

IN THE MATTER OF  
ONTARIO REGULATION 123/89  
MADE UNDER THE *POLICE SERVICES ACT* R.S.O. 1990, C.P. 15  
AND AMMENDMENTS THERETO

AND IN THE MATTER OF  
POLICE CONSTABLE ANDREW PFEIFER BADGE #408  
AND THE  
HAMILTON POLICE SERVICE

JUDGMENT

APPEARANCES

BRIAN DUXBURY for the Hamilton Police Service

DAVID MARSHALL

WADE POZIOMKA for the Public Complainant

BERNARD CUMMINS for Police Constable Andrew Pfeifer

BEFORE:

Terence Kelly, Deputy Chief (Ret)

York Regional Police

Hearing Officer

Judgment Date:

POLICE CONSTABLE ANDREW PFEIFER BADGE #408

HAMILTON POLICE SERVICE.

April 26<sup>th</sup>, 2018

DEPUTY CHIEF TERENCE KELLY (Ret.) Before dealing with judgment in this matter, I wish to thank Mr. Bernard Cummings, defence counsel, and Mr. Brian Duxbury and Mr. David Marshall, Service prosecutors, also Mr. Wade Poziomka, counsel for the public complainant.

Police Constable Andrew Pfeifer, Badge #408, has pleaded not guilty to one count of Discreditable Conduct laid under the *Police Services Act*. This charge has been adequately detailed in the Notice of Hearing.

In general, the rules of evidence will be followed. If there is an easing of the rules it is essentially in an attempt to arrive at the truth while balancing the need for fairness towards the officer and also ensuring natural justice.

Charge – Discreditable Conduct Alleges on April 26<sup>th</sup>, 2016, while being a sworn member of the Hamilton Police Service, acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Hamilton Police Service by engaging in an arbitrary and unjustified street check, thereby constituting an offence against discipline as prescribed in section 2(1)(a)(xi) of the Code of Conduct, Regulation 268/10, as amended.

The first witness for the Prosecution, Mr. Mathew Green, testified that on April 26<sup>th</sup>, 2016, he attended a constituents call in the condominium off of West Avenue, where he spent time working with the constituent on a constituent issue. After leaving the constituent's residence he walked up to Stinson Street to the bus stop which is located under the Claremont access. He noted on this particular day he was wearing sports blazer, a blue shirt, and khaki pants, and the shoes he is wearing today. Mr. Green stated, he was slightly underdressed that day for the weather, which he described as being around four degrees and windy. He advised the Tribunal the bus stop for the eastbound 5 Delaware bus was located underneath the underpass and it created a bit of a wind tunnel. As a result he walked to a small berm located on the south side of Stinson Street to shelter from the weather and still give him the ability to observe the arrival of the bus. Prior to Mr. Green giving his testimony (*Exhibit's #4 and #5*) photo diagrams of the area Mr. Green was located while waiting for the bus were entered. Upon identifying the exhibits Mr. Green stated the location he chose to take shelter from the weather also gave him a full line of sight regarding the area and the bus arrival.

Mr. Green advised the Tribunal, in the course of his work he often has frequent interactions with police, and it is often the case that he engages in small chat to get a sense of what is going on in the community. He thought that was the case when Constable Pfeifer stopped his police vehicle directly in front of him with his window rolled down.

When questioned by the Service prosecutor where exactly Constable Pfeifer stopped his vehicle, Mr. Green stated that there was a lane of traffic between them, and Constable Pfeifer stopped in a live lane of traffic headed eastbound in the northerly lane. He said he anticipated a cordial interaction which has always been the case with frontline officers in the Hamilton Police Service, and what ensued were a series of questions that made him feel targeted and harassed. The first question asked by the officer,

"What are you doing there?" caught him off guard because it seemed very obvious what he was doing as he had his phone in his hand, stating he was incredulous, and said, "I'm checking my phone." He further stated, the officer's comments took him aback, and it wasn't what he anticipated, in his mind it was obvious what he was doing there, he may have said, "I don't know," and may have laughed. The officer then asked him why he was under a bridge. Mr. Green responded that he was getting "Out of the wind", and can appreciate he couldn't put two and two together, noting that the officer's tone became quite agitated and the conversation became confrontational; he was feeling very much the target of attention with the cars that were stopping behind the officers' vehicles. The officer questioned him with regard to where he was going. Mr. Green realized at that time he was in a situation where there was an arbitrary questioning and detainment that he didn't feel he could walk away from the situation as the officer had taken control of the conversation.

Mr. Green stated, he looked to the officer parked behind Constable Pfeiffer's vehicle and motioned to him to say, like, "What's happening here?" And the officer responded, "Tell him he's holding up traffic." Mr. Green advised Constable Pfeifer that his partner told him that he should move along as he was holding up traffic. Mr. Green then asked Constable Pfeifer if he should go over to him and carry on the conversation, to which the officer responded, "No, he is good where he is." Mr. Green advised the Tribunal at this time he was feeling very frightened and intimidated because the officer was showing him clearly he was under some kind of investigation, his character, having to justify his existence in his own community. He further stated that he felt humiliated as there was four or five people watching

Constable Pfeifer then asked him where he was going and is he even from this city. Mr. Green stated, he should know better than to be having this conversation with this particular officer, and, as a City councillor, again found it incredulous he was even engaged in this conversation. He told Constable Pfeiffer he was very much from this city and asked the officer if he was. The officer then asked him for his name. Mr. Green then advised the Tribunal at that point he felt like he was being psychologically detained, that the tone of his voice, the statements of him being in care and control of the situation, indicated to him that he was under detainment. He told the officer that his name was Mathew Green, and at this point noticed immediately the officer's demeanour changed and he went from a direct kind of confrontational body position in his car, to looking forward, and stated, "Are you a city councillor?"

Mr. Green stated, he did not answer him because he did not want to have the association of his position reflect or change his demeanour.

When questioned by the Service prosecutor how the exchange with Constable Pfeifer ended, Mr. Green stated as soon as the officer heard his name he asked him if he was okay, to which he responded, he was okay. At that time, he could see the colour drain out of the officers' face, he could see him realize what had just occurred, stating that the officer just turned his head, and drove away, leaving him standing there.

When questioned by the Service prosecutor about the length of the exchange, Mr. Green responded, in his initial complaint he stated roughly eight to seven minutes, however it could have been three to four minutes, but it felt like forever. At this time an ongoing discussion took place between Mr. Green and the Service prosecutor with regard to the exact location of Mr. Green and Constable Pfeifer during their exchange. Mr. Green stated he did not move from his initial position during the dialogue with Constable Pfeifer.

When asked if Constable Pfeifer during this time had shown any concern for his well-being, Mr. Green responded, not at all, not at any time, his question left him confused and based on the antagonism that he experienced, the targeted questioning, the search and seizure of his personal information, he believed it was an arbitrary stop. Neither officer asked about his well-being or explained to him why he was stopped or were concerned about him because of the conditions. Mr. Green stated it was four (4) degrees, frigid, but it was certainly not below freezing and the rain had stopped earlier in the day. It was sunny, in fact. The only condition that was problematic for him was the wind.

When questioned by the Service prosecutor whether other persons, third parties, were watching, he replied, he did see some people about, and that there were roughly four to five cars backed up behind Constable Pfeifer's vehicle waiting. People were bottle-necking, kind of looking and watching. He felt like he was being criminalized in his own community, like he was being psychologically detained, and made him feel like a suspect in his neighbourhood.

Under examination by Mr. Poziomka, counsel for Mr. Green was handed a photograph and asked to identify. He advised the Tribunal it was a photograph taken during a Spectator News article on April 27<sup>th</sup>, 2016. The photograph depicts where he was standing during the exchange with Constable Pfeifer. The photograph was subsequently entered as **(Exhibit #6)**. When questioned by counsel if he was standing in a pile of mud during the exchange with the officer, Mr. Green advised the Tribunal that he was not standing in a pile of mud. The rain had stopped earlier in the day, it was sunny.

When questioned where he was heading that day, he responded, he was heading home after speaking to a constituent. When asked if he had noticed any mud on his shoes upon his arrival at home, he replied, "No."

When questioned if he had hit his chest aggressively, did he hit his chest at all while engaged with Constable Pfeifer? Mr. Green responded, "No, at no point does he make a habit of thumping his chest."

When questioned by his counsel if he was anti-police. Mr. Green responded he was not anti-police, that he has spent a great deal of his time working closely with the Hamilton Police Service, stating, he has a great relationship with the frontline officers, working with them during community events. Mr. Green further stated that he had offered opportunities to mediate, that he made a personal call to the Hamilton Police Association to let the officer know he was not trying to vilify the officer or personalize it in any way, out of respect for the Hamilton Police Service.

When questioned if he was hiding behind the bridge giving reason to cause suspicion, he stated, he was not hiding under the bridge. He positioned himself out of the wind to make it more comfortable for him while he waited for the bus, and it was obvious to him that the officer in question didn't put the two and two together, and it escalated the conversation. When asked a series of questions by counsel if he was concealing himself in anyway while waiting for the bus, he advised counsel that he was not concealing himself prior to the exchange with Constable Pfeifer. Counsel asked if, on the day in question did he believe race was a factor. Mr. Green stated, he felt targeted, like there was absolutely no indication he

was in any crisis, no indication there was care or concern for his well-being and no other reason than a conscious or unconscious bias.

When asked by counsel if it was possible the officer just thought perhaps he was under dressed and beside a bridge, was concerned for his well-being, Mr. Green responded that he never considered or entertained that. He stated it was about power, about control, and it was intimidation. The conscious or unconscious bias is the only indicator why he would have stopped him. Counsel then asked Mr. Green if he yelled at the officers at any point. Mr. Green advised the Tribunal at no time during the exchange did he yell at the officers, and his ongoing disappointment with how all this, the exchange, unfolded. It could have ended in many ways, he provided for many exits, to de-escalate and to move on, but the officer continued to detain him and harass him.

Under cross-examination by defence counsel, Mr. Cummins read an excerpt from the interview with Mr. Green and members of the OIPRD where possible mediation in this matter was discussed. After reading portions of the transcript out, Mr. Green was asked if in fact Mr. Green was interested in mediating this matter. He responded, it was the timing of the mediation. He wanted to see what was put forward as testimony by the officers, it may play out from a procedure perspective and that he would have an opportunity to mediate after the finding, or during the finding.

