Constable Foster’s responses defied logic. There were inconsistencies in his evidence, and he refused to acknowledge that he could be wrong on any aspect of what happened. His assertion that he came to a complete stop behind Ms. Broomes is not

supported by the GPS data. He had time to type the licence plate into his MDT, but he did not have time to read the results. He could not provide information to Ms. Broomes about her detention as he did not have time even though she stood in front of him and was compliant. There was no reason to believe, at that point, that she was going to flee. Constable Foster noted that no matter who got out of the car he would have arrested them, then he qualified it as 'detained' them. Constable Foster was either completely unconcerned with the description of the driver or he was concerned with the description of the suspect and is now telling the truth as he knows it looks bad. Constable Foster was defensive and refused to acknowledge that this series of events was completely out of the norm from how a stop of this nature would typically be conducted. He arrested someone who had no connection to the weapons incident, and he is not willing to admit his mistake. Constable Foster attempted to justify, after the fact, his detention of Ms. Broomes without the lawful grounds to do so.

The prosecutor outlined the events of July 29, 2017, in detail. Constable Foster did not initiate a traffic stop, use his lights/siren, or notify the dispatcher. He never told Ms. Broomes before, during, or after their interaction that he observed her speeding. Sgt. Green noted 'poor driving'. Ms. Broomes was not given a speeding ticket and she was adamant she did not speed. She noticed the police vehicle when she arrived home. Her story is credible when you consider Constable Foster's version which included speeding and the GPS stamps. Constable Foster observed a red SUV, believed it might be involved in the weapons call, felt it required further investigation but did not contact the dispatcher as he did not have enough information. He did not have the grounds to conduct a traffic stop and testified he wanted to investigate further. He did not review the query on Ms. Broomes that he entered in the 2.5-3 mins before he stopped on Crombie. He paused before he exited the vehicle to see if the driver met the description. He took the time to shine his light into the car to look at the driver. If he reviewed the query, he would have known it belonged to a female and this was her address. He did not have sufficient grounds to issue a speeding ticket and believed, based on driving, that the vehicle was involved in the weapons incident.

Shortly after running her plate, it was dispatched over the radio that the suspect had been identified as Jomo Smith 1987/02/23 at 0:527:19. He did not recall hearing this information. This was available to Constable Foster before he exited his vehicle. He had access to the registered owner's name and date of birth in 1976. The suspect was a Black male born in 1987. He used his flashlight to look in the car and observed the driver was Black with dreadlocks. He believed he had reasonable and probable grounds to arrest the driver as soon as he confirmed the driver was Black with dreadlocks and exited his vehicle. His suggestion that the appearance of the driver had no bearing on his decision is false. Ms. Broomes testified that she was advised she fit the description of someone they were looking for with a gun. Constable Foster stated it was her car that met the description they were looking for. Ms. Broomes was led to believe that a police officer believed she was involved with a gun.

What is uncontested is that Constable Foster did not tell her that he observed her driving/speeding, that she was being stopped under the *HTA*, or under investigative detention in relation to a weapons call. He did not tell her any legal obligations, ask if she had a gun or any connection to 'Joe'. When she laughed and walked away, Constable Foster grabbed her, slammed her against the car, held her there and asked for her driver's licence which she did not have on her. He did not ask her to get it. He asked for her name which she did not provide, and she was arrested.

The interior light of her vehicle was still on, and Constable Foster confirmed there were no other occupants. He still believed that she was involved, might have a firearm, and she recently dropped someone off. He could not have her walk away because of the possibility of a firearm and that she has committed an *HTA* offence. She did not fit the description, there was no one else in the car and he knew upon approach that she was female. He still believed he had reasonable suspicion to justify detention. There was no reasonable belief remaining that Ms. Broomes was involved in the weapons call. The only connection was the colour of her car, she has dreadlocks and is Black.

Constable Foster agreed his primary concern was the weapons event. He asked her for identification pursuant to the investigative detention. He did not stop Ms. Broomes under the *HTA*. When she refused to identify, he used the *HTA* to justify the arrest because

there was insufficient basis to arrest her for the weapons incident. He should have initially advised her he stopped her pursuant to the *HTA*, if that was what he was doing, or that she was under investigative detention and did not have the ability to walk away.

Ms. Broomes acknowledged that she struggled, screamed, was in pain and scared. She is a Black woman who was aware of the history between the police and the Black population. She was fighting for her life. She begged him to switch arms. She was pinned to the ground for about six minutes. No officer heard Constable Foster read Ms. Broomes her rights to counsel and caution her for failing to identify under the *HTA* or that she was under investigative detention. She said this did not happen.

Sgt. Green confirmed the description of the suspect vehicle which did not fit the car she was driving and the suspect description with no female seen. She was ultimately released. Constable Foster reviewed the CPIC returns at 0549 hrs and confirmed her identify. This was 20 mins after his first engagement and 25 mins after he first observed the vehicle. The information was available to him at 0525 hrs. Prior to release, she was not asked for her licence, to identify herself, for her registration or insurance. Constable Foster stated that he asked and took her silence as non-compliance. If so, she had the right to remain silent. The tickets were retaliation for her failure to cooperate.

If Constable Foster had sufficient grounds, he could have pulled her over before she arrived home, advised the dispatcher that he observed a car he believed was involved in the weapons call, reviewed the CPIC return and the call details with the suspect information. He could have explained the reason for the investigative detention or the *HTA* investigation, her obligations or allowed Ms. Broomes to leave.

Standard of Proof

In Jacobs and Ottawa Police Service, ONCA, 2016, (Exhibit 12, Tab 12) the court clarified the standard of proof for *PSA* hearings as clear and convincing evidence. This standard is higher than the balance of probabilities in a civil proceeding and not that of beyond a reasonable doubt in criminal proceedings. In Johnson and Durham Regional Police Service, OCPD, 2020, the Hearing Officer wrote, "The standard of proof for this Tribunal is clear and convincing evidence meaning there is weighty, cogent, reliable

evidence upon which the trier of fact, acting with care and caution can come to a reasonable conclusion that the officer is guilty of misconduct” (Exhibit 9, Tab 9).

Law Count #1

Section nine of the *Charter* notes, “Everyone has the right not to be arbitrarily detained or imprisoned” (Exhibit 9, Tab 43). This is what informs all the law in relation to unnecessary and unlawful arrest. Section 25 of the *Criminal Code of Canada* notes,

“Everyone who is required or authorized by law to do anything as a peace officer or public officer is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose” (Exhibit 9, Tab 44).

Section 217(2) of the *HTA* outlines the power to arrest without a warrant and notes,

“Any police officer who, on reasonable and probable grounds, believes that a contravention of any of the provisions has been committed, may arrest, without warrant, the person he or she believes committed the contravention” (Exhibit 9, Tab 45).

Where a police officer believes that a contravention of section 33 has occurred, an arrest is allowed. Section 33(1) of the *HTA* notes,

“Every driver of a motor vehicle or street car shall carry his or her licence with him or her at all times while he or she is in charge of a motor vehicle or street car and shall surrender the licence for reasonable inspection upon the demand of a police officer or officer appointed for carrying out the provisions of this *Act*” (Exhibit 9, Tab 44).

Section 33(3) of the *HTA* further clarifies,

“Every person who is unable or refuses to surrender his or her licence in accordance with subsections one or two shall, when requested by a police officer or officer appointed for carrying out the provisions of this *Act*, give reasonable identification of himself or herself and, for the purposes of this subsection, the correct name and address of the person shall be deemed reasonable” (Exhibit 9, Tab 44).

If a person is unable to produce their driver’s licence, they must be asked and permitted to identify themselves by giving their name and address.

There is a limitation to any power of arrest and to the arrest powers in the *HTA*. The arrest must be supported by subjective, reasonable and probable grounds, and must be objectively reasonable based on the test of a reasonable person. Under section 33(3) of the *HTA*, an arrest is not lawful unless the officer demands the licence of the driver and the driver was unable/refused to produce their licence and upon demand to provide some other identification, and the motorist was given reasonable opportunity to identify him/herself and refused to do so.

In the disciplinary context of unlawful exercise of authority, there is an added element of even where lawful, an arrest can still be unnecessary, and where it is unlawful or unnecessary to safely arrest, the police officer must demonstrate that they have conducted an inquiry and that the circumstances reasonably required an arrest.

In R. v. Storrey SCC, 1990, (Exhibit 9, Tab 20), the *Supreme Court* clarified that, for an arrest to be lawful, the arresting officer must have reasonable and probable grounds. There must be objectively discernible reasonable grounds for the arrest. Officers cannot just look at information that was incriminating. In R. v. Golub, ONCA, 1997, the court described the duty of a police officer in relation to an arrest.

“In deciding what reasonable grounds exist, the officer must conduct the inquiry which the circumstances reasonably would permit. The officer must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable” (Exhibit 9, Tab 19).

This point is also present in Servant v. Bonhomme, 1997 (Exhibit 9, Tab 34). This is a civil case where the plaintiff had his bail conditions amended and the officer refused to look at his revised bail papers. The court noted that the officer had a duty objectively to review all information available to him and not focus on what was incriminatory. The officer closed his mind to objective data.

R. v. Waechter, ONCJ, 2006 (Exhibit 10, Tab 32) is an *HTA* case involving an arrest under s33. The court held there must be more than a suspicion or a hunch and less than proof beyond a reasonable doubt. After trying to confirm the driver’s identification,

the officer made an arrest which the court determined was precipitous and the officer did not take reasonable steps to determine whether the identification was valid. The court found the officer believed he had the subjective belief that he had the grounds to arrest, where a reasonable person would have concluded that he did not based on all the evidence. In *Waechter*, the court identified the four steps that the crown is required to establish for reasonable and probable grounds to exist. In Chartier v. Attorney General of Quebec, SCC, 1979 (Exhibit 9, Tab 3), the court held that a police officer's reasonable and probable grounds to arrest must include all available information, not only evidence that is incriminating.

In R. v. Plummer, ONCA, 2006, (Exhibit 8, Tab 28), the court concluded that, although the officer made numerous attempts to get the driver's licence and the driver did not comply, he did not ask for the person to identify themselves in some other way, so the arrest was not lawful.

The case of R. v. Smith, ONSC, 2015 (Exhibit 9, Tab 31) involved the arrest of a young Black male while driving a Mercedes. He was arrested for careless driving and failure to identify under the *HTA*. He was searched incident to arrest and a loaded firearm was found in the vehicle. There was a discussion about the lawfulness of the arrest. The court referred to *Plummer* which addressed the need for reasonable opportunity to provide their driver's licence or alternative identification before an arrest is justified.

The similarities with this case include the immediate arrest, the motorist was not given the opportunity to identify himself, the officer did not ask the motorist for other identification until physically detained and questioned. The court identified that the officers did not give Mr. Smith reasonable opportunity to provide his licence as they were either holding his arms or in handcuffs. He was not given opportunity to provide alternative identification before he was handcuffed. The court identified that the 'failure to identify' was a 'tag on' to the primary concern of stolen car or that a young, Black male was involved in a crime. The court noted this was a case of racial profiling where the officer wanted to stop the car to investigate. It was not a valid *HTA* stop, but a 'ruse' to get what they really wanted. The officers used excessive force. They were using the *HTA* to conduct a criminal investigation based on a hunch.

For a disciplinary offence of unlawful arrest to be established, there must be clear and convincing evidence that the arrest was unlawful or unnecessary and made without good and sufficient cause. This principle was upheld in Correa v. OCPC, ONSC, 2020 (Exhibit 9, Tab 5). In relation to the idea of good and sufficient cause, the court held that demonstrating evidence of good faith was not necessarily sufficient for that purpose. The officer must have both objective and subjective grounds. An arrest may be lawful and still be unnecessary. An arrest will not be justified where the officer acted precipitously or without establishing reasonable grounds. In Wong and Toronto Police Service, OCPC, 2015 (Exhibit 10, Tab 41), the Commission noted the analysis in Storrey, which required objective and subjective grounds for an arrest was relevant to whether the arrest was lawful, and the officer had good and sufficient cause for the arrest. Acting in good faith does not necessarily satisfy the requirement of good and sufficient cause.

In Wowchuck and Thunder Bay Police Service, OCPC, 2013 (Exhibit 10, Tab 42), the Commission noted that where there is no specific evidence of good and sufficient cause, a failure to have reasonable and probable grounds will likely be sufficient to demonstrate that good and sufficient cause was absent. The hearing officer found that the officers did not have lawful grounds for the arrest, and they rushed to judgment with too much information missing. In Maloney v. RNCPC, NSC, 2002, the court noted,

“The first is that a police officer has a duty to thoroughly and properly investigate an alleged offence before arresting and charging a person. It is the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable...Evidence respecting post-arrest investigation would, in my opinion, often be relevant in assessing the adequacy of the pre-arrest investigation. Whether the post-arrest investigative steps court have and should have been taken pre-arrest may well be central to the determination of whether due inquiry was conducted” (Exhibit 9, Tab 11).

In Suleiman and Ottawa Police Service, OCPC, 2011 (Exhibit 9, Tab 36), it was determined that the arrest was precipitous because there was additional information available that the officer failed to turn his mind to.

Four branches were identified for consideration:

1. Were there subjective and objective reasonable and probable grounds. Were proper inquiries made by the officer. Did he act appropriately on that information?
2. Did Ms. Broomes refuse to identify herself and was she given reasonable opportunity to identify herself.
3. Even if the arrest was lawful, was the arrest necessary?
4. If either unlawful or unnecessary, did Constable Foster have good and sufficient cause for the arrest?

Constable Foster had all the necessary information to identify Ms. Broomes and confirm she was not involved in the weapons incident, but he chose not to use it. He arrested her almost immediately and not in relation to the *HTA*. He believed she was connected to the gun call and could not let her get away. His actions were not objectively reasonable and did not include the appropriate and necessary inquiries to obtain and review relevant information. He asked Ms. Broomes to identify pursuant to the investigative detention, not the *HTA*. He did not tell her he stopped her pursuant to the *HTA*, did not ask her to identify or tell her that she had an obligation to do so. He conceded he should have told her, but he did not have time. She had not turned away at that point and was still standing there. He had no reason to believe she was a flight risk at that point. Any further belief that Ms. Broomes was involved in the weapons incident was not reasonable. The continued detention of Ms. Broomes was not justified solely because she drove a red SUV and clearly did not meet the suspect description.

Even if the arrest was lawful, it was unnecessary. Forcibly arresting a woman you have never told is being stopped pursuant to the *HTA* and failing to comply with the *HTA* within seconds of approaching her is a gross overreaction of the situation. He approached Ms. Broomes and did not cite the *HTA*, her speeding or explain her legal obligations. He conceded that at this point, she was compliant. The first thing he says to her is he is investigating a gun crime and demands that she identify herself. The arrest was unnecessary. He could have confirmed her identity through other means. If he could not arrest Ms. Broomes under the *Criminal Code*, he could not use his *HTA* powers inappropriately to affect the arrest. He had an obligation to consider the factual circumstances about whether an arrest was necessary under the *HTA*, which it was not. Even if an arrest is determined to be unlawful or unnecessary, an officer can establish that he had good and sufficient cause. Constable Foster acted unreasonably. His good

faith is insufficient according to case law to establish good and sufficient cause. His unreasonably held beliefs cannot constitute good and sufficient cause.

Law Count #2

If the arrest was unlawful, the use of force was similarly unlawful. Section 25 of the *Criminal Code of Canada* justifies the use of force where it is used reasonably and in conjunction with a lawful arrest. If the officer conducted an unlawful or unnecessary arrest, the corresponding use of force is automatically unlawful or unnecessary.

