SUPREME COURT OF NOVA SCOTIA

Citation: *Borden v. Nova Scotia Police Review Board*, 2024 NSSC 30

Date: 20240207
Docket: 524517
Registry: Halifax

Between:

Kayla Borden

Applicant

v.

Nova Scotia Police Review Board, The Attorney General of Nova Scotia

- and-

Halifax Regional Police

-and-

Scott Martin

-and-

Jason Meisner

Respondents

Decision

Judge:	The Honourable Justice Denise Boudreau
Heard:	January 11, 2024, in Halifax, Nova Scotia
Counsel:	Asaf Rashid, for the Applicant Adam Norton, for the Respondent (Nova Scotia Police Review Board, The Attorney General of Nova Scotia) Andrew Gough, for the Respondent (Halifax Regional Police) Nasha Nijhawan, for the Respondents (Scott Martin, Jason Meisner)

By the Court:

[1] The applicant has brought an application for judicial review in relation to a decision ("the Decision") of the Nova Scotia Police Review Board ("the Board") dated May 12, 2023. The Decision was in relation to a complaint filed by the applicant as against the two individual respondents, both of whom are police constables with the Halifax Regional Police ("HRP").

[2] During the early morning hours of July 28, 2020, the applicant was driving her vehicle in Dartmouth, Nova Scotia, when she was stopped and arrested by police. This occurred because police officers mistakenly believed that the applicant was a person who had fled from another police officer earlier that evening. The respondent Cst. Meisner identified her vehicle as the suspect vehicle, and the respondent Cst. Martin effected her arrest.

[3] The applicant remained under arrest for less than one minute as, upon the arrival of another officer, the respondents were advised that the applicant was not the person the police were seeking. The applicant was then "released" from the arrest, although she was detained a few minutes more for an ID check.

[4] The applicant then filed a complaint alleging that her stop and arrest by police was unlawful; that it (and her subsequent treatment) had been racially motivated and/or caused by racial profiling. The applicant sought for the officers to be subject to formal discipline.

[5] In its Decision, the Board found that the stop/arrest, while unfortunate, was lawful. They found no evidence that racial considerations or racial profiling had been a factor in the arrest of the applicant. The complaint was dismissed.

[6] The applicant seeks judicial review of the Board's decision.

Review of the evidence

[7] The Board held a full six-day hearing to assess the applicant's complaints. It heard viva voce testimony from 10 witnesses, including the applicant, the respondent officers, and the chief of police. The evidence before the Board also included photos, maps of the relevant areas, as well as audios of the relevant police radio transmissions.

[8] The evidence from the police officers was to the effect that on July 28, 2020, at approximately 12:00 a.m. – 1:00 a.m., Cst. Stuart McCulley of the HRP was parked near Mount St. Vincent University on the Bedford Highway in HRM. He

observed a vehicle without taillights, travelling quickly outbound, going approximately 80-90 kilometers per hour.

[9] Cst. McCulley engaged his lights and siren and pursued the vehicle. He advised dispatch that he was in pursuit of a "black Pontiac, one occupant". The vehicle did not stop but accelerated. Cst. McCulley pursued the vehicle at high speed.

[10] Cst. McCulley was asked why he was pursuing the vehicle by the watch commander; he indicated "no lights, possible impaired". He was advised to discontinue the pursuit. Cst. McCulley turned off his lights and siren but continued to try and keep the vehicle in his sights. The vehicle turned up Kearney Lake Road and Cst. McCulley lost sight of it. Other officers then joined into the radio communications in an effort to locate the vehicle. When asked for a description, Cst. McCulley noted:

> It was a dark colored Pontiac, probably like a, uh, pursuit or something like that. Uh, he had no lights on single, single, uh, driver and he had a baseball hat on is all I could tell, with a temp permit.
>
> (Exhibit 5, Transcript of dispatch audio.)

[11] At this time Cst. Jason Meisner was at the West Division HRM police office on the Bedford Highway. He got into his police vehicle and headed inbound on the Bedford Highway in an effort to help locate the suspect vehicle.

[12] Cst. Meisner then passed a vehicle headed outbound on the Bedford highway, which appeared to be travelling at a higher rate of speed than the posted limit. He noted that the vehicle had running lights only, and he also saw it had no taillights. Cst. Meisner could only tell that the vehicle was a dark colored sedan; he did not observe the driver. He noted that there was little traffic on the Bedford Highway at that time of night. All of these observations led Cst. Meisner to suspect that he had found the vehicle that had evaded Cst. McCulley.

