SUPREME COURT OF NOVA SCOTIA
Citation: *Taylor v. Nova Scotia (Attorney General)*
2019 NSSC 292

Date: 20190927
Docket: Hfx No. 481177
Registry: Halifax

Between:

Cory J. Taylor

Applicant

v.

The Attorney General of Nova Scotia,
Police Complaints Commissioner, Constable Donna Lee Paris,
and Constable Devon Norris

Respondents

Decision

Judge:	The Honourable Justice Gerald R.P. Moir
Heard:	April 18, 2019 in Halifax
Last Written Submission:	July 26, 2019
Decided:	September 27, 2019
Counsel:	Benjamin Perryman, for the Applicant Sheldon Choo and Kelly McMillan, for the Respondents

Moir, J.:

Introduction

[1] Cory Taylor signed a complaint under s.31(1) of the *Police Act Regulations* against Constable Donna Paris, Constable Devon Norris, and "unknown other member(s) responsible for the HRPD detention facility". All were members of the Halifax Regional Police force.

[2] Mr. Taylor's complaints were that Constables Paris and Norris arrested him without cause, used unnecessary force to do so, and caused him serious injury. He also complained that his detention included crude and discourteous behaviour by the police and a lack of concern for his health and safety.

[3] As required by s.72 of the *Police Act*, the Police Complaints Commissioner referred Mr. Taylor's complaint to the Halifax Police Chief. The chief delegated his authority and the delegate found that none of Mr. Taylor's complaints were "sustained".

[4] Mr. Taylor requested the Police Complaints Commissioner to refer his complaint to the Police Review Board. She retained an investigator. After getting his report, the commissioner dismissed the complaints because, "I find there are no facts upon which a Review Board could make a finding of misconduct."

[5] Mr. Taylor applied for judicial review on grounds of procedural unfairness and unreasonableness. On procedural fairness, he alleged a lack of thoroughness in the investigation, a failure to give Mr. Taylor an opportunity to respond to the investigator's report, and unfairness of the implied finding against Mr. Taylor's credibility. On unreasonableness, he contests the Police Complaint Commissioner's interpretation of her legislative authority and her finding that the complaint was without merit.

Record and Supplemental Evidence

[6] Mr. Taylor's complaints read as follows:

- arrested me without good or sufficient cause, using unnecessary force;
- treated me cruelly while I was detained;
- neglected or showed a lack of concern for my health or safety while I was in custody;
- caused a "serious injury" to me that amounts to a "serious incident";

- acted discourteously or uncivilly to me, having regard to all the circumstances; and
- knowingly were accessories to the above by aiding, abetting or conniving with the offending member(s).

[7] The complaint was signed in November, 2017 and it concerned events during the early morning hours of a Saturday in the previous August. Mr. Taylor filed an affidavit with his complaint. He swore to events between 11:30 p.m. on Friday August 11, 2017 and noon the next day.

[8] He and five friends, who he specifically named, drove to a bar on Argyle Street where Mr. Taylor's brother worked. Mr. Taylor left his wallet, including his identification, in the car. The id would have shown Cory Taylor was born on January 22, 1999, that he was six months short of the drinking age for Nova Scotia.

[9] The group stayed in the bar for three or four hours. Mr. Taylor's brother was working that night, and he gave Mr. Taylor his own wallet and twenty dollars. Mr. Taylor provided an improbable explanation for why he carried his brother's wallet, with his brother's id inside.

[10] The group next stopped at Pizza Corner. They left there in two cars, made Sackville Street, and turned downhill towards the harbour. Both cars stopped for a red light at the Barrington Street intersection.

[11] Apparently, the group of five were made up of four young Black men and a young woman. According to the affidavit, a group of four to six intoxicated White men accosted them from the sidewalk, yelling racial slurs.

[12] Mr. Taylor's group left their cars. A fight broke out near Starbucks on the corner of Barrington Street and Sackville Street. According to Mr. Taylor, the fight broke up before the police came on the scene. He was walking back towards the car in which he had arrived. It was parked just off Sackville, on Hollis, the next street below Barrington.

[13] According to Mr. Taylor, he was grabbed from behind by Constable Paris without warning and she threw him against a wall with his hands pinned behind. He says he suffered cuts to his face and nose.

[14] Constable Paris prepared a standard police report soon after the incident. She said she yelled out her cruiser window for three Black men to stop. They kept

moving. She yelled again. Two stopped, but Mr. Taylor kept going. She got out of her car, but Mr. Taylor "continued to ignore my commands to stop".

[15] Constable Paris and Constable Norris caught up with Mr. Taylor. She said they pinned him against a plexiglass window. He complained that they injured his nose. Constable Paris denies this. She did allow that Mr. Taylor has "skinny arms" and she put handcuffs on them snugly. She asked if he had a hearing problem.

[16] Constable Norris corroborated Constable Paris. The fight had broken up when he observed the scene. Constable Paris arrived next. Constable Paris ordered Mr. Taylor to stop many times. He "continued to walk away from Police".

[17] Constable Norris observed a cut on Mr. Taylor's nose. Then he and Constable Paris arrested him and put him in hand cuffs.

[18] Mr. Taylor was placed in the back of the cruiser, which I notice had to have doors that could not be unlocked from the inside. Mr. Taylor complains that Constable Paris spoke rudely to him and that he was the only one arrested. The White men who started the altercation were allowed to go free.

[19] Contemporaneous police records include, "VICTIMS DO NOT WANT ANTHING PURSUED OR INVESTIGATED AND ARE HEADING HOME". Someone wrote "Cst. Norris" next to that entry. Constable Norris accompanied one of the White antagonists to the hospital. The Black protagonists were allowed to drive away from the scene, but without Mr. Taylor. The reference to "victims" appears to be to those of the White antagonists who the police caught up with. Either these were never more that two, or the rest escaped.

[20] There are contradictory reports of the numbers involved in the fight. In the end, police refer to two White men in one group and three Black men and one White woman in the other. As I said, Mr. Taylor named five individuals in his group plus himself, and he said there were four to six White men in the other. Police records of calls from the scene show that a witness called from her car on Barrington Street towards the end of the fight, and police arrived after it broke up. There may have been others involved, unknown to the police.