When questioned by counsel if he is passionate about the subject of carding. Mr. Green responded, he is passionate in justice, he is not passionate about carding; however, it is a topic he is interested in. And further, the tone defence counsel is using towards him is actually reminding him about the day in question and that during the procedural justice way, there is a professional way they can communicate with each other in the hearing that doesn't result in the type of agonizing, and tone the counsel is using with him. This is the type of power and control that was presented by the officer in question. At this time the witness was instructed to listen to the question being asked by defence counsel, and subsequently respond to them. Mr. Green then advised the Tribunal that he has done work organizing around the arbitrary, unlawful, unconstitutional police checks. Further, he stated that he hosted a Town Hall meeting on the practice of carding, and invited the Minister of Community Safety and Correctional

Services to attend along with senior members of the Hamilton Police Service and members of the community.

When asked by counsel to describe what carding actually means, he stated, it is the arbitrary, indiscriminate stop of people, unrelated to any crimes. It is the search and seizure of their information that is often put in a database that he knows to be called CPIC, and it is held in perpetuity, forever. It essentially works to create big data around Canadian citizens and residents or non-citizens, in a way that he believes to be unlawful and unconstitutional.

When questioned by counsel about the officer's responsibility under the *Police Services Act* to take notes when interacting with a member of the public. Mr. Green responded, the officer should be interacting with people that are related to crime, and to do his job as a police officer, and to be involved in investigations. The call list is high for him to be able to take time out of his day just to arbitrarily harass people on the side of the street, and that's where the problem starts. It was after he identified he wasn't in crisis, it was after he asked where he was going and who I was, he realized this was going to be improper. Mr. Green agreed with counsel that Constable Pfeiffer never asked him if he was in crisis, as the question put to him by the officer, "Are you alright?", and came at the end of the conversation.

When questioned if the second officer, Constable Thompson, could have heard the exchange between himself and Constable Pfeiffer. Mr. Green stated, it is quite possible. Defence counsel then asked the witness that if officer Thompson heard the first question put to him by Constable Pfeiffer and it contradicts Mr. Green's testimony, then they are either wrong or they are lying. Mr. Green agreed.

When questioned if on the day in question was he standing in water or muddy conditions and shielding himself from the wind while Constable Pfeiffer asked, "How are you doing?" and he responded, "How are you doing?" in a much heightened aggressive tone while pounding his chest. Mr. Green responded, "Not at all."



When asked if he asked Constable Pfeifer to come over to him to have a conversation, Mr. Green stated he invited the officer to pull over and have a conversation with him, and agreed with counsel during the conversation with Officer Pfeifer they were trained on each other. Counsel then questioned Mr. Green if any parties walked by him during this conversation. He said a young family, maybe some Syrians, a father and mother and two or three kids. He remembered this because it kind of confounded him, his feeling of humiliation, where the officer has him stopped in the side of the road, and this family is kind of looking at him as they shuffled by. He agreed he made no mention of this in his interview with the O.I.P.R.D. Asked if any vehicle drove by him, he responded, no recollection, although there could have been one that drove slowly by him.

When further questioned about carding, and whether he was under the opinion that on April 26<sup>th</sup>, 2016, he was carded or not. The witness stated, he was arbitrarily stopped and doesn't know whether or not they were still using the form that are called cards, but felt like the process in which he was undergoing was a form of that. Whether or not they were still using those forms, he doesn't know. He agreed with counsel up to today's date he still doesn't know.

Counsel then asked the witness about the first tweet he made on the bus directly after the exchange with the officer where he tweeted, "For those of you who think carding has stopped, I was just arbitrarily stopped and detained." When asked to explain the tweet, the witness stated he told the public he was arbitrarily stopped and detained as a city councillor. When asked by counsel with regard to actually being carded, is the issue for carding whether or not it is put on a card. The witness disagreed with counsel's comments and said it's when the information is detained, as soon as the illegal stop occurred and the information was now put into a book which could become part of this collection of data.

When asked how he knew he was carded, he responded, that's the way he felt.

When asked about feeling psychologically detained during the exchange throughout the incident, why he invited the officer to come over to him and carry on the conversation, would that not increase the degree of detention he was feeling? He responded, "No. It would provide me getting into the conversation." He would have been able to engage in a much more respectful manner, and it hopefully would have changed the tone of the conversation. He was trying to de – escalate and exit the conversation.

When questioned if he himself was aggressive during the exchange with Constable Pfeifer, the witness responded, "Absolutely not." Counsel then asked the witness, if Constable Pfeifer at any time told him he can't move. He responded, he could in all probability have just walked and left; however, it was psychological detainment when someone is in care and control of the conversation. Entered at this time **(Exhibit #7)** transcript of the Metro Morning broadcast, dated April 27<sup>th</sup>, 2016.

Counsel then questioned the witness about his comments during this broadcast **(Exhibit #7)**. He agreed with counsel that Constable Pfeifer during the exchange did not ask him for any identification. He was then questioned how he could possibly conclude he had been carded. He stated that Constable Pfeifer took his name and wanted to know where he lived and where he was going. He agreed with counsel that he never divulged his address or date of birth to the officer, just advising him he was from around here.

When questioned again by counsel if Constable Pfeifer had carded him, the witness responded that the exchange between himself and Constable Pfeifer was a classic example of a street check, which is what the Hamilton Police Service recognizes as carding. Further stating, that the practice of carding is a practice that was imported from Toronto under, as he understood it, the *Toronto Police Service and Tavis*. A little bit different in its nuance, outcome is the same. "It's the extraction of personal information from people unrelated to any crime, for the recording and for, you know, perhaps the addition into databases at future times."

When questioned as to the length of time the exchange between himself and Constable Pfeifer lasted, the witness conceded it could have been between three and four minutes, but to him it felt like an eternity .

Entered at this time (**Exhibit #10**) a blown up photograph of the one entered as Exhibit #3.

When asked if Constable Pfeifer used any profanity towards him, the witness replied that he did not. Counsel then asked the witness if he was shouting loudly during the exchange between himself and Constable Pfeifer, he stated that he spoke loud enough for the officer to hear him, not shouting, and never stepped onto the sidewalk during this exchange.

Under re-examination by the Service prosecutor, Mr. Green was asked if he had any intention of leaving Officer Pfeifer during the exchange. He said he had no intention of leaving as he felt psychologically detained and couldn't leave the conversation; Officer Pfeifer was in care and control of the conversation and he felt at that time if he left it would have escalated the conversation, and if he walked away, there was a high likelihood, in his opinion, that he would have ended up in an arrested situation, or a situation that would have been a physical altercation.

Under re-examination by his counsel, Mr. Poziomka, a series of photographs marked as (**Exhibit #11**) A through D was entered. Mr. Green was then given a copy of Constable Pfeiffer's notes April 30<sup>th</sup> with a notation, "Late entry" and asked what the distance he was away from him. He responded, forty feet (40) away from him. Entered at this time was a measuring tape (**Exhibit #12**) Duramax Measuring Tape, 25 Feet.

The next witness for the prosecution, Shahzi Yasmin Bokhari, testified that she resides in the neighbourhood of Corktown, stating it is located on the west side of the Claremont Access in Hamilton. She was then asked to tell the Tribunal about her knowledge pertaining to the events that happened back in April of 2016. She stated on that date she was driving along Stinson Street to visit a friend, as she

approached the stop sign at Victoria Avenue, she observed several vehicles already stopped at the sign. As she approached the stop sign she observed two police vehicles that were stopped on the opposite side of Stinson Street, both vehicles were facing east, noting that the vehicles had been stopped there for some time which made her kind of alarmed. She then proceeded along Stinson Street and noticed the first police vehicle and its occupant who appeared to be talking to a male on the opposite side of Stinson Street. This male was standing on the sidewalk and she could tell there was an interaction going on.

When shown Exhibit #5, she identified as Stinson Street looking eastbound. On observing the male on the sidewalk she noticed he was leaning over, and speaking quite loudly to the officer in the first vehicle and the officer in this vehicle was also shouting or speaking loudly back to the person on the sidewalk.

She drove eastbound on Stinson Street, her vehicle window was down as she wanted to get a better understanding what the interaction was about. As she proceeded though she recognized the man on the sidewalk was Councillor Mathew Green. As she approached she could see the body language, facial expressions and could see it wasn't a, maybe a friendly hello as the officers were in their vehicles for quite some time holding up traffic.

When asked if she heard any of the conversation, she responded, she heard Councillor Green saying, "I told you..." – something along the lines of – "...I told you my name, you know, can you tell me your name?, something along the lines of that." She believes the Councillor repeated himself and thinks that's because the officer either didn't hear him or was refusing to respond. She stated that there were cars passing through in the underpass and it was very difficult to hear.

When asked if she observed the officer in the first car, she said she took note of the officer, saw a male officer with his driver side window down, as she was driving through she didn't hear him say anything. It was Councillor Green's voice she was hearing at the time. She noticed the facial expression and body language didn't quite match the demeanour of Councillor Green. The councillor was seemingly engaged in a conversation, leaning into the street and speaking very loudly in order that the officer could hear.

Further, Councillor Green was not screaming or shouting; however, the officer's demeanour didn't match Councillor Green, and his facial expression, he didn't seem inviting or welcoming or friendly, so at that point she got a clue this wasn't a friendly interaction.

When asked by the Service prosecutor, upon observing Councillor Green was she of the opinion he was in need of assistance. She stated, "No, not at all. He was dressed similar, maybe to what he's wearing today, business casual."

When questioned if she knew Councillor Green, she stated she has never met Councillor Green before. She then advised the Tribunal she proceeded to a friend's place and told her about her observations and then made some notes. Later that day or the following morning she saw Councillor Green's social media post relating to the incident that she had witnessed and she was glad she paid some attention to the incident.

She reached out to Councillor Green over social media and told him she was there and saw what happened. Councillor Green asked her if she would be a formal witness to his complaint against the Hamilton Police, to which she responded, "Yes."

Under examination by Mr. Poziomka, Ms. Bokhari again reiterated where her vehicle was when she first observed the police vehicles, and that she waited at the stop sign longer than she normally would upon observing the vehicles and their interaction with someone on the street. Asked why she stayed longer at the stop sign, Ms. Bokhari stated, she was curious as to what was taking place between the officer and Councillor Green and was debating at this point whether she should park her car and head over to the situation for a better vantage point, and perhaps if need support Councillor Green in that interaction. She had a feeling he might need some support.

When questioned why she believed Councillor Green needed some support, Ms. Bokhari stated, it was because she noticed the interaction wasn't friendly and perhaps there was something inappropriate happening in that interaction. She could clearly see Councillor Green standing on the sidewalk when she drove right passed him and he seemed to be really engaged in a conversation, and sharing his name and requesting the officer's name. She noted the demeanour of Councillor Green and the officer were not matching, Councillor Green was engaged and looking for information, and she noticed as she drove past the officer she couldn't actually hear him speak at the time; however, his demeanour didn't seem friendly, it didn't seem open, it didn't seem he was stopping to say hello to Councillor Green. It didn't seem as innocent as that.