In Chartier v. Greaves, OSCJ, 2001 (Exhibit 9, Tab 4), the judge outlined several factors that were relevant to a claim of justification of force. The onus is on the police officer if he or she intends to rely on section 25 to demonstrate the force was not excessive. Constable Foster testified that, when he physically held Ms. Broomes to the ground, he was worried about guns, or someone in house and officer safety. At this point, it was no longer reasonable for him to believe that Ms. Broomes had any involvement in the weapons incident, that she had a gun or was a dangerous person.

In R. v. Nasogaluak, SCC, 2010 (Exhibit 9, Tab 27), the Supreme Court clarified that although an officer may be justified in use of force relying on section 25 of the *Criminal Code*, the ability to use force is not limited. It is constrained by the considerations of proportionality, necessity, and reasonableness.

The case of R. v. Holmes, ONCJ, 2019 (Exhibit 9, Tab 25) involved the arrest of an individual under the *HTA*. The cyclist commented that the stop was ridiculous and refused to cooperate. While trying to handcuff the cyclist, the officer pushed him to the ground and caused injury. The court reviewed that the police are permitted to use force to affect a lawful arrest when reasonable and probable grounds exist, but only as much force as is necessary and reviewed a series of factors for consideration.

When considering a disciplinary offence, the term unnecessary should be interpreted as unreasonable under the circumstances. It is unlawful for a police officer to roughly handle a person offering passive resistance, and where there is active resistance, an

officer may not use more force than is necessary to achieve a permissible goal. These principles are supported in Batista and Ottawa Police Service, OCPC, 2007 & Nobody and Toronto Police Service, OCPC, 2018 (Exhibit 9, Tab 1 & 14).

Constable Foster claimed that he arrested Ms. Broomes under the *HTA* for failing to identify herself. It cannot reasonably be said that it was necessary to forcibly grab her arm, push her against the car, trip her and hold her to the ground for five minutes simply because she failed to identify herself. At best, she committed a very minor infraction under the *HTA*, and the corresponding use of force was not reasonable.

Constable Foster justified his actions with Ms. Broomes was resisting. She was in pain, and he could have alleviated the pain by switching arms. His belief that she had a gun was not a reasonable one. The use of force used in this case resulting in bruising and cries of pain so significant that a neighbour called 9-1-1 because she believed someone was being assaulted or raped. It is inconceivable that all of this was required because she did not identify herself under the *HTA*.

Law Count #3

Constable Foster was charged with a very specific section of discreditable conduct where the allegation is that he has engaged in discrimination and that Ms. Broomes was treated differently based on her race. There is not a lot of law in the *PSA* context that deals with this charge. This section of the Code of Conduct notes that discrimination is discreditable. Discrimination would be problematic from a public reputation perspective and would constitute discreditable conduct.

Racial profiling has been recognized as a problem in the context of policing. It is understood as actions relating to safety, security or public order based on stereotypes related to membership in a particular group. No one is necessarily alleging in this case that there was a conscious choice to act in a discriminatory way. That choice does not have to be conscious; it can be subconscious as well.

Racial profiling is usually proven by inference. There will be a situation where someone has directly demonstrated evidence of bias and are unaware of their biases. A

precipitous arrest can amount to circumstantial evidence which can lead to an inference of racial profiling.

The case of R. v. Brown, O.J. 2003 (Exhibit 9, Tab 21) is the leading Ontario Court of Appeal decision relating to racial profiling. A young Black man driving an expensive car was pulled over for speeding and charged with impaired driving. The court explained generally what racial profiling is and that it can be conscious and unconscious. It is not necessary to demonstrate that a police officer is overtly racist.

In R. v. Le, SCC, 2019 (Exhibit 9, Tab 26), the Supreme Court of Canada defined racial profiling as noted by the prosecutor. The court noted that there was reliable social evidence and authoritative studies and research demonstrating that people in minority groups are subjected to disproportionate levels of contact with the police.

In R. v. Dudhi, ONCA, 2019 (Exhibit 9, Tab 23), a Black man was arrested for a breach of recognizance. The arrest was found to be precipitous and unreasonable. The court reviewed the meaning of racial profiling and determined it had two components: attitudinal and causation. The attitudinal component is when officers rely on stereotypes to identify persons with a propensity to commit crimes or be more dangerous. The causation component requires that conscious or subconscious stereotypical thinking inform their decision-making in the moment. It was necessary to consider the surrounding circumstances to determine if illegitimate thinking contributed to suspect selection.

In R. v. Sitladeen, ONCA, 2021 (Exhibit 11), the Ontario Court of Appeal clarified the issue of racial profiling. The court noted,

“To summarize, the case law from Brown onwards recognizes that in cases where an officer had objective grounds to detain a person or stop a vehicle but was also subjectively motivated by racial stereotypes, the officer is unlikely to admit his bias. The matter becomes more complicated when the officer is unaware that he was influenced by race because of unconscious bias. The officer may not be consciously lying about his motivation, but that does not mean he did not unconsciously engage in racial profiling. It is the role of the trial judge in such cases to consider all of the circumstances that led to an accused’s detention and/or arrest and to determine whether they correspond to the phenomenon of racial

profiling, as understood in the social science literature, the reports of inquiries into race relations with the police, and the case law. The trial judge can then decide whether those corresponding circumstances form a basis to infer that the record is capable of supporting a finding that the stop was based on racial profiling contrary to the evidence of the officer. Ultimately, to reach a conclusion about racial profiling, the trial judge is not required to find a police officer who testifies that race played no role in the decision to detain or arrest was lying”.

No one has suggested that any kind of bias that informed Constable Foster’s decision making was conscious or that he is now lying. I can infer that the explanations do not make sense and I can infer that race had to have played a role.

When considering discreditable conduct, the cases of Girard v. Delaney, Board of Inquiry, 1995 and Mancini and Niagara Regional Police Service, OCCPS, 2004 (Exhibit 9, Tabs 8 & 12) were discussed. The test for discreditable conduct was identified. If a police officer engaged in discriminatory behaviour, it would constitute discreditable conduct as the public would be concerned and consider the reputation of the police service as damaged.

In Deviney, there is a racist remark by an officer. In O’Farrell and Metropolitan Toronto Police Force, OCCPS, (Exhibit 9, Tab 15), a racial insult was used. In Venables and York Regional Police Force, OCCPS, 2008 (Exhibit 10, Tab 40) a discriminatory remark was made by an officer. These cases demonstrate that the Commission is clear that discriminatory behaviour is discreditable conduct.

R. v. Campbell-Noel, ONSC, 2019 (Exhibit 9, Tab 22), involves an application in criminal court to excuse evidence on the basis it was seized as part of an arrest under the *HTA*. The applicant claimed it was a ruse to allow the police to criminally investigate them because they were Black. The court noted that, “a traffic stop cannot be used as a ruse for general criminal investigative work”. When considering indicia that racial profiling has occurred, the court noted,

“The manner in which an officer deals with the driver and/or passengers in a vehicle may provide some indicators from which one may infer that the detention of the occupants was not for a legitimate purpose. For example, in R. v. Smith...a vehicle stopped because the driver turns too quickly in front of a police officer leading that police officer to believe that he was

engaged in criminal activity. He was immediately detained, handcuffed, and then arrested for careless driving. The court found that the stop was racially motivated. Similarly, where officers use excessive force or respond to perceived danger with excessive force, this may lead to the inference that the stop was racially motivated...In this case, the conduct of A/S Robinson when he stopped the vehicle was consistent with it being a routine traffic stop and not an improper criminal investigation. A/S Robinson asked Mr. Campbell-Noel for his driver's licence and insurance. He told him he was being stopped for a sobriety check. A/S Robinson readily admitted that he did not ask Mr. Campbell-Noel any questions about drinking as he did not get that far, given the argument they were having about whether Mr. Campbell-Noel was required to identify himself. A/S Robinson did not arrest first and then ask questions. He asked questions related to his investigation into the sobriety of the driver. He did not ask unrelated questions, such as, is there anything in your possession that you should not have?"

In the case of Maynard v. Toronto Police Services Board, HRTO, 2012 (Exhibit 9, Tab 13), Mr. Maynard was driving a BMW. He was investigated in the driveway of his home. The exchange escalated and the officer pointed his firearm at Mr. Maynard. This was a traumatic event for him. The officer did not explain the purpose or nature of his investigation or why he stopped the individual. My Maynard responded in an angry manner and refused to engage. The tribunal stated,

"In my view, the focus by Officer Baker on Mr. Maynard was premature and cannot be fully explained by the nature of the call and the description he received of the suspect and the suspect vehicle. No one disputed the fact that the Malvern Town Centre area was regarded as a place with the potential for gun crimes. Considering the entire context, the most reasonable explanation for Officer Baker's decision to follow Mr. Maynard is that he was a black man, specifically a young black man, and specifically a young black man driving a black vehicle near the Malvern Town Centre and as a result, he was stereotyped as a person with some probability of being involved in a gun-related incident. The problem for Mr. Maynard is not that he was in the wrong place at the wrong time. One can easily empathize with both an officer and a victim in circumstances of mistaken identity where the officer has sufficient information to act upon. The problem is that Officer Baker cast his investigative net so wide that Mr. Maynard's race was the predominant factor that put him at risk of being investigated that day. I do not believe that if the suspect had been a Caucasian man in the same circumstances, with no other defining characteristics, particularly age, and with as little information available about the car and direction of travel, that Officer Baker would have chosen to investigate the first Caucasian man he saw driving the same car at the

same intersection. It is consistent with a finding of racial profiling that all black men or all black men of a certain age, driving alone in the area in a black car were possible suspects at the moment that Officer Baker decided to commence his investigation of Mr. Maynard”.

Constable Foster was looking for a red car with a Black person in it. When he noted Ms. Broomes was female, he believed she was involved. He cast his investigative net too wide. In *Maynard*, the court noted, “Officer Baker testified that he wanted to engage Mr. Maynard in conversation. However, his approach, even if I accept his testimony, was to ask Mr. Maynard, ‘Sir, where are you coming from’. Mr. Maynard’s interpretation of that approach as aggressive and confrontational was reasonable given the fact that he had been followed home by an officer who had then parked at the base of his driveway without giving any indication as to why he was being followed. Mr. Maynard’s response was to be immediately defensive and to refuse to answer Officer Baker’s questions”.

It was entirely reasonable for Ms. Broomes to respond the way she did because of the way she was approached. Constable Foster believed her vehicle was used in a weapons offence. Ms. Broomes just happened to be driving a red SUV and was trying to go home. Ms. Broomes belief that Constable Foster was aggressive or assertive was understandable from her perspective and she responded in kind.

In *Maynard*, the court noted,

“Officer Baker had no doubt found himself in a very difficult situation when Mr. Maynard reacted the way he did. I can understand why Officer Baker found Mr. Maynard’s conduct towards him troubling. Mr. Maynard claimed to be seeking a dialogue with the officer but escalated very quickly into profanity and defensive behaviour. However, the person responsible for taking control of this dialogue, de-escalating the growing tension, and ensuring a safe outcome was Officer Baker. The decision to commence an investigation of Mr. Maynard was made with little reliable information and it set in motion a course of events which could have had much more tragic consequences for either or both of them”.

Constable Foster followed Ms. Broomes car all the way home. When he discovered the driver of the car was Black, he approached her in a confrontational manner. Either Ms. Broomes or her car met the description of one involved in a gun incident and he demanded her identification. There was no dialogue or explanation of the nature of his investigation or her obligations. He needed to act urgently because he believed she was involved in a gun incident. She did not match the suspect description, there was no evidence that she dropped anyone off, he did not ask her real questions about her circumstances even though he had information at his disposal that he did not review.

The case is clear that it is difficult to establish racial profiling without direct evidence, so the bias must be inferred. Constable Foster testified that he formed reasonable and probable grounds to arrest the driver once he determined that the driver was Black. Without any further investigation or discussion, he felt that he had the grounds to arrest the individual, essentially because they were driving a red car and they were Black. Constable Foster was convinced that the driver was suspicious, and he acted hastily. At least part of the reason he was so suspicious of this person was that he discovered that the driver was Black. He never backed down from his position. He remained suspicious once he discovered Ms. Broomes was female and did not meet the suspect description. There was no evidence she dropped someone off. The fact that Ms. Broomes drove a red car gave Constable Foster a firmly held suspicion. At every stage of his interaction, there was overreaction. He arrested her without engaging in real dialogue. He had concerns for his safety, but these concerns were not justified. No matter who got out of the car, he would have detained them. To suggest that a White person would not have been treated differently does not make sense. Either he was acting hastily without any regard to whether the driver met the suspect description, which is inconsistent with his testimony and his police duties, or he did not want to admit that the race of the driver played a role in his decision-making. Constable Foster was acting on subconscious bias. The person he was looking for was a Black male driving a red SUV. He found a Black female and acted like she was a criminal. Constable Foster held a subconscious belief that Ms. Broomes being Black made her more likely to be connected to this crime, and it should be inferred that had Ms. Broomes been White, the situation would have

unfolded differently. It should be inferred that Constable Foster engaged in racial profiling and that constitutes discreditable conduct under the Code of Conduct.

Counsel for Ms. Broomes---Mr. Charney

Constable Foster's purpose when he stopped Ms. Broomes was to investigate the weapons offence. If this was an *HTA* stop for speeding, why did he not stop her right away, as was his usual practice. He never told Ms. Broomes or anyone else that she was speeding as he did not have time. This was not discussed at the time she was speeding, before/during/after the arrest, was not on the video or in radio communications. There was a reference to 'poor driving'.

There is a lack of credibility to suggest that the stop was now about speeding. He barely went over the speed limit to catch up to Ms. Broomes vehicle according to the objective GPS data. He gave Ms. Broomes four tickets, none of which was for speeding.

Mr. Charney suggested that Ms. Broomes hit the light at the bottom of the hill which explained why she slowed down, and her brake lights went on. The GPS data shows the officer slowed down to 11 km/hr which suggested he hit the light. There is nothing to support that Ms. Broomes was speeding. In his OIPRD interview, Constable Foster stated he would be guessing about her speed. His assertion that she was now travelling 70 km/hr shows that he has had a lot of time to consider this case. This was not an *HTA* stop. There were no grounds to demand identification under the *HTA*. This is an after-the-fact justification of an investigative detention without lawful authority.

Constable Foster's credibility was undermined by the GPS data and the fact that he could not explain why he slowed down after the U-turn. He stated he stopped at the second intersection where he ran the licence plate, but this is not confirmed by GPS data. He is a professional witness and knows the difference between guessing and estimating. His argument on this point undermined his credibility. He catered his evidence to bolster the suggestion that he had grounds to detain whoever got out of the car which is a workaround to suggest that the person's skin colour did not matter.

One way for an officer to avoid the suggestion that they acted in a discriminatory way is to suggest that they did not know the skin colour when he pulled the person over. Constable Foster stated he did not know the skin colour, but it did not matter as he was going to detain them anyway. This is not proper police conduct. He used the Use of Force model 'plan, assess, act' which means you see what is in front of you, take it in and act accordingly. When confronted with the fact that Ms. Broomes was a woman, he took the position that it did not matter. It was his way to avoid dealing with the skin colour of the person he observed.

His evidence about the licence plate search undermined his credibility. He ran the plate at the light, followed Ms. Broomes for minutes but could not move the cursor. Considering he conducted the search suggests that the results were important, given the priority of the call and the weapon involved. He would certainly want to know who was in the vehicle and to suggest otherwise does not make sense.