[21] The records are inconsistent about the reason for Mr. Taylor's arrest. At 4:44, someone, probably Constable Paris, reported "(M): ARRESTED FOR PUBLIC INTOXICATION". The booking records are inconsistent on the subject

of intoxication: “Drugs/alcohol involved: NO”, “CONSUMED ALCOHOL”, and “subj intoxicated”.

[22] Another police report, this one titled “Follow Up Report #HP1” and authored by a Brian Palmeter says “male detained for assault. He became agitated and ended up being arrested and held for breach of peace.” All of the booking records refer to breach of the peace, not assault or public intoxication. In her contemporaneous report, Constable Paris said: “I arrested him for Breach of the Peace and to stop any continuance of fighting in the downtown area at 0430 in the morning.”

[23] Constable Paris wrote another statement six months later. She described an initial arrest for assault and a change to breach of the peace when police decided not to pursue an assault investigation.

[24] On the initial arrest, Constable Paris wrote:

> “Mr. Taylor was initially detained and arrested for assault in relation to the physical altercation that took place on Sackville Street. He appeared to be walking away from the scene and had injuries consistent with involvement in the altercation. An eye witness also identified him as one of the males involved. I read Mr. Taylor his Charter rights and caution while in the police car, during which time he was constantly speaking over me.”

On the ultimate arrest, she wrote:

> Ultimately, police determined that there would be no assault charges arising from the fight, and Mr. Taylor was held for breach of the peace because of his escalating behaviour with me and my belief that he had just been involved in a fight and could not be released safely at that hour of the night.

[25] Mr. Perryman drafted a “notice of review” requiring the Police Complaints Commissioner to review the decision of the Halifax Police disciplinary authority. Mr. Taylor signed it. Mr. Perryman delivered it by email to the commissioner.

[26] At that time, the commissioner had this contact information for Mr. Taylor: Mr. Perryman’s office address, his telephone number, his email address, and an email address at which Mr. Perryman copied Mr. Taylor. In all correspondence after the notice of review, the Police Complaints Commissioner either wrote to Mr. Taylor through Mr. Perryman or used the email address and copied Mr. Perryman.

[27] The commissioner appointed her own investigator. Mr. Fred Sanford was appointed under s.74(2) of the *Police Act*. Throughout, Mr. Sanford had counsel's contact information. He also had Mr. Taylor's mother's contact information.

[28] On August 2, 2018 Mr. Sanford sent an email to Mr. Taylor. Mr. Sanford requested a telephone number and a time when they could speak. The email went to junk mail. However, Mr. Taylor's mother provided his telephone number, and he and Mr. Sanford had a brief telephone conversation.

[29] Justice Arnold allowed Mr. Taylor to supplement the record with limited affidavit evidence. Mr. Taylor swore that the telephone conversation lasted less than five minutes. The commissioner was permitted a reply affidavit from Mr. Sanford. One was filed but it took no issue with Mr. Taylor's evidence about the short duration of his only communication with the investigator.

[30] Mr. Sanford's notes are exhibited to his affidavit. They show he spent more that thirteen hours investigating the incident before he attempted to call Mr. Taylor. That included two hours with the manager of the bar Mr. Taylor had visited on the night of the incident. It does not appear that Constable Paris, Constable Norris, or other police were questioned.

[31] The notes show that on August 2, Mr. Sanford sent the email that went to junk, but Mr. Sanford did not stop there. He contacted Mr. Taylor's mother who said he had moved to Ontario. She provided a 902 telephone number. The short telephone conversation occurred on August 9.

[32] In that conversation Mr. Taylor said he was "unable to provide a mailing address, still in the process of getting settled". No note suggests there was any discussion of email as an effective way to communicate. Despite that, Mr. Sanford emailed questions to Mr. Taylor on August 13. He did not try to go through counsel or through Mr. Taylor's mother. Mr. Sanford's report blames the lack of communications on Mr. Taylor, and the respondents do so to this day.

[33] The notes of the conversation of August 9 include "friends who were with him did not witness his arrest – does not believe they could provide any further evidence". Obviously, Mr. Taylor had a much narrower view of the limits of relevancy than even the investigator did. It is obvious Mr. Sanford recognized the relevance of events surrounding the altercation for assessing the validity of the detention, because his ineffective email of August 13 asks:

> [W]ould any of the friends who were with you when the altercation occurred on Sackville St. be able to provide any further information relating to whether or not you were involved in an actual physical altercation at that location? If so, would you be able to provide me with contact information?

[34] It appears that no attempt was made to telephone Mr. Taylor. It is clear that the effectiveness of Mr. Taylor's email address had become doubtful. It is clear that no attempt was made to reach him through counsel or his mother. It is clear that no attempt was made to get contact information from counsel, Mrs. Taylor, or the police although the friends had been specifically named in the affidavit supporting the complaint. All of this had to be clear to the Police Complaints Commissioner when she read Mr. Sanford's report.

[35] That report was prepared in August or September, 2018. The commissioner distributed it on September 20, 2018.

[36] The report includes statements that the other parties to the altercation complied with Constable Paris' directions, "but Mr. Taylor was walking away from the scene despite being verbally directed to stop." No mention is made of Mr. Taylor's evidence that he did not hear any direction.

[37] The report continues, "He was approached by Cst. Paris and Cst. Taylor [sic] and physically restrained from leaving the scene." It appears that the physical restraint involved a tackle from behind. It appears that "the scene" somehow extended down to Hollis Street.

[38] The investigator gave this explanation for the arrest:

> Mr. Taylor was initially detained for investigative purposes as the officers attempted to determine the nature of the altercation, if injuries had been sustained and if any of the parties involved had committed criminal offences. It was determined that there would not be any criminal charges as a result of the altercation, however Cst. Paris states "Mr. Taylor was held for breach of the peace because of his escalating behavior with me and my belief that he had just been involved in a fight and could not be released safely at that time of night".