When asked about the weather, she said it was cold, not raining, but may have been spitting rain.

When questioned about what Mr. Green was wearing, she responded, he was dressed in pants, and it seemed like he was wearing nice shoes and a blazer and it didn't seem out of line for the weather that day.

When questioned if Councillor Green appeared angry, the witness did not observe this, saying he was speaking loudly and she believes it was because of the acoustics of the intersection.

When questioned by counsel if she observed any mud on the shoes of Councillor Green, she responded, she did not observe any mud on his shoes, nor did she think there was any mud on the sidewalk.

Under cross-examination by defence counsel, she was asked if she recalled giving a statement to the O.I.P.R.D. on July 8<sup>th</sup>, 2016. The witness was given the opportunity to revisit her statement and advised counsel during the interview she tried to be full and accurate with the interviewers. She agreed with counsel that she didn't give an estimation how long she was stopped at the stop sign; however, agreed it could have been between five and two minutes, but it felt longer. When questioned if she heard the officer saying, "What's your name?", she stated she could not remember, she doesn't recall. However

she recalls Councillor Green saying "What is your name", and that he was saying it over and over, she believes the officer could not hear him because of the noise under the overpass.

Ms. Bokhari agreed with counsel on the day in question she had no idea what the whole context of the discussion was between the officer and Councillor Green, that she doesn't know why he was stopped, nor could she hear any question being asked by the officer. When questioned how she could determine that the officer was unfriendly, she stated she referred to his body language and his facial expressions.

When questioned whether or not she posted an article on Facebook on December 13<sup>th</sup>, 2016 saying that, "The Hamilton Police Service and the union have a responsibility to serve the community, not racially target Hamiltonians and question their existence in a particular time and space." She stated she does not recall writing that, however, agrees that it is her post. She agreed with counsel she has made several posts related to the incident.

Counsel then asked Ms. Bokhari how she can conclude it was a racially charged incident when she only hears one question as she drives by, said she could not definitively say that it was a racially motivated stop. She was questioned further with regard to a posting on May 13<sup>th</sup>, 2017 where she said, "New hearing sets for police disciplinary case, the case of "Andrew Pfeifer is accused of discreditable conduct for a stop of Councillor Green."

She also noted above that, "Mark your calendar, folks."

When asked during the O.I.P.R.D interview if there was anything else she wished to tell them about the incident she considers important, she agreed with counsel she didn't have any concerns about it being racially motivated, because she didn't know whether Councillor Green was stopped because of a racially motivated bias of the officer. She didn't have these facts. She doesn't have the facts because she was not there hearing the exchange between the officer and Councillor Green. Further, she still does not know why Councillor Green was ever stopped.

When asked further by counsel with regard to the officer's facial expressions, she noted he did not have a smile on his face as that is one clear indication that someone is welcoming, an inviting smile. What she observed of the officers face was it didn't appear friendly. The witness agreed that she couldn't hear what Constable Pfeifer was saying while she was stopped at the stop sign other than he was shouting towards Councillor Green. She recalls Councillor Green speaking very loudly and repeating himself so that the officer could hear him. When asked if that was what Constable Pfeifer was doing, the witness stated, "I'm sure", but when passing through she could only hear Councillor Green.

Under re-examination by Mr. Duxbury, the witness was asked about the name Shahzi Yasmin. She responded that is the name she uses on social media.

Under re-examination by Mr. Poziomka the witness was asked to review two articles. The first one dated December 15<sup>th</sup>, 2016 relating to Mr. Green creating a spectacle over a carding complaint. Upon referring to these articles, the witness stated this was what she was referring to when she put out her Facebook comments about the incident. The first document was entered as **(Exhibit #13)**, 'CBC Hamilton Police Union Comments'.

The second article was a Global News article December 15<sup>th</sup>, 2016 referring to Hamilton Police officer facing a charge of discreditable conduct. The witness agreed with council that this article was the one that jogged her memory about the altercation being a well-being check. This document was entered as **(Exhibit #14)**.

When questioned if she thought the intersection was safe she replied, "No, Councillor Green was standing on the sidewalk, very close to the road, with one step he could have been on the road." He was leaning forward into the street and she thinks it was because of an audible issue with the officer. She was concerned if she drove through the intersection something could have changed, and Councillor Green could have ended up on the road.



The next witness for the prosecution, Mr. Michael Doyle, advised the Tribunal he is a resident of Hamilton living on Ontario Street with his family. He was then asked by counsel as to what he observed on April 26<sup>th</sup>, 2016. He stated that he and his son were walking home after picking him up from school. As they were walking on Victoria Ave. they got to the corner of Victoria Ave. and Stinson where they met a male on the corner who pointed down the street and said, "Look at these fuckin' assholes causing trouble." As he was with his son he didn't engage with him but looked down the street where he was pointing. Underneath the Claremont Access, he saw two police cars parked on the side of the street, and a gentleman standing underneath the overpass. He also noticed a couple of cars behind the police cars, stating that it didn't look like anything at that point was really happening and didn't want further conversation with the gentleman so he continued on his way down Stinson. When asked about the weather that day, he described it as wet and very windy. He recalled putting the umbrella they were using forward in an attempt to block the wind from their faces while walking.

Under examination by counsel for Mr. Green, Mr. Doyle explained it took him about a minute and a half to get to the intersection of Victoria Avenue and Stinson. He stopped at the intersection where the male made the comments to him for approximately ten (10) seconds then continued along. When asked if he looked back at this time to see if the interaction was still happening, he replied, "No." When asked if he noticed anything about the demeanour of the individuals, either the police officers in their cars, or the individual standing on the side of the road, he responded, the officers were in their cars and the gentleman was just leaning against the wall of the access. He never heard anything. When questioned about his observations of Councillor Green, he stated, he was just leaning against the wall of the underpass. Nothing looked out of the ordinary to him. When asked if the gentleman looked like he was in any sort of stress, he replied, "No."

Under cross- examination by defence counsel he was asked about the male leaning against the wall of the underpass. Mr. Doyle responded, he was just leaning against the wall, right at the corner and believed he was seeking shelter from the rain. He agreed with counsel he couldn't see the face of the male and was unable and could not tell if he was in distress or not and he was not doing anything that would indicate to him that there was a touch of trouble going on. He believed he had his cell phone in his hand.

When asked if he observed any interaction between the officers and the male, he replied that there appeared to be nothing going on during the short time of his observations.

Entered at this time by Mr. Poziomka was (*Exhibit #15*) a document labelled "Applying the Racial Profiling Correspondence Test."

The first witness for the defence, Police Constable Andrew Pfeifer, testified he is a member of the Hamilton Police Service and has been a sworn officer for the past eight and a half years. When questioned about any mental health training he has been given, stated, that he has received the normal courses all officers of the Service receive. He has also received additional training in Crisis Intervention run by St. Joseph's Healthcare. He described COAST as a mental health unit, a partnership between the Hamilton Police Service and St. Joseph's Healthcare that offer a 24/7 service and follow-up visits with people who are assessed with mental health issues. Constable Pfeifer then spoke to his Use of Force Training and the equipment he carries while on duty.

When questioned what he was wearing on April 26<sup>th</sup>, 2016. He stated, he was in full uniform with all of his authorized service equipment along with a rain jacket as that particular day was cool and rainy.

When questioned about wearing sunglasses on that particular day, he did not believe he was.

He was then asked by counsel to advise the Tribunal what duties he had performed prior to his interaction with Mr. Green. He said he was at a mental health call dealing with an individual on Emerald Street at the Emerald Lodge. He described this location as being a couple of blocks away from where he first observed Mr. Green. After completing the call he drove to a recreation centre a short distance away to complete his notes with another officer, Constable Thompson, who attended the call with him. After completing their notes Constable Pfeifer left the parking lot and was proceeding to turn left to go east on Stinson Street. As he was turning into the street he observed a male standing in a puddle of mud, hiding behind the bridge, hands in front of him looking right and left.

Constable Pfeifer was then shown Exhibit #10, a large photograph of the area where he had observed Mr. Green. The officer identified the photograph. Stating Mr. Green was standing a little bit further from the bridge. When questioned what drew his attention to him, the officer stated, the fact he was standing in a puddle of mud, hiding behind the bridge, such that nobody westbound would be able to see him, and he was looking left and right. It was a cool and rainy day, he wasn't wearing a jacket, and thought he was underdressed for the weather. He said he was familiar with the area and had never observed anyone stand there before, so he wanted to stop and check his well-being. As a result he stopped his police cruiser on Stinson Street in the eastbound lane west of the bridge.

When questioned how far away from Mr. Green did he stop, Officer Pfeifer said it was approximately 40 feet. A distance he checked the following day with a measuring device located in his vehicle.

Upon stopping he rolled his window down and asked the male a greeting, saying, "How are you doing?" The male looked at him with an angry look on his face, and replied in a sarcastic tone, "How are you doing?" Constable Pfeifer said he was not expecting that reaction and was a little taken aback, it heightened his belief that he needed his well-being checked.

He then asked him, "Are you okay?" And at this point he just looked even more irritated and repeated it back to me, "Are you okay? Come over here. Let's have a conversation," and he starts hitting his chest, and I was taken more aback." He then asked him what he was doing here, as he is aware there are three lodging homes and one crisis centre within the area. The lodging homes being essentially for persons with mental health issues are located on the other side of the bridge. Constable Pfeifer then identified three lodging homes in the immediate area that deal with people in crisis. The male advised him he was waiting for a bus and trying to stay out of the wind. Constable Pfeifer said he looked around the general area and didn't see any bus stop and noted nobody westbound would be able to see him. He then told the male he was going to miss the bus, to which he responded, "No, I never miss the bus. The bus always sees me."

He then asked the male if he was from around here, he responded, "I'm very much from this city." Constable Pfeifer said what he meant by that was, are you from around the general area, as he was thinking about of all the lodging homes in the area. He again asked him if he was okay, he responded, "Are you?" and said, "Your partner says you're holding up traffic and to move along." Constable Pfeifer told him he was okay here and wanted to make sure he was okay before he moved along. He then asked the male his name, to which he responded "Mathew Green. What's yours?" Constable Pfeifer said he responded, "The City Councillor?" because he wasn't sure, he recalled the name, but had never seen him.

At this time he asked him once again if he was okay and he responded, "Yes, are you?" to which he responded, "Yes, have a good day," and drove off.