[13] Cst. Meisner turned around with the intention of following this vehicle. At first he lost sight of it but managed to catch up to it at near Shore Drive (off the Bedford Highway). He then followed the vehicle (without flashing lights or siren) outbound on the Bedford Highway. Cst. Meisner confirmed that the vehicle had no lights on the back; he could not see any license plate. He followed the vehicle up the Dartmouth Road towards Dartmouth; at that time Cst. Meisner noted that the driver had "just clicked his lights on". The vehicle continued to head towards Dartmouth on Magazine Hill, with Cst. Meisner following. He noted that he was not activating his lights and siren, as the suspect might just "take off again".

[14] There was radio discussion with various officers during this time about what to do to safely stop this vehicle, including officers on units located in the

Dartmouth area. Officers came into the location and got into position to help stop the vehicle.

[15] When the vehicle approached an intersection at Magazine Hill and Windmill Road, Cst. Nicholson and Cst. Martin (who were working together) pulled ahead of the suspect vehicle and blocked it from proceeding.

[16] Cst. Martin had been provided with the description of the suspect/suspect vehicle by dispatch; he was also aware that Cst. Meisner had followed this vehicle from Bedford. He believed this to be the vehicle that had evaded Cst. McCulley and that had been followed to Dartmouth.

[17] Cst. Martin described the vehicle he stopped as a dark colored sedan. While still in his vehicle Cst. Martin noted that there was no emblem on the front of this vehicle to identify its make or model. He could not see the back of the vehicle and therefore could see no plate. He was able to identify that there was a single occupant in the vehicle, the driver, but could determine nothing further about the person. He did not see any ball cap on the driver.

[18] Both officers, Cst. Martin and Cst. Nicholson, approached the vehicle from the front (where they had stopped). They then noted that the driver was a black female, and the sole occupant of the car. This was the applicant Ms. Borden.

[19] Cst. Martin effected an arrest of the applicant at that time and told her it was for a “flight from police”. She disputed that she had fled from police, but was compliant. She was removed from the vehicle and placed in handcuffs. Cst. Martin testified that he handcuffs everyone he arrests, for safety reasons.

[20] Cst. Martin testified that, upon stopping this vehicle, he believed he had reasonable grounds to effect the arrest of the driver of the vehicle, based on all the information he had before him at that time. In other words, he intended to arrest the driver from the moment he had effected the stop of the vehicle, and he made this decision prior to seeing the driver of the vehicle. He advised that the fact that the driver was a black female made no difference in his plan to arrest.

[21] Following the arrest of the applicant, and within less than a minute, Cst. McCulley arrived on scene. He immediately advised that this was not the right vehicle. The applicant was released from arrest but was asked to move her car to the roadside, and her identifying information was recorded. She was then released.

[22] Cst. Martin noted that the applicant was not given an opportunity to contact counsel, as there was no time to do so. Her release from arrest occurred less than a minute after being arrested.

[23] The applicant's evidence before the Board provided a few details of difference with that of the officers. She indicated that during the early morning hours of July 28, 2020 (around 12:45 or 12:50 a.m.) she was driving her vehicle, a silver 2010 Dodge Avenger, from the Bedford area back to her home in Dartmouth. The applicant disputed ever having driven without her lights on that evening. She recalled that, while on the Bedford Highway, a police car had passed her with its overhead lights on; she pulled over, and the police vehicle passed her.

[24] The applicant went on to Dartmouth and testified about being stopped and arrested by police. She described being approached by the arresting officers from the back of her vehicle, not the front.

[25] The applicant recalled asking why she was being arrested and being told "you'll see in a minute"; the police officer then told her that she had been stopped for not having lights on. The applicant disagreed with the officer and said her lights had been on. The applicant described being upset and humiliated, and expressed to the officers that, in her view, what had occurred was discrimination.

[26] The applicant identified three areas to the Board where, in her view, the officers were deserving of disciplinary sanction:

1. That they had unlawfully detained/arrest her;

2. That they had not provided her with right to counsel; and

3. That racial profiling had been a factor in the initiation and continuation of her detention/arrest.

[27] The Board in its decision found that none of these concerns had been borne out by the evidence and her complaints were dismissed.