The fact that he eventually did receive this information but ignored it and does not want to admit that he knew the registered owner was a woman named Natasha Broomes undermined his alternative suggestion that it didn't matter who got out of the vehicle, he was going to detain them. If he knew a woman was driving, it would undermine his grounds/suspicion for detention. He stated it was a bad decision not advising the dispatcher of the circumstances, but he told the OIPRD investigator that it was confidence about his ability to handle himself and he wanted to investigate further. If he wanted to investigate further, he was not confident about who he was dealing with or that he had the right person. This was inconsistent and contrary to his suggestion that he was going to detain whoever got out of the vehicle. The statement about confidence is to give the appearance that he was confident in his grounds to detain whoever was in the vehicle and is an inconsistent prior statement.

Constable Foster could have observed the driver when he stopped at the second intersection or when she reversed into her driveway. He could have read the information in the query, and he could have had this information and is not being up front about it as it undermines his suggestion that it did not matter who got out of the vehicle and he did not know who was in the vehicle.

In fairness, it appears his training is inadequate and not all the weight of this event must be put on his shoulders. He never received anti-racism training prior to this incident.

It is rare that incidents of racial profiling are so obvious that they manifest as racial slurs, are recorded on video, or are documented in police records. Adjudicators must make inferences and read between the lines. One of the most compelling facts was that Constable Foster continued his belief that Ms. Broomes was involved in the event even as more evidence was available that did not support that conclusion including the suspect information/gender and vehicle description. To ask another officer if they were sure that a female was not involved points to the mindset of the officer and that he was intransigent and not assessing the situation or changing his views as things progressed. He relied on the fact that the suspect was Black with dreads, and Ms. Broomes was Black with dreads. He did not rely on contrary evidence and points to conscious or unconscious bias on his part.

Constable Foster told Ms. Broomes that she was to blame and gave her four tickets to reinforce that she was responsible. If she had done things differently, this would not have happened. He gave her the tickets when she was handcuffed and exercised her right to remain silent, which he took as refusal, and points to malice. It could be attributed to racial profiling or that he was upset and realized he stepped out of line.

Constable Foster grabbed Ms. Broomes and arrested her right away. He did not tell her to stop, she was being detained and could not go anywhere and he may have to arrest her. He could have held her by her arms, blocked her path, walked with her, and articulated that she was required to identify under the *HTA*. Ms. Broomes had no idea she was being investigated for speeding or any *HTA* offence. She did not know or understand her obligation to provide identification. From her point of view, she was being accosted by a police officer in front of her home and told she was involved in a gun offence. The way she responded made sense, thinking that it was ridiculous and walking away. If Ms. Broomes started the video, then stopped it, why would she tell us something different and why would she stop the video. This supports her point that it was made without her knowing that she had done so.

Defence counsel—Mr. Jeffries

Jacobs stands for the proposition of the clear and convincing evidence standard in police discipline proceedings. It is more onerous than the civil balance of probabilities, but it is not a 50-percent plus one standard—balance of probabilities standard. This standard is confirmed in *Johnson* as outlined by the prosecutor.

The Tribunal is obliged to acquit Constable Foster subject to acceptance of his evidence on the material points. The Tribunal is not able to convict him unless the charges have been laid out on clear and convincing evidence. It is possible to not accept Constable Foster's evidence, yet clear and convincing evidence has not been established.

In *O'Reilly*, there are various factors listed that hearing officer's ought to consider when making credibility assessment. In *Talha*, the Board of Inquiry found the complainant's memory was better as this was so offensive that it stuck out in their mind where it was nothing unusual for the officer. This case is not applicable. Constable Foster testified this was another traffic stop he was involved in, and he had extensive time to think about it. The Tribunal has acknowledged that this is significant to him. Constable Foster's recollection is good as the outcome of the case matters to him.

Constable Foster's evidence was challenged on very difficult operational decisions, on mistakes and things he might have done differently. Constable Foster's evidence was given honestly, in a forthright manner, his answers were direct, and he acknowledged things he could have done differently. There is nothing from this incident where Constable Foster could be characterized as evasive.

Constable Foster's evidence was internally consistent. He was dispatched to an offensive weapon call on Elgin St. N. which is corroborated by the GPS. He had a supportive role which included locating the suspect vehicle. Constable Foster acknowledged that from the moment he was dispatched, he was aware that the individual from the weapons incident was a Black male. His ultimate grounds to pursue and stop Ms. Broomes' vehicle turns on his observations about the vehicle itself. Constable Foster's legal justification stems from his observations of the vehicle, not the occupant. He believed that the vehicle he observed was the suspect vehicle.

The fact that Ms. Broomes is a Black person had no bearing on Constable Foster's decision-making or his actions. The objective GPS record showed Constable Foster travelled into Cambridge on Concession St., made an abrupt U-turn around Harris St. Constable Foster testified that he observed Ms. Broomes' vehicle further east, past the Ainslie St. intersection, at/around Harris St. His evidence is entirely consistent with the GPS data where he conducted a U-turn in/around this location.

Constable Foster testified he observed a vehicle headed in the opposite direction and the speed of approx. 70 km/hr caught his attention. He made a guess/estimate. He observed the vehicle 'dip' which he equated to abrupt braking. It was a red SUV, and together with the direction of travel and timing, it was consistent with the vehicle leaving Elgin St. This was the only information Constable Foster had at this point about the vehicle. He formed reasonable grounds to believe, at that moment, that this was the suspect vehicle. At this point, Constable Foster had not observed the driver. Ms. Broomes did not see the police vehicle or Constable Foster until she arrived home. The Tribunal is left with Constable Foster's evidence alone. Witnesses are not expected to be perfect in their recollection. Constable Foster's observations of the subject vehicle were complete, internally consistent, and reliable.

At Water/Concession St., Constable Foster positioned himself at a 45-degree angle to Ms. Broomes' vehicle and confirmed the vehicle was red which substantiated this was the vehicle that left the weapons occurrence. He did not observe the occupant. To say that Constable Foster pulled up beside her vehicle is not supported by Ms. Broomes' evidence that she first noticed the police vehicle in front of her house.

Constable Foster followed Ms. Broomes' vehicle for two blocks and did not have the opportunity to review the MTO search results or make a traffic stop. He was challenged on these failures and he acknowledged that, in hindsight, he might have done so. Constable Foster made operational decisions informed by the circumstances as they unfolded. He believed the vehicle he was following was involved in the weapons call. His reasonable belief was based on the direction of travel, the timing of the encounter and the vehicle description.

As he pulled up to Ms. Broomes' residence, Constable Foster made the operational decision to identify the driver rather than take the chance to look at the MTO search results. He deployed his flashlight and, for the first time, observed an individual with Black skin and dreadlocks. His belief that he followed the vehicle from the weapons call caused him to reassess the situation. He formed reasonable and probable grounds to arrest this individual for the weapons call. Before he was able to do any of the things suggested in cross-examination, Ms. Broomes exited her vehicle and was headed into her home. Constable Foster was concerned about the loss of investigative opportunity if she entered her home, so he exited his vehicle.

When he approached Ms. Broomes, it was the first time he observed that she was a woman. He reassessed the situation, and realized he no longer had grounds to believe that she was the suspect identified as Joe, a Black man with dreadlocks. He held a strong belief that the vehicle was involved in the weapons call. His suspicion at this point had nothing to do with the driver. Ms. Broomes described Constable Foster as aggressive and that she was initially compliant. She testified that Constable Foster advised her she matched the suspect involved in the weapons call which she found 'asinine', laughed, and turned to go home. She had no idea what information Constable Foster had about the suspect or what caused him to approach her. When asked why she was scared, she advised it was watching Black people get killed by police.

Ms. Broomes decided she was going to be a victim before Constable Foster had the opportunity to explain the nature/scope of his investigation. Constable Foster testified he approached Ms. Broomes to ask if she was okay, to check on her wellbeing and gauge her reaction. He approached Ms. Broomes as someone he believed was involved in an ongoing and serious call with a gun, in a professional manner.

Constable Foster did not have the time in a 10-15 second span to do all the things that was suggested. Constable Foster, by virtue of Ms. Broomes conduct, had only 10-15 seconds to ask the questions he felt were pertinent. He advised Ms. Broomes her vehicle matched the description of a vehicle involved the weapons call and was consistent with Constable Foster's priority being the weapons call. He was investigating the weapons occurrence based on his suspicion the vehicle was involved but was also

conducting an *HTA* investigation. The fact that his questions started with the offensive weapons call makes sense. He asked if there was anyone else in the vehicle as an officer safety concern, trying to ascertain if the suspect Joe might be in the car. His third question was: did you drop anybody off. All these questions relate to his first priority. He then asked for her driver's licence and Ms. Broomes did not have it. Constable Foster asked his final question to provide other identification to which she responded 'no' and turned to go into the home. The front door was approximately 8-10 feet away.

Constable Foster testified it was necessary to arrest Ms. Broomes to preserve his *HTA* investigation and to continue the weapons call investigation. Both Joe and the firearm were outstanding. To prevent Ms. Broomes from escaping, he placed his hand on her arm and advised she was under arrest for failure to identify. Ms. Broomes stated she was 'fighting for my life'. She agreed that Constable Foster did not threaten to shoot her or deploy his use of force options. He first pinned her to the vehicle and took her to the ground to gain control of her arms. His efforts were unsuccessful until backup arrived.

Ms. Broomes testified that Constable Foster told her to 'shut up' several times and this was all her fault which was inconsistent with the video where Constable Foster was professional, calm and clear. He told Ms. Broomes several times to stop resisting, she was not going anywhere, she was under arrest and the reason for the arrest. He was not aggressive, did not strike Ms. Broomes or use his use of force options. Ms. Broomes' description of Constable Foster is inconsistent with the video. Constables Hanby and Worswick and Sergeant Green described Constable Foster's demeanour as calm and professional. They did not recall Ms. Broomes stating she did not want to be placed in Constable Foster's car. Ms. Broomes went to great lengths to create a narrative to buttress her civil suit.

Count One

Constable Foster had grounds to arrest Ms. Broomes for failure to identify under the *HTA*, or in the alternative, to detain Ms. Broomes pursuant to the investigation detention. The arrest and detention were reasonably necessary.

In *Wong*, the Commission noted there must be an unlawful or unnecessary arrest and the officer must not have good or sufficient cause. The Commission referred to *Storrey*, where the proposition that an arrest is lawful where the arresting officer subjectively has reasonable and probable grounds upon which to base the arrest. These grounds must, in addition, be justifiable from an objective viewpoint. A reasonable person placed in a position of the officer must be able to conclude there were reasonable and probable grounds for the arrest. In *Wong*, the Commission noted, “the lack of objective grounds for the arrest is relevant but is not necessarily determinative. It requires an analysis of other factors including the officer’s subjective belief”. Acting in good faith does not necessarily satisfy the requirements of good and sufficient cause. It is possible that an arrest is unlawful, yet the officer had good and sufficient cause to make the arrest where, among other things, he was acting in good faith which does not breach the Code of Conduct.

In *Wowchuk*, this statement of law is also confirmed by *Correa*. In *Correa*, the court considered that the Commission erred in failing to articulate what constituted good and sufficient cause. The officer argued, despite the unlawfulness of the arrest, he was acting in good faith within a potentially dangerous and dynamic situation and had good and sufficient cause to arrest. The court upheld the hearing officer’s factual finding that the officer was not acting in good faith and there was no good and sufficient cause to arrest. It is implicit that the court confirmed where an officer acts in good faith within a potentially dangerous and dynamic situation, there may be good and sufficient cause for the arrest, notwithstanding the arrest was either unlawful or unnecessary.

Constable Foster had reasonable and probable grounds to arrest Ms. Broomes under the *HTA*. In *Plummer*, the court confirmed that the proper interpretation of section 33(3) requires that, “the officer must make a specific request for identification other than a driver’s licence”. Until the request for alternative identification is made and the person has refused, there is no contravention. In *Smith*, the court interpreted the *Plummer* case as follows, “As I read *Plummer*, a person must be given a reasonable opportunity to provide his or her driver’s licence or to provide alternative evidence of identification

before police are justified in exercising their powers of arrest under the *Highway Traffic Act*.

In *Smith*, Justice Wilson found that the officers were holding the accused person's arms or, perhaps, he was already in handcuffs by the time he was asked or invited to provide alternate identification. Justice Wilson found that was not a case where the officers had given the accused person a reasonable opportunity to identify himself or provide alternate identification. This case is distinguishable based on the officer's evidence that he made the demand for the driver's licence and invited Ms. Broomes to provide alternate identification before she turned to leave. Unlike *Smith*, Ms. Broomes was invited to identify herself, satisfying the *Plummer* requirements, before Constable Foster became physical.

In *Waechter*, Justice Hearn interpreted *Plummer* in the same manner as *Smith* and again identified the requirement that the officer provide a reasonable opportunity to identify themselves. The facts in *Waechter* are fundamentally different from Foster. In *Waechter*, the officer went to great lengths to identify the individual. Constable Foster had 10-15 seconds. Appropriate inquiry is an obligation informed by reasonableness. Constable Foster did not have the time to conduct any further inquiry given the circumstances. Ms. Broomes actions constituted a refusal to identify herself. To prevent Ms. Broomes from entering her home, he effected a lawful arrest under s33 of the *HTA*. It was necessary to conduct the arrest at this point as she would have entered her home. The *HTA* does not afford the officer the authority to enter a private residence to continue an investigation.

Constable Foster was criticized for not advising Ms. Broomes that he stopped her for speeding, that he was conducting an *HTA* investigation or that she had an obligation to identify herself under the *HTA*. Constable Foster did not have time. His priority was the weapons investigation, to identify Ms. Broomes and see if there were other individuals in the vehicle. Ms. Broomes conduct and effort to flee did not afford Constable Foster any opportunity to advise her of the parallel *HTA* investigation or her obligation to identify.

In *Plummer*, the court required the officer to make a specific request for identification other than a driver's licence. There is no obligation, before affecting a lawful arrest, to go through a litany of cautions indicating that in the absence of compliance, an arrest is possible. These are best practices to avoid an unnecessary arrest, but Constable Foster did not have the benefit of time. Constable Foster was forced to act by Ms. Broomes decision to end the conversation, avoid her obligation to identify herself and go into her home. The *Plummer* case obliges Constable Foster to ask for a driver's licence and if unable, to provide alternative identification. Constable Foster did that. Constable Foster also testified that he had grounds to detain Ms. Broomes pursuant to the weapons call.

The leading case on investigation detention is R. v. Mann, SCC, 2004, (Exhibit 12, Tab 4) which sets out the established reasonable suspicion standard that is the subject of a lawful investigative detention.

In R. v. Ollson, ONCJ, 2018 (Exhibit 12, Tab 5), a police officer responded to a call for a domestic incident. A physical altercation ensued, and the officer was charged criminally. At trial, he was acquitted as the judge found the officer had reasonable grounds to arrest the complainant based on the information provided by the dispatcher and his subsequent investigation, including the complainant's conduct.

In *Ollson*, the court noted the requirements for the objective component, including the officers training and ability to draw inferences based on his experience when deciding if a constellation of factors give rise to a reasonable suspicion. It is not a scientific exercise, rather a common-sense approach through an experienced/reasonable person.

We should not hold Constable Foster to a standard of perfection or criticize him for things that he might have done differently. He did not advise Ms. Broomes at the first instance that he was conducting an *HTA* stop as the weapons investigation was his priority. It would be an error for this Tribunal to confine itself to a scientific analysis of what could have been done differently. The Tribunal is obliged to consider whether Constable Foster, with the information available to him, acted reasonably and, based on the information available to him, he had a reasonable suspicion to detain Ms. Broomes.