Constable Pfeifer agreed with counsel all the conversations with Councillor Green took place while he parked opposite him. Further during these conversations Councillor Green stepped forward onto the sidewalk to get closer to him. When questioned how long the interaction between himself and Councillor Green lasted, he responded, "Less than a minute."

When questioned during the exchange with Councillor Green, did any pedestrians or vehicles pass between them, obstructing his view, he replied, "No."

Counsel then questioned Constable Pfeifer if he received any information from Councillor Green other than his name, and did he utilize any checks on his in-house computer in relation to the information. Constable Pfeiffer stated the only thing he asked for was his name, nothing else, and did not do any searches related to it reiterating it was a well-being check.

Counsel then questioned the officer in relation to his observations of Councillor Green with regard to a cell phone. The officer identified him holding a cell phone during their exchange; however, he was not using it. He also said he did not ask Councillor Green anything other than his name and made no

statements or asked personal questions of him other than his concern's for his well-being. At no time did he interfere with the movements of Councillor Green.

When questioned about making notebook entries about his exchange with Councillor Green. He stated he made some after the exchange with him.

When asked if he was familiar with carding, he explained carding to him it is the arbitrary stop and detention of someone, requesting they provide identification, recording the information, usually, and name, date of birth, address, and then entering it into a database. Constable Pfeifer stated he has never carded anyone and is not something that has been brought to his attention.

With regard to Councillor Green, Constable Pfeifer said he has never had any dealings with him in the past. When questioned about his movements after the call, Constable Pfeifer said after leaving the area he went to the police station.

When questioned about talking to citizens during a tour of duty, Constable Pfeifer stated he does this on numerous occasion during his shift regardless of the ethnicity or the culture of the person, he would stop and ask them how they are doing, and to see if they need any assistance.

Under cross-examination by the Service prosecutor, he was asked if Constable Thompson and he had worked together before the day in question they were stopped in a parking lot of a recreation centre exchanging observations about the previous call they had attended. He responded they have worked together prior to this. When asked about his observations of Mr. Green upon entering Stinson Street, he agreed with the Service prosecutor he needed to have some reasonable foundation to engage someone on the street. When asked with regard to the contents of the notes made by him on that day, Constable Pfeifer stated that he didn't use the word 'hiding', but noted Mr. Green was standing in a way that he's not next to the wall of the bridge, so anyone westbound wouldn't be able to see him. He agreed with counsel that Mr. Green in his opinion was not hiding from him. When questioned about Mr. Green

standing in a puddle of mud, Officer Pfeifer again agreed with counsel he had no notation of this in his notebook, he noted there was a muddy hill behind him and he was just standing there; however he observed he was standing in a puddle of mud.

When asked if he was interviewed by the O.I.P.R.D. in July 2016, he replied yes and has reviewed the transcript of the interview. He was then taken to page six of the interview where the prosecutor questioned about his comments with regard to Mr. Green looking from right to left. Constable Pfeifer stated he did mention this later in the interview, page 12 where he stated, " So I found it strange that someone so well dressed would be standing in this wet puddle of mud hiding behind a bridge with his hands in front of him and looking around like this. It just drew his attention to me and I felt duty bound to stop and talk to the person."

When questioned about his exchanges with Mr. Green on the day in question, he agreed his first exchange was "How are you doing?" and Mr. Green responded, "How are you doing?" His second exchange was asking him if he was okay and Mr. Green responded, "Are you okay? Come over here. Let's have a conversation." At the time there was a gesture from Mr. Green, he started to hit his chest saying, "Let's have a conversation." His third exchange was to ask Mr. Green what he was doing there, to which he responded, "I'm waiting for the bus. It's windy. I could get wind on me. I'm staying out of the wind." Constable Pfeifer advised counsel that it was windy on that particular day. He disagreed with the Service prosecutor after these series of questions and responses with Mr. Green it should have been the end of the exchange. Stating that Mr. Green's hostility towards him is not a typical reaction he thought he should have, based on checking his well-being. Also the response he was waiting for a bus, he was not standing at a bus stop, and in his opinion no westbound traffic would be able to see him. As a result, he was not yet satisfied he did not need assistance. Constable Pfeifer agreed with the Service prosecutor he asked Mr. Green on several occasions if he was okay, and the first few times Mr. Green repeated it back to him and then he said, "Yes, are you okay?"

When questioned about the exchange with Mr. Green in reference to a comment about his partner, Constable Thompson, he stated during the exchange Mr. Green said to him that his partner says, "Move along, you're blocking traffic." To which Constable Pfeifer replied they can wait, he wants to make sure

that Mr. Green is okay first. The next exchange he had with Mr. Green was asking him if he was from around here. The service prosecutor then questioned Constable Pfeifer if he agreed this exchange would indicate to Mr. Green he wasn't free to move along. He responded, "No." He was seated in his vehicle approximately forty (40) feet away from him talking a calm manner.

The next exchange was asking Mr. Green his name and agreed later he entered his name in his notebook. When questioned if, at that point he was starting to collect data, Constable Pfeifer did not agree with this assumption. When questioned about asking him one more time if he was okay did he detect someone who was frustrated and disturbed by the length in which he was engaging him, Constable Pfeifer said, "No. He was frustrated and angry, from the onset of the exchange."

Constable Pfeifer stated, his last exchange was telling Mr. Green to have a good day and left the immediate area. He then proceeded to the police station. The Service prosecutor then asked Constable Pfeiffer if the reason he headed to the police station was because he felt the exchange with Mr. Green was problematic and he needed to get some guidance. He responded, "Yes."

He was then questioned with regard to the time he made notes of the incident. He stated his notes were made shortly after the incident. He went to the station for a few minutes, left and parked somewhere to complete his notes. The Service prosecutor took the officer through the notes he made on that particular day. He was asked if the portion of his notes on page thirty-nine (39) where he described Mr. Green's attitude, and his behaviour towards Mr. Green was nothing more than a self-serving editorial comment. Constable Pfeifer stated these notes were his observations, thoughts, and his feelings at the time.

When questioned about a late entry in his notes on April 30<sup>th</sup> with regard to the incident, the Constable advised the Tribunal he made the entry as his exchange with Mr. Green had hit the news so he returned to the area to check the distances. He was then questioned about the entry of Mr. Green standing in a puddle of mud and asked if he created this justification that something is wrong with the situation so he

could start a conversation with Mr. Green. Constable Pfeifer responded that he entered this information as the incident had hit the news and he felt compelled to gather more information for his benefit.

Under examination by Counsel for Mr. Poziomka, the following exhibits were entered. **(Exhibit #15)** Document entitled, 'Applying the Racial Profiling Correspondence Test'; **(Exhibit #16)** document entitled, 'Past Weather in Hamilton, Ontario, Canada, April 2016'; **(Exhibit #17)** document entitled, 'Training Practices of the Hamilton Police Service on Bias Free Policing,' July 23<sup>rd</sup>, 2015; **(Exhibit #18)**, Superintendent Nancy Goodes-Ritchie, April 21<sup>st</sup>, 2016; **(Exhibit #19)** hand-drawn diagram of overpass, road, and two vehicles, initialled "DT", dated July 17<sup>th</sup>, 2016.

Asked by Mr. Poziomka if he had a positive relationship with the community he works in. Constable Pfeifer responded, "Yes."

He also advised counsel during the year 2016 he worked alongside Constable Thompson. He no longer works with him as he has moved to another shift.

When questioned with regard to the time he stopped in the parking lot at Central Memorial Recreation Centre after his previous call, Constable Pfeiffer stated he and Officer Thompson arrived at approximately 2:50 pm and stayed there approximately five minutes. They completed their notes pertaining to the last call and both left together.

He was then questioned how long it took to drive from the parking lot to his interaction with Councillor Green. He stated approximately one minute. Constable Pfeifer was then given Exhibits #4 and #5 and asked by counsel to mark the area where his police vehicle was stopped on Stinson Street. After making the notations, Mr. Poziomka questioned why he had stopped at this location, to which he replied, "That's just where I stopped," and Constable Thompson stopped his vehicle behind him.



When asked when he first noticed Mr. Green, he stated upon turning into the street he observed Mr. Green standing in the puddle of mud behind the bridge, looking around. He was then shown Exhibit #6 and asked if that is where Mr. Green was standing. He stated Mr. Green was further back from the road. Counsel then put several questions to the witness in regards to the position of Mr. Green's feet, responding he is unable to give the exact position of his feet, but recalls him standing in a puddle of mud.

When questioned if he observed any mud on Mr. Green's shoes Constable Pfeifer did not recall if there was mud actually on his shoes. He observed he was physically standing in mud with his hands in front of him. Counsel then asked the witness what drew his attention to Mr. Green. He stated, the mud, the location, hiding behind the bridge. He was standing beside the concrete of the bridge, such that he was hidden from westbound pedestrians and westbound vehicles. It was cold that day, wet in the morning and it had rained sporadically throughout the rest of the day. He was underdressed for the weather. The temperature at the commencement of his shift was three (3) degrees Celsius.

When questioned about any other factors that drew his attention to Mr. Green, Officer Pfeifer continued, there is a lodging home for mentally ill people on the other side of Claremont along with several other lodging homes situated in the immediate area and that was what he was thinking about for a well-being check.

He was then questioned by counsel if during his exchange with Mr. Green, did he observe a vehicle creeping by between them. Constable Pfeifer responded, at no point did he observe a westbound vehicle creeping by, especially one going slow. He would have noticed it, because it would have obstructed his view and his ability to communicate with Mr. Green. When questioned if he noticed any vehicles behind him, he responded, "Yes." When Constable Thompson told him he was holding up traffic, he glanced briefly in his mirror and saw two or three vehicles behind Officer Thompson's vehicle.

He was then questioned with regard to his reasons for going back to the station. He advised the Tribunal he was concerned about the exchange between himself and Mr. Green as he believed there could be a complaint based on the way Mr. Green reacted towards him. At the station he advised the Acting Staff Sergeant about the exchange with Councillor Green. He was advised by the Acting Staff Sergeant to make good notes of the exchange. Afterwards, he left the station and stopped in a parking lot with Constable Thompson and completed his notes on the matter. Counsel then took the witness through his O.I.P.R.D. statement with regard to the questions and answers with Mr. Green.

When questioned about his comment to Mr. Green, "Are you from around here?" and asked if he felt this was an appropriate question, Constable Pfeifer believed it was an appropriate question as he was trying to ascertain if he's lost, or if he knows where he lives, or if he's from the area in general, given all the mental health lodging homes in the area. Mr. Green responded, he was very much from this city. At that point Constable Pfeifer asked him his name, to which he responded, "Mathew Green, what's yours?" The officer then told Mr. Green his name and asked him one more time if he was okay. When asked what changed in the exchange to make him satisfied that he was okay. He stated, after being made aware of his name, he thought he might be a city councillor, he is okay, and he is a city politician.