[28] Before this Court, the applicant has raised the following grounds for review:

1. That the Board made an error of law in finding that Cst. Martin had lawful grounds to arrest her;

2. That the Board made an error of law in finding that there was no racial profiling at play in her arrest/detention;

3. That the Board made an error of law in finding no violation of the right to counsel.

Standard of review

[29] Although the applicant has itemized her grounds for review as being "errors of law", she acknowledges (as do all parties) that the appropriate standard of review of this decision is reasonableness.

[30] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*") is the leading authority in the area of judicial review and the standard of reasonableness.

[31] The decision in *Vavilov* confirmed that the standard of "reasonableness" means that a reviewing court must adopt an attitude of deference in reviewing the decision of the administrative decision maker. A reviewing court is not to ask itself what answer it would have given to the question at hand, but rather whether the answer given by the administrative decision maker was a reasonable one.

[32] *Vavilov* also confirmed that a reviewing court must carefully assess not only the decision, but also the path that led to the decision. The following paragraphs of *Vavilov* are helpful and instructive:

> 83 It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision makers reasoning process and the outcome. ...
>
> 84 As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, …
>
> 85 Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrained the

> decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.
>
> …
>
> 99 A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency, and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.
>
> 100 The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.
>
> 101 What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. …
>
> [Emphasis added]

[33] Having said all of that, the Court in *Vavilov* also confirmed that a reviewing court's function is not a "line-by-line treasure hunt for error" (para. 102), and that judicial restraint remains appropriate in reviews of administrative decisions:

> 13 Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. …

[34] The Court also noted the importance of assessing decisions in their proper context; in particular, in acknowledgement of the fact that administrative decision makers are not judges, and cannot be expected to write as a judge might write:

> 92 Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge – nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily assigned of an unreasonable decision – indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[35] Lastly, any alleged error or omission in an administrative decision must be shown to be material, in the context of the decision as a whole. A reviewing court is to use a flexible approach, and may supplement elements found to be missing in the decision itself:

> 301 Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons. … Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision … .
>
> …
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> 303 Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 *U.N.B.L.J.* 109, at pp. 137-38). Reviewing these materials may assist a

> court in understanding, "by inference", why an administrative decision-maker reached a particular outcome … .

Statutory framework

[36] The Board takes its authority to discipline officers from the Nova Scotia *Police Act* (S.N.S. 2004, c. 31) (the "*Act*") and the provincial *Police Regulations*, N.S. Reg. 230/2005 (the "*Regulations*"). These provide a code of conduct for police officers, a complaints process, as well as a listing of possible disciplinary offences and penalties.

[37] Sections 71-79 of the *Act* provide the general procedure for complaints. I note the following particular sections for my purposes:

> **Referral to chief officer**
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> **71** **(1)** A complaint respecting the police department generally or the conduct of or the performance of a duty of a member of a municipal police department other than the chief officer shall be referred to the chief officer of that police department in accordance with the regulations.
>
> **(2)** Upon receiving a complaint, the chief officer shall attempt to resolve the matter in an informal manner.
>
> …
>
> **Report and referral to Complaints Commissioner**
>
> **72** …
>
> **(2)** Where a complaint is not satisfactorily resolved by the chief officer and where the person making the complaint or the member of a municipal police force has requested a review of the decision by the Review Board, the complaint shall be referred to the Complaints Commissioner in accordance with the regulations.
>
> …
>
> **Duties and powers of Complaints Commissioner**

74 **(1)** Upon receipt of a complaint from the board or chief officer pursuant to subsection 72(2) of 73 (5), the Complaints Commissioner shall attempt to resolve the complaint.

…

(4) 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, vexatious, without merit or an abuse of process, and the Review Board shall conduct a hearing in respect of the complaint.

…

Hearing de novo

78 A hearing by the Review Board shall be a hearing de novo and the parties to the proceeding may

(a) appear and be heard and be represented by counsel;

(b) call witnesses and examine or cross-examine all witnesses.