Constable Foster was looking for a vehicle that may/may not contain a firearm, which travelled from a direction that was consistent with the information he had. The vehicle could have gone somewhere else, but we are looking at possibilities. Constable Foster had grounds to detain Ms. Broomes as her vehicle matched the description of the vehicle leaving the weapons call. The direction of travel and timing were consistent with the information available to him. The speed and abrupt braking gave Constable Foster the belief that Ms. Broomes vehicle was involved in the weapons call.

Sergeant Green had no issue with Constable Foster's decision to detain Ms. Broomes. He assumed responsibility for Ms. Broomes' detention upon arrival. Sergeant Green determined it was reasonably justifiable and necessary to continue to detain Ms. Broomes pursuant to the ongoing weapons call until other officers were able to provide a more detailed description of the vehicle and ultimately locate the subject.

Constable Foster had the grounds to lawfully arrest Ms. Broomes for failing to identify under the *HTA* and it was necessary to make that arrest to prevent Ms. Broomes from escaping into her residence. Should the Tribunal find there were no grounds for arrest under the *HTA*, Constable Foster had grounds to detain and did detain Ms. Broomes pursuant to the weapons call. Should the Tribunal find that Constable Foster did not lawfully or necessarily arrest or detain Ms. Broomes, it is still a necessary element of the charge to find that he did not have good or sufficient cause to make the arrest. Constable Foster acted in good faith in a challenging and dynamic situation.

Count Two

It is uncontroverted that Constable Foster pinned Ms. Broomes to her vehicle then took her to the ground to gain control and apply the handcuffs. Constable Foster testified that he used no more force than was necessary to gain control of Ms. Broomes' arms. Ms. Broomes was resisting Constable Foster's efforts and was able, while struggling, to find her phone, activate the screen and start recording.

Constable Foster did not deploy any strikes or use of force options. In *Chartier and Greaves*, Justice Power noted, "A police officer must be engaged in an activity that he or she is required or authorized by law to do. The officer must act on reasonable

grounds. And the officer must only use as much force as is necessary". He further stated that the protection afforded under section 25 is not absolute. An officer must act on reasonable grounds and must not use unnecessary force.

In *Ollson*, the court recognized the chaotic circumstances, challenging, and confined environment, unknown threats to the officers, and confined space. An officer is not required to measure his exact force used against a standard of perfection.

In *Holmes*, the court warned against judging against a standard of perfection or force with exactitude. The court agreed with a degree of latitude in difficult, dangerous, and demanding situation. They agreed that, just as it is wrong to provide an after-the-fact justification of police conduct, it is wrong to ignore the situations wherein officers must make these decisions.

Constable Foster testified that he needed to gain control of Ms. Broomes for officer safety reasons. Ms. Broomes actively resisted and was "fighting for her life". Constable Foster's conduct involved appropriate and necessary escalation. He tried to gain control of Ms. Broomes' hands while standing, used the vehicle as leverage and finally took Ms. Broomes to the ground. He could not have used less force under the circumstances. Ms. Broomes was in pain, and it was suggested that Constable Foster should have taken control of her left arm. Constable Foster testified it was not possible to let go of her right arm with the hope of gaining her left for fear of losing both arms. The force used by Constable Foster during his interaction with Ms. Broomes was reasonable, necessary, proportionate and is justified under section 25(1) of the *Criminal Code*.

Count Three

There are few, if any, police discipline decisions which deal with racial profiling. The prosecution referenced cases from other forums that involve different standards of proof. As noted in *Brown*, racial profiling is based on inference from circumstantial evidence. The same comment of 'inference' is noted up in *Sittadeen*. The trial judge noted that an inference must be made from the record whether the circumstances support a finding of racial profiling. The concept of proof by inference raises this challenging evidentiary hurdle unique to the police discipline world, where clear and

convincing evidence is required, and except in police discipline, every other allegation of racial profiling is decided on a balance of probabilities. The *Charter* cases have the criminal standard of proof beyond a reasonable doubt, but the applicant must make their racial profiling case on a balance of probabilities. The cases of *Sitladeen* and *Campbell-Noel* involve racial profiling as the subject of the judicial decision made on the balance of probabilities. In *Maynard*, the burden of proof is on a balance of probabilities. It is possible to have proof on a balance of probabilities where the totality of the circumstances supports an inference of racial profiling.

The comments in *Brown* about drawing an inference must be applied differently in a tribunal that requires clear and convincing evidence. In *Johnson*, the Commission provided a definition of clear and convincing evidence. It is not appropriate to convict an officer on the standard of clear and convincing evidence based on inference alone. An inference of racial profiling does not rise to the standard of weighty, cogent, or reliable evidence.

Constable Foster stopped the vehicle based on the colour of the vehicle and direction of travel only. Ms. Broomes' race was unknown to him until he exited his vehicle and engaged. His intention was to investigate the driver, irrespective of the race or gender. Ms. Broomes cannot contradict Constable Foster on this point as she did not see the officer or make any observations about what he may have seen/done prior to his arrival at her home. It was suggested that once Constable Foster observed the driver to be a Black individual with dreadlocks and having reasonable grounds to affect an arrest, he must have lied about his decision to stop the vehicle based on the vehicle description alone. This is not supported by evidence.

In Pieters and Toronto Police Service, OCPC, 2003 (Exhibit 12, Tab 10), the Commission considered an appeal by Mr. Pieters who alleged he was unlawfully detained by the police when executing a search warrant on a neighbouring apartment. The Commission upheld the findings of the hearing officer. Not every police interaction with a person of colour is racially motivated. Officers have a legal obligation to investigate criminality and that duty extends to investigating *HTA* matters. Constable Foster could not let Ms. Broomes walk away and the officers in *Pieters* could not ignore

potentially dangerous conduct to fellow officers. Constable Foster believed Ms. Broomes had information about a subject/firearm.

In Pfeifer and Hamilton Police Service, 2018, (Exhibit 12, Tab 11), it was alleged that an officer detained a person when he conducted a brief wellness check. The charges were dismissed. The hearing officer noted, "Police officers seldom have the luxury of relaxed contemplation when determining whether a person is in need of assistance or there are other motives for their behaviour without further investigation on their behalf. The officers' conduct must be analyzed as a whole, in context, having regard to all sources defining acceptable conduct. Therefore, some element of common sense is required when considering the conduct of police officers". Constable Foster should be afforded the same measure of common sense.

The Human Rights Tribunal, in *Maynard*, found that the officer discriminated against the complainant based on race, as the principal basis for the officer's decision to follow the complainant was that he was a Black man. Constable Foster's decision to stop Ms. Broomes' vehicle was based on his belief that her vehicle matched the description from the weapons call. He was unaware of her race until she exited her vehicle. Constable Foster stated he would have detained a White woman in the same circumstances.

The *Campbell-Noel* case speaks to articulable cause. The Justice accepted the officer's evidence that he did not make observations of the occupant of the vehicle until after he initiated the traffic stop and outlined the reasons why he felt the stop was justifiable. Articulable cause to make an *HTA* stop does not require grounds to lay an *HTA* charge. Articulable cause refers to the reason behind the exercise of the statutory authority to stop and detain. Constable Foster did not lay a speeding charge, in good faith, as he did not have radar and his best guess is that she was speeding. This does not take away from the fact that the *HTA* concern constitutes articulable cause to affect the stop.

Prosecution reply—Ms. Barrow (p 205-216)

The case of *Talha* demonstrated that where an incident has been somewhat traumatic to the complainant or witness, they might have a more heightened memory. It was noted that Constable Foster has also had a long time to think about these issues and it

was significant to him. Every case is important to the subject officers as they are conscientious and care about their jobs.

One theme throughout defence counsel's submissions was the legal justification that Constable Foster had to behave the way he did was limited only to the car. This position is inconsistent with the evidence. If this were the case, when he initially saw the car, he should have pulled it over. He waited several minutes, pulled up outside of her house, waited to observe what Ms. Broomes looked like then got out of the car. He was not planning to detain or arrest the car; rather, he was planning to detain or arrest the person in the car. It is unreasonable to suggest that what the person looked like and if they fit the description of who they were looking for was irrelevant. Constable Foster did not approach the person until he saw what the person looked like and confirmed the person was Black.

We have evidence of speeding from Constable Foster and from Ms. Broomes who stated she was not speeding. Constable Foster's evidence is inconsistent with Ms. Broomes' evidence and with the GPS data.

With respect to the statement that Ms. Broomes decided she was going to be a victim before Constable Foster had the opportunity to explain herself ignores the real justifications for Ms. Broomes to feel the way she did in the circumstances. It ignores the fact that Ms. Broomes was approached and treated as a suspect. She decided that Constable Foster believed she was a suspect with a gun, and she reacted as such.

Constable Foster is a highly trained police officer with 7-8 years of experience. We are submitting that he did not comply with his obligations as a police officer. The idea that he had 10-15 seconds is a situation of his own making. He came at Ms. Broomes as a suspect, and he did not say any of the things he could have said. Ms. Broomes testified to the reasons why she felt threatened in the moment, and many had to do with the way Constable Foster treated her. It is unreasonable to say that Ms. Broomes should not be fearful of Constable Foster as he had not given her any reason to, and that Constable Foster had reason to be fearful of Ms. Broomes even though she did not give him reason.

The *Plummer* case speaks to the power of arrest under s33 of the *HTA*. The powers of arrest and its limitations go beyond s33. There had to be reasonable and probable grounds. In relation to the *PSA* charge, it can be lawful but not necessary. To suggest that it is not fair for us to expect an officer to say the right things when arresting someone is not consistent with the law and with Constable Foster's evidence. Constable Foster agreed that he had an obligation to notify a person they are being detained or stopped pursuant to the *HTA*.

The law relating to investigative detention is accurate, but not relevant. Constable Foster has not been charged with improperly detaining Ms. Broomes. He has been charged with unnecessary or unlawful arrest. Either the arrest was unlawful or unnecessary or it was not. One cannot say it was unlawful and unnecessary, but in the alternative, I was detaining Ms. Broomes. Constable Foster may have detained Ms. Broomes, but he also arrested her, applied handcuffs, cautioned, and released her from investigative detention several minutes before she was released from the *HTA* arrest.

Sgt. Green had no direct evidence of the reasons or justifications for Ms. Broomes original detention. He was taking Constable Foster's word that it was justified. If I determine that it was not justified, then Sergeant Green's evidence is not relevant. Constable Foster acknowledged that it was his responsibility to ensure that he had the lawful grounds to detain, grounds to arrest, to continually assess the situation and release Ms. Broomes when he no longer had those lawful grounds.

In *Ollson*, we heard about the force being proportionate to the threat. What threat did Ms. Broomes posed to Constable Foster? It is not appropriate to suggest that I cannot draw inferences from evidence or rely on circumstantial evidence borne from other standards of proof; otherwise, it would be impossible to prove racial profiling unless you had overt racism. Inferences can be drawn, and circumstantial evidence relied on as long as I am convinced pursuant to the appropriate standard that the evidence is sufficient to substantiate the charge. The cases of *Pieters* and *Pfeifer* are distinguishable.

Public Complainant reply---Mr. Charney 218-224

Ms. Broomes did not decide to be followed home, investigated for a crime she did not commit, grabbed, put to the ground, injured, and have the neighbours call the police as they believed someone was being attacked. Ms. Broomes did not decide to be a victim. This was not a situation where a police officer would panic. It is no surprise that Ms. Broomes, having never been arrested and no dealings with the police, and in the context of police violence, found his approach to be aggressive.

The case law suggests there must be reasonable opportunity to identify yourself. If you approach a person in a vehicle, it would be obvious to a person they had to identify themselves. A person not in their vehicle would not understand that requirement. It is not reasonable opportunity if the situation was not explained to you. If you do not suggest to a person the request for identification related to their driving, there was no reasonable opportunity to identify yourself under the *HTA*.

The reasonable suspicion standard put forward in the cases of *Ollson* and *Mann* suggests we are not scientific in our examination. When Constable Foster observed the driver of the vehicle to be a woman, it is not a scientific analysis, it is common sense that she was not the suspect so there was no reasonable suspicion. This cannot be just about the red SUV as they are common vehicles.

There was no detention of the vehicle, just Ms. Broomes. The evidence of Sgt. Green is not helpful or relevant. He noted, "I'm assuming that it was possible that the vehicle was not involved in the incident". We have heard citations from case law that it cannot be a hunch or an assumption. Sgt. Green talked about the investigative detention of the vehicle, so he did not turn his mind to the detention of Ms. Broomes and how he thought through things did not meet the threshold of reasonable suspicion.

ANALYSIS AND DECISION

The submissions by all counsel were in-depth, considerate, and compelling. I received 58 cases and statues, as well as audio and video recordings, all of which I have reviewed, in addition to listening to the submissions from each party. I am aware that this is a case with significant public interest.

A police officer is generally in a position where he/she has a significant amount of information about a call that is unfolding. This may include a suspect and/or vehicle description, direction of travel, and weapons involved. A community member does not have this information and is often at a disadvantage as to why they are being approached or questioned and sees the event from a different perspective. These were the conditions under which Constable Foster and Ms. Broomes met on July 29, 2017.

Credibility

There is no evidence, and I do not believe, that Ms. Broomes decided she was going to be a victim during her interaction with Constable Foster. She was a member of the community who was going about her business when she was stopped, questioned, and arrested by the police. She was not involved in criminal behaviour. She did not have a gun and I accept that her reaction was completely justified given the 'shock' of her experience. She gave her evidence in a straightforward manner and in short, her evidence was believable. When applying the O'Halloran test, her version of events was internally consistent and reliable. The reliability of her evidence was subjected to repeated testing through cross-examination, using subjective and objective data and evidence. This is not a finding based on demeanour, or empathy, but on the ability of her evidence to stand alone. I found Ms. Broomes was a credible witness.

Constable Foster's evidence had some consistency issues. I found areas of inconsistency particularly with the speeding allegation, prior inconsistent statements in his OIPRD interview, and between Constable Foster's testimony and Sgt. Green's knowledge of the driving issues. There were inconsistencies with his testimony compared to the objective reality of the GPS data.

Constable Foster's evidence was tested through cross-examination by the parties, and in conjunction with other evidence and it has left me with some concerns that I will articulate further in my decision. I believe a reasonable person would join me in these concerns. This is not to say that I found Constable Foster was not an honest witness. There were many areas that were consistent between his testimony and earlier interviews; however, he was the subject of a *very* vigorous cross-examination which led me to identify consistency issues.

This is not the case of one party appearing to tell the truth over the other, as noted in *Buckle*. This was about having the opportunity to listen to the evidence and assess its weight and credibility using subjective and objective data. As noted in *Pacitto*, the testimony of each party was not perfect, but this was not a test of memorization. Ms. Broomes was consistent in describing the information she had, and had not been given by Constable Foster, his efforts to physically control her and her own feelings of being powerless given what she experienced in the moment. She was honest about not seeing a police vehicle on the way home, accurately described her physical takedown and police control techniques and statements she did not recall, such as being asked whether there was anyone else in the vehicle. Comments about 'shut up and it's your fault' were not reflected on the video which was an area of concern if this statement was made so often. Ms. Broomes stated she offered up her left arm due to the recent surgery which did not make sense to do so if she was fighting for her life. She was not perfect in her testimony, but I found her evidence to be consistent with the likelihood of what occurred on July 29, 2017.

This was a life-changing event for Ms. Broomes, but it has also impacted the life and career of Constable Foster. Ms. Broomes' memory of the events might be heightened due to the traumatic impact on her life, as noted in *Talha*, but I also believe that this has had an impact on Constable Foster's life and career as it has been a long road to get to this point. The outcome of this case matters to both parties. To his credit, Constable Foster did reflect on many areas where he would have done things differently. For instance, he would have called for backup or notified the dispatcher or checked the CPIC return earlier and described these as areas impacting officer safety. It was noted

that Ms. Broomes had a separate interest in the outcome of this case. Any such interest is not a concern of this tribunal.