The quotation is from Constable Paris' statement of February 9, 2018 (see para. 23 and 24, above.) The finding that the detention was initially for investigative purposes is contradicted by that statement, "Mr. Taylor was initially detained and arrested for assault in relation to the physical altercation that took place on Sackville Street."

[39] The contemporaneous report prepared by Constable Paris does not suggest an investigative detention either. Indeed, all of the other contemporaneous police records refer to an arrest for breach of the peace, and they say nothing about a detention for investigation.

[40] The Halifax Regional Police have a policy on arrest for breach of the peace. It is in a part titled "B. General" and sections 1 and 2 read:

> 1. Breach of Peace in Sections 30 and 31(1) CC does not constitute an offence but provides a power of arrest. These sections act as a preventative remedy either through arrest for not more than 24 hours or as a peace bond at common law. Breach of Peace has never been completely defined in the Canadian courts.
>
> 2. When a police officer arrests without a warrant under the provisions of Section 31(1) CC or when a person is taken into custody who has been arrested under provisions of Section 30 CC, the police officer must release the person as soon as the need for detention no longer exits.

Oddly, these policies do not indicate that this arrest power can only be exercised by a "peace officer who witnesses a breach of the peace": *Criminal Code*, s.31(1).

[41] After referring to these police policies on arrest for breach of the peace, Mr. Sanford concluded:

> Given that Cory Taylor had been involved in a recent altercation and Cst. Paris's assessment of his "escalating behavior", it would be reasonable to remove him from the environment of a busy summer night in downtown Halifax. It is the undersigned's opinion that Cst. Paris had reasonable grounds to arrest and detain Mr. Taylor.

[42] On the complaint about unnecessary force, Mr. Sanford referred to Constable Norris' report that he saw blood on Mr. Taylor's face before the arrest and Constable Paris' February 2018 statement that "none of the contact between police and Mr. Taylor could have been the cause of his physical injuries". Finally, he blames Mr. Taylor for Mr. Sanford's inability to interview the friends who were with Mr. Taylor that night.

[43] Mr. Sanford knew that Mr. Taylor had moved. He knew that he was represented by local counsel. Never did he attempt to reach Mr. Taylor through counsel. Further, if an investigation was conducted at the scene, as Mr. Sanford found, there would be police records of the names, addresses, etc. of the parties. Instead of asking counsel, the police, or Mr. Taylor's mother, Mr. Taylor's supposed unresponsiveness is counted against his complaints.

[44] Mr. Sanford found, "it is not possible to form the conclusion that Mr. Taylor's injuries were suffered at the hands of the police."

[45] On the complaint about mistreatment in booking and the cells, Mr. Sanford found nothing when he reviewed the video recordings. And, he says cells are regularly checked.

[46] Mr. Sanford concluded, "It is this investigator's recommendation that no further action be taken regarding the complaint."

Social Context and Race

[47] As I said, Mr. Taylor is a young Black man. So were most of the group he partied with that night. I am told that Constable Paris is a Black woman and Constable Norris is a White man.

[48] Mr. Taylor submits that I should notice three things:

> a. Racial prejudice against visible minorities is notorious and indisputable in Canada and Nova Scotia….
>
> b. A reasonable person must be deemed to be cognizant of the existence of anti-Black racism in Halifax, Nova Scotia because such racism is part of this community's psyche and the racial dynamics of this city…
>
> c. Black Nova Scotians are subjected to systemic discrimination, including in the form of targeted and excessive policing… .

He cites *R v. Spence*, 2005 SCC 71 for the first proposition, L'Heureaux-Dubé and McLachlin JJ. in *R v. R.D.S.*, [1997] 3 S.C.R. 484 for the second, and *R. v. Jackson*, 2018 ONSC 2527 for the third. He added *R. v Le*, 2019 SCC 34 after I requested further submissions on breach of the peace.

[49] *R.D.S.* concerned remarks of Her Honour Judge Sparks when explaining her reasons for accepting the testimony of a Black youth over that of a White police officer. The boy was charged with assaulting the officer. He gave evidence which, if believed, may have shown the arrest was unlawful.

[50] The judge said, "…certainly police officers do overreact, particularly when they are dealing with non-white groups." And, "I believe that probably the situation in this particular case is…a young police officer who overacted."

[51] The Crown appealed to my court as the summary conviction appeal court. Chief Justice Glube found the remarks created a reasonable apprehension of bias. R.D.S. appealed. Justices Pugsley and Flinn upheld Chief Justice Glube. Justice Freeman dissented. R.D.S. appealed (as of right).

[52] Chief Justice Lamer and Justices Sopinka and Major found the trial judge's remarks crossed the line.

[53] Justices Cory and Iacobucci decided the remarks did not cross the line when they are read in the context of the extensive reasons given by Judge Sparks before the "subsequent comments about race" (para. 147) and in light of the fact that the remarks about race were part of her disposition of a provocative Crown submission, "there's absolutely no reason to attack the credibility of the officer" (para. 153).

[54] Justice Cory's reasons, concurred in by Justice Iacobucci, did refer to the remarks about race as "unfortunate" (para. 147, 150, and 156), "troubling" (para. 148, 151, and 158), "worrisome" (para. 152), and "inappropriate" (para. 153). And, their reasons conclude with a statement that aligns them with the dissent except for application of "the principles and the test" (para. 160).

[55] That said, Justice Cory's reasons took notice of the "history of anti-black racism in Nova Scotia" (para. 149). And, he said "racism may have been exhibited by police officers in arresting young black males" (also, para. 149). The inclusion of those observations leads me to question amalgamation of the reasons of Justices Cory and Iacobucci with the dissent reasons on the issue of judicial notice of systemic racism. See Sydney N. Lederman, Alan W. Bryant, and Michelle K. Fuerst *Sopinka, Lederman & Bryant The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018) para. 19.48 to 19.50.