Powers of Review Board at hearing and decision

79 **(1)** At a hearing under this Act, the Review Board may

(a) determine all questions of fact and law;

(b) dismiss the matter;

(c) find that the matter under review has validity and recommend to the body responsible for the member of the municipal police department what should be done in the circumstances;

(d) vary any penalty imposed including, notwithstanding any contract or collective agreement to the contrary, the dismissal of the member of the municipal police department or the suspension of the member with or without pay;

(e) affirm the penalty imposed;

(f) substitute a finding that in its opinion should have been reached;

(g) award or fix costs where appropriate, including ordering costs against the person making the complaint, where the complaint is without merit;

(h) supersede a disciplinary procedure or provision in a contract or collective agreement.

(2) The decision of the Review Board must be in writing and provide reasons and shall be forwarded to the parties.

(3) The decision of the Review Board is final.

…

[38] The *Regulations* at section 24 and following provide a "Code of Conduct" for police officers falling within its jurisdiction. The applicant noted in her submission before the Board that her complaints alleged breaches of sections 24(1)(b) and 24(7)(a) and (b):

> **Code of Conduct**
>
> **24** **(1)** A member who engages in discreditable conduct in any of the following ways commits a disciplinary default:
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> …
>
> (b) contravening an enactment of the Province, a province or territory of Canada or the Government of Canada in a manner that is likely to bring discredit on the reputation of the police department;
>
> …
>
> **(7)** A member who abuses their authority in any of the following ways commits a disciplinary default:
>
> (a) making an arrest without good or sufficient cause;
> (b) using unnecessary force on or cruelly treating any prisoner or other person with whom the member may be brought into contact in the course of duty;
>
> ….

[39] In this case, as I have already indicated, the Board underwent a full hearing. It provided its 25-page decision dismissing the applicant's complaints on May 12, 2023.

[40] The question for this Court is whether the Board was reasonable in both its reasoning and conclusion(s).

Lawful grounds for arrest

[41] It is the contention of the applicant that the Board made an error in concluding that there were lawful grounds for her arrest. Specifically, that although the Board referenced Cst. Martin's subjective grounds for this arrest, the Board did not properly assess whether those grounds were objectively reasonable. The applicant submits that the Board in its decision failed to engage with the "objective" element needed for a valid arrest.

[42] I disagree. The Board was clearly aware that an assessment of a warrantless arrest, requires an assessment of both its subjective and objective grounds. The Board quoted from various cases wherein the correct legal principles were affirmed. It noted, "The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective standpoint" (*R. v. Storrey*, [1990] 1 S.C.R. 241).

[43] The Board went on to address Cst. Martin's subjective reasons for effecting the arrest of Ms. Borden (paras. 52-60). The Board then found that the subjective grounds expressed by Cst. Martin were objectively supportable and valid. As to the objective reasonability of the grounds, the Board noted:

> [61] The Board is satisfied that Cst. Meisner (sic) had the subjective grounds to see the Borden car as the subject, fleeing vehicle. On the facts of this case, those grounds are easily objectively verifiable, and the circumstances leading up to the arrest support the legality of the arrest. This was not simply a routine traffic stop, to remind (and possibly ticket) a driver for driving without lights, which would be

> a *Motor Vehicle Act* infraction. Subjectively, and objectively, Cst. Martin had reasonable grounds to believe that this driver had committed a criminal offence. As Cst. Martin testified: "there was urgency there to remove that person from the vehicle to avoid further risk to the public, ourselves, and the driver should that flight continue." His decision to arrest had been made even before he saw Ms. Borden.

[44] Recall that, in addition to the evidence of Cst. Martin, the Board was also in possession of the police radio transmissions between all of the officers in question, which would provide real evidence as to the sequence of events that evening.

[45] In my view, the Board did identify the appropriate test for assessing the reasonableness of an arrest and did engage with the evidence to apply the test properly to the facts as it found them. Having found that the officer did have reasonable grounds to arrest, there was no Code of Conduct violation for the Board to address further.

Right to counsel

[46] The applicant notes that she was not provided her right to counsel upon arrest (as guaranteed by the *Charter*); she claims that such is a breach of the Code of Conduct which should also result in discipline for Cst. Martin.

[47] Again, I note that my role is to assess whether the Board's decision to dismiss the applicant's complaint(s) was reasonable. The issue of whether this

factual circumstance was one that created a *Charter* right to contact counsel, would be step one in that process.

[48] The Board noted that, in fact, there had been two separate periods of "detention" for Ms. Borden that evening: the first when she was stopped and arrested, and the second when she was asked to go to the side of the road and provide her information.