When asked what the weather was like that day, the officer was not sure, but believes it was sporadically raining all day long. He was then shown Exhibit #16 a weather report for April 26<sup>th</sup>, 2016 and asked to look at the line that says 3:00 pm. Where he describe the weather statement to read four (4) degrees, mostly cloudy, wind speed nineteen kilometres an hour and at times light rain. It was noted the forecast was for the City of Hamilton.

Mr. Poziomka then took the officer through the interactions between himself and Mr. Green stating there are a total of thirteen (13) exchanges. Constable Pfeifer was then asked how long this interaction lasted. He stated, in his mind it felt about 55 seconds.

Constable Pfeifer was then asked about training he received in 2015 from the Hamilton Police Service. He described his training, as Block training, that it is a mandated training for one week that took place in February. Also the same training in January 2016. When asked about the specifics of this training, Constable Pfeiffer, the officer could not remember any of the specifics of the training. He also stated he took the Block training in 2017 stating it was very general with various subjects; harassment, discrimination, vehicle driving and criminal law. When asked about the discrimination training he received from the Hamilton Police, he could not recall the generalities of it.

He was then asked about Exhibit #18, 'Training and Practices of the Hamilton Police Service on Bias Free Policing' and asked if he has seen this document. He stated, he was not familiar with it, and did not recall attending any training pertaining to it.

When asked to define street checks, he responded, "Like, carding, that it's an arbitrary stop and detention where a person, they are required to provide identification, recording that information, and then entering into a database, putting it on cards."

He agreed with counsel that street checks are the same as carding; however, he does not use the term 'street checks'.

When asked if he agreed that the Hamilton Police Service acknowledges racism, racial-profiling exists in policing. Constable Pfeifer responded, "He didn't think so, not in his experience."

When questioned if he was aware of street checks being implemented in 2010, he said he was not aware of that.

He was then questioned in relation to training he has received with regard to interactions with a person from a racialized group. He agreed he had, explaining they received training on the collection of identifying information about the upcoming law in July 2017 in regards to carding. The witness was then shown Exhibit #5 "D" and asked to mark the location where he was during the exchange with Mr. Green. He stated he does not recall the features on the photo, stating he measured the location where he parked his vehicle to where Mr. Green was located and it was forty (40) feet.

Under re-examination by defence counsel, Constable Pfeifer was asked if a well-being check has ever been defined to him in any policy or procedure from a superior.

When questioned if he is trained on a reasonable standard when he makes observations, Constable Pfeifer stated that it is all subjective. They all make their own observations and arrive at conclusions at their own pace and time, that it's a case where each officer is unique and that gets based on many things in their experience as officers.

When asked if it would be prudent from his perspective to stop someone and have an interaction not to obtain a name for his notes, he responded, only if he knew who they were. There would have to be some record of who he interacted with. He was then asked if the information he received when doing a wellness, would the information go on the central management system or shared with anyone else in the course of his policing duties. He replied, "No."

Asked why he told his supervisor about his exchange with Councillor Green, Constable Pfeiffer said his supervisors like to be kept apprised of the things they are doing, especially when something like that could potentially come to them. They like to have a heads-up in case they receive a phone call about an interaction with a citizen.

The next witness for the defence, Police Constable Derrick Thompson testified he is a member of the Hamilton Police Service and has been for the last ten (10) years and currently holds the rank of 1<sup>st</sup> Class Constable. He advised the Tribunal he is allocated to the central zone which includes the area where the exchange with Councillor Green occurred. He stated he was in full uniform that day, driving a marked police vehicle. Prior to the exchange with Councillor Green, he was with Constable Pfeifer in a parking lot off Stinson Street completing their notes in relation to another call dealing with a mental health/traffic issue they had been dispatched to. After completing their notes Constable Pfeifer left the parking lot and he followed in his vehicle turning eastbound onto Stinson Street. As he was making the turn he noticed a gentleman tucked behind a wall standing in a muddy area wearing what he would describe as nice clothes. He noticed the male was looking to his left on several occasions which made him wonder what he was looking for, or is he hiding. As he moved on he felt he should stop this person. Constable Pfeifer who was ahead of him stopped and started a conversation with this male.

Constable Thompson said he stopped behind Constable Pfeifer's vehicle and activated his rear lights to advise oncoming vehicles approaching them. At this time he could hear Constable Pfeifer speaking to the male he observed tucked in behind the wall. Constable Pfeifer asked the male if he was okay, to which he responded, "I'm fine. How are you?" He was then asked if he was okay, and he responded saying, "I'm fine."

He was then asked by Constable Pfeifer what he was doing here. The male now responded, "I'm not allowed to stand there. The bus, I'm waiting for the bus. I'm blocking wind to wait for the bus. Constable Thompson felt at this point the male is anti-police or has a mental health issue, that he didn't need help.

He noticed at this time there was a vehicle behind him and two more heading in that direction so he decided to lighten the mood, stuck his head out of the window and said to the male, "Why don't you tell my partner we're holding up traffic and we need to leave." The male then stated to Constable Pfeifer, "Your partner says you're holding up traffic. If you want to have a conversation, come over and let's have a conversation." Constable Thompson noticed at this time the male was touching his chest and his tone when talking was an aggressive tone, he sounded angry.

Constable Pfeifer then asked the male, "Are you from around here?" and he responded, "I'm very much from around here." At this point Constable Pfeifer asked the male his name, and he responded, "Mathew Green." Shortly after that Constable Pfeifer pulled out from the area, leaving the scene, and he followed him.

When asked about Constable Pfeifer's demeanour when talking to Mr. Green. Constable Thompson, said he was sitting in his vehicle talking to someone who was approximately forty (40) feet away from him. When questioned with regard to the length of time the exchange took place between Mr. Green and Constable Pfeifer, he said it was approximately one minute.

Questioned about what happened after leaving the area, he said they drove to the police station and parked their vehicle. Thompson questioned Constable Pfeifer what was on his mind as he had that look. Constable Pfeifer responded, the person they stopped was a councillor. Thompson disagreed with him and asked him to "Google it," and sure enough, it was Mr. Green.

When asked why he didn't think the male was a councillor, Constable Thompson replied, the interaction itself, it was a simple stop just to check someone's well-being, it is something that happens all the time, virtually every shift, a quick conversation, and he just couldn't understand the anger behind it, the tone.

When questioned if he has dealt with similar situations before during his tour of duty, Thompson stated he has and gave the Tribunal several examples, stating, "As police officers they should be prepared to help the public, in case something is wrong, I mean you are a human being, police officer or not."

When asked if he believed the exchange with Mr. Green was a race-based stop, he responded, "Absolutely not." Advising the Tribunal if he believed that was the reason for the stop, he wouldn't work with someone like that and he would be reporting them to a supervisor.

Constable Thompson described to the Tribunal the difference between a detention and a well-being check. That the exchange with Mr. Green was strictly a well-being check and at no time did Constable Pfeifer place Mr. Green in detention, nor did he ask Mr. Green to confirm his identity.

Counsel then asked Constable Thompson if he was familiar with carding, to which he responded yes and explained it as an arbitrary stop to get pertinent information from someone: name, birth date, address, phone number. Upon receiving this information it is placed in a database. When asked if he has ever carded anyone, he responded, "No."

He was then questioned if he observed a slow moving vehicle heading west, pass between Mr. Green and Constable Pfeifer, he responded, "No." Nor did he observe a family or any pedestrians heading east or west passing in front of Mr. Green on the sidewalk

Constable Thompson agreed with counsel that he never conducted any queries with regard to the exchange with Mr. Green and is not aware of any queries of the exchange being contacted by Constable Pfeifer with regard to Mr. Green.

When asked to describe the area surrounding Stinson Street. He described it as a very diverse place that contains several lodging homes that deal with a number of people with mental health issues in the immediate area.

When questioned by defence counsel with regard to an officer holding an attitude that somebody from a different race, colour, or creed is lesser than them, and that's their motivation for stopping that persons, is there a benefit to that sort of policing. Constable Thompson responded, "No, and they shouldn't be police officers. Sorry, I don't think they should be police officers, if that was the case."

When asked if he believes racial profiling does exist in policing, he stated, "Yeah, it probably does." However, he has not seen it in the people he works with, nor with Constable Pfeifer.

He was then asked to characterize the interaction with Mr. Green. Constable Thompson said, for him it was having a feeling something was wrong with the individual, stopping to see if they're okay and they needed help, had a quick conversation, but that didn't happen. "Mr. Green was angry the whole time, and after that, we carried on the, you know, to do the rest of our day. It should have been a quick conversation to see if they're okay. If they're okay, they're okay, then move on."

Under cross-examination by the Service prosecutor, Constable Thompson stated he observed Mr. Green after turning onto Stinson Street. While on Stinson Street he noticed that he was holding a cell phone. Constable Thompson was then questioned about making his notes with Constable Pfeifer in regard to the call they had attended prior to observing Mr. Green. He advised the Tribunal they were both parked together in the recreation parking lot completing their notes. He agreed with the Service prosecutor that they discussed the call; however, when it came to completing his notes, he would enter only what he had seen and observed.

Entered at this time was **(Exhibit #19)** a sketch prepared by Constable Thompson during his interview with members of the O.I.P.R.D. He agreed the sketch was made in an attempt to signify the direction or movement of his and Constable Pfeifer's vehicles at the recreational centres and their movement from it. The Service prosecutor then took Constable Thompson through his recollections of the exchange between Mr. Green and Constable Pfeifer, noting that he had made notes with regard to conversation but omitted to make any notes pertaining to any physical gestures made by Mr. Green. He agreed he had not noted the physical gestures he observed Mr. Green making. He agreed with counsel after the third exchange between Constable Pfeifer and Mr. Green, he was of the opinion Mr. Green was not in danger of himself or anybody.



He was asked about the sequences of the question between Constable Pfeifer and Mr. Green. Constable Thompson agreed with the Service prosecutor, to the best of his recollection there were no further exchanges between Constable Pfeifer and Mr. Green, after Constable Pfeifer had asked Mr. Green his name.

Under examination by counsel acting for Mr. Green, Constable Thompson was asked to recall the call that dispatched him and Constable Pfeifer to the Central Memorial Recreation Centre prior to the interaction with Mr. Green.