[56] Justices L'Heureaux-Dubé and McLachlin (later the Chief Justice) wrote joint reasons, and Justices La L'Heureaux-Dubé, La Forest and Gonthier concurred. These reasons adopt a more generous view of our ability to notice systemic racism as fact.

[57] Mr. Taylor emphasizes para. 46 and 47 of the L'Heureaux-Dubé and McLachlin reasons. The judges discuss the perspective from which bias is determined: a reasonable person understood as "a right-minded person familiar with the circumstances" (para. 36). Citing the *Royal Commission on the Donald*

Marshall Jr. Prosecution, Justices L'Heureaux-Dubé and McLachlin wrote at para. 47:

> The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues… .

The judges went further than their discussions of the reasonable person perspective on allegations of bias. They also wrote at para. 47:

> The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that judges may take notice of actual racism known to exist in a particular society. Judges have done so with respect to racism in Nova Scotia.

So, when they applied the law relating to judicial bias, Justices L'Heureaux-Dubé and McLachlin said at para. 56:

> While it seems clear that Judge Sparks did not in fact relate the officer's probable overreaction to the race of the appellant R.D.S., it should be noted that if Judge Sparks had chosen to attribute the behaviour of Constable Stienburg to the racial dynamics of the situation, she would not necessarily have erred. As a member of the community, it was open to her to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background.

And, at para. 57:

> That Judge Sparks recognized that police officers sometimes overreact when dealing with non-white groups simply demonstrates that in making her determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities.

[58] *Spence* was about challenging potential jurors when the accused is Black and the alleged victim is Indian. It is an important decision about the limits of judicial notice on subjects of race and social context. Justice Binnie wrote for the Court.

[59] Mr. Taylor emphasizes para. 5 and 52, where Justice Binnie made it clear that courts take judicial notice of racial prejudice against visible minorities. This

includes "the likelihood that anti-black racism is aggravated when the alleged victim is white" (para. 52).

[60] However, the Ontario Court of Appeal took judicial notice too far when it decided that the *Parks* question, "Would your ability to judge…be affected by the fact that the person charged is…black…and the deceased is a white man?" necessarily extends to, "…the fact that the accused is a black man charged with robbing an East Indian person?" (para. 1). A theory that members of a race are partial to their own was not a candidate for judicial notice.

[61] *Spence* held that the *Morgan* criteria for judicial notice of social facts or legislative facts are relevant but not conclusive. Outside notice supplying an adjudicative determination, "the limits of judicial notice are inevitably somewhat elastic." "Still, the *Morgan* criteria will have great weight when the legislative fact or social fact approaches the dispositive curve." *Spence*, para. 63.

[62] *R. v. Le* was about excluding evidence obtained through arbitrary detention on private property. Only five members of the Court determined the case. Justices Brown and Martin wrote a joint opinion, and Justice Karakatsanis concurred. Justice Moldaver wrote a dissenting opinion, and the Chief Justice concurred with him.

[63] The third *Grant* factor for determining legality of a detention is "The particular characteristics or circumstances of the individual where relevant…". The police engaged four young Black men and one young Asian man in a private backyard. Charges were laid against Mr. Lee.

[64] At para. 72, Justices Brown and Martin reiterated the relevance of a community's experiences with the police for assessing the third factor. The two judges surveyed a large body of scholarship and commissioned reports. Two of these were published after the *Le* case was argued. About the most recent reports, they said at para. 96:

> Courts generally benefit from the most up to date and accurate information and, on a go-forward basis, these reports will clearly form part of the social context when determining whether there has been an arbitrary detention contrary to the *Charter*.

They made this finding at para. 91:

> We do not hesitate to find that, even without these most recent reports, we have arrived at a place where the research now shows disproportionate policing of

> racialized and low-income communities... . Indeed, it is in this larger social context that the police entry into the backyard and questioning of Mr. Le and his friends must be approached. It was another example of a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions. The documented history of the relations between police and racialized communities would have had an impact on the perceptions of a reasonable person in the shoes of the accused.

[65] The dissent was about the limits on appellate interference with trial level fact finding, not judicial notice (see para. 307). Justice Moldaver expressed reservations about taking account of studies published after argument (see, para. 260). Otherwise, he took no issue with the large volume of studies reviewed by Justices Brown and Martin. He made a number of points with bullets at para. 260 including:

- A person may experience a police interaction differently depending on his or her age, race, life experience, and other personal characteristics, and these factors should be taken into account in the s.9 analysis.

and,

- the judicially constructed reasonable person must reflect and respect racial diversity, as well as the broader state of relations between the police and various racial groups.

and,

- Credible reports, studies, and other materials on race relations may assist courts in understanding how racialized persons may experience police interactions differently and courts may take judicial notice of such materials – which qualify as "social context" evidence – where the test set out in *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 459, is met.

[66] Among the studies and authorities that helped shape the judicial view on noticing social facts about race is Nova Scotia. *Report of the Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: McCurdy's Printing, 1989). Another important source in Nova Scotia is the decision of Professor Philip Girard sitting as a Board of Inquiry under the *Human Rights Act* in *Johnson v. Sanford*, [2003] N.S.H.R.B.I.D. 2 reversed on costs only 2005 NSCA 70. Also *R. v. Downey*, 2010 NSSC 10 is an example of a judge considering her own knowledge of the racial dynamic when a young Black woman is arrested by police in Halifax. See para. 18 to 19.

[67] Mr. Taylor sought to add to these sources Dr. Scot Wortley. *Halifax, Nova Scotia: Street Checks Report* (2019, Nova Scotia Human Rights Commission). All

respondents objected on two bases: the report is hearsay and Mr. Taylor's complaints were not about a street check.

[68] It was left that I would rule on admissibility when I determined the main issues. The report was not offered as expert evidence, and no one required proof. If the report is admitted, it is as a scholarly source whose weight is diminished precisely because it is not presented through expert evidence and is not subject to cross examination: *Spence*, para. 68 and 69. However, *Le* shows, and *Spence* ("a preference" and "proceed at some risk") allows, for consideration of some scholarly works without proof through an expert.