[49] The Board found no violation of the right to counsel in respect of either period of detention:

> [63] It is undisputed that she was not advised of her right to counsel. Cst. Nicholson testified that there simply was not time, as she was released almost immediately. She was never searched or placed in a police vehicle; within seconds of her arrest, she was released. She then was asked to move her car to one side, and was asked for drivers license, registration, etc. This had become a *Motor Vehicle Act* infraction.
>
> [64] The request for her to move her car to a safe position, and provide her drivers documents, etc. is characterized by counsel for Ms. Borden as a further 'detention', it was a detention, but for a different purpose than the original detention.
>
> [65] Ms. Nijhawan argues that the detention, in relation to a possible *Motor Vehicle Act* ticket, does not generate a requirement of right to counsel:
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> …
>
> [68] In this complaint, we are satisfied that there was no right to counsel in the course of this brief detention to gather Ms. Borden's information. Indeed, pursuing right to counsel would have unnecessarily extended the period of 'detention'. The detention to gather information was lawful and, further, was not a violation of the disciplinary code of conduct.

[50] The applicant is of the view that the Board was unreasonable in these conclusions. She notes caselaw which has confirmed that:

> [45] The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. … [Emphasis added.] (*R. v. Rover*, 2018 ONCA 745)

[51] Of course, those general principles are correct. However, the circumstances of the applicant must be placed in their proper context. Here the applicant was detained for a few seconds, and then released. While that was unfortunate, the Board found that there was no time for the police to provide her with the opportunity to contact counsel. Furthermore, there were no "procedures to which she was about to be subjected", for which she needed to seek "legal advice and guidance", to use the language of the *Rover* decision (supra).

[52] I cannot find anything unreasonable about the Board's reasoning and conclusions as to this issue.

Racial profiling

[53] The applicant took the position before the Board that her arrest (and her treatment while arrested) was the result of racial profiling.

[54] The Decision of the Board on this specific point is found at paras. 78-86. (However, I would note that the Board, earlier in its decision, had already accepted that Cst. Martin's decision to arrest the applicant had been made before he saw her.)

[55] The Board starts by noting the definition of racial profiling as outlined by the Supreme Court of Canada in *R. v. Le*, 2019 SCC 34. It then references (as had the applicant) *R. v. Sparks*, 2022 NSPC 51, where the police officer had approached a black male "on a hunch" that it was the person he sought. The Court in *Sparks* disapproved of that practice and noted that the officer had other options available to him.

[56] The Board distinguishes *Sparks*:

> [81] In this case, however, Csts. Martin and Meisner were not acting on a "hunch"; they had a reasonable suspicion that Ms. Borden was the driver of the subject vehicle, and that when the decision to follow, and ultimately arrest, arrest (sic) was made, no one was aware of her colour, nor did her colour contradict the known information. They did not have a plate number, and had not seen any temporary registration, and would have no means to access any database that might have existed.
>
> [82] As noted in the above review, race could not have been and was not a factor at any point in the Borden incident. No officer involved had any knowledge of her racial origins until Cst. Martin became aware that she was black, when he arrived at the side of her car. He had already made the decision to arrest and in fact, had a duty to do so in the circumstances. Cst. McCulley had two seconds, travelling at a dangerously high speed, on a dark night, to observe the driver of the actual fleeing vehicle; he did not discern race; at best, he thought the driver might be male.
>
> …

> [84] Cst. Martin had already made the decision to arrest when Ms. Borden stopped, and it was his duty to control what he reasonably perceived to be a dangerous situation. The discovery that Ms. Borden was a black female neither added to or diminished the risk.
>
> …
>
> [86] Her subsequent 'detention' to gather her particulars was not done as a result of her colour; it was an officer's duty, in the circumstances, justifiable, both for the purpose of issuing a ticket but also for properly completing a full occurrence report of an incident that was far from routine. Surely, in the circumstance, that information would have been needed regardless of race or gender.

[57] Before me, the applicant submits that the Board's decision was an "error in law", and unreasonable. Essentially, her position remains the same as it was before the Board, that what occurred was the result of racism.

[58] To paraphrase her submissions on this point: the applicant does not accept that the decision to arrest her was made independent of her race; she believes it was the result of racial discrimination. She takes the position that the decision to arrest her was made, in fact, due to a "heightened perception of dangerousness or criminality" as a result of her race, which she notes is a common feature in instances of racial profiling.