He advised the Tribunal the call was in relation to a mental health/traffic call. It was a panhandler jumping into traffic. After dealing with it they pulled into the parking lot. He agreed with counsel he did not make a time entry with regard to making his notes on this matter, however, they were dispatched to the call at 1427 hrs.

When questioned with regard to the time Constable Pfeifer had the exchange with Mr. Green, the officer stated it was at approximately 3:10 pm.

He further testified that his first observation of Mr. Green took place as he is at the sidewalk about to pull out of Stinson Street behind Constable Pfeifer. He observed a person standing where he has never observed someone before. It's at the base of a hill in a muddy area, the male had nice clothes on and he is standing in there, looking left under the underpass. He first observed him from a distance between twenty-five (25) and thirty (30) feet, noticed he was dressed nicely with a jacket or blazer and shoes.

When shown Exhibit #6, a picture of Mr. Green standing in the described location. He stated, that's where he saw him standing. He agreed with counsel, he would have stopped and spoke with him if Constable Pfeifer hadn't, as he thought there may have been something wrong, as he was standing in mud repeatedly looking in an easterly direction. He described the area where Mr. Green was standing as

a watery area, and he looked out of place and wondered what he was doing, which led me to wonder if he was okay.

Constable Thompson advised the Tribunal he has worked this area for a number of years and there's a lot of mental health issues and wanted to see if he was okay.

When asked what took place when both police vehicles stopped on Stinson Street after observing Mr. Green. Constable Thompson responded, his driver's window was down and he heard Constable Pfeifer asking the male, "How are you?" and Mr. Green responding, "I'm fine, how are you?"

Constable Pfeifer then asked him if "he was okay." Mr. Green said, "I'm fine, the question is are you okay?" Asked if Mr. Green was beating his chest at this time, Constable Thompson said he didn't see that happening.

Constable Pfeifer then asked him what he was doing there, to which Mr. Green responded, "Am I not allowed to stand here? I'm waiting for the bus, I'm blocking the wind. There's wind. I'm waiting for the bus." Constable Pfeifer then asked Mr. Green, "Where are you from, are you from around here?"

Constable Pfeifer then asked the male for his name, to which he responded, "Mathew Green." After that exchange Constable Pfeifer began to pull away and he followed him. When questioned how long the interaction between Constable Pfeifer and Mr. Green was, he said it felt about a minute long.

When questioned if he saw any people in the immediate area, he responded no, but does recall some people standing at a bus stop in the area of Stinson Street and Victoria.

Constable Thompson then advised the Tribunal, after leaving the area both he and Constable Pfeifer proceed back to the police station. Upon arrival, once out of their police vehicles, Constable Pfeifer decided to Google Mr. Green. After which, they entered the station and went into Acting Staff Sergeant

Abbott's office and advised him of the exchange with Councillor Green. After meeting with the Acting Staff Sergeant he completed his notes. Constable Thompson couldn't recall exactly where he made his notes on this occasion, stating he makes many notes during his tour of duty at several different locations.

When further questioned about the reason for talking to his Staff Sergeant, Constable Thompson stated, that Councillor Green was another City employee and the way Mr. Green was talking to Constable Pfeifer just rubbed him the wrong way. It was a heads-up as he didn't understand what was going on.

Constable Thompson agreed with counsel that he and Constable Pfeifer talked about the exchange with Mr. Green. He recalls two days later asking Constable Pfeifer if he saw the article in the paper about their exchange with Mr. Green, to which Pfeifer responded, "Yeah, it's ridiculous."

When asked if he thought Mr. Green may have had mental health issues on the day in question. Constable Thompson advised the Tribunal he did, even after the completion of the exchange as he didn't know who Mathew Green was, he still thought he could have mental health issues.

When questioned if Mr. Green could have been anti-racist. Constable Thompson stated, "Yeah, and that's not what happened that day. It's not what happened that day, and he can't answer for him how he feels. If he feels a certain way, that's the way he feels. That's not what happened, in his opinion, that day."

When questioned if he understood what racial profiling is, he stated, "Well, you are using creed, colour of skin, to say that person is doing something wrong, using that as a primary basis for stopping someone." When asked if he knew the reason Constable Pfeifer stopped Mathew Green, he responded that he didn't know. He was then asked if the exchange with Mr. Green could have been racial profiling, Constable Thompson said, it's possible, but it wasn't in his mind. He was then asked if racial profiling

exists within the Hamilton Police Service. Constable Thompson stated, anything is possible, however he has never witnessed it or had an interaction with co-workers.

Counsel then questioned the officer with regard to Exhibit #16, 'Training and Practices of the Hamilton Police Service on Bias Free Policing'. He was then asked about a statement on page seven of the document. "This police service acknowledges that racism, racial profiling and other biases exist in policing," and asked if he agrees with it, to which he responded, "Yes."

Counsel then questioned the witness with regard to the exchange between Constable Pfeifer and Mr. Green, asking him if this was the most hostile and angry interaction exchange he has ever dealt with. Constable Thompson didn't think it was the worst incident he has ever seen, but agreed it was hostile in his opinion. He also didn't agree the stop was arbitrary, stating that Mr. Green was verbally aggressive, he appeared to be angry.

The witness was then asked to describe a well-being check. Constable Thompson then gave several examples of his understanding of a well-being check. He then described the exchange between Constable Pfeifer and Mr. Green as a well-being check. Further, it stopped being a well-being check when he came to the conclusion that Mr. Green was fine.

When questioned about activating the rear lights on his police vehicle. He stated the reason was to tell the public the vehicle was stopped. He agreed with counsel the flashing lights draw the attention of the public.

The witness was then questioned about training he has received with the Hamilton Police Service. He stated he has received Block training in 2016. He recalls receiving training with regard to racial profiling describing it as something you should never do, that it doesn't matter what someone's ethnic background is and never let it be the reason for stopping someone, or the only reason for stopping someone.

Constable Thompson then explained the Use of Force training he received. Counsel then questioned the officer about the continuum of the levels of force. Constable Thompson described it as a tactical communication, which changes when the behaviour of the person advances into aggressive behaviour.

When asked about Mr. Green's behaviour on April 26<sup>th</sup>, he described it as aggressive behaviour.

He was the asked if, in his opinion, the interaction Constable Pfeiffer was having with Mr. Green was safe. He believed it was, there was nothing unsafe about it, and he was just talking out of his open window.

When questioned by counsel if Mr. Green was just a random black man and not a city councillor would he have told Acting Staff Sergeant Abbott? He responded, "No." Asked if Mr. Green was yelling at Constable Pfeiffer, he said Mr. Green had an aggressive tone when he was talking.

Under re-examination by defence counsel, Constable Thompson agreed because he was satisfied with regard to Mr. Green's position, does not mean that Constable Pfeifer shouldn't be as well. He agreed with counsel that everyone doesn't come to the same conclusions at the same time.

In his submissions, defence counsel advises the Tribunal that Police Constable Pfeiffer is charged with one count of Discreditable Conduct. He argues, how speaking to a citizen brings discredit to the Hamilton Police Service. He stated the prosecution argues the exchange between the officer and Mr. Green went on too long and even if the Tribunal could find the exchange went on too long, how can Mr. Green participate in the exchange, by offering answers, posing questions and arguing with the officer, but then complain that it was too lengthy; doesn't he play an important role in keeping the discourse going?

He further argues that this case is not about racial profiling. It is not alleged by the prosecution or particularized in the Notice of hearing. There was no criminal investigation used by Constable Pfeifer as a pretext for stopping Mr. Green based on his race. Not one question was asked of Constable Pfeifer that was focused on any criminal behaviour.

Defence counsel on referring to the complainant stated, he is a politician who created a narrative that he was carded and detained. And when challenged on that narrative, unsheathed the sword of racism: 'The officer is racist.'

He questions how an educated person, intelligent person truly believe they are psychologically detained when Constable Pfeifer uttered no word, and made no gesture to indicate detention.

It is alleged that the exchange took too long, arguing there was no evidence called to support how long you are supposed to talk to the public, especially when the subject continues to engage you as an officer in a hostile and argumentative way. Counsel notes that every officer is going to respond differently in these types of exchanges, as was observed in the evidence of Constable Thompson, who reached his conclusion ten (10) to fifteen (15) seconds earlier than Constable Pfeifer. Constable Pfeifer testified that every officer reaches conclusions differently and at a different pace.

Counsel further argues, if this was a case of racial profiling and an unlawful detention, would one not expect there to be a hint of impropriety, a CPIC check done by the officer, a local records check, a query, an effort at carding, questions probing potential criminality of Mr. Green? There is no evidence of Mr. Green being detained.

Counsel spoke to the cross-examination of Mr. Green on page 172, Volume Two of the transcript, where he stated, "Having underestimated the temperature outside, I was dressed in a blazer and pants...and standing beside the bridge in order to shield myself from the frigid wind."

Counsel stated several factors are not in dispute: where Mr. Green was standing; whether it was a cold day; and that particular area is saturated with people who have mental health issues.

On that fact alone, that the area is saturated with people suffering from mental health issues, would give the officer ample reason to stop and inquire into the well-being of someone. It was cold outside and Mr. Green appears underdressed for the weather. His location and conduct drew the concern of the officer, not his colour.

He stopped him because he had questions about whether he was okay in an area that's saturated with mental health problems.

Defence counsel spoke to the evidence of the complainant where he stated he invited Constable Pfeifer to, quote, "Would you like to come over here and have the conversation over here?" and questioned, by inviting the officer to get closer to him, how can he possibly feel detained. He further questions how it is possible that Mr. Green claims he was psychologically detained when he says at page 255, Volume Two of his complaint, quote, "I have the privilege of knowing my rights, knowing, um, what I can say and can't in that particular situation."

Defence counsel again speaks to Mr. Green's evidence in-chief at page 37 where he stated, "I recognize what is transpiring and that he is taking my personal information." Counsel states that this is where Mr. Green's tweet becomes relevant. Quote, "For those of you who think police carding is over, I was just arbitrarily stopped and questioned by Hamilton Police as a city councillor in my own city." A tweet that was put out by Mr. Green right after the incident. However, when challenged about his knowledge of carding he stated it, "occurs when officers take notes." Counsel notes that Mr. Green was not carded by Constable Pfeifer, neither was there any personal information extracted from him.

With regard to the witness. Ms. Shahzi Bokhari, defence counsel argued she wasn't a witness. She was an advocate for the position of Mr. Green, quoting a tweet she had made with regard to the upcoming trial of Constable Pfeifer, "Mark your calendar, folks." Stating she is not a witness who came to the hearing to provide evidence.