[69] Dr. Wortley's report is based on an extensive scholarly investigation. The report itself is extensive. The fact that it is about street checks takes it away from any dispositive issue in this review.

[70] Constables Paris and Norris argue in the main that race is not an issue because Mr. Taylor made no complaint about racism. On the contrary, a young Black man's complaints about how he was treated by Halifax police have to be understood against the background of established systemic racism.

[71] The Wortley report brings social facts accepted long ago by the courts into the present. For example, the findings at p. 153 and 154, including "young Black males…are by far the group most exposed to police street check activity", tell us we continue to have serious problems with "systemic discrimination against black and aboriginal people" *R.D.S.* para. 47, "clashes between the police and the visible minority population over policing issues" (also, *R.D.S.* para. 47), "the likelihood that anti-black racism is aggravated when the alleged victim is white" (*Spence*, para. 52), "disproportionate policing of racialized…communities" (*Le*, para. 97), and "A person may experience a police interaction differently depending on his or her age, race, life experience, and other personal characteristics and these factors should be taken into account in the s.9 analysis." (*Le*, para. 260).

[72] I will direct that the copy of Dr. Wortley's report handed to me be marked as an exhibit.

[73] Dr. Wortley picks up on a hopeful theme sounded also by Professor Girard at p. 29 of *Johnson v. Sanford*. Professor Girard said of the several police who stopped Kirk Johnson, "I am unable to say that the police response was the result of any discriminatory behavior, attitudes or policies on their part." Dr. Wortley said of the whole Department that was the subject of his study "Personally, after

years of examining these issues, I believe that only a small portion of the racial disparity in police street checks can be explained by overt, malicious racism." (p. 154).

[74] The uncontradicted evidence before the Police Complaints Commissioner was that an act of overt racism started the altercation that lead to Mr. Taylor's arrest for assault and, later, to his detention for breach of the peace. That act is directly relevant to the assessment of the grounds for the arrest and of the justification for the detention. Our understanding of unconscious racism in encounters between police and young Black men shines light on the need for detailed information about the overt racism that caused the encounter in the first place.

Reasonableness of Commissioner's Decision

[75] As I said, Mr. Taylor seeks review of the commissioner's decision and review for procedural fairness. I begin with the decision. The complaints are that the police illegally detained and arrested Mr. Taylor, they used unreasonable force doing so, they spoke to him rudely after the arrest, and they mistreated him during detention in booking and in cells.

[76] ***Standard of Review***. This review is at the deferential level, reasonableness not correctness: *Mercier v. Nova Scotia (Police Complaints Commissioner*), 2014 NSSC 79 at para. 20.

[77] *Mercier* determined reasonableness in the circumstances of a commissioner's refusal to refer a complaint in light of the meaning of reasonableness in *Dunsmuir v. New Brunswick*, 2008 SCC 9 para. 47 and *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 para. 12 to 16. At the time *Mercier* was decided, s. 74(4) of the *Police Act* read:

> Where the Complaints Commissioner is unable to resolve the complaint, the complaint shall be referred to the Review Board in accordance with the regulations unless the Complaints Commissioner is satisfied that the complaint is frivolous or vexatious, and the Review Board shall conduct a hearing in respect of the complaint.

[78] Justice Leblanc, now the Lieutenant-Governor, discussed "frivolous and vexatious" at para. 25 to 31 of *Mercier*. Among other things he pointed out uses of

that phrase in former rules of court. (The present *Civil Procedure Rules* relegate that to abuse of process: Rule 13.01(3) and Rule 88 – Abuse of Process.)

[79] Mr. Mercier refused to cooperate with the investigator appointed by the Police Complaints Commissioner (see para. 37). In words remarkably similar to the record of the decision in this case, then Commissioner Mont wrote:

> I have now received the results of the independent investigation done in relation to your complaint. I have carefully reviewed his investigation report as well as the original file.
>
> Unfortunately I find that there are no facts here upon which a Review board could make a finding of misconduct.
>
> Therefore, I am exercising my authority under subsection 74(4) of the *Police Act* to not forward your complaint to the Board. For clarification, s.74(4) includes situations where a complaint has no merit.

Justice Leblanc found the implicit interpretation of "'frivolous and vexatious' as including complaints that have no merit" (para. 38) to be within the scope of reasonableness.

[80] Eight months after the *Mercier* decision was released, the Legislature amended s.74(4) to make it express that the exception to the requirement of the Commissioner to refer a complaint to the Review Board includes "unless the Complaints Commissioner is satisfied that the complaint is…without merit…".

[81] I must assess the decision for its "justification, transparency and intelligibility" (*Dunsmuir*, para. 47) and ask "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (also, para. 47) I must pay attention not only to the reasons given by the commissioner but also to the reasons which could be offered in support of the decision (*Newfoundland and Labrador Nurses Union*, para. 12). Because the commissioner's reasons are scant, I must "look to the record for the purpose of assessing the reasonableness of the outcome." (*Newfoundland and Labrador Nurses Union*, para. 15)

[82] Mr. Taylor submits that both the commissioner and the investigator applied the "wrong legal test". Relying on "frivolous and vexatious", he says that the threshold for moving the complaint along is a low one, "air of reality" or "arguable case".

[83] This submission misses two points. Justice LeBlanc found that the commissioner could refuse to refer a complaint she found to be "without merit". And, the Legislature expressly added that criterion to be statute.

[84] I must determine whether the finding that each complaint was without merit is reasonable in the senses expressed in *Dunsmuir* and *Newfoundland and Labrador Nurses Union*.

[85] ***Unlawful Detention and Arrest***. In my assessment the finding that this complaint had no merit is unreasonable because the Police Complaints Commissioner did not have before her information necessary to make that determination.

[86] The record shows that Constable Paris tackled Mr. Taylor because he disobeyed her "command" to stop, and Constable Norris joined to assist. I must repeat what Mr. Stanford wrote about this in his report:

> Mr. Taylor was initially detained for investigative purposes as the officers attempted to determine the nature of the altercation, if injuries had been sustained and if any parties involved had committed criminal offences.