[59] The applicant further makes the point, as did the Supreme Court in *Le* (supra), that racial profiling can affect either or both "subject selection" or "subject treatment"; in other words, even if the *selection* of a suspect by police is not racially motivated, that suspect's *treatment* by police can be. In other words, she submits that even if the police were unaware of her race when they first

approached her, their decision to detain/arrest/handcuff her, was motivated by racial bias.

[60] In her submissions before this Court, the applicant acknowledged that she could not point to any evidence which would demonstrate any overt racism on the part of the officers. Rather, she argued that the evidence showed a "deviation" from usual practice by the officers in her case; and that this Court should make the inference that these deviations were the result of racism.

[61] The applicant notes, in particular, the evidence of Chief Kinsella in support of her claim that regular procedures were not followed in her case:

> 26. Chief Daniel Kinsella testified that the normal course of action in a traffic stop is to begin with transmitting the licence plate to the dispatch to have them run it to identify the registration. He also testified that the recommended practice is to approach a vehicle from behind. He further testified that if a suspect vehicle was stopped form the front, the recommended approach was to let it go and pull it over from behind.
>
> …
>
> 44. Ms. Borden stated from the outset of her interactions with her (sic) Cst Martin and Cst Meisner that she was the victim of discrimination. Despite the short duration of her arrest and detention, she was racially profiled when an unnecessary arrest was made, <u>contrary to the proper procedure in a traffic stop</u>… [Emphasis added.]
>
> …
>
> 48 Notably, upon seeing her, the recommended procedures for traffic stops were not followed, as noted in the testimony of Chief Kinsella referenced above.
>
> (Applicant's Brief, October 6, 2023)

[62] Counsel for the respondent HRP have pointed out, quite rightly in my view, that this is not a fair description of Chief Kinsella's evidence.

[63] Chief Kinsella's evidence was not offered as expert opinion, or as evidence of the appropriateness of Cst. Martin's and Cst. Misener's actions on that specific evening. Rather, he gave general evidence relating to HRP policies and procedures.

[64] Chief Kinsella noted that, in the case of a typical or routine traffic stop (for example, for a traffic violation), usually a vehicle would be stopped from behind, and the officer would then note the plate number to dispatch. The officer would then determine whether it was safe to approach the vehicle, in this scenario, and would usually do so from the rear.

[65] Having said that, it is clear from a review of Chief Kinsella's evidence that, in discussing vehicle stops and proper procedures for doing so, two themes become apparent: first, that safety (of all involved) is a primary consideration; and second, that there are multitude of circumstances and situations that may face an officer who decides to effect a vehicle stop. An officer must use his/her judgment in deciding the best and safest way to stop a vehicle, depending on all of the circumstances.

[66] Chief Kinsella noted there are "probably hundreds" of variations depending on the situation facing the officer. He notes, for example, at p. 295 of the transcript:

> But the other thing I will say, there is no specific way for one specific incident. There's a general way which I just related to you. But everything is situational and determinant on environmental factors, pedestrians, dogs, you know, other cars, schools in the area, all of those kind of things. So there's a myriad of applications for this.
>
> Predominantly, you want to be safe. You want to prevent continuation of offence.
> …

[67] And later at p. 302-303:

> **Q.** What are some public safety issues that police may have a concern over when stopping a suspect vehicle?
>
> **A.** So some big considerations would be certainly … I mentioned earlier, these are in no particular order and they are off the top of my head, is there a school in the area and what is the vehicle being stopped for?
>
> If the vehicle is being stopped for, you know, a potentially armed individual, there is … the officer's not generally going to stop that car without making a call for backup.
>
> So weather conditions, lighting, pedestrians, children, playground in the area. All of those kind of things have to be taken into consideration.
>
> But it's really important to know the circumstances that you're dealing with. A 3 a.m. vehicle stop versus a 3 p.m. vehicle stop. A rural road at 3 a.m. versus a crowded bus stop with people at 3 p.m. and you believe the vehicle might flee. These are all things that have to be taken into consideration. There's no one answer for your question. There's a myriad of answers. It's situational.
>
> And without knowing what the situation is, it's difficult to give you an exact answer. I know that's what you're looking for. But there are no exacts here.