Counsel notes at page 188, of Volume Two, of Mr. Green's cross-examination he was asked about any vehicles heading west during the exchange, he responded, "Not to his recollection. I don't know. There could have been one that drove by slowly and rolled passed him." Counsel argues in her evidence the witness Bokhari testified she drove by them slowly when making her observations of the exchange. However, in his statement to the O.I.P.R.D. he makes no mention of it despite knowing she supposedly witnessed it, nor does he provide this evidence in-chief. He noted the witness Bokhari had reached out to him within twenty-four (24) hours of the incident.

Defence counsel then spoke to the evidence-in-chief of Mr. Green in Volume One, page 68 where he tells his own lawyer, "At multiple times throughout this process, Mr. Poziomka, and to my friends that are present here today, he had offered opportunities to mediate, however under cross-examination it was clear he made no offers to mediate, beyond his call out to the Police Association President."

Counsel noted that Mr. Green during his interview with the O.I.P.R.D. that not only does he reject mediation, but he wants to, "play it out, see it play out, it will be fascinating."

Entered at this time was **(Exhibit #20)** defence counsel's Book of Authorities.

Entered at this time by the Service prosecutor the following exhibits; **(Exhibit #21)** prosecution Book of Authorities, **(Exhibit #22)** Compendium of Transcript Excerpts.



In his submissions, the Service prosecutor argues, that this case is about the fine line and the sensitive difference between community-based policing, which involves well-being checks, or street checks, on the one hand, and interactions between police officers and members of the community that are not properly founded, that go too far, that bring discredit upon the Hamilton Police Service.

The prosecutor spoke to the fact that Constable Pfeifer's exchange with Mathew Green should never have started, there is after-the-fact justification by Constable Pfeifer that is worrisome.

At the core of the prosecutor's submissions, by the third or fourth exchange between Constable Pfeiffer and Mathew Green it became clear Mathew Green was not in distress. He was waiting for a bus, and Officer Pfeiffer should have disengaged at that point and moved on.

Thirdly, the continued questioning of Mathew Green by Constable Pfeifer would, by an objective community standard, make the person feel that they were limited or constrained in their ability to move on. The stoppage, exchange, became an arbitrary, unjustified street check.

The prosecutor agreed that Mathew Green became angry; however, that should not be a factor. As in any common sense notion of community-based policing, officers have to look beyond that, rise above that. Further, the length of the exchange, whether it lasted one minute or four minutes is not terribly helpful. What matters is why the exchange started. What was the nature of the questions, how did it end.

The prosecutor spoke to Exhibit #22, a compendium of the exchanges between the officers and Mathew Green. He notes the initial exchanges between the three witnesses are remarkably similar. Mathew Green stated he was waiting for a bus standing out of the wind, there is no suggestion of distress in the way that the answer was proffered. The Service prosecutor argues at that point the exchange should have stopped. Constable Pfeifer at this time was advised by Mathew Green that his partner says he should move along, to which Constable Pfeifer said, "They can wait. No, I am good where I am." The

Service prosecutor argues Constable Pfeiffer's remarks can only be interpreted at this point as I'm in control. I have more questions, and we're not done here yet. You are not free to go. Don't you dare move.

The Service prosecutor spoke about the need for officers to engage the community, however, it's how they do it, why they do it matters. He noted he detected in the evidence of Constable Pfeifer and Thompson their need to justify or explain why they stopped Mathew Green and started to engage him.

He spoke to the cross-examination of Constable Pfeifer where he agreed when you have a reasonable basis to come to a conclusion, there is a need to bring the conversation to a conclusion and move on.

The prosecutor states the stoppage, and the start of the enquiry, the Tribunal is left clouded about its motives, and it leaves a nagging question about why it started at all.

The Service prosecutor then spoke to a number of cases dealing with the dangers and limits to police interaction with members of the public, noting they caution us about how a well-intended stoppage or engagement of an individual might easily and quickly turn into something that becomes more like psychological detainment because the Court said where a reasonable person might – that's the test – where a reasonable person in that position would conclude they are not free to walk away. Constable Pfeifer, from his seated position in his marked car, in uniform, stated, "No, I'm good where I am." Anyone would feel constrained at that point. No one would walk away from these words being uttered to them from the street.

He then spoke to the most recent application of the test for discreditable conduct in Ontario confirms the test is 'primarily an objective one' and that the conduct must be measured against the reasonable expectations of the community.

The Service prosecutor then spoke to the cross-examination of Constable Thompson with regard to the exchange he overheard between Constable Pfeifer and Mathew Green. Constable Thompson as a result came to the conclusion Mr. Green he was waiting for the bus and didn't think he was a danger to himself. Constable Thompson was very much satisfied by the time that information comes out of Mathew Green standing and waiting. It seemed perfectly normal. He argues, what matters in this situation are the words describing the conduct of Constable Pfeifer, was it arbitrary, was it justified.

Entered at this time by Mr. Poziomka counsel for Mathew Green was (**Exhibit #23**) a Book of Authorities. Mr. Poziomka spoke to the Case of *Peart v. Peel Regional Police Service*, paragraph 95 where the court state:

“Racial profiling can seldom be proved by direct evidence. Rather it must be inferred from the circumstances surrounding the police action that is said to be the product of racial profiling. The courts, assisted by various studies, academic writing, and expert evidence have come to recognize a variety of factual indicators can support that inference police conduct was racially motivated, despite the existence of an apparent justification for that conduct.”

Counsel then spoke to **Exhibit #15**, the writings of Professor David Tanovich. He spoke to some of the relevant factors that are manifestations of racial profiling that are set out in part two of Professor Tanovich's paper.

Counsel in his submission asked the Tribunal to be mindful of community context. Not only by applying the test set out in professor Tanovich's writings, but also in assessing Constable Pfeifer's credibility and frankly, common sense, given his testimony that he does not believe racial profiling exists in the Hamilton Police Service.

Counsel then spoke to the statistic contained in the Professor's writings pertaining to the number of them that were done on black people over the last five years, 11 to 14 percent, noting that only three percent of the population of Hamilton is black.

Counsel then spoke to the conduct of Constable Pfeifer questioning if the officer had to go out of his way to make the stop, questioning Mr. Green from a live lane of traffic. The nature of the questioning of the individual. Is it consistent with the purported reasons for the stop or a criminal investigation? Counsel submits there was no reason for the stop, nor the questioning of Mr. Green. That the explanation for the investigation lacks credibility, defies common sense. He then outlined the evidence of Constable Pfeifer with regard to Mr. Green hiding, standing in a puddle of mud, but was unable to ascertain if Mr. Green had mud on his shoes, hiding behind a bridge. When questioned in cross-examination with regard to hiding, Constable Pfeifer stated he was hidden from the westbound view. That he looked out of place.

Counsel then spoke to the evidence of Ms. Bokhari, when she was asked if she felt Mr. Green upon her observations at the bridge looked like he was in need of assistance, replied, "No, no, not at all." When asked if she questioned what Mr. Green was wearing in that particular weather, she said, "No, absolutely not." She also noted that Mr. Green was not standing in a puddle of mud.

Mr. Poziomka then spoke to the exchange between Constable Pfeifer and Mr. Green that the exchange was much longer than the time allotted to it by the officers.

He stated Mr. Green was very clear in his testimony that he felt targeted, harassed. The interaction went for some time. He felt like it was seven or eight minutes, but it could well have been three or four minutes. He felt he could not leave or exit the situation.

Counsel then spoke of the return to the police station by the officers and the length of time Constable Pfeifer took to firm up his notes, asserting these aren't the actions of someone who thought they weren't doing something wrong.

Counsel further stated, if the Tribunal is to find the actions of Constable Pfeifer to be racial profiling, the blame does not solely lie with Constable Pfeifer, but also lies with the Hamilton Police Service as the evidence demonstrates that the Service is a largely uneducated police service, as far as it relates to racial profiling.

Counsel then spoke to the evidence of Constable Pfeifer with regard to training he receives with the Hamilton Police Service, or the lack thereof and his lack of recollection about the training he received.

Counsel spoke with respect to the issue of racial profiling, stating that allegations of racial profiling must be taken seriously. The explanation put forth by Constable Pfeifer for the stop, frankly, is without merit. Applying a common sense analysis of what he says occurred, why he says he stopped to talk to Mathew Green, and continued to talk to him throughout the whole interaction, is nothing but ludicrous.

He then asked the Tribunal to consider two questions.

- (1) Was the stop and/or continuation of the questioning arbitrary because of race?
- (2) Was the stop and/or the continuation of the questioning arbitrary, and not because of race?

In reply, defence counsel again touched on all of the salient points with regard to the exchange between Constable Pfeifer and Mathew Green. He further states that you can't draw anything from the fact the prosecution asserts a street check is akin to a well-being check. Further, nobody needs grounds to stop and talk to a member of the public. There is no evidence to support simply rolling up in your cruiser and talking to a member of the public, requires you have grounds to do so.

Counsel spoke to a number of cases dealing with the charge and the evidence placed before this Tribunal in relation to them.

I will not recite these cases in their totality. I have read and considered the cases provided and alluded to by counsel. These cases are for guidance with respect to dispositions pertaining to the allegation before this Tribunal .

In reaching a decision in this matter. I have taken into account the submissions by defence counsel, Mr. Bernard Cummins, the Service Prosecutor, Mr. Brian Duxbury, and counsel for Mathew Green, Mr. Wade Poziomka. I have studied the exhibits and reviewed my notes with respect to the witnesses who have appeared before this Tribunal.

As I have stated in previous decisions, my duty as a Hearing Officer, while ensuring procedural fairness and ultimately natural justice to all parties, is to listen to the testimony of witnesses, receive and review exhibits and weigh the evidence provided. At the conclusion, I must decide if there is sufficient “weighty and cogent” evidence that leads me to conclude the evidence is clear and convincing and find the subject officer has committed the misconduct. If I find at the end of the day, the evidence is not clear and convincing, it is my duty to find the officer has not committed misconduct and dismiss the allegation.

Five witnesses testified in this hearing over a number of days and each provided their version of the events as they perceived they occurred. While witnesses are not expected to provide identical versions of the events, in fact, if they are identical then questions of collusion might arise; there should be consistency on the essential aspects.

I have employed in my assessment of the witnesses' credibility, notably what is described at the *O'Halloran Test* from *Faryna v Chorny*. I will only provide a portion of the text but want to indicate it has served as a guide throughout my decision-making.

In the case of *Faryna v Chorny*, (1952) 2D.L.R.354 (B.C.C.A.) *Justice O'Halloran* stated:

"...if a trial judge's finding of credibility is to depend solely on which person he thinks made a better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box.