In considering the factors as set out in *O'Reilly*, I find that both witnesses observed the same matters as they were unfolding. I did not witness any partisanship to the side that called each party other than a comfort level that would normally be expected. The appearance and demeanour of witnesses did not give me any concern. Both were professional, and calm. I also understand that this was a very stressful four days after a lengthy four-year wait and did not find anything concerning in this area. This is not a case of who made a better appearance of sincerity as noted in *Krug*.

As highlighted in *Chartier v. Greaves*, I found that Ms. Broomes gave her evidence in accordance with her best recollection of what happened in a forthright and honest manner. Any discrepancies were attributable to the intensity of what happened on that morning.

The fact that I have some concerns around Constable Foster's decision-making and actions, at times, does not deter from the fact that I found his testimony to be straightforward. This is not a matter of a preference of one witness's testimony over the other but more based on common sense and adherence to the law and whether their testimony helped clarify what occurred on July 29, 2017.

Standard of Proof

All parties agreed that the standard of proof in a police tribunal is 'clear and convincing evidence' as clarified in *Jacobs*. Clear and convincing evidence was defined in *Johnson* as evidence that is "weighty, cogent, reliable evidence upon which the trier of fact, acting with care and caution can come to a reasonable conclusion that the officer is guilty of misconduct". This is how the evidence was weighed and assessed in this hearing.

The parties referred to several cases from the criminal, civil or human rights forums, each of which have different standards of proof. In some cases, the trial judge or trier of fact was asked to infer from the record for findings of racial profiling or to make a finding

based on a balance of probabilities. As noted by Mr. Jeffries, the concept of proof by inference raises an evidentiary hurdle unique to police disciplinary hearings where clear and convincing evidence is required. I am in the unique position to examine evidence, to draw inferences and to rely on circumstantial evidence as long as I am convinced that the evidence supports the standard of proof of 'clear and convincing evidence' to substantiate (or not) the count as read.

Count #1 Unlawful or Unnecessary Arrest

There is no doubt that Constable Foster was on his way to a serious call and given that a gun was at the very least mentioned or assumed, he would have been on heightened alert. He notified the dispatcher and other units that he was driving on Main Street towards Dundas looking for the suspect vehicle, most likely a speeder.

At or near the same time, Ms. Broomes was on her way home when she crossed paths with Constable Foster. Constable Foster's attention was drawn to her vehicle at approximately 05:24:47. He noticed her red/burgundy SUV travelling westbound from the direction of the weapons call at approximately 70 km/hr in a 50 km/hr zone. The vehicle braked suddenly as it passed him. Given the speed, sudden braking, slowing down, the fact it was a red SUV and the only one he had seen, time of day with light traffic, and the time delay, he believed this was the suspect vehicle.

What is important is what was known, or ought to have been known, to Constable Foster at that time. The dispatcher had voiced over the radio, which Constable Foster would have received, and she entered the information into the CAD system, which Constable Foster had access to, that the suspect vehicle was a red SUV, that left two minutes prior heading down Elgin towards Dundas. The suspect was believed to be a Black male with dreadlocks named Joe.

I have difficulties accepting Constable Foster's testimony about the speed of Ms. Broomes' vehicle, which formed his grounds for the *HTA* arrest. He testified that Ms. Broomes travelled approximately 70 km/hr. This statement was inconsistent with his OIPRD interview, wherein he stated, "I believe that the vehicle was travelling in excess of 50 km an hour. I'd be guessing; I didn't have radar out or mobile radar to pinpoint

exactly the speed, uum, but it was a higher speed than the posted speed limit, in my, in my opinion” (Exhibit 7, Tab 6). He testified he used his experience and observations to estimate her speed at 70 km/hr., but the first time we heard such an exact speed was during his testimony in this Tribunal. Mr. Jeffries highlighted the ‘approximate’ as a qualifier. I do not agree. Going from ‘in excess of 50 km/hr., to higher than the posted speed limit and based on my experience’ are not qualifiers. These are patently different statements made by Constable Foster. If he had an approximate speed, why was it articulated for this first time in this Tribunal? In his OIPRD interview, he stated that he told Ms. Broomes she was speeding, but did not provide an approximate speed. Constable Foster did not give Ms. Broomes a ticket for speeding as there was no reasonable prospect of conviction. He did not tell Ms. Broomes that he observed her speeding. Sgt. Green had a notation of ‘poor driving’. Constable Foster testified that he would not charge Ms. Broomes for speeding, in good faith, and I assert that he could not take this scenario to court and successfully defend it. Constable Foster stated in cross-examination that he was looking for a red SUV that was speeding. He also testified that he believed this was the suspect vehicle.

His testimony of 70 km/hr does not correlate with the objective GPS data. From the time he conducted his U-turn at Harris Street, Constable Foster barely travelled above the speed limit. If he were following Ms. Broomes, who testified that she did not see a police vehicle prior to arriving home, then why would she have the sudden need to slow to within, or close to, the posted speed limit? Constable Foster also stated he stopped at the lights at Water and Concession Streets, angled himself facing Ms. Broomes’ vehicle and entered her licence plate. The GPS showed that Constable Foster travelled approx. 11-14 kms/hr at that location. His vehicle was obviously moving and not stationary as noted. Looking at the objective data and Constable Foster’s testimony, I do not accept the fact that Ms. Broomes was speeding. This is a material point as it formed the foundation for his arrest of Ms. Broomes. He followed her vehicle as it fit the criteria for the criminal offence, and I agree that further investigation was warranted at this point.

On the other hand, Ms. Broomes testified that she did not believe she was speeding and had no reason to speed. She testified that if she were on the hill at that location and driving faster, she would have braked, which would have reflected the 'dipping' of her vehicle. Her action was not the result of seeing a police vehicle and slowing down. She testified that the first time she saw a police vehicle was when she got out of her car on Crombie. I accept her evidence as it carries an air of reality.

Much was said by all counsel that Constable Foster purposely followed Ms. Broomes home. I do not view the evidence in the same way. At 05:25:23 hrs., Constable Foster conducted a query on the licence plate. He ran one search which was also run through the MTO. There was no evidence that he read the CPIC/MTO return while driving; otherwise, he would have known where the vehicle was most likely headed. This is supported by the fact that he did not know his location when he advised the dispatcher that he was with an uncooperative female and a red SUV. If he had read the return, he would have identified with where he was. He asked the dispatcher if the GPS showed his location, which she identified as Grand and Crombie.

What I do find disconcerting is that Constable Foster referred to this as a traffic stop. Constable Foster's main priority was always the weapons call. He testified that he believed this was the suspect vehicle when he conducted his U-turn near Harris Street. Additionally, he did not advise the dispatcher about the red SUV and did not activate his lights or request backup for a serious call. Having his lights activated would have been an additional sign for Ms. Broomes that she was being stopped or the police wanted to speak with her. These actions are requisite parts of a traffic stop.

Constable Foster stated he held reasonable suspicion that this was the suspect vehicle based on his observations of the red SUV, speeding (which I do not accept), direction of travel, time delay and light traffic. Ms. Barrow noted that there were several side streets that the suspect vehicle might have taken. I agree with Mr. Jeffries that we are looking at possibilities and not probabilities. The route along Concession Street was one of those possibilities. I must question why he did not make a traffic stop earlier in the process, after his initial observations. Although he entered the plate, he did not have time to review the return. His reasonable suspicion formed, or started to form, when he

conducted the U-turn at Harris Street. He confirmed the vehicle colour and licence plate at Water and Concession Streets, but still did not advise any other units or the dispatcher that he might have the vehicle or suspect from a very serious call where several units were dispatched given the call priority.

His assertion that he wanted to properly position himself, read the return, and identify a location to stop the vehicle did not make sense with respect to the severity of the call and officer safety. It was also unusual to do all this preparation while following a suspect vehicle, yet he did not communicate with his dispatcher or other units or review the CPIC return.

Constable Foster told the OIPRD investigator that it may have been confidence on his part and that he wanted to investigate further. Reviewing the CPIC return, and CAD information were important parts of that investigation as many of the answers were at his disposal. He had approximately three minutes to read the return, which is part of the multi-tasking that takes place daily as officers perform their duties, and as confirmed by Constable Foster. He could have told the dispatcher what was going on and asked him/her to run the plate and voice over the return, also known as a 'rolling marker check'. Aside from reviewing the CPIC/MTO query, the only other further investigation was to identify the driver.

Constable Foster stated that the vehicle made a series of turns before it pulled into the driveway, which he found suspicious. He had a heightened sense of alert as he had a subjective belief that this was the suspect vehicle. His collective actions to this point left me with the belief that he was acting on tunnel vision. He had a single-minded concentration on the red SUV for the weapons call and did not take into consideration other available information. He ran the licence plate at 05:25:23 at Water and Concession Streets, and it was voiced over the radio at approx. 05:26:35 that the suspect had been identified, and at 05:27:19 that the suspect was Jomo Smith 1987/02/23. This information was available to Constable Foster before he exited his vehicle. He did not recall hearing this transmission which continues to support my belief that he was so focused on what was unfolding that he did not consider contrary information.

As noted in *Storrey*, an officer must consider all information, and not only that which is incriminating. This duty of a police officer is confirmed in *Golub* where the court noted that an officer must consider all available information and only discard that which is unreliable. This concept is continued in *Servant*, where the officer refused to review the plaintiff's bail papers. The court noted that the officer had an objective duty to review all information available to him and not focus on what was incriminatory. In the *Servant* case, the officer closed his mind to objective data.

Constable Foster was so focused on the red SUV and driver, that he did not hear what was broadcast over the radio, he did not keep abreast of the CAD information, or read the CPIC return. This information would have told him that the suspect had been identified and should have informed his next steps and his initial approach of Ms. Broomes. I understand the importance of dynamic situations, but this information should have served to slow down the situation to ensure a greater perspective of what was unfolding rather than allowing emotions or time pressures to dictate next steps. I do not believe that Constable Foster closed his mind to objective data; rather, he set it aside until he had the time to review all information, at which time Ms. Broomes was handcuffed and seated in his police vehicle. This was preventable.

Upon arrival on Crombie Street, the situation became more muddled. Constable Foster testified that he held a strong suspicion this was the *vehicle* involved in the weapons call. This refutes his point that this was just a traffic stop. Constable Foster shone his flashlight in the vehicle and identified the driver as a Black-skinned person with dreadlocks. I do not see this as a pause, as noted by the Prosecutor; rather, taking the opportunity to determine who was in the vehicle. He testified that his intention was now to place the *driver* under arrest based on reasonable and probable grounds for uttering threats. He exited his vehicle quickly and identified the driver as a woman. At that point, his grounds for arrest changed, but his mindset was still that she was involved. Instead of noting that the driver was a female and something in this scenario did not add up, that she did not fit the description and he needed to de-escalate, the situation ramped up.

In *Waechter*, the court held there must be more than a suspicion or hunch and less than proof beyond a reasonable doubt. Constable Foster held a strong suspicion based on the driving observations. When he noted that the driver did not fit the description, he was suspicious, and believed that she must have dropped someone off before they crossed paths, and she might have information important to the investigation. Although this would be a normal consideration in the circumstances of this investigation, there was no evidence to support this theory. Even if she had dropped someone off, Ms. Broomes was not a threat.

I find that the arrest was precipitous as Ms. Broomes was not informed of the reason for the stop, no connection was made to her driving the vehicle, which was now parked, she was not given her obligations under the law, and there was no urgency, which I will discuss shortly. In *Chartier*, the court held that that a police officer's reasonable and probable grounds must include all available information to inform their actions.

At this point, Constable Foster described the situation as dynamic and complex. He still believed that this was the same *vehicle* from the weapons call. The fact that the driver was a female did not change his *driving* observations. He still did not call for back-up, even though he was concerned about somebody coming out of the house or the vehicle, as well as the actions of Ms. Broomes. In his OIPRD interview, he stated that the interior light was still activated, and he did not see anyone else in the vehicle. He testified that he shined his flashlight into the vehicle and did not see anyone. These observations should have allayed any concerns about a person hiding in the vehicle.

In his request for back up, Constable Foster noted, "It may be related. She was headed away from that area. She pulled in, got out of the car and tried to go into the house" (Exhibit 9, Tab 9). Constable Foster was trying to arrest Ms. Broomes at this point. Although he testified that he had formed reasonable suspicion when he pulled behind her vehicle on Crombie, he did not seem confident during this radio transmission. Ms. Broomes pulled into her driveway, got out of her car, and tried to go into her house. There was nothing nefarious about her actions.

In my experience, it is up to the officer to control the speed of dynamic and complex situations. This is usually accomplished through communication and non-threatening questions to slow down the situation to reach your intended goal. Providing sufficient and fulsome information to the party so they know why you are engaging them in conversation is essential. Telling someone that they, or their vehicle, fit the description of a gun call does not slow down a dynamic situation or help an officer retrieve information. His initial approach was one of the most important steps in this interaction, both for officer safety and for suspect cooperation. He also had to know what authority he was acting under and for what reason. Ms. Broomes felt like a suspect and post-arrest felt like she was powerless.

The court, in *Waechter*, stated,

“The law is clear that the court must be satisfied on the basis for all of the evidence in its totality that Constable Dreise had the subjective basis for arresting Mr. Waechter and those reasonable and probable grounds for the arrest must exist from an objective point of view. That is, whether a reasonable person in the place of Constable Dreise would conclude there were reasonable and probable grounds to believe Mr. Waechter had committed an offence under s. 33(3) of the Highway Traffic Act”

In following the direction from *Waechter*, I find that Constable Foster *believed* he had the subjective grounds to make an arrest but considering the totality of the evidence and the circumstances, a reasonable person would not agree that there were grounds to make the arrest given my finding about the speeding allegation and the use of conflicting authorities. There was not sufficient inquiry, as required of Constable Foster under the *HTA*. The goal was not to further the *HTA* investigation, but to identify Ms. Broomes for the weapons call.

The court, in *Waechter* noted the steps to establish reasonable and probable grounds for an *HTA* arrest. In applying these steps, I agree that Constable Foster asked Ms. Broomes for her driver’s licence. She did not overtly refuse to surrender it, and in fact, it was in her vehicle within feet from where she was standing. He did not further his line

of questioning to determine where it was and if she was able to surrender it. What is also interesting is, in *Waechter*, the court noted that “the observations of Cst. Dreise both with respect to the operation of the vehicle and the condition of Mr. Waechter’s eyes played no further part in any investigation once the vehicle had been stopped” (Exhibit 10, Tab 32). Constable Foster did not discuss the speeding issue until Ms. Broomes was handcuffed and in the rear of his police vehicle.

Constable Foster believed he had reasonable suspicion to detain the driver and/or reasonable and probable grounds to arrest the driver. His priority was the weapons call, yet he used the *HTA* to try and identify the driver and ultimately arrest her.

I found *Plummer* to be instructive as it considered the interpretation of s 33(1) and s 217 of the *HTA*. The court noted,

“The *Act* is only quasi-criminal legislation, and strict limits have been placed on the powers of police and others to enforce the legislative duties and obligations by means more normally associated with criminal legislation. The limited power of arrest is one example. Under the *Criminal Code*, a person can be arrested without warrant for any offence. Under the *Act*, the circumstances that can trigger an arrest have been closely circumscribed”.