[68] When asked how to stop a vehicle where the police vehicle is "ahead" of it, Chief Kinsella said this (pp. 298-300 of the transcript):

A. Again, its …

THE CHAIR: (Inaudible – talkover).

A. … you know, all an assessment. Right? It …

THE CHAIR: Right.

A. … it's not the preferred method.

THE CHAIR: Right.

A. If that was the scenario and I was driving in front of a vehicle that I wanted to stop, I would get to the side and let it go by then I would pull it over from behind.

THE CHAIR: Okay.

A. There may be circumstances …

THE CHAIR: Right.

A. … where that's not possible.

THE CHAIR: Right.

A. Because there's all kinds of traffic in both directions.

THE CHAIR: Yeah.

A. So, I have on occasion, it's not preferred, I'm speaking for myself, stopped a vehicle and got out and waved the person over or spoke to them, whatever the case is.

But before doing that and in every instance, a safety assessment has to be made. And that's why I've mentioned a couple times and I believe it's important to reiterate, I can't speak for the officers who made the vehicle stop. They are in the best position to provide you the evidence and I believe they have on why they did what they did.

[69] To summarize, it is clear to me from reviewing the evidence of Chief Kinsella, that the suggestions being made by the applicant (in relation to his evidence) are not supported. His evidence does not reasonably stand for the proposition that the methods used to stop and arrest the applicant here were "contrary to proper procedure". The Board, correctly and reasonably, did not make that finding.

[70] As to the issue of racial bias or profiling, and as I have previously noted, the Board accepted that Cst. Martin was unaware of the applicant's race until he saw her as he was actually approaching the vehicle. They also accepted Cst. Martin's evidence that he had already decided to arrest the driver of the vehicle before he noted anything in relation to her, and that her race had no effect on his decision to arrest.

[71] I might also note (although the Board did not explicitly note this in their reasoning), Cst. Martin's evidence to the effect that he arrests everyone using the same procedure.

[72] This evidence, and these findings, led the Board to the conclusion that racism or racial bias, either conscious or unconscious, were not factors in what occurred. Given the evidence before them, and their factual findings, their conclusions were entirely reasonable.

Final issues raised by the applicant

[73] The applicant is of the view that the comments in the Decision relating to the possible "reaction of the public", were an inappropriate consideration for the Board. The Decision notes:

> [59] … One can well imagine ensuing public outrage had this been the initial fleeing driver, who then fled once again and eventually caused injury or property damage elsewhere.

[74] The respondents note that such concerns (relating to public reaction) are very much relevant as an assessment of a complaint pursuant to Code of Conduct ss. 24(1)(b), which requires an assessment as to whether the behaviour was effected "in a manner that is likely to bring discredit on the reputation of the police department".

[75] I do not disagree with the respondents on this point, that there is at least some relevance to that consideration. Having said that, and in any event, that comment did not render the decision unreasonable.

[76] Counsel for the applicant also noted that, in his view, the comments of the Board as contained in paras. 94 and 95 of the Decision amounted to an "admonishment" of the applicant, for having raised the spectre of racism under the circumstances. He noted, in his view, that such commentary from the Board would be inappropriate.

[77] I disagree that the referenced paragraphs constitute an "admonishment" of the applicant.

[78] The Board (at paras. 91-93) starts by clearly acknowledging that it would be entirely understandable and legitimate for a black person interacting with police to be afraid and distressed. They also acknowledge that, given what was experienced by the applicant, it was understandable (or as expressed by the Board, "not surprising") for the applicant to have filed a complaint, in order to have the matter fully heard and explored. Those comments refute any suggestion that the Board was disapproving of the matter having been brought forward by the applicant.

[79] The Board did go on to point out that the evidence during the hearing did not bear out the concerns expressed by the applicant. The Board expressed it as "unfortunate" that, despite having heard the evidence in its entirety, and despite there having been no evidence of racial bias demonstrated, the applicant continued to maintain her position that her arrest had been racially motivated.

[80] I see nothing unreasonable in that comment.

[81] In reviewing the decision as a whole and applying a reasonableness standard as that standard was defined in *Vavilov*, I find that the decision of the Board was reasonable. I see no reason for it to be disturbed. This application for Judicial Review is dismissed.

[82] If the parties cannot agree on costs, I would ask for written submissions within 30 days.

Boudreau, J.