The common law power to detain for investigative purposes is subject to s.9 of the *Charter*. The circumstances of the offence and of the offender figure in the balance between police duties and the individual's constitutional rights to liberty and privacy. See *R. v. Clayton*, 2007 SCC 32.

[87] Constable Paris justifies the continuing detention on the basis of breach of the peace. Does Constable Paris think, as the record suggests, that her "command" to stop, and a failure to comply, are sufficient to justify the use of force and detention? If so, would a Review Board want to make recommendations to the Halifax police about educating members on the limits of this power? See, s.79(1)(c) of the *Police Act*.

[88] The information before the commissioner left unanswered the question about an inconsistent report of an arrest for public intoxication and inconsistencies in the records at booking about Mr. Taylor's sobriety.

[89] Most seriously, the record did not give the Police Complaints Commissioner information by which she could assess whether Mr. Taylor's continued detention on the basis of a breach of the peace was justified.

[90] When he was hand cuffed and locked in the back of the cruiser, Constable Paris told Mr. Taylor he had been arrested for assault. Earlier, she told him he was being arrested because he was involved in a fight. She refers to an eyewitness, but the witness signed no statement and was not present when the fight broke out. Was there an assault or a consensual fight instigated by racial insults?

[91] Constable Paris did not release Mr. Taylor when she learned the "victims" were not cooperating and there were to be no assault charges. According to her later statement, Mr. Taylor was then under arrest for breach of the peace. Did she afford him his constitutional rights by telling him of the new reason and reminding him of his right to counsel?

[92] As I said, s.31 of the *Criminal Code* gives a "peace officer who witnesses a breach of the peace" power to arrest for breach. Constable Paris did not witness any altercation. The respondents say that the common law power to arrest for breach of the peace applied. That may be, but the commissioner never considered it.

[93] As I said, the Halifax Police Department has a policy on arrests for breaches of the peace. A Review Board may have concerns with one provision and issues about compliance with another. Policy "2.10 Breach of Peace – detention, B. General" provides:

> Breach of Peace in Sections 30 and 31(1) CC does not constitute an offence but provides a power of arrest. Theses sections act as a preventative remedy either through arrest for not more than 24 hours or as a peace bond at common law. Breach of Peace has never been completely defined in the Canadian courts.

A Review Board might be concerned about the failure to reflect the *Criminal Code* requirement that the officer witness the breach.

[94] Policy "D. Police Officer 1." provides:

> Police officers must give consideration and care when exercising the Breach of Peace provisions of the *Criminal Code* since a person arrested under this authority does not normally appear before a Justice.

What inquiries were made of Mr. Taylor about his way home that night? What were the rest of his group prepared to do for him? Why was the inquiry about Cory Taylor not answered with, "I have someone with the same last name, someone who was involved in the altercation"?

[95] The questions I have posed are not answered in the record. The information should have been available from Constable Paris, Constable Norris, the booking officer, Mr. Taylor, or the five friends named in his affidavit. The Police Complaints Commissioner submits, "Thus, there was no chance that the complaint would succeed if it was referred to the Police Review Board, particularly given that there would be credibility issues concerning the Applicant and no corroborating evidence." Constables Paris and Norris say, "The Applicant did not request that the investigator interview [the friends]." And, "When asked to provide his friends' contact information, he declined." They rely on *Selig v. Nova Scotia (Human Rights Commission),* 2018 NSSC 116, a decision of my colleague, Justice Gabriel. Particularly, para. 70, 71, and 84.

[96] The applicant's credibility would be in issue before the Police Review Board, but if he was an eighteen-year-old who snuck into a bar and carried a false id, he would not be the first. If that were found to be the case, it would not be a rational ground for disbelieving all of his testimony.

[97] There may well have been corroborating evidence. It is just that the Police Complaint's Commissioner did not obtain information about what potential corroborating witnesses would say.

[98] Mr. Taylor did not decline to provide contact information on his friends. The record is clear that their information on the altercation was relevant enough to be in need of inquiry and the inquiry failed because attempts to obtain contact information on the friends were wholly inadequate. To blame Mr. Taylor for this state of affairs is unfair, as well as unreasonable.

[99] *Selig* does not assist the respondents. In that case a *Human Rights Act* complainant asserted that there were additional witnesses who the investigator ought to have interviewed. The investigator had interviewed ten witnesses and had reviewed numerous materials. The court had no evidence about what the additional witnesses might have added.

[100] In the case at hand, the investigator sought out the additional witnesses. They had evidence to give about an altercation that underlied Mr. Taylor's initial arrest and his later detention for breach of the peace. The only evidence about what caused the altercation was Mr. Taylor's. He said it was provoked by racial insults. That information went to the heart of breach of the peace. It was necessary to understand Mr. Taylor's behaviour against the backdrop of racial discrimination generally and systemic racism in encounters between the Halifax

police force and young Black men. A consensual fight provoked by racial insults is no basis for the assault arrest or the breach of the peace detention. It would, however, explain the so called escalation.

[101] Unlike the refusal of the Human Rights Commission in *Selig* to refer a complaint to a Board of Inquiry, the Police Complaints Commissioner in this case had before her evidence that her own investigator saw Mr. Taylor's companions to be necessary witnesses to a relevant event. I would say, an event central to the complaint.

[102] Again, I repeat Mr. Sanford's opinion on detention for breach of the peace as expressed in his report:

> Given that Cory Taylor had been involved in a recent altercation and Cst. Paris's assessment of his "escalating behavior", it would be reasonable to remove him from the environment of a busy summer night in downtown Halifax. It is the undersigned's opinion that Cst. Paris had reasonable grounds to arrest and detain Mr. Taylor.

Mr. Taylor's "escalating behavior" needed assessment in light of the racial insults, his arrest for rising to the racial insults, his being handcuffed and locked in the back of a cruiser, and the White antagonists going free. In that regard, the Police Complaints Commissioner had nothing from which to determine whether the police had given "consideration and care".