As noted previously, I do not believe that Ms. Broomes was speeding; however, if I were to continue along this train of thought, Constable Foster asked for her driver’s licence and whether there was anyone else in the vehicle or dropped off. She was not informed why he wanted to see her licence, or that he had observed her driving and/or speeding. When asked for verbal identification, she replied, ‘no’. She still had no information why he wanted her identification, and what her obligation was under the *HTA*. Mr. Jeffries asserted that Constable Foster fulfilled the requirements as set out in *Plummer* as Ms. Broomes was asked for her licence or to provide alternate identification before she refused, and the interaction turned physical.

I agree that a demand was made for her licence or alternate identification, but I find that Ms. Broomes was not given reasonable opportunity to do so as noted in *Smith*, citing

Plummer. She did not have the benefit of knowing why Constable Foster wanted that information and, contrary to his assertion, she was not 'fleeing' into her home to avoid her obligation. She lived there, she did not know what her obligation was, and he could have taken further steps to identify her through the CPIC and MTO results. There was no urgency and ultimately, he was trying to use the *HTA* to achieve his end goal, which is more normally associated with criminal investigations as noted in *Plummer*. She had no information that she was under investigative detention or that she was not free to leave until Constable Foster physically detained her. She was not provided any objective information upon which to base her next moves. I agree with Mr. Jeffries that appropriate inquiry is an obligation which is informed by reasonableness; however, reasonableness equates to fairness. How is it fair or reasonable that a person is stopped, questioned, and arrested without the benefit of knowing her rights and her only mistake was driving a red SUV at a specific time on a specific day.

Like *Smith*, Ms. Broomes testified that she was asked for her driver's licence, then grabbed and slammed against the vehicle before she was asked to identify verbally. Constable Foster testified that he asked for her licence or to identify verbally to which she replied, 'no'. I have no evidentiary foundation to determine which event transpired. Either way, he took physical control of Ms. Broomes at/around this point. He told her that she was under arrest and not free to leave. Like *Smith*, I feel that the 'failure to identify' arrest was a 'tag on' to his primary concern of the weapons call. This was not a valid *HTA* stop, it was not about her driving, but a pretext to get what he really wanted, that being her identity. What is concerning is, I do not believe Constable Foster intended this to be a pretext. His authorities were not clear in his mind, and he was determined to meet his end goal of identifying the driver of this vehicle.

Defence counsel stated that Constable Foster only had 10 to 15 seconds by virtue of Ms. Broomes' conduct, and he used that time to ask the most pertinent questions. I disagree that Ms. Broomes' conduct was the driver for the inability to further a dialogue or provide information. She was initially compliant until told that she or her vehicle were possibly involved in a gun call and a demand was made for her licence or verbal identification. Even as she walked away there was the opportunity to state that he

observed her speeding, and the potential outcome if she did not comply. I have noted that the obligation to control that initial approach was Constable Foster's alone. I agree with the prosecutor that he approached Ms. Broomes as a suspect, which shortened the opportunity for dialogue. When he asked for her driver's licence or verbal identification, she was standing in front of her home. He had time to advise Ms. Broomes of her obligation as she walked away so she could make an informed choice. This is not a case where there were no alternatives. He could have disengaged given the lack of urgency that I will discuss shortly. His mind was made up when he saw the red SUV in the vicinity of the call on that date and that time and he did not back away from his belief given conflicting information. It is not satisfactory to assert that an officer can forgo his legal obligations in the interest of time when an arrest has been deemed precipitous.

I found the case of *Maloney* to be very instructive in this situation. The court discussed the duty of a police officer to conduct a thorough and proper investigation before charging a person. The court noted,

“Evidence respecting post-arrest investigation would in my opinion, often be relevant in assessing the adequacy of the pre-arrest investigation. Whether the post-arrest investigative steps could have and should have been taken pre-arrest may well be central to the determination of whether due inquiry was conducted” (Exhibit 9, Tab 11).

This is important when I consider that Constable Foster had access to the CPIC and MTO returns, as well as the suspect information that was voiced over and available through the CAD system. These investigative steps were important as they presented conflicting information which Constable Foster had access to pre-and post arrest and should have considered.

Constable Foster continued to testify that he had grounds for investigative detention, yet he used the *HTA* to identify the driver. I refer to this as a pretext as his sole focus was on the weapons call, but suddenly the driving observations became the important factor. This was a Criminal Code investigation turned into an *HTA* arrest for failure to identify and was not reasonable. As noted in *Waechter*,

“It is also important to remember that the determination is not whether Constable Dreise’s belief was accurate, it is whether it was reasonable. What is relevant are the facts as understood by Constable Dreise when his belief was formed”

With respect to investigative detention, in R.v. Mann, SCC (2004), the court noted at para 34.,

“...calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer’s suspicion that there is a clear nexus between the *individual to be detained* (emphasis added) and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer’s reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer’s duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test” (Exhibit 12, Tab 4).

I have considered the issue of investigative detention at length and from many angles. In reading this passage from *Mann*, within the circumstances informing the officer’s suspicion there must be a clear nexus between the individual being detained and a recent or on-going criminal offence and that the individual is implicated in the criminal investigation. I go back to the fact that Constable Foster used the *HTA* to identify Ms. Broomes for the weapons call. The ‘detention’ of the vehicle or her connection with the vehicle appears to be outside of the scope considered in *Mann*. Based on my experience, I do not find fault with Constable Foster wanting to investigate the incident in its totality, but I must question the legality of the continued investigation detention, and specifically, ask what were his objective grounds that Ms. Broomes (as a person) was involved in the weapons call.

This principle was brought to the forefront by Mr. Charney when he stated that there was no detention of the vehicle, just Ms. Broomes. He stated that the detention cannot be about the colour of the vehicle, and he questioned whether there was sufficient reasonable suspicion to believe that Ms. Broomes was the suspect. Sgt. Green also acted on an assumption which was based on the colour of the vehicle. Sgt. Green did not turn his mind to the investigative detention of Ms. Broomes and how the information the officers had at the time of the arrest met the threshold of reasonable suspicion.

In *Ollson*, the court identified several considerations which inform an assessment of reasonable grounds. I will briefly address each consideration.

When Constable Foster pulled behind Ms. Broomes' vehicle, he held a subjective belief that the vehicle was involved in the weapons call, and by extension and including the skin colour and dreadlocks, so was the driver. When he noted that the driver had Black skin and dreadlocks, he testified that he had reasonable grounds to arrest for threatening. He held this belief until she exited the car, noted that the driver was female, then his belief was based on assumptions. Other than the red SUV, there was nothing to tie Ms. Broomes subjectively or objectively to the weapons call. This brings me back to my assertion that Constable Foster was operating based on 'tunnel vision'.

Constable Foster had a description of the suspect as a Black male with dreadlocks named Joe. His subjective belief that Ms. Broomes might be involved was not objectively reasonable based on known information. He followed and investigated the red SUV that he observed driving on Concession Street away from the direction of the gun call, and when he realized the driver was not the suspect and there were no other persons in the vehicle, any subjective belief was no longer objectively reasonable. I place myself in the shoes of a reasonable person within the community and I do not believe that reasonable grounds existed for the arrest.

I agree that Constable Foster's training and experience come into play with any call for service, any investigation, or vehicle stop. His training record was not discussed or submitted. I am not a lay person reviewing the grounds for arrest and/or detention. Constable Foster had an obligation to make observations and put them into the proper

context, which he did, and consider all available objective information to inform his investigation, which he did not. His firmly entrenched belief that this was the suspect vehicle, and that Ms. Broomes must be involved as the driver of that vehicle prevented him from viewing the situation with a degree of objective reasonableness.

Constable Foster made observations and assessments based on his experience which included the vehicle colour, direction of travel, delay, speeding and dipping of the vehicle which I have addressed. I agree that these observations formed his reasonable suspicion as he pulled up to Crombie Street and were valid to a point in time. His belief that Ms. Broomes was trying to evade him with quick turns and pulling into another driveway to reverse her vehicle and her attempt to flee into the house elevated his heightened degree of awareness and helped construct a scenario that was not reasonable.

I agree with Mr. Jeffries that a significant amount of time has been spent examining the evidence to determine what happened on the morning of July 29, 2017. This is not about armchair quarterbacking or a scientific exercise; rather, it is about whether Constable Foster acted appropriately and within the confines of the law. I am in the unique position of a reasonable person armed with the knowledge, training and experience of the investigating officer given my 30 years in policing. I agree that common sense, flexibility, and practicality must be the lenses through which this situation is viewed, and I have done so. This is not about holding Constable Foster to a position of perfection. That would be unreasonable; however, his actions must be viewed by a reasonable person, using common sense, armed with knowledge of police practices in a dynamic situation.

In s.9., the *Charter* notes, "Everyone has the right not to be arbitrarily detained or imprisoned". Up until the point that Ms. Broomes' exited the vehicle, I would agree that Constable Foster had reasonable suspicion to detain the driver for investigation. He also could have investigated and informed Ms. Broomes of what was happening and asked questions, but she had no obligation to respond. She was certainly not subject to arrest as there was nothing objective to connect her to the weapons call. Since investigative detention is about the person and not the vehicle, and there was ultimately

no evidentiary foundation to connect Ms. Broomes to the weapon call, Constable Foster had no legal authority to continue to detain Ms. Broomes. Constable Foster's actions breached s.9 of the *Charter* once he removed Ms. Broomes liberty without reasonable and probable grounds or good and sufficient cause.

Constable Foster noted that he had a parallel *HTA* investigation, and he would be negligent if he did not complete this investigation. I am left with the impression that he did not know his authorities or which route to take once he saw that the driver was a female. His positions about speeding and detention were not clear. On any other day at that time in the morning, the same driving observations would not have been an issue, or a very minor issue at best. Now it became the sole grounds for an arrest. There was no evidence to support that her vehicle was speeding as outlined by the GPS data. There was no evidence that Ms. Broomes was not sober and there was no urgency to check her vehicle documents.

I have read the requirements under sections 33(1), 33(3) and 217(2) of the *HTA*. Constable Foster made a demand for Ms. Broomes' driver's licence and verbal identification. Mr. Jeffries asserted that the Court of Appeal in *Plummer* required an officer make a specific request for identification other than a driver's licence and nothing more is required. I would suggest that reasonable opportunity to provide the licence is required as is knowing the reason for the request. The latter may not be laid out in case law specifically, but such an approach, relying on my experience, will help diffuse situations such as the one Constable Foster found himself in.

Constable Foster did not create a nexus between his demands and his observations which I deem necessary to give Ms. Broomes the required information to inform her next steps. Otherwise, you are left with a woman who is stopped by the police in her driveway, asked for her licence, not given any reason for the demand or her obligation to comply, and ultimately arrested. Constable Foster may have had reasonable suspicion to detain the driver, or at the very least to investigate, but he also had to tell her that she was under detention, why she was being detained, and he failed to do so.

Before I address the use of force itself, I want to address the necessity of the arrest. Constable Foster had access to the suspect description, name, and date of birth. He either did not hear the information via his vehicle or portable radio, or he was so focused on what was in front of him that he disregarded it. Either way, this is troublesome. Constable Foster was faced with a decision as Ms. Broomes turned to walk towards her front door. My question is, what was the urgency? There was certainly no urgency under the *HTA*. He could identify her once he viewed the CPIC/MTO return. He testified that “once she enters her home, barring exigent circumstances—I don’t wanna have a situation where we have to force our way into a home, or we have to write a search warrant or anything like that. I needed to make—I needed to make a decision. I needed to act on that immediately before she was able to walk away”. His sense of urgency came from the belief that Ms. Broomes was still involved in the weapons call and he was concerned for his safety. This was a misguided belief without an evidentiary foundation to support it. It was not objectively reasonable to effect an arrest and a physical altercation when there were more suitable options.

I question the grounds for the exigent circumstances and his ability to force his way into her home. This was an *HTA* arrest and an investigative detention according to his testimony. Constable Foster said he did not want to write a search warrant or lose the continuity of the evidence. What evidence? At that point, he was left with a red SUV and a female driver who did not match the suspect description who was wearing pajama pants and a t-shirt, carrying a cell phone and keys. He had nothing to connect Ms. Broomes to the gun call and did not have grounds to arrest her. She was not trying to flee—she was going into an address that Constable Foster would later find out was her registered address. He knew where to find her. The steps he was following as part of his investigation were flawed, and he had no control of the situation. If he wanted to continue with any *HTA* offence, he had access to her name, address, and photo verification through the MTO, and could have proceeded with a summons. He could have had the house guarded pending a *Feeney* warrant vs. an arrest in the first instance. Stating that he did not want to have to write a search warrant is not an excuse for a precipitous arrest or use of force. In cross-examination, Constable Foster stated that he preserved the need to identify Ms. Broomes as once you commit an *HTA*

offence, you are not able to walk away. A reasonable person would not agree. Disengaging is always an alternative, depending on the circumstance. Being concerned with not completing a minor *HTA* investigation was not a reasonable consideration for using force to affect an arrest and using the *HTA* to identify the driver was negligent.

This arrest was unlawful, and it was unnecessary. He did not have reasonable and probable grounds under the *Criminal Code* to affect the arrest and he did not have grounds to use the *HTA* to identify an individual to further a criminal investigation. Under cross-examination, Constable Foster stated that he used his discretion to detain and arrest Ms. Broomes and he was the only officer with direct knowledge of what formed that discretion. Discretion comes from the freedom to decide what to do in certain situations, which lends itself to the belief that there were alternatives to the arrest. He also had the discretion to release her and continue the investigation without the need for a precipitous arrest and use of force.

After Ms. Broomes was handcuffed and placed in the rear of the scout car, Sgt. Green confirmed with units that there was no female seen. He confirmed that the description of the vehicle did not match Ms. Broomes' vehicle and the suspect was described as a Black male with a thick Jamaican accent. In the face of all this new information, Constable Foster still suspected Ms. Broomes was involved to some degree. It was while Ms. Broomes sat in the rear of his police vehicle that Constable Foster reviewed the CPIC/MTO returns and read the CAD information.

One area that I found troubling was the evidence of Sgt. Green. He attended the Crombie scene, noted the red SUV and a Black female with dreadlocks. He did his due diligence but continued to ask units if the complainant was sure a female was not involved. He continued to go to great lengths to confirm Ms. Broomes specifically, and her vehicle, were not involved. He did not turn his attention to the ongoing arrest of Ms. Broomes, who was clearly not a suspect, and whether the arrest and detention were justified according to the principles as set out in *Mann*. He also stated, "I assume it was possible that the vehicle was not involved in the incident". This statement lends itself to the assumptions as laid out in *Waechter*.

Acting in good faith is not a blanket excuse for mistakes that are made in the execution of one's duties. A pretext *HTA* stop to achieve another means is not good faith action. As soon as he noticed a female driver, Constable Foster stopped leading with good faith. I do not underestimate the dynamic situation Constable Foster found himself in as highlighted in *Correa*. There are many areas of consideration, including officer safety, the detained person and possible weapons, which is why having backup, notifying the dispatcher, knowing your authorities, and considering all available information to inform your next steps was key to controlling how this event unfolded.

For the offence of unlawful arrest to be established, there must be clear and convincing evidence that the arrest was unlawful or unnecessary and made without good and sufficient cause. This proposition was upheld in *Correa*, where the court observed that demonstrating evidence of good faith was not necessarily sufficient to establish good and sufficient cause. An officer must have both objective and subjective grounds.

In *Suleiman*, the court noted that the arrest was precipitous because there was additional information available that the officer had not turned his mind to. They established four points to consider:

1. *Were there subjective and objective reasonable and probable grounds. Were proper inquiries made by the officer. Did he act appropriately on that information?*

As noted, Constable Foster may have had subjective grounds that formed his reasonable suspicion or belief, but he did not have reasonable and probable grounds for an arrest. He did not make proper inquiries, which he stated was due to the short passage of time, although he did ask for her driver's licence. Depending on which version occurred, he may have asked for verbal identification before or after he arrested Ms. Broomes. I believe that he did. If there are no reasonable and probable grounds, warrantless arrests are unlawful.