A witness by his manner may create a very favourable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case, may point sizably to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The trial judge ought to go further and say that the evidence of the witness he believes is in accordance with the preponderance of probabilities in the case, and if in his view is to command confidence, also state his reasons for the conclusion."

I lack the necessary confidence in Mr. Mathew Green's credibility to accept his evidence he was psychologically detained. In his evidence in-chief he stated, when Constable Pfeifer started to ask him a series of questions it made him feel targeted and harassed, the tone of the officer was confrontational and he realized at the time this was an arbitrary questioning and detainment. He felt he could not walk away from the situation as the officer had taken control of the conversation. He was feeling very frightened and intimidated as the officer was showing him he was clearly under investigation, his character, having to justify his existence. Further, he felt humiliated as there were four or five people watching.

He testified, a young family, maybe some Syrians, a father and mother and two or three kids kind of looking at him as they shuffled by. No other witness when questioned by counsel observed other people in the immediate vicinity where Mr. Green was located.

Prior to making this statement, Mr. Green advised the Tribunal, in the course of his work as a councillor he often has frequent interactions with the Hamilton Police, and it is often the case he engages in small chat to get a sense of what is going on in the community. He thought this was the case when Constable Pfeifer stopped his vehicle directly in front of him with his window down. However, after a few minutes of exchange with the officer he became very frightened and intimidated.

Clearly, Mr. Green has had numerous interactions with members of the Hamilton Police Service, and feels comfortable engaging in conversation with them. Under cross-examination by defence counsel Mr. Green agreed he invited Constable Pfeifer to pull over and have a conversation with him, noting that during their exchange they were trained on each other.

Mr. Green, after the exchange with Constable Pfeifer, boarded the bus he had been waiting for where he immediately tweeted, "For those of you who think carding has stopped, I was just arbitrarily stopped and detained." When asked to explain his 'tweet', he stated, he told the public he was arbitrarily stopped and detained as a city councillor. When questioned how he knew he was carded, he responded, "That's the way he felt."



The actions of Mr. Green standing at the end of the bridge and staying out of the weather, where he would be partially obscured to accomplish this and keep himself dry and out of the wind, are consistent with the initial observations of Constables Pfeifer and Thompson upon entering Stinson Road.

I closely observed Mr. Mathew Green on the witness stand during his evidence in-chief and cross-examination. He responded in a relaxed manner to questions put to him by the Service prosecutor, Mr. Brian Duxbury, and by his own counsel, Mr. Wade Poziomka. However, under vigorous cross-examination by defence counsel, Mr. Bernard Cummins, appeared to resent questions, which were quite properly put to him, repeatedly making speeches and arguing with counsel, rather than answering the questions.

This hearing was provided with photographs taken of the location where Mathew Green was standing at the corner of the bridge on Stinson Road. Specifically (Exhibit #6) and (Exhibit #10) showing a raised area of grass and open bare earth where Mr. Green was standing. While these photos were obviously taken on a clear sunny day, there appears to be an erosion of soil towards the paved walkway, and obvious signs of wetness at the base of the concrete structure, which would indicate a collection of water during inclement weather.

I accept the evidence of Mr. Michael Doyle who is a resident of the area and was walking his son home from school that day. Mr. Doyle's evidence would support the fact there are people residing in the area dealing with possible mental health issues. While walking his son home from school he was approached by an unknown male at the corner of Victoria Avenue and Stinson Road who pointed down the street to where the police vehicles were parked and stated, "Look at these fucking assholes causing trouble." As he was with his son he didn't engage him. Upon walking away from the male, he observed the two police cruisers parked, stating it didn't look like anything at that point was really happening. When questioned about the weather that day. He described it as wet and very windy.

Mr. Doyle, under cross-examination by defence counsel stated, he observed the male leaning against the wall of the underpass, right at the corner of the underpass and believed he was seeking shelter from the

rain. He stated he could not see the face of the male and was unable to say if he was in any distress or not. However, he was not doing anything that would indicate to him there was a touch of trouble going on.

The evidence of Ms. Bokhari is troubling and gives me concern as to her authenticity. Counsel, Mr. Poziomka, describes her in his submissions as an independent witness. Defence counsel argues she wasn't a witness. She was an advocate for the position of Mr. Green, noting a tweet made by Ms. Bokhari with regard to the upcoming trial of Constable Pfeifer, "Mark your calendar, folks." Ms. Bokhari testified she drove slowly by the location where Mathew Green and the officer were located. Upon reaching the location and continuing to drive slowly passed she was able to observe Mr. Green and take notice of the area where he was standing, the clothes he was wearing, and commented on the fact she noticed he was wearing nice shoes that had no mud on them. She was also able to hear comments made by Mr. Green and the tone of his voice, noting Mr. Green was not shouting or screaming, stating, it seemed relatively innocent at that point. At the same time she was able to turn and look in the opposite direction observing Constable Pfeifer sitting in his cruiser with the driver's window down, noting the officer's demeanour didn't match that of Councillor Green, stating, the officer's facial expression didn't seem inviting or friendly, which indicated it wasn't an innocent friendly transaction. Ms. Bokhari managed to accomplish this while continuing to drive passed the location, further testifying it was quite loud as there were cars passing through the underpass so, just very difficult to hear. I found this evidence to be of limited use to the Tribunal on the facts in issue.

The Service prosecutor in his submissions argues, Constable Pfeifer's exchange with Mathew Green should never have started. The continued questioning of Mathew Green by the officer would, by an objective standard, make the person feel they were limited or constrained in their ability to move. The stoppage, exchange, became an arbitrary, unjustified street check.

I disagree with the prosecution submissions and based on my hearing and assessing the officer's evidence it is my belief the officers acted as one would expect.

We require as a routine part of their duties that police officers talk to members of the public at random for a variety of reasons and more so if there are concerns on their part regarding the behaviour of an individual to them on first glance, about the individual's welfare and/or motives for being in a certain location.

Police officers seldom have the luxury of relaxed contemplation when determining whether a person is in need of assistance or there are other motives for their behaviour without further investigation on their behalf. The officers conduct must be analyzed as a whole, in context, having regard to all sources defining acceptable conduct. Therefore, some element of common sense is required when considering the conduct of police officers.

In my view, Constable Pfeifer and Thompson's concerns were reasonable and not borne of an unfounded 'hyper-sensitivity' towards Mr. Green. This concern is concluded to be reasonably based as a consequence given of the fact the officers had just completed a call in the immediate area dealing with an individual who had mental health issues. Further, the area is well known to them for housing accommodations to assist persons dealing with these health problems.

I have concluded given the evidence presented in this Tribunal, the questioning of Mr. Green was not an arbitrary one. The officers believed upon initially observing Mr. Green standing at the edge of the underpass, partially concealed, may have possibly been dealing with some kind of anxiety, and made the decision to stop and speak to him.

Counsel for Mathew Green in his submissions spoke with respect to the issue of racial profiling, stating that allegations of racial profiling must be taken seriously, the explanation put forth by Constable Pfeifer for the stop, is without merit.

He then asked the Tribunal to consider the following questions.

(1) Was the stop and/or continuation of the questioning arbitrary because of race.

(2) Was the stop and/or the continuation of the questioning arbitrary, and not because of race?

Mr. Green, in his evidence in-chief stated, the exchange with Constable Pfeifer could have lasted three to four minutes, but it felt like forever. He stated the only weather condition of concern to him was the wind. It was about four (4) degrees and the rain had stopped earlier in the day.

Mr. Green, when questioned by his counsel if he was anti-police, responded he was not and that he has spent a great deal of time working with the Hamilton Police Service. Stating he has a great relationship with the frontline officers, working with them during community events. **(Exhibit #7)** page 2, paragraph 25, an interview Mathew Green had with Metro Morning Broadcast the following day, he made it clear at no time did the officer ask for any identification, describing the exchange between himself and the officer as humiliating but more frustrating. Entered as **(Exhibit #8)** a transcript of an interview with 680 News Broadcast by Mr. Green April 27<sup>th</sup>, 2016, page 1, paragraph 25, Mr. Green makes the following statement: "What does a criminal look like? What does a suspect look like? What does trouble look like?" These are reasonable questions to ask and the reason police officers upon observing unusual circumstances, stop and have conversations with people, to make that determination or offer assistance if required.

Clearly, from this statement Mr. Green is very comfortable dealing with or talking to frontline officers, yet on April 26<sup>th</sup>, 2016 after a three to four minute conversation with Constable Pfeifer, states he felt like he was being criminalized in his own community, intimidated and harassed and there was no reason for the exchange between himself and Constable Pfeifer other than a conscious or unconscious bias. It was about power, about control, and it was intimidation.

I find this explanation beyond belief. It is clear from listening to the evidence of Mr. Green he is clearly an intelligent individual who feels relatively comfortable talking to frontline officers. During the exchange with Constable Pfeifer there was no evidence placed before this Tribunal that comments made to Mr. Green by Constable Pfeifer would indicate a bias towards Mr. Green.

There has been no evidence placed before this Tribunal that would indicate Mathew Green was stopped and questioned because of race.

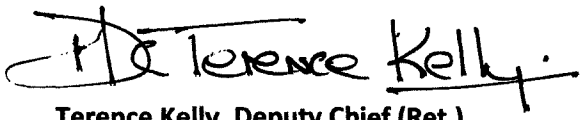
The next factor I must be aware of is the standard of proof. For this Tribunal the standard of proof is clear and convincing evidence meaning there is weighty, cogent, reliable evidence upon which a Trier of Fact, acting with care and caution, can come to a reasonable conclusion the officer is guilty of misconduct.

I have reviewed the Code of Conduct in the *Police Services Act* specifically addressing the charge of discreditable conduct, and I am aware of the general principles, the law, and the application of the law to this offence.

In Ontario, *Legal Aspects of Policing (6-14)* provides that a police officer commits an offence against discipline by acting, "...in a disorderly manner prejudicial to discipline or likely to bring discredit upon the reputation of the police service."

I do not have the confidence in Mr. Green's account that would allow me to base a conviction on his evidence. I do not accept the proposition the evidence of Constables Pfeiffer and Thompson themselves with the indisputable facts, supplies the validation that the conduct of Police Constable Pfeiffer was discreditable or likely to bring discredit upon the Hamilton Police Service by engaging Mathew Green in a well-being check.

**Based on my findings, I find Police Constable Andrew Pfeifer, Badge Number #408  
not guilty of the charge of Discreditable Conduct.**

A handwritten signature in black ink that reads "Terence Kelly". The signature is written in a cursive style with a horizontal line striking through the middle of the name.

**Terence Kelly, Deputy Chief (Ret.)**

**York Regional Police**

**Hearing Officer**

**Judgment Date:**