[103] The extent of Mr. Taylor's involvement in the altercation was not known by the arresting officers. Witnesses were not interviewed by Mr. Sanford, and the Police Complaints Commissioner had no information from which to assess the extent of his involvement in the altercation or the knowledge of police officers in that regard.

[104] Detention for breach of the peace is not justified by "it would be reasonable to remove him from the environment". The Police Complaints Commissioner had no information before her to answer the questions I referred to at para. 94. She was in the dark about what the police knew about Mr. Taylor's means for going home and what his friends could say for him. She was in the dark about whether these subjects were ever inquired into. She had no information explaining the inadequate response to his friend's inquiries about him.

[105] For the Police Complaints Commissioner, Mr. Choo draws this passage from para. 38 of *R. v. Puddy,* 2011 ONCJ 399 to my attention:

> While breaching the peace is *not* itself an offence, those who commit acts amounting to a breach of the peace or are at the cusp of doing so may be arrested and temporarily restrained under the Criminal Code or, in the latter case, the common law. This is a form of proactive or preventative power designed to preserve the peace and inhibit the occurrence of criminal conduct.

Mr. Choo also refers me to the decision of Justice Gogan in *R. v. MacInnis*, 2014 NSSC 527.

[106] In addition to *R. v. MacInnis*, Ms. MacMillan, on behalf of Constables Paris and Norris, refers to *R. v. Biron*, [1975] SCJ 64, *R. v. T.R.J.* 2010 NSSC 233, *R. v. Khatchadorian*, [1998] BCJ 1867 (C.A.), *R. v. Knowlton*, [1974] S.C.R. 443, and *Hayes v. Thompson*, [1985] BCJ 1904 (C.A.). The facts in those cases are said to be similar to those at hand.

[107] For Mr. Taylor, Mr. Perryman refers me to a leading authority on the common law power to arrest for breach of the peace, *Brown v. Durham (Regional Municipality)*, [1998] O.J. 5274 (C.A.). Justice Doherty delivered the judgement of the Ontario Court of Appeal. At para. 73 he wrote, "a breach of the peace contemplates an act or actions which result in actual or threatened harm to someone." And, at para. 74:

> Two features of the common law power to arrest or detain to prevent an apprehended breach of the peace merit emphasis. The apprehended breach must be imminent and the risk that the breach will occur must be substantial.

[108] The facts of this case are unlike the others. Mr. Taylor was not arrested for breach of the peace. He was arrested for assault. Only when that basis evaporated did Constable Paris decide that Mr. Taylor was arrested and detained for breach of the peace. At that, he was either wrongfully detained or he was detained to prevent an apprehended breach of the peace. The alternative, sending him home with his driver and other friends, was either not considered or it was ignored by the investigator. The record does not tell us which.

[109] The commissioner did not have information from which she could rationally find that Mr. Taylor, in handcuffs and locked in the back of a cruiser, posed a substantial and imminent risk. The risk was neither substantial nor imminent if the altercation resulted from racial insults, the antagonists had gone home, and Mr. Taylor had a safe way to his home. The record supports all of those findings and detracts from none of them. It does not support, in any way, Mr. Sanford's conjecture of a young man prowling the downtown in search of a fight.

[110] In light of systemic racism, the apparent cause of the altercation demands far more information before the Police Complaints Commission could come to a conclusion that Mr. Taylor's complaints had no merit so as to justify a hearing. And, the same with the apparent alternative to a night in jail, the ride home.

[111] ***Excessive Force***. As I said, Constable Paris speculated that Mr. Taylor's injuries came from the altercation, rather than the tackle on arrest. The commissioner acted on that speculation when she found that the complaint of excessive force had no merit.

[112] The police did not witness the altercation. The record before the Police Complaints Commissioner showed her that, in addition to Mr. Taylor's sworn statement, there were numerous witnesses who should have been able to give evidence about whether Mr. Taylor participated in the altercation and, if so, whether he suffered blows.

[113] In the absence of information from those who could give a firsthand account, confirming or denying the police speculation, the finding that the complaint had no merit was unreasonable. The finding was outside the range of rational consequences because it chose speculation over information that would have qualified as evidence.

[114] ***Rudeness***. Professor Girard discussed the police duty of "reasonable tolerance and tact", even in the face of belligerence, at p. 23 of *Johnson v. Sanford*.

[115] Mr. Taylor's allegations of rudeness are not very specific. I do not regard "skinny arms", "hearing problem", or "fool" as signs of respectful treatment, but I have to defer to the assessment of the Police Complaints Commissioner.

[116] ***Abuse During Detention***. Mr. Sanford's investigation was confined to the surveillance videos at police booking and his acceptance that the cells are regularly monitored. I have watched the videos, and I cannot gainsay Mr. Sanford's report about monitors. (I must say that the videos show Mr. Taylor in full motor control despite having to preform maneuvers that would challenge an intoxicated person. He also appears to be compliant rather than "accelerating".)

[117] The commissioner had before her Mr. Taylor's evidence, Mr. Sanford's accounts, and the surveillance videos. She was entitled to make limited findings of credibility: *Mercier*, para. 32 and 34. She had sufficient materials before her to

support a finding that the complaint about abuse was without merit. That is being within the scope of rational outcomes.

Procedural Fairness

[118] There is no standard of review on procedural fairness. The standard, reasonableness or correctness, is for judicial review of a decision. The Police Complaints Commissioner was required to afford procedural fairness to the parties affected by her decision.

[119] The question when a decision is challenged for procedural unfairness is "how much procedure was due", or, less glibly, "what was the content of the duty of fairness". A majority of the Supreme Court of Canada identified five factors to be considered when we determine the context: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. 39. In *McDougall v. Nova Scotia (Human Rights Commission*), 2016 NSSC 118 at para. 13, Justice LeBlanc abstracted the factors this way:

1) Nature of the decision;
2) Nature of the statutory scheme;
3) Importance of the decision to the individuals affected;
4) Legitimate expectations of the person challenging the decision; and
5) Choices of procedure made by the agency itself.