2. *Did Ms. Broomes refuse to identify herself and was she given reasonable opportunity to identify herself?*

Ms. Broomes was asked for her driver's licence, which she did not have, and I believe she was asked for alternate identification which she did not provide. The location of her

licence was not flushed out any further. She was not given her legal obligations under the *HTA* and was not given reasonable opportunity to identify herself. She was out of her car at that point, there was no nexus made between the demand and the requirement for her licence or why the officer was asking for her identification. It was not objectively reasonable that she would understand her obligations.

3. *Even if the arrest was lawful, was it necessary?*

The arrest was not necessary as there were alternative ways to handle the situation as already noted. To go to such lengths to identify a person under the guise of a minor *HTA* offence when she was standing in front of her home was unreasonable.

4. *If either unlawful or unnecessary, did Constable Foster have good and sufficient cause for the arrest?*

Constable Foster did not have good and sufficient cause for the arrest. His goal was to identify the driver, but he did not have the grounds and there were other means to accomplish this goal. Police officers are allowed to be wrong but are not permitted to knowingly use an alternate authority as 'a means to an end'. Both Ms. Barrow and Mr. Jeffries cited the *Wong* and *Storrey* cases. The Commission noted there are two elements necessary to find a breach of this provision of the Code of Conduct: an unlawful or unnecessary arrest and the officer must not have had good or sufficient cause.

The Commission in *Wong* noted, "acting in good faith does not necessarily satisfy the requirement of good and sufficient cause" (Exhibit 10, Tab 41). In *Storrey*, it was noted that, "the lack of objective grounds for the arrest is relevant but is not necessarily determinative. It requires an analysis of other factors including the officer's subjective belief" (Exhibit 9, Tab 20). Constable Foster had the subjective belief that Ms. Broomes (as a person) and her vehicle were involved in the weapons call, articulated his reasons, and was firmly entrenched in this belief. I have accepted that some of these reasons were enough to form a reasonable suspicion but were not sufficient to affect an arrest. It was apparent that Constable Foster improperly used the arrest powers under the *HTA* which was not objectively reasonable. Constable Foster lacked the objective grounds for an arrest under the *HTA*, as evidenced by the inconsistencies in his testimony and

interviews and did not consider conflicting information. The officer had a subjective belief that the red SUV was the suspect vehicle, but he did not have the grounds for arrest under the *Criminal Code*. I would have a more accepting opinion that Constable Foster had good and sufficient cause if he did not make a precipitous arrest, considered all the information that was voiced over the radio and available to him and understood the authorities for which he was making his arrest.

In *Wowchuck*, the Commission noted,

“Where there is no specific evidence of good and sufficient cause, a failure to have reasonable and probable grounds will likely be sufficient to demonstrate that good and sufficient cause was absent. The hearing officer found that the officers did not have lawful grounds for the arrest and they rushed to judgment with too much information missing”. (Exhibit 10, Tab 42)

I have found that Constable Foster did not have the grounds to arrest Ms. Broomes under the *HTA* and that the arrest was precipitous given the information that was available to Constable Foster as this event unfolded and the conflicting objective data with respect to the speeding issue. His firmly held belief considering the conflicting information was unreasonable and cannot constitute good and sufficient cause.

Ms. Broomes was released with four Provincial Offence Notices (PONS). There is an air of maliciousness with respect to the tickets. They served no purpose at this point and there was no reason to further a bad situation. This assertion is supported by the fact that the tickets were dismissed or withdrawn without any consultation with Constable Foster. Constable Foster was still suspicious as to her behaviour and failure to identify. He felt it is very rare for someone to be as defiant when they had nothing to hide.

Given the foregoing, for count #1, Unlawful or Unnecessary Exercise of Authority, I find on clear and convincing evidence, that Constable Foster did, without good and sufficient cause, make an Unlawful or Unnecessary arrest, contrary to section 2(1)(g)(i) of the *Police Services Act Code of Conduct* and I find him guilty of this count.

**Count #2: UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY—
Excessive Use of Force**

It is uncontested that Constable Foster used force during the arrest of Ms. Broomes. She described being grabbed and slammed against her vehicle and brought to the ground. Constable Foster testified that he grabbed her right arm and pushed her against her vehicle, using it as leverage. The difference lies between the perspectives of police training, and the 'shock' of being arrested in what was perceived as a forceful manner. Ms. Broomes yelled for help and told Constable Foster that he was hurting her. She continued to struggle and was swept off her feet. Constable Foster got on her back and pinned her to the ground. She was in pain and sustained multiple bruising because of the arrest.

The right to be promptly advised of the reason for one's detention or arrest is embodied in section 10 of the Charter and is founded most fundamentally on the notion that "one is not obliged to submit to an arrest if one does not know the reason for it" (Exhibit 10, Tab 43). Constable Foster failed to fulfill this obligation. When Constable Foster acted outside of his authority, Ms. Broomes was entitled to resist, and any use of force used against her was unlawful or unnecessary.

Section 25(1) of the *Criminal Code* states:

Everyone who is required or authorized by law to do anything in the administration or enforcement of the law

- a) As a private person,
- b) As a peace officer or public officer,
- c) In aid of a peace officer or public officer, or
- d) By virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose. (Exhibit 10, Tab 44)

As noted by the prosecutor, if the officer conducted an unlawful or unnecessary arrest, the corresponding use of force is automatically unlawful or unnecessary. An officer is protected by Section 25(1) of the *Criminal Code* only where it is deemed that the force was used reasonably and in conjunction with a lawful arrest. Constable Foster has

been found guilty of Unlawful or Unnecessary Exercise of Authority in relation to this incident. As such, any force used against Ms. Broomes is deemed unlawful.

In *Chartier v. Greaves*, the court noted that, to rely on s. 25 of the Criminal Code, the onus is on the police officer to demonstrate that the force was not excessive. The prosecutor asserted that, when Constable Foster physically held Ms. Broomes to the ground, it was no longer reasonable for him to believe that Ms. Broomes had any involvement in the weapons incident, that she had a gun or was a dangerous person. In *Nasogaluak*, the ability to use force is constrained by the considerations of proportionality, necessity, and reasonableness.

As noted in count #1, I deemed the arrest of Ms. Broomes to be unlawful and unnecessary. There were alternatives to the arrest and the subsequent use of force, and the arrest was made under the wrong authority. In *Batista*, the Commission stated,

“We find the word “unnecessary” as used in the section, does not mean “not absolutely essential” but rather means something closer to “unreasonable under the circumstances: considering other options that were in fact available”.
(Exhibit 9, Tab 1).

I have found that the arrest for ‘failure to identify’ under the *HTA* was unlawful. When Constable Foster exited his vehicle and noted that Ms. Broomes was female, he did not have the requisite grounds for an arrest under the *Criminal Code*, and he did not have the grounds to arrest under the *HTA* for failure to identify, therefore the use of force was unreasonable under the circumstances and ultimately, unlawful. He is not afforded the protection under s. 25(1) of the *Criminal Code*.

Constable Foster arrested Ms. Broomes under the *HTA* for failing to identify herself. Although I did not accept the validity of his action, it cannot reasonably be said that it was necessary to forcibly grab her arm, push her against the car and use the car as leverage, swipe her feet out from under her and hold her to the ground for five-six minutes simply because she failed to identify herself. Even if she had indeed committed a very minor infraction under the *HTA*, the corresponding use of force was not reasonable or proportionate.

Constable Foster justified his actions by testifying that Ms. Broomes was actively resistant. He stated that he had to gain control for officer safety reasons. Although officer safety is of paramount importance for any police officer, there was no reason to arrest Ms. Broomes and there was no safety issue that necessitated the use of force. Ms. Broomes was in pain, and it was suggested that Constable Foster could have alleviated her pain by switching arms. Although I have found that the use of force was not justified, this suggestion is not fair to Constable Foster as in normal circumstances he would have lost further control of the situation. Having said that, his belief that she had a gun was not a reasonable one. The force used resulted in cries of pain and help that caused a neighbour to call 9-1-1 as she believed someone was being assaulted or raped.

Although Constable Foster testified that he used the least amount of force possible, and I am apt to agree based on the video, this is all about perspective. Ms. Broomes had never been involved with the police before. She just wanted to go home, and she found herself in a 'struggle for her life'. This was an incredible shock and her yells of pain and for help were understandable given the circumstances. Ms. Broomes referred to Constable Foster as aggressive, and as a bully. She did not understand what was going on or why. This was her first impression. Although I continue to state that the arrest, and therefore the use of force, was unlawful, upon review of the video, Constable Foster appeared assertive, professional, and calm. He is a professional witness as noted by Mr. Charney, but the video also demonstrated that he acted professionally in a stressful situation, albeit one that he initiated and that was unlawful. There was no evidence that he told Ms. Broomes to 'shut up'. He did inform Ms. Broomes that she was under arrest for failing to identify, but I could barely hear him given the amount of screaming so it is doubtful that Ms. Broomes heard the statement or was in the position to process the words.

Ms. Broomes stated that she did not want to be put in Constable Foster's car once she was handcuffed. This request seemed reasonable under the circumstances. None of the involved officers recalled this request, but the involvement of Constables Hanby,

Worswick and Sgt. Green were minor and involved a 'hands off' approach once Ms. Broomes was handcuffed.

I have reviewed the evidence of Constable Hanby and found that it did not provide any further clarity on this issue. He saw the struggle, assisted in handcuffing, and placed Ms. Broomes in Constable Foster's vehicle. He left shortly after. He described his normal practice to release some pressure if a handcuffed person complained of pain. Constable Worswick observed Constables Foster and Hanby and Sgt. Green struggling with Ms. Broomes on the lawn. He did not know the reason for the arrest and was not involved in the release. He left shortly thereafter.

I agree with the assertion in *Chartier and Greaves* that officers find themselves in dangerous circumstances, but the court also noted that officers are justified and exempt if they use no more force than was necessary. Constable Foster's arrest was unlawful and was based on an unreasonable assessment of the circumstances. In *Holmes*, the court looked at the minor traffic offence, which parallels this case and the fact that other officers were available to assist if he informed the dispatcher what was happening. The court deemed the use of force in *Holmes* was not appropriate.

I have considered the cases submitted, and the evidence of attending officers. The law pertaining to unlawful or unnecessary use of force is not controversial. If force was used to affect an unlawful or unnecessary arrest, the use of force is unlawful.

Given the foregoing, for count #2, Unlawful or Unnecessary Exercise of Authority (Use of Force), I find on clear and convincing evidence that Constable Foster did, without good and sufficient cause, use excessive force contrary to section 2(1)(g)(ii) of the *Police Services Act* Code of Conduct and I find him guilty of this charge.

Count #3: Discreditable Conduct

As noted by the prosecutor, racial profiling has been recognized as a problem in the context of policing. There was no allegation that Constable Foster made a conscious choice to act in a discriminatory way towards Ms. Broomes. In reaching a decision on this count, I read all the case law and took guidance from it. I considered the

submissions of all counsel, reviewed the concept of subconscious bias and the identification of inferences based on specific actions. Additionally, I considered the radio call and information received and I ensured that everything was kept in context. This was a difficult decision to write as I reflected on the issues of racial profiling, discrimination, and bias. It was a priority for me to ensure that I kept the information provided in context but made sure that I understood the context from varying perspectives and made certain that I did not project my own subconscious bias into any consideration.

What happened to Ms. Broomes on July 29, 2017 should not have happened and it was preventable. I agree that, if an officer engaged in discriminatory behaviour, it would constitute discreditable conduct as it is a reputational issue for the police organization and policing in general. This principle was set out in *Girard v. Delaney, Mancini, Deviney, O'Farrell, and Venables*.

At the onset of the hearing, much was said about the standard of proof. As discrimination can be a conscious or subconscious action, it is generally made by inference based on an action or a constellation of factors that may infer that race played a role. I am aware that, in many of the cases presented, inferences were accepted and based on a balance of probabilities or proof beyond a reasonable doubt where the standard of proof in this hearing is clear and convincing evidence. We take direction all the time from cases drafted in other forums, such as criminal and civil courts, Boards of Inquiry, or the Human Rights Tribunal. In evaluating the evidence, I was cognizant that any inference(s) must convince me that they were sufficiently weighty, reliable, and cogent.

The case of *Brown* noted that racial profiling is generally proven by inference. I can make inferences that certain actions or testimony did not make sense in the context they occurred or were explained, and that race had to have played a role. In *Brown*, the justice made it clear that, based on a balance of probabilities, evidence may be direct or circumstantial and it was not necessary to prove intentional discrimination.

As noted in *Brown*,

“Racial profiling involves the targeting of individual members of a particular racial group, on the basis of the supported criminal propensity of the entire group...Racial profiling provides its own motivation-a belief by a police officer that a person’s colour, combined with other circumstances, makes him or her more likely to be involved in criminal activity”.

Further, the court, citing *Richards*, stated,

“Racial profiling is criminal profiling based on race. Racial or colour profiling refers to the phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour, resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group”. (Exhibit 12, Tab 8)

In *Brown*, the court noted that the test to be applied under s. 9 of the *Charter* was whether the police officer had articulable cause to stop the vehicle and can the reason(s) for the vehicle stop be articulated.

The concept of police motivation, the definition of racial profiling and conscious or unconscious bias were addressed in *Le*. The court noted that there was reliable social evidence and research showing that minority groups are exposed to disproportionate levels of contact with the police. The court, in *Dudhi*, outlined the attitude and causation components of racial profiling. The court noted that it was necessary to consider the circumstances to determine if illegitimate thinking contributed to subject selection. This case involved a precipitous arrest. The case of *Sitladeen* was informative with respect to objective grounds and subjective motivators of racial stereotypes. Further, the court discussed the fact that an officer may not be aware that race was a motivator due to subconscious bias. All circumstances that led to the arrest and/or detention must be considered in the context of racial profiling.

In *Venables*, the Commission referenced the obligations of a police officer and underscored the role of a police officer in safeguarding individual rights and freedoms under the *Charter* and the *Human Rights Code*. The Commission was clear that discriminatory behaviour is discreditable conduct.

The case of *Campbell-Noel* discussed the types of indicia that may indicate racial profiling has occurred. These include how an officer deals with the driver or passenger

of a vehicle, the reasons for the vehicle stop, and how quickly the driver or occupant are arrested or handcuffed for criminal activity. Other indicia may include excessive force, a response to perceived danger, asking unrelated questions, failing to ask questions specific to the reason for the stop or using the 'arrest first, question later' philosophy. Some of the same indicia are outlined in *Smith* specifically the quick handcuffing and using the *HTA* as a means to an end and based on a hunch or suspicion.

In *Maynard*, the court noted that,

“In my view, the focus of Officer Baker on Mr. Maynard was premature and cannot be fully explained by the nature of the call and the description he received of the suspect and the suspect vehicle” (Exhibit 12, Tab 13).

I found *Maynard* to be instructive as there are similarities between *Maynard* and the case involving Constable Foster. When Constable Foster noted Ms. Broomes was female, he still believed she was connected to the call. Mr. Maynard found the approach of the officer in his case to be aggressive and confrontational. Ms. Broomes described Constable Foster as aggressive in his approach. The officer in *Maynard* followed Mr. Maynard home and parked at the base of his driveway without giving any sign as to why Mr. Maynard was being followed. As noted earlier, I do not believe that Constable Foster purposely followed Ms. Broomes home; however, he parked at the base of her driveway, did not use his lights, or conduct a proper vehicle stop.