[120] I adopt the submission of Mr. Choo on the first factor, the nature of the decision:

> This review is of a decision by the Commissioner to not forward the Applicant's complaint to the Police Review Board. This is not a preliminary decision but one that is determinative. If the matter is not forwarded, there is no appeal mechanism; a complainant must seek Judicial Review. This suggests a higher level of procedural fairness is owed.

[121] As to the nature of the statutory scheme, we need to focus specifically on the role of the Police Complaints Commissioner but also on the context supplied by the provisions in the statute for laying complaints, first instance determinations, the right to seek review, the discretion of the commissioner, and the purpose of the Police Review Board.

[122] Subsection 74(4) casts the commissioner's discretion broadly, "the complaints commissioner is satisfied that the complaint is frivolous, vexatious, without merit or an abuse of process". That broad discretion and its place in the

complaint process, indicate that the commissioner has a gatekeeper role to filter out complaints that have no merit.

[123] Read in isolation this would suggest a duty of fairness at the lower levels. However, we cannot ignore the immediate context, "Where the Complaints Commissioner is unable to resolve the complaint, the complaint shall be referred to the Review Board…". Note the mandatory "shall". The discretion is an exception to what is otherwise required.

[124] The right to request review applies to the member complained about when the police authority finds the complaint has merit as well as in cases, like Mr. Taylor's, where the police authority determine otherwise. The Police Review Board exists to provide civilian oversight. The discretion cannot be meant to override that.

[125] The gatekeeper role suggests a higher duty of fairness when it is seen in light of the legislative purpose of civilian oversight.

[126] The statute provides the commissioner's power to appoint an investigator and to act on the investigator's report: s.74(2). The statute and the *Police Regulations* leave procedure for investigations, and satisfaction on whether the complaint is without merit, mostly to the Police Complaints Commissioner herself. This suggests a lower level of procedural fairness.

[127] On balance, the nature of the statutory scheme suggests a duty of procedural fairness that is neither the highest nor the lowest.
[128] I adopt Mr. Choo's submission on the third factor, importance of the decision to those affected:

> The allegations made by the Applicant suggest abuse of power, and an infringement of his *Charter* rights. These allegations, if true, are serious. This decision in undoubtedly important to him. But it should also be viewed in the context that the Applicant's liberty or other *Charter* rights are not in jeopardy as a result of this decision. Nevertheless, this decision does have importance, not only to the Applicant, but to the Respondents, Constables Paris and Norris. A decision to refer the matter to a hearing by the Police Review Board would have impacts on the Constables professionally as well as personally, particularly if the allegations were without merit. Given the importance to all involved, this would suggest a higher duty of procedural fairness.

I would only add that the inquiry into importance must not be limited to tangible interests. A person may have a strong interest in the Police Review Board hearing

a complaint that legitimately raises a public policy issue. The correct stance when police consider using their power to arrest for breach of the peace would be such an issue when it arises in the context of race.

[129] The Police Complaints Commissioner referred to *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness*), 2013 SCC 38 at para. 74 to 76 for the meaning of legitimate expectation in respect of procedural fairness. Once again, I find myself in agreement with Mr. Choo's submission:

> As stated above, the Act and Regulations are silent on procedures that must be followed when the Commissioner is considering whether to refer the complaint to the Board. There is nothing on the record that requires a hearing, oral submissions, or a right of response. No representations were made that the Commissioner would contact the Applicant or Mr. Perryman prior to making her decision or provide a copy of the investigator's report prior to making a decision. No representations were made that would have given rise to a legitimate expectation on behalf of the Applicant with regards to any type of procedure beyond what is set out in the Act and Regulations. No statements were made that would bind the Commissioner to afford the Applicant a specific procedure. This suggest a lower level of duty.

[130] At para. 27 of *Baker*, Justice L'Heureaux-Dubé commented on the last factor as follows:

> Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures…While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints… .

[131] The commissioner did have a policy of including counsel on all communications. Her office said that did not apply to her investigator. That is difficult to justify because he is her substitute under s.74(2) of the *Police Act*. It remains, however, that her choices not to hold a hearing and not to provide an opportunity to respond to the investigator's report are to be accorded "important weight".

[132] The choice to give scant reasons, no reasons at all really, was for the Police Complaints Commissioner to make. See *Green v. Nova Scotia (Human Rights Commission*) 2011 NSCA 47, a decision of Oland, JA. If *Johnson* and *Mercier* are guides, scant reasons this has long been the practice of commissioners who screen

out complaints. It means that counsel and the court have to scour the record to imply reasons.

[133] Considering the factors, the Police Complaints Commissioner owed Mr. Taylor procedural fairness at the medium level. That includes the provision of a "thorough and neutral" investigation: *McDougall* at para. 22 and the authorities cited there. At the level of fairness documented for this complaint, a thorough investigation must include obviously crucial witnesses or key witnesses: *McDougall*, para. 22 to 24.

[134] Mr. Taylor submits that the investigation was not neutral because "the investigator is police, through and through". He was a member of the Halifax force for thirty years, and the Director of Police for the province for ten more years.

[135] In my assessment ten years with the province is plenty of time for insulating Mr. Sanford from the Halifax police department. Ten years supervising police across the province does not found a charge of bias in favour of police.

[136] Mr. Taylor is also more critical of Mr. Sanford's work than am I. I have expressed my criticisms. They do not give rise to a finding of bias.

[137] However, for the reasons expressed in my assessment of the record and in my treatment of the claim for judicial review, the investigation was not thorough.

Remedy

[138] I will grant an order setting aside the decision of the Police Complaints Commission dated September 20, 2018. Mr. Taylor prefers I also require the commissioner to refer the complaint to the Police Review Board. This is a case for maintaining deference. I will remit the issue back to the commissioner for her to make a determination after thorough investigation.

[139] Mr. Taylor prefers that the investigation be completed by a different investigator. I rejected his submission that Mr. Sanford was not neutral. I am not prepared to interfere with the Police Complaints Commissioner's discretion as to how she conducts an investigation.

[140] If necessary, the parties may deliver written submissions about costs to my office.

J.