I found that Ms. Broomes' reaction was completely justified and in keeping with a woman who was unlawfully arrested by a police officer and taken to the ground with little knowledge of what transpired. I can understand why Ms. Broomes shut down after she was handcuffed, why she was upset, hurt, and felt this was a storybook situation of a person with a gun and she was that person the police were looking for.

As noted at the onset, information and perspective played a role in this interaction, which could have unfolded differently at different points along the way. Constable Foster described this incident as dynamic, but as noted in *Maynard*, the individual responsible to de-escalate the situation was Constable Foster himself. In *Maynard*, the court noted,

“The decision to commence an investigation of Mr. Maynard was made with little reliable information and it set in motion a course of events which could have had much more tragic consequences for either or both of them” (Exhibit 9, Tab 13).

Although this case involved a gun being pointed at Mr. Maynard, the events in the case before the Tribunal are equally as tragic, as a woman in the community, returning home from dropping off her son was unlawfully arrested, grounded, handcuffed, and released with four traffic tickets which were later dismissed.

The prosecutor asserted that, when Constable Foster discovered the driver of the SUV was Black, he approached her in a confrontational manner. It was also stated that Constable Foster did not approach the driver until he confirmed she was Black. Although I agree that his approach was far from stellar, I do not find the way he approached Ms. Broomes, or the fact that he waited, was based on her race. Constable Foster was ‘hyped’, was acting solo, had a belief that a gun was involved and lost perspective considering available information.

As I examined each element of this call, it was important to remember that the dispatcher informed all units about the weapons call, the assumption of a gun, the description of a red SUV, direction of travel, timing, and a description of a Black male named Joe with dreadlocks. This was all information available to Constable Foster. This was not a case of conducting random or discretionary stops of persons of colour at 05:24 on a Sunday morning. There were specific and objective descriptors provided about the vehicle and the suspect. When Constable Foster observed a red SUV coming from the direction of the call, with the time delay of two minutes, his focus homed in on the vehicle.

He has been chastised for not reviewing the CPIC return or stopping the vehicle at an earlier juncture, but this was not based on subconscious bias; it was poor judgement which he acknowledged. He developed such a strong belief that this was the subject vehicle and coupled with what he perceived to be officer safety concerns based on the possibility of a gun, he did not consider contrary information that was available to him. As I noted earlier, he developed tunnel vision with respect to the vehicle. I agree there

was little dialogue, and when Ms. Broomes felt like a suspect, she walked away, which fueled the need for Constable Foster to erroneously act with urgency.

When Constable Foster observed that the driver in the parked vehicle was a Black-skinned person with dreadlocks, he formed reasonable and probable grounds that this was the vehicle for the weapons call, and the driver was the suspect. When he shone his flashlight in the vehicle, the driver ducked down, notably to stop the light from shining in her eyes, but Constable Foster could see a person with Black skin and dreadlocks driving a red SUV and the 'ducking down' would have increased his suspicion. He could not ascertain the gender of the driver, but the elements of the red SUV, dreadlocks and a person with Black skin met the information provided by the dispatcher. The crux of the issue began when he exited his vehicle and discovered the driver was a female.

Constable Foster told the OIPRD Investigator that he did not stop the vehicle or ask for back-up earlier due to confidence on his part and he wanted to investigate further. At several points in his testimony, he stated that this was the suspect vehicle. He was beyond convinced. I assert that part of that confidence was he *wanted* to find the vehicle, to *make* the arrest, and *find* the gun. He agreed that it crossed his mind that the complainant was mistaken about the gender of the suspect. Although not a common mistake, this does occur with complainants. With long hair, a witness might provide a description that is not consistent with the actual suspect's gender expression. His consideration was not attributable to attitudinal or causation bias based on race; rather due to poor judgement. I did find it interesting that he considered the possibility that the complainant may be wrong about gender, but not about the vehicle description.

Constable Foster may have formed reasonable grounds to arrest the driver once he determined (the driver) was Black, with dreadlocks and driving a red car, but again, these were identifiers he was provided and his formulated grounds to this point were not based on race, and this was not a random stop based on race. Constable Foster was convinced Ms. Broomes was speeding, which he used as part of his articulable cause, and although I did not accept his evidence on this matter, this was the understanding he was acting upon at the time.

It was asserted that Constable Foster found Ms. Broomes to be suspicious at least in part because she was Black, and he remained suspicious when she did not meet the suspect description. I want to address this point in conjunction with Constable Foster's statement that he would have arrested anyone who exited the vehicle, even if they were White. This statement made me pause to consider the meaning behind it. I considered that he possibly set himself up to reveal a bias based on this statement because it did not make sense, but also in keeping with Mr. Charney's assertion that this was a work around to suggest that the person's skin colour did not matter. When I re-examined Constable Foster's testimony and his OIPRD interview, it was clear that his focus was so strong that this specific red SUV was the suspect vehicle. The driver, if he was not 'Jomo Smith', was, by extension, involved with the *vehicle* and therefore involved in the weapons call. Ms. Broomes, as the driver of what Constable Foster firmly believed was the suspect vehicle, could have had knowledge about the suspect's location or that she dropped him off along the way. These were viable considerations if this truly was the vehicle in question. He wanted information from the driver and his approach and desire to identify her was not based on her race. She matched some of the identifiers provided to him and he was unconcerned with her gender.

I reviewed the definitions of attitudinal and causation components as described in *Dudhi*. I do not believe stereotypes informed Constable Foster's thinking. His decision-making was flawed, he was beginning to lose control of the situation, the authorities he worked under to reach his goal were flawed and he did not know how to stop the event from continuing down the wrong path. I agree with Mr. Charney that Constable Foster did not properly 'plan, assess, act' as noted in his evidence, as there were many pieces that he missed. Mr. Charney was more than fair when he recognized that Constable Foster's training was inadequate and not all the weight of this event should be placed on his shoulders. This is an area that I leave to the organization to investigate and consider.

I agree there was no evidence that Ms. Broomes had dropped anyone off. From a policing or officer-safety perspective, this was a real possibility, and a question that

would be asked of any driver. I do not find that this consideration was built on a conscious or unconscious bias.

One area that caused me to consider if an inference was present was that Constable Foster continued his belief that Ms. Broomes was involved in the event, even as more information became available that did not support his conclusion. Mr. Charney asserted that to ask another officer if they were sure that a female was not involved points to the mindset of the officer. I agree, but to be clear, it was Sgt. Green who made those inquiries of the officers on Elgin Street. Sgt. Green's support of what was unfolding on Crombie was troublesome, but I do not know what information he was provided to make his decisions and give direction. Sgt. Green thought it was possible that Ms. Broomes and her vehicle were still involved in the offensive weapons call and he also spoke about the investigative detention of the vehicle. His focus was also on the vehicle and, by extension, the driver.

Mr. Charney asserted that Constable Foster was intransigent in not re-assessing the situation or changing his view as things progressed. I agree. Where we part ways is his assertion that this points to conscious or unconscious bias on Constable Foster's part as he relied on the fact that the suspect was Black with dreadlocks and Ms. Broomes is Black with dreadlocks so his continuance must have been based on race. Mr. Charney also stated that this event cannot be all about the vehicle. This statement resonated with me as I worked my way through this call and Constable Foster's actions. It was a Sunday morning at approximately 0530 hours when Constable Foster observed a red SUV with the right direction of travel and timing, and at the time of day where there would be few vehicles on the road, let alone red SUV's. If this were the suspect vehicle, it would have been a congruence between the call for service and Constable Foster's location.

I assert that, given Ms. Broomes connection to Constable Foster's flawed belief that this was the 'suspect vehicle', Constable Foster believed she must have information about the suspect or the gun. The fact that the driver had Black skin and dreadlocks, two of the suspect descriptors, heightened Constable Foster's belief that this vehicle was involved. This was another area wherein I paused at length to examine Constable

Foster's consideration of this description under the lens of racial profiling. If not for the description from the complainant via the dispatcher, I would agree that this presented as a bias; however, Constable Foster was given this information and that is the vehicle and person he looked for, gender aside. This was not a random act that formulated his decision-making. His focus became completely about the vehicle, and not on the race or gender of the driver.

I considered the direction in *Dudhi*, that it is necessary to consider the surrounding circumstances to determine if illegitimate thinking contributed to suspect selection. Constable Foster did not select Ms. Broomes as a suspect. He identified her vehicle as 'the' suspect vehicle and did not let go of this belief. This is not a case of a random suspect selection. Ms. Broomes became the subject of his reasonable suspicion due to her affiliation with the vehicle and Constable Foster's inaccurate belief that she must have information as a result. I do not believe that this flawed belief was based on subconscious bias. I viewed the video for signs of differential treatment and, aside from the fact that this arrest was unlawful, and Constable Foster is being held accountable for his actions, I did not see anything different from what his training would dictate.

Upon review of *Maynard*, the court noted that all the actions of the officer until he parked his car in Mr. Maynard's driveway were consistent with the officer's initial perception that Mr. Maynard was a viable suspect for the gun call. Constable Foster was able to articulate his actions until he stopped at the end of Ms. Broome's driveway. It was at this point where poor decision-making started to add up.

I have reviewed the case of *Campbell-Noel* in its entirety and considered the section on articulable cause. As noted, there is no requirement to lay an *HTA* charge after an *HTA* stop. Although I found Constable Foster did not have the grounds to do so, I must consider Constable Foster's articulation of the reasons why he focused on the red SUV as the suspect vehicle. The concept of articulable cause was also considered in *Brown*.

I have considered the issue of racial profiling as articulated in *Sitladeen*, most notably the need to consider all the circumstances that led to the arrest and detention of Ms. Broomes. In *Dudhi*, the court noted that a precipitous arrest may be an inference.

There are areas that gave me concern, such as Constable Foster's perceived need to make a quick and erroneous *HTA* arrest and his heightened response to perceived danger yet he did not find the need to alert his dispatcher or call for backup. The 'arrest first/ask questions later' scenario was also concerning, but Constable Foster was able to articulate the reason behind each of his actions. The prosecutor stated that I can infer that his explanations do not make sense and that race had to have played a role. I examined his explanations that did not make sense but do not find that the explanations or actions were racially motivated. This was why it was important to review the all the circumstances that led to the arrest/detention in the context of racial profiling as noted in Sitladeen, but the actions of Constable Foster must also be viewed within the context of how they occurred. I agree that the race of the driver factored into Constable Foster's decision-making, but this was not an arrest made because of Ms. Broomes' race. As noted, there were areas individually that caused dissonance between the evidence and common police practice, but in the totality of these areas, they do not rise to the standard of evidence that is weighty, cogent and without sufficient explanation or articulation, however flawed.

I find Constable Foster not guilty for the charge of Discreditable Conduct, section 2(1)(a)(i) of the *Police Services Act* Code of Conduct.

Debra Preston
Superintendent (Retired)
Hearing Officer

Delivered electronically on August 3, 2021

APPENDIX 'A'

Batista and Ottawa Police Service, OCPC, 2007 (Exhibit 9, Tab 1)

R. v. Brown, O.J. 2003 (Exhibit 9, Tab 21)

Buckle and Ontario Provincial Police, OCPC, 2005 (Exhibit 9, Tab 2)

R. v. Campbell-Noel, ONSC, 2019 (Exhibit 9, Tab 22)

Canadian Charter of Rights and Freedoms, 1982 (Exhibit 10, Tab 43)

Chartier v. Attorney General of Quebec, SCC, 1979 (Exhibit 9, Tab 3)

Chartier v. Greaves, OSCJ, 2001 (Exhibit 9, Tab 4)

Correa v. OCPC, ONSC, 2020 (Exhibit 9, Tab 5)

Criminal Code of Canada (R.S.C.) Sec. 25(1). (Exhibit 10, Tab 44)

Deviney and Toronto Police Service, OCPC, 1999 (Exhibit 9, Tab 6)

R. v. Dudhi, ONCA, 2019 (Exhibit 9, Tab 23)

Faryna and Chorny (1952) BCCA (Exhibit 9, Tab 7)

R. v. Ferguson-Cadore OSCJ, 2016 (Exhibit 9, Tab 24)

Girard v. Delaney, Board of Inquiry, 1995 (Exhibit 9, Tab 8)

R. v. Golub, ONCA, 1997, (Exhibit 9, Tab 19)

R.v.Holmes, ONCJ, 2019 (Exhibit 9, Tab 25)

Jacobs and Ottawa Police Service, ONCA, 2016, (Exhibit 12, Tab 12)

Johnson and Durham Regional Police Service, OCPC, 2020

Krug and Ottawa Police Service, OCPC, 2003 (Exhibit 9, Tab 10)

R. v. Le, SCC, 2019 (Exhibit 9, Tab 26)

Maloney v. RNCPC, NSC, 2002 (Exhibit 9, Tab 11)

Mancini and Niagara Regional Police Service, OCPC, 2004 (Exhibit 9, Tab 12)

Maynard v. Toronto Police Services Board, OHRTD, 2012 (Exhibit 9, Tab 13)

R. v. Mann, SCC, 2004, (Exhibit 12, Tab 4)

R. v. MacKenzie, SCC, 2013 (Exhibit 12, Tab 6)

R. v. Nasogaluak, SCC, 2010 (Exhibit 9, Tab 27)

Nobody and Toronto Police Service, OCPC, 2018 (Exhibit 9, Tab 14)

O'Farrell and Metropolitan Toronto Police Force, OCCPS, (Exhibit 9, Tab 15)

R. v. Ollson, ONCJ, 2018 (Exhibit 12, Tab 5)

Ontario Highway Traffic Act, R.S.O. 1990 (Exhibit 10, Tab 45)

O'Reilly and Ottawa Police Service, OCPC, 2004 (Exhibit 9, Tab 17)

Pacitto and Toronto Police Service, OCCPS, 2004 (Exhibit 9, Tab 17)

Peart v. Peel (Regional Municipality) Police Services Board, 2006 (Exhibit 9, Tab 18)

Pfeifer and Hamilton Police Service, 2018, (Exhibit 12, Tab 11)

Pieters and Toronto Police Service, OCPC, 2003 (Exhibit 12, Tab 10)

R. v. Peterborough Police Commissioners, ONCA, 1965 (Exhibit 10, Tab 33)

R. v. Plummer, ONCA, 2006, (Exhibit 8, Tab 28)

R. v. Remus, ONCA, 2014 (Exhibit 10, Tab 29)

R. v. Rice, ONCA, 2015 (Exhibit 10, Tab 30)

Servant v. Bonhomme, 1997 (Exhibit 9, Tab 34)

R. v. Sitladeen, ONCA, 2021 (Exhibit 11)

R. v. Smith, ONSC, 2015 (Exhibit 9, Tab 31)

Spiegel v. Nehr, Ont. Brd. Inq. 1995 (Exhibit 10, Tab 35)

R. v. Storrey, SCC, 1990, (Exhibit 9, Tab 20)

Suleiman and Ottawa Police Service, OCPC, 2011 (Exhibit 9, Tab 36)

Talha and Culleton, Board of Inquiry, 1993 (Exhibit 10, Tab 37)

Thomas v. Ontario (Police Complaints Commissioner), 1995 (Exhibit 10, Tab 38)

Turgeon and Ontario Provincial Police, OCPC, 1000 (Exhibit 10, Tab 39)

R. v. Waechter, ONCJ, 2006 (Exhibit 10, Tab 32)

R. v. Wu, ONCA, 2015 (Exhibit 12, Tab 7)

Venables and York Regional Police Force, OCCPS, 2008 (Exhibit 10, Tab 40)

Wong and Toronto Police Service, OCPC, 2015 (Exhibit 10, Tab 41)

Wowchuck and Thunder Bay Police Service, OCPC, 2013 (Exhibit 10, Tab